

In the

ORIGINAL

Supreme Court of the United States

BOARD OF EDUCATION OF THE HENDRICK
HUDSON CENTRAL SCHOOL DISTRICT,
WESTCHESTER COUNTY, ET AL.

Petitioners,

v.

AMY ROWLEY, BY HER PARENTS AND
NATURAL GUARDIANS, CLIFFORD
AND NANCY ROWLEY, ETC.

NO. 80-1002

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Board of Education of the Hendrick Hudson Central School District against Amy Rowley, by her parents.

Mr. Kuntz, you may proceed whenever you're ready.

ORAL ARGUMENT OF RAYMOND G. KUNTZ, ESQ.

ON BEHALF OF PETITIONERS

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

The principal issue before the Court this morning is: Did the Hendrick Hudson Central School District meet the requirements of Public Law 94-142, the Education of All Handicapped Children Act of 1975, when it provided Amy Rowley with an educational program which resulted in outstanding academic achievement and social success, although it did not comply with her parents' wishes that a sign language interpreter be placed in her classroom.

In one respect the case that's before you is an age-old problem that confronts every public school board. It's not unusual in the course of any child's education that the parents disagree with the program prescribed or dictated by the local school board. And

1 the question before you then becomes, how does this Act
2 handle a disagreement with a program or a placement
3 developed by a local school district by the parents when
4 the parents are the parents of a handicapped child.

5 According to the Respondent's position in this
6 case, if they are able to persuade a court that they
7 have a rational basis for the program that they advocate
8 -- that it's a slightly better program, if it results in
9 somewhat improved performance -- it's their claim that
10 the Act allows them to go to court and to have the court
11 dictate to the local educational institution that better
12 program.

13 Now, this is not a case where no services were
14 provided to Amy Rowley. As a matter of fact,
15 extraordinary care was taken to ensure benefit from the
16 placement that was developed for her by the local school
17 district.

18 Before Amy Rowley enrolled in the Hendrick
19 Hudson School District, plans were made for her arrival
20 in this particular school. The school district has
21 several elementary schools and in this particular
22 elementary school this was the first time that this
23 elementary school was to educate a deaf child. And the
24 first determination made by the school district prior to
25 the entry of Amy into the classroom was that she would

1 not be sent to a school for the deaf, but that the
2 school would make an effort, an attempt to educate her
3 in a regular classroom.

4 Now, having made that determination, the
5 school then prepared to receive her. The teachers in
6 the school took a sign language course, because they
7 knew that Amy was somewhat familiar with sign language
8 and they wanted to be able to communicate with Amy.
9 They did not know Amy, but they wanted to do everything
10 that they thought they could to prepare themselves for
11 her arrival at the school.

12 The school district purchased a teletype
13 machine which they installed in the office of the
14 principal. Amy's parents are both deaf, they have a
15 teletype machine, and consequently the school and the
16 parents can communicate visually by means of the
17 teletype machine.

18 The school then went a little bit further.
19 They hand-picked Amy's teacher. They gave her a teacher
20 that they thought would be responsive to the problems
21 provided by a deaf child. They put her in a small
22 classroom. They made that classroom visually oriented,
23 so that instead of ringing bells they flashed lights.
24 They seated Amy -- they gave her a preferential seating
25 so that she was in a position to see everything that

1 went on; in other words, to make use of her natural
2 facilities to enable her to understand what was going on
3 in that classroom.

4 Then they agreed with the parents that an
5 experimental program would be conducted. That is,
6 during the first year, the kindergarten year, would be a
7 time of trial where various methods would be
8 experimented with to see what was appropriate for Amy.

9 The first thing they did was to do nothing, so
10 that they could have some base data upon which to
11 compare the results of the other experiments. Then they
12 tried a variety of hearing aids to see what kind of
13 hearing, supplemental electronic hearing, worked best.

14 They tested Amy. They had her hearing
15 tested. They discovered that she had significant
16 residual hearings in the lower frequencies. That means
17 that the vowel sounds are audible to Amy, and that when
18 her hearing is electronically supplemented she can
19 understand a good portion of what's spoken to her.

20 They tried a sign language interpreter in her
21 kindergarten classroom. They put the sign language
22 interpreter in for a two-week trial period to see what
23 effect this would have upon the educational program. At
24 the conclusion of the two-week period everybody who
25 participated in that experiment, including the sign

1 language interpreter, determined that it was not a
2 useful service for Amy and as a matter of fact it might
3 be a distraction for Amy.

4 QUESTION: Were there other children in the
5 classroom while these experiments were going on?

6 MR. KUNTZ: Yes.

7 QUESTION: A full classroom?

8 MR. KUNTZ: A full classroom.

9 There was also a constant monitoring of her
10 program, not only by her teachers but by the school
11 principal, who visited her classroom almost daily to
12 make sure that her educational program was progressing
13 satisfactorily.

14 Now, the results of this program were quite
15 satisfactory to the school district. When Amy entered
16 the first grade there was a determination made by the
17 committee on the handicapped, and it's that
18 determination which is ultimately before you today. She
19 was classified as a handicapped child and she was
20 classified as severely deaf.

21 The committee on the handicapped conducted an
22 investigation of what was an appropriate placement for
23 Amy in first grade. They visited other classrooms.
24 They sent one of their members to see Amy in her first
25 grade classroom setting and to see how she was doing

1 there with the services that had been provided in
2 kindergarten.

3 The committee on the handicapped dispatched
4 several of its members to visit other classrooms in
5 other school districts, to visit a school for the deaf,
6 to visit a board of cooperative educational classroom
7 where deaf children were taught as a group. They
8 consulted experts on the education of the deaf. They
9 read articles and gathered professional materials and
10 expert opinions.

11 At the conclusion of that process they came
12 back in early October and determined that what they
13 would do for Amy was to place her in a regular -- to
14 allow her to remain placed in a regular first grade
15 classroom, to supplement her hearing with an FM wireless
16 system which amplifies the sound spoken into the sending
17 unit, thereby blocking out all other sounds. The
18 receiving units pick up only what's sent; consequently,
19 it doesn't amplify everything and background noise is
20 thereby eliminated.

21 It decided that what they would do is give her
22 the services of a speech therapist three times a week;
23 that she would receive the services of a certified
24 teacher of the deaf an hour a day, who would serve as a
25 tutor for Amy during the regular school day.

1 She was again placed in a small classroom. It
2 was again very visually oriented. Her teacher was again
3 hand-picked so that the teacher would be responsive to
4 Amy's needs.

5 Now, the result of this placement was
6 outstanding academic and social success for Amy. She
7 went into the first grade as a non-reader, a typical
8 thing for a child entering the first grade. When she
9 left the first grade she was a reader. She had high
10 standardized test scores developed for non-deaf norms.
11 She had an equivalent class rank. In other words, Amy
12 placed in her class exactly as you would expect her to
13 place, given her IQ, in terms of how that IQ compared
14 with everybody else in that particular class.

15 She had excellent peer relationships and she
16 had excellent rapport with her teachers.

17 This program shows on the part of the Hendrick
18 Hudson School District a deep caring for Amy Rowley.
19 The school district believes that it has an objective
20 view as to what is the best program for Amy. It
21 believes that the sign language interpreter is a
22 disservice.

23 The school district has built bridges of
24 meaning to Amy, and the court dismantled those bridges
25 and substituted a different program based upon what we

1 contend is an inaccurate view of the purpose of the Act
2 and its requirements.

3 It's our contention that the Act is a funding
4 statute and that as a funding statute the provision of
5 free appropriate public education is a goal; that it
6 requires no specific services; that the Act could have
7 described specific services and it did not. We believe
8 that education is a state matter and that the provision
9 of services and the determination of the content of the
10 education is left to the states under the Constitution.

11 QUESTION: Mr. Kuntz, perhaps you mentioned
12 it, but where is Amy now?

13 MR. KUNTZ: Amy's in the fourth grade. I did
14 not mention it, Your Honor. She's in the fourth grade
15 at the Hendrick Hudson School District.

16 QUESTION: And has she maintained her place
17 with the others?

18 MR. KUNTZ: Yes. As a result of the
19 affirmance by the Second Circuit of the District Court
20 decision, a sign language interpreter was placed in her
21 classroom early in the third grade.

22 Our review of the progress of Amy indicates
23 that she has continued as one would expect her to
24 continue, that she's made the same progress with the
25 sign language interpreter that she made without the sign

1 language interpreter. We see no significant
2 difference.

3 While she has made some increase in her
4 spelling skills, her mathematics skills declined
5 somewhat, but not precipitously in either case and we
6 find that her progress has continued on the same upward
7 satisfactory level that it did prior to the time that
8 the sign language interpreter was placed in her
9 classroom.

10 QUESTION: That's not in the record, is it?

11 MR. KUNTZ: No, it's not, Your Honor.

12 QUESTION: Thank you.

13 MR. KUNTZ: Because that happened all post the
14 record.

15 QUESTION: I just want to get it straight.

16 MR. KUNTZ: We feel that there's a presumption
17 that Congress passed the Act in accord with traditional
18 principles. We feel there's nothing in the Act or its
19 history that points to an intention of Congress to act
20 in derogation of the principles.

21 We believe that the specifics of a free
22 appropriate public education are limited by the state
23 plans submitted to the Secretary of Education under the
24 Act, particularly to each class of disability. We
25 believe that this view is consistent with the

1 description and purposes of a state plan as mandated by
2 the Act.

3 QUESTION: Counsel, I take it that under the
4 state plan in question it's your position that the
5 school district could have furnished an interpreter, but
6 was not required to?

7 MR. KUNTZ: Yes, Your Honor, that's our
8 position.

9 It's the contention of the Respondents that
10 the state and the local educational agency, in acceding
11 to the provisions of Section 1315 of the Act, that is
12 that they will guarantee procedural safeguards with
13 respect to the provision of free and appropriate public
14 education, lets in through the back door what Congress
15 declined to let in through the front door; in other
16 words, that each court can determine a particular
17 educational program under the remedial sections of the
18 Act.

19 And we --

20 QUESTION: Is it your contention that the
21 review in the civil action provided for in the federal
22 district court in 1415 is to guarantee only the
23 procedural safeguards in the previous administrative
24 proceeding?

25 MR. KUNTZ: Yes, we believe that, Your Honor.

1 We believe that the court has the power to send it
2 back. We don't believe that the court has the power to
3 simply set aside the state plan and substitute a
4 different methodology of education.

5 QUESTION: The section does provide for de
6 novo review, doesn't it?

7 MR. KUNTZ: Not in those words. It provides
8 that the court shall receive the proceedings of the
9 administrative agency, at the request of either party
10 shall receive new evidence, and taking all of that into
11 consideration make its determination based upon the
12 preponderance of the evidence, granting such remedy as
13 it deems appropriate.

14 But we say even if it --

15 QUESTION: That's pretty de novo, isn't it?

16 MR. KUNTZ: Yes, I suppose it's as de novo as
17 you can get. But it does require the receipt of the
18 administrative records and the prior determinations. If
19 it was totally de novo, I would think that the
20 requirement to receive those records would not be found
21 in the statute.

22 QUESTION: Well then, there are really
23 inconsistencies or cross-currents in the statute, are
24 there not?

25 MR. KUNTZ: Yes, there are.

1 QUESTION: Because certainly if it were a
2 substantive determination that the judge were to make,
3 you would expect that Congress would have provided for
4 some deference to the administrative record.

5 MR. KUNTZ: I would have thought so. And we
6 believe that the proper way to reconcile those
7 differences is to look at 1415 as remedial only. The
8 Respondents look at it, and some of the amici and
9 frankly many if the circuits look upon it, as a statute
10 granting them absolute authority to write a new
11 substantive program without regard to the state plan and
12 without regard to the cost of whatever program they
13 devise.

14 As a matter of fact, I believe the Seventh
15 Circuit has explicitly ruled that cost is no
16 consideration when the court makes its determination as
17 to what is an appropriate remedy. That circuit also
18 said that it included as a subset of appropriate remedy
19 an appropriate education, holding that when it had the
20 power to devise an appropriate remedy that included
21 within that power was the power to devise an appropriate
22 education.

23 QUESTION: Did you take the same position as
24 you're now expressing in the Court of Appeals?

25 MR. KUNTZ: Yes, we did, Your Honor. In our

1 brief and our reply brief, we specifically set forth the
2 portions of our brief where we made those arguments.

3 QUESTION: Mr. Kuntz, may I ask, is it your
4 view that a federal judge may merely require compliance
5 with the procedures specified in the Act and that there
6 is no substantive standard that the federal judge may
7 apply to define what is a free appropriate public
8 education?

9 Say you're -- in this case, I know it is not
10 the case. But supposing what you did is have a teacher
11 with a loud voice and nothing more, or something like
12 that, that most people would say was clearly not
13 sufficient. Could the federal judge correct anything at
14 all substantively?

15 MR. KUNTZ: I would think that in that
16 particular situation, that the first thing that would
17 occur is a finding that the procedure had not been
18 followed. I seriously doubt whether a proper view of
19 the child -- that is, the Act requires the local school
20 district to plan for the unique needs of that child. I
21 think that's a procedural requirement.

22 I think that once there's an explanation of
23 what those needs are and once there is some rational
24 relationship developed between the response to those
25 needs and the program that's provided, that in most

1 cases the local school district will come out with an
2 adequate and acceptable program.

3 I tend to think in your situation that, in
4 your example, that you would find so many procedural
5 errors in arriving at that determination that there
6 would be no need to get into a substantive
7 determination.

8 QUESTION: Well, supposing the board had a
9 meeting and said, we really can't afford to buy the FM
10 wireless and we can't afford to have our teachers take
11 the time off to take sign language training, as you did,
12 and we can't afford any of these things. We're just
13 going to do the best we can, which is to select the
14 teacher we think would have the best rapport and has the
15 best diction, but did very little other than that, for
16 reasons that very well might make good sense for a board
17 that has a tight budget.

18 MR. KUNTZ: I would hate to think that there
19 would be no situation where the court couldn't step in
20 and cure a totally arbitrary and capricious act.

21 QUESTION: The problem I have with the case
22 is, as soon as you acknowledge that there's some
23 substantive review, then what's the stopping point?

24 MR. KUNTZ: I totally agree with you. I feel
25 that there is that: Once you grant one case, then every

1 other case follows behind it, and it's only a question
2 of degree. But I truly believe that Congress did not in
3 this particular statute move in and determine for each
4 local school district that ultimately what is to be the
5 governing philosophy in that particular school district
6 is what a court, federal or state, tells the agency.
7 And I'm afraid that's what happens when you carry the
8 logic to its extreme on the other side.

9 QUESTION: Is it your view that this school
10 board has done more than they were required to do?

11 MR. KUNTZ: Yes, they did. They not only
12 complied with the state plan as it specifies services
13 for deaf children whose audiological loss is within the
14 range that Amy's is, but they provided extra services
15 far over and beyond what they were required to do.

16 I think critical to the school district's
17 position is that program that they developed worked, and
18 that the program that the court substituted does not
19 particularly appear to the school district to be that
20 much better. As a matter of fact, the school district
21 believes that ultimately in the long run it does Amy a
22 disservice, because it does not take advantage, so to
23 speak, of her residual skills. It does not take
24 advantage and promote use of her residual hearing, of
25 her excellent ability to lip read. And those skills

1 will atrophy.

2 And to come back to Justice Marshall's point
3 before, while it's not in the record because the
4 developments occurred post the trial, it's the school
5 district's finding that that's what's occurring in Amy's
6 situation.

7 QUESTION: But this Court of Appeals limited
8 its decision to the facts in this case.

9 MR. KUNTZ: Yes, I think because they --

10 QUESTION: So it wasn't any broad, general
11 sweep like you're talking about, was it? It said that
12 you were wrong in this case for the facts that were
13 before it at that time. What's wrong with that? Isn't
14 that the normal way to decide a case?

15 MR. KUNTZ: Then it becomes a case about Amy,
16 as the court said in its opening sentence: "This is a
17 case about Amy." It's also a case about the law, and
18 every case that's decided by the Court of Appeals is
19 precedent. I simply don't know how any court is going
20 to distinguish Amy's case from the case of any other
21 deaf child. Amy's situation is not an unusual
22 situation.

23 QUESTION: Well, aren't all constitutional
24 rights individual?

25 MR. KUNTZ: Yes, I believe that they have to

1 adhere in the individual in order to be effective. But
2 also, I would say that all decisions of the Court of
3 Appeals become precedent for all other factual
4 situations which are similar in content and nature to
5 the one addressed by the court, and consequently that
6 court can't simply invoke a rule which has no purpose in
7 this particular situation and attempt to limit its
8 application.

9 QUESTION: What rule are you talking about?

10 MR. KUNTZ: Well, they attempt to invoke Rule
11 23 of their local rules, which is designed to limit the
12 effectiveness of rulings from the bench that are made in
13 the course of -- or at the conclusion of arguments.
14 They cannot be cited as precedent before the Second
15 Circuit.

16 The Second Circuit attempted to invoke its
17 rule in this case despite the fact that there was a
18 published opinion and a substantial decision by Judge
19 Mansfield.

20 QUESTION: Do you think they were afraid of it
21 as a precedent?

22 MR. KUNTZ: I think they were, and I think the
23 implication of that rule reveals, to me anyway, that
24 they were somewhat leery of the precedent that they were
25 creating and that they were attempting to limit it. I

1 don't think that they were deciding on the law. I think
2 they were deciding on the facts of this particular case
3 and out of sympathy to Amy.

4 QUESTION: Counsel, I suppose it's arguable
5 that there is under the Act a substantive right to a
6 free appropriate education, but that what the free
7 appropriate education would consist of would be those
8 things spelled out in the statute and the regulations,
9 namely an individual education program in conformity
10 with a state plan which has been approved.

11 Would you concede that that certainly would
12 appear at least to be within the framework of the
13 statute?

14 MR. KUNTZ: I would say that if a substantive
15 right has been created at all, that's where it's
16 created. It's created in the submission of the state
17 plan to the then Commissioner and now, under the
18 amendments to the law, to the Secretary of Education.
19 And that's the only place, if at all, that a substantive
20 right appears.

21 I think there are substantive rights insofar
22 as a right to the procedure is concerned. But I think
23 that's the only right of substance that was enacted by
24 the statute.

25 QUESTION: Mr. Kuntz, is the New York plan

1 part of the record?

2 MR. KUNTZ: I'm sorry, Your Honor?

3 QUESTION: Is the New York plan part of the
4 record? Was it introduced?

5 MR. KUNTZ: No, it wasn't, Your Honor, and the
6 reason why that occurred is that when the school
7 district made a motion to dismiss the complaint on the
8 ground that the educational program provided to Amy was
9 in conformity with the state plan, on the hearing of
10 that motion the Respondents admitted that the plan had
11 been developed, that the plan had been accepted by the
12 then Commissioner of Education, that the school district
13 was in compliance with the plan, but that that was
14 irrelevant.

15 And consequently the plan never became a part
16 of the record, because it was never at issue. We felt
17 that the District Court should have dismissed the case
18 at that point, but it did not. It did not address
19 itself to that issue in its decision on that motion.

20 QUESTION: Did the Court of Appeals adopt the
21 District Court's standard, the full potential standard?

22 MR. KUNTZ: We believe that it did.

23 QUESTION: Suppose -- I think, if I understand
24 your argument, you say that even if that's the standard
25 you don't need a sign language interpreter to reach that

1 standard.

2 MR. KUNTZ: That's correct, Your Honor.

3 QUESTION: What if it were quite clear that it
4 was necessary to have a sign language interpreter to
5 realize a person's full potential. Do you disagree with
6 that standard?

7 MR. KUNTZ: We would disagree with the
8 standard. We feel that the full potential standard is
9 something that's beyond the power of the local school
10 district.

11 QUESTION: So you would say that the state
12 need not, under this Act, live up to that standard?

13 MR. KUNTZ: We say that we feel that there are
14 standards in the Act. We think the Act defines free
15 appropriate public education. We think that as part of
16 that definition the definition is constrained by the
17 state plan submitted.

18 QUESTION: I take it that the -- I take it
19 that the Respondents suggest that you conceded in the
20 Court of Appeals that you did not disagree with Judge
21 Broderick's statement?

22 MR. KUNTZ: They contended that, but that's
23 inaccurate. We did not make that concession.

24 I have reserved --

25 QUESTION: Don't you necessarily have to

1 attack the standard, because you do have the District
2 Court and the Court of Appeals both agreeing, as I
3 understand it, that as a matter of fact the sign
4 language interpreter was required to satisfy the full
5 potential standard? It's difficult for us to go behind
6 two courts who agree on a matter of fact.

7 MR. KUNTZ: We agree that -- we contend,
8 rather -- excuse me -- that the District Court standard
9 is not an appropriate standard. We've written four
10 briefs to this Court specifically with that allegation,
11 and I think we've analyzed the full potential standard
12 and shown two things:

13 One, that that's not a requirement that can be
14 fulfilled by any school district. The full potential
15 standard is an impossible standard. The tests devised
16 by Judge Broderick to determine whether the full
17 potential had been met are simply unworkable tests.
18 There are no measurements to gauge what the potential --
19 the fulfillment of that potential would be. There are
20 no tests to gauge the shortfall, and no tests to gauge
21 the comparison, as he suggested, between the shortfall
22 experienced by normal children and the shortfall
23 experienced by handicapped children. We think that that
24 standard is simply impossible.

25 QUESTION: Is there any place in the record to

1 show why this case didn't originally go to the state
2 board and the Board of Regents?

3 MR. KUNTZ: It did go.

4 QUESTION: It did.

5 MR. KUNTZ: It did go to the Commissioner of
6 Education and the Commissioner of Education made a
7 finding, and that finding is in the record.

8 QUESTION: Thank you.

9 MR. KUNTZ: I'm reserving my time for
10 rebuttal, Your Honor.

11 CHIEF JUSTICE BURGER: Very well.

12 Mr. Chatoff, you may proceed whenever you're
13 ready.

14 ORAL ARGUMENT OF MICHAEL A. CHATOFF, ESQ.

15 ON BEHALF OF RESPONDENTS

16 MR. CHATOFF: Mr. Chief Justice and may it
17 please the Court:

18 The primary issue in this case is this: Has a
19 school district that receives funds under the Education
20 of the Handicapped Act upon its commitment to provide
21 each handicapped child with a free appropriate public
22 education fulfilled that obligation when it fails to
23 provide a specific deaf child with the services
24 necessary for that child to receive an educational
25 opportunity equivalent to the educational opportunity

1 provided to other children?

2 The Respondents in this case are Amy Rowley,
3 who is deaf -- she is now ten years old and in fourth
4 grade -- and her parents Clifford and Nancy Rowley.
5 This is not your typical everyday family. Clifford and
6 Nancy Rowley are deaf, too.

7 Upon learning of Amy's deafness, they began
8 training Amy in the use of total communication, the mode
9 of communication used in their home. Total
10 communication is a flexible mode of communication using
11 lip reading, amplification of residual hearing, if any,
12 sign language, finger spelling, and visual cues.

13 The lower court found that relying upon lip
14 reading and amplification only Amy does not have access
15 to more than two-thirds of all communications. The
16 lower court found that relying upon total communication
17 Amy has access to 100 percent of all all
18 communications. Therefore, the lower court found that a
19 program relying upon lip reading and amplification only
20 would not be appropriate for Amy Rowley.

21 Recipients of funds under the Education of the
22 Handicapped Act commit themselves to provide each
23 handicapped child within its borders with a free
24 appropriate public education. A free appropriate public
25 education is specially designed instruction to meet the

1 handicapped child's unique needs in order to provide
2 that child with an equal educational opportunity.

3 The Petitioners and their amicus concede that
4 the goal of the Act is to provide handicapped children
5 with equal educational opportunities. Among the factors
6 to be considered in determining what is a free
7 appropriate public education for each child is the
8 extent of that child's disability and that child's
9 upbringing.

10 Amy's unique needs are obvious. The shortfall
11 in her comprehension is precisely the deficiency
12 Congress had in mind when it directed recipients to
13 provide for the unique needs of each handicapped child.
14 Amy needs a visual depiction of oral communications.
15 She can't learn if she can't understand, and she can't
16 understand if material is presented to her in a mode of
17 communication that's closed to her.

18 An interpreter merely provides Amy with access
19 to the same education as available to every other
20 student, no more and no less.

21 QUESTION: Mr. Chatoff, did the evidence show
22 at the trial court level that the school district had
23 found that having an interpreter present was a
24 distraction to the child, and that she did not need it?

25 MR. CHATOFF: The trial court found that the

1 school district said that providing an interpreter would
2 be a distraction to Amy. However, relying upon expert
3 evidence and written statements in the record, the trial
4 court determined that an interpreter would not be a
5 distraction for Amy.

6 Amy is not special because she's deaf. Amy
7 has special needs resulting from her deafness. It is
8 those special needs that Congress directed recipients to
9 accommodate in order to fulfil its obligations under the
10 Act. If Amy is special -- and even the witnesses for
11 the Petitioners concede that she is -- she is special
12 because of her intelligence and her creativity and her
13 enthusiasm and her rapport with others.

14 I don't believe anyone would question the fact
15 that there have been past deficiencies in the education
16 of deaf children. But that's all water under the
17 bridge. We can't correct past deficiencies by providing
18 Amy with anything on a silver platter. This is a tough
19 world. It's going to be as tough for Amy as it will be
20 for every other child. She'll have no preparation for
21 that world if things are handed to her in a silver
22 lining.

23 But if she is going to compete in this world,
24 she must receive an education equivalent to other
25 children. This court said that education is the

1 principal instrument for preparing the child for later
2 professional training and helping that child to adjust
3 normally to its environment.

4 Once Amy gets an education, an equivalent
5 education, what she does with that education is up to
6 her. The school district has no obligation to guarantee
7 her any particular level of achievement, only the same
8 opportunity to achieve as everyone else.

9 The purpose of the Act is to accommodate the
10 unique needs of each handicapped child so that the
11 deficiencies of the past do not reoccur in the future.
12 The Act covers gifted handicapped children, and Amy has
13 the intelligence and the desire --

14 QUESTION: May I interrupt? Mr. Chatoff, will
15 your interpretation of the statute require every school
16 board to provide a sign language interpreter for every
17 deaf child in the country?

18 MR. CHATOFF: Definitely not. The statute
19 requires an individual determination of the needs of
20 each handicapped child. The deaf community is not a
21 monolithic entity. Although all deaf children have in
22 common their hearing loss, their other characteristics
23 are all different. Every child is different.

24 Every child is brought up differently. Some
25 use strictly oral methods of communication. Some use

1 oral speech. Some use the Rochester method. Some use
2 what is known as American sign language. We discussed
3 that in the trial court.

4 Not every deaf child can be educated in the
5 public school. In fact, very few can. Amy happens to
6 be one of those very few. Children who are educated in
7 special schools or in research rooms have no need for
8 interpreters. Children raised using the oral method
9 have no need for interpreters. It will be only very
10 specific instances.

11 This case does not establish that any or every
12 other child is entitled to an interpreter. The
13 Commissioner of Education of New York State held -- this
14 decision is the appendix to the brief submitted by the
15 National Association of the Deaf -- that merely because
16 Amy is entitled to an interpreter does not mean that any
17 other deaf child is entitled to an interpreter.

18 This case involves Amy and only Amy and does
19 not go beyond Amy's particular and individual needs.

20 QUESTION: Mr. Chatoff, what is there in the
21 Act itself or the accompanying regulations that would
22 yield the precise test that the Court of Appeals
23 applied, the measurement of the potential and
24 determining the shortfall and applying that standard?
25 The language of the Act and the regulations appear to

1 require no more than an individual educational program
2 and in accordance with the state plan.

3 MR. CHATOFF: The Act requires specific
4 individualized instruction for each handicapped child.
5 The equal educational opportunity standard is set forth
6 in the Senate report and in the Congressional debate
7 accompanying the Act. I think that that should be
8 responsive to your question.

9 I would only add that if Amy receives the
10 proper education she can become a doctor, a lawyer, an
11 engineer. The only occupations that are closed to her
12 would be those of disc jockey and telephone operator.

13 Congress made a legislative determination that
14 each child's opportunities shall not be limited beyond
15 those restrictions inherent in the child's disability.

16 Thank you.

17 CHIEF JUSTICE BURGER: Mr. Schulder.

18 ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,
19 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

20 MR. SCHULDER: Mr. Chief Justice and may it
21 please the Court:

22 In my portion of the argument I would like to
23 address several of Petitioner's contentions that raise
24 fundamental questions about the purpose and intent of
25 Congress in enacting the Education of the Handicapped

1 Act in 1975.

2 Relying on this Court's recent decision last
3 term in Pennhurst, Petitioners argue that the Act does
4 not entitle individual handicapped children and their
5 parents to claim a substantive right to a free
6 appropriate public education. They also contend that
7 the judicial review provisions of the Act limit review
8 to matters of procedure and do not permit a handicapped
9 child and his or her parents to challenge determinations
10 of state and local school authorities concerning
11 particular services that are to be given to an
12 individual child.

13 Instead, Petitioners assert that the Act
14 merely requires that the services provided to a child
15 conform to the state plan prepared by the state
16 commissioner of education pursuant to the Act, and that
17 if the individual program complies with the plan there
18 is no further recourse.

19 These claims are completely contrary to the
20 Congressional intent as reflected in the language and
21 history of the statute. Unlike the state at issue in
22 Pennhurst, the Education of the Handicapped Act requires
23 as a condition for receipt of federal funds that each
24 recipient state have in effect a policy that assures all
25 handicapped children the right to a free appropriate

1 public education.

2 The Act also requires the states, as a
3 condition of receiving funds, to develop a plan setting
4 forth in detail the procedures and policies that it
5 intends to provide in order to assure that a free
6 appropriate public education will be available to all
7 handicapped children within the state within certain
8 periods.

9 The Act also requires as a condition of
10 receiving funds that the states establish procedures to
11 assure that to the maximum extent appropriate
12 handicapped children receive supplemental aids and
13 services to allow them to be educated together with
14 non-handicapped children.

15 The legislative history confirms that Congress
16 meant to establish a statutory right of individual
17 handicapped children to a free appropriate public
18 education. For example --

19 QUESTION: How does one get from there to the
20 standard that apparently the District Court used and
21 that the Court of Appeals was willing to see used in
22 this case, that each handicapped child be given an
23 opportunity to achieve his full potential commensurate
24 with the opportunity provided to other children?

25 MR. SCHULDER: Your Honor, we do not agree

1 with that particular part of the District Court's
2 opinion.

3 QUESTION: It came out of the law, didn't it?

4 MR. SCHULDER: I believe it did. The Court of
5 Appeals, however, did not rely on that part of the
6 District Court's opinion. On page A-6 of the appendix
7 to the petition, the Court of Appeals quoted that part
8 of the District Court's opinion that stated that under
9 the Act the educational authorities involved in this
10 case are required to bring Amy's educational opportunity
11 up to a level of educational opportunity being offered
12 to her non-handicapped peers.

13 In other words, the emphasis is not on
14 potential or shortfall from potential, but on the making
15 available to handicapped children the same opportunities
16 that are available to non-handicapped children to
17 benefit from the regular educational program that the
18 state or local school authorities provide.

19 QUESTION: The Petitioners say that that
20 doesn't mean that each individual handicapped child has
21 a right to go to court.

22 MR. SCHULDER: Excuse me, Your Honor?

23 QUESTION: The Petitioners say that they don't
24 want each individual handicapped child to litigate his
25 particular problem.

1 MR. SCHULDER: I understand the Petitioners'
2 contention, but unfortunately for Petitioners the Act
3 specifically provides an express private right of action
4 to every handicapped child and his parents regarding any
5 complaint concerning any matter relating to the
6 provision of a free appropriate public education.

7 QUESTION: So that if the child says, or the
8 parents, that we have three books and we should have
9 four, we go to court?

10 MR. SCHULDER: Well, Your Honor, we're only
11 dealing with --

12 QUESTION: Well, that's my hypothetical.
13 Would you mind dealing with it? Or you can ignore it.
14 It's all right with me.

15 MR. SCHULDER: No. Well, the statute does
16 provide for a right of access to the court. But I would
17 like to emphasize that only in a very, very small number
18 of cases --

19 QUESTION: Well, suppose they say, to get
20 closer to this case, if they say you need a number 72865
21 machine, and they say that's the wrong machine, we need
22 another machine. That would be litigated? Obviously
23 you don't mean that, do you?

24 MR. SCHULDER: The Act specifically provides
25 for access to courts after the exhaustion of appropriate

1 administrative --

2 QUESTION: Well, your answer is that that
3 would -- they could go to court on that?

4 MR. SCHULDER: Theoretically they could, Your
5 Honor.

6 QUESTION: My question was can they or can't
7 they.

8 MR. SCHULDER: Yes.

9 QUESTION: They can?

10 MR. SCHULDER: Yes.

11 QUESTION: Thank you.

12 QUESTION: You haven't answered yet what the
13 standard should be on review. It's not inconsistent
14 with what the Act says, even if it's a de novo hearing,
15 that all the District Court might be allowed to do is to
16 determine whether the school had acted arbitrarily,
17 rather than arriving at some independent judgment about
18 what a --

19 MR. SCHULDER: Well, the Act provides that the
20 District Court's decision shall be based upon a
21 preponderance of the evidence, and it specifically
22 permits --

23 QUESTION: About what?

24 MR. SCHULDER: About any matter relating to
25 the provision of a free appropriate public education.

1 QUESTION: Well, it doesn't say that.

2 MR. SCHULDER: Well, the statute provides that
3 the children and their parents have a right to go to
4 court regarding any matter relating to a free
5 appropriate public education.

6 QUESTION: But what's this court supposed to
7 do? Independently make its own judgment or -- is it
8 inconsistent with the Act of the District Court said,
9 all I'm allowed to do is to decide whether the school
10 acted arbitrarily? Is that inconsistent with the Act?

11 MR. SCHULDER: I don't believe that would
12 necessarily be inconsistent with the Act, no.

13 QUESTION: So I'm not going to decide it
14 independently, as though I were writing on a clean
15 slate.

16 MR. SCHULDER: Absolutely.

17 QUESTION: Now, is that inconsistent with the
18 Act?

19 MR. SCHULDER: No, I don't think it would be.

20 QUESTION: Is that what the District Court did
21 in this case? It is not, is it?

22 MR. SCHULDER: Well, I'm not sure whether it
23 is or is not. The District Court made specific findings
24 that are not challenged here.

25 QUESTION: Well, he certainly disagreed with

1 the school, and he didn't say -- their standard
2 certainly wasn't arbitrariness. It was just that this
3 plan doesn't provide for full development of the child.

4 MR. SCHULDER: No -- well, he may have said
5 that, but the way we view the statute the appropriate
6 test would be whether or not a handicapped child has
7 equal access to the same educational program as
8 non-handicapped children.

9 QUESTION: To do what? To fulfil --

10 MR. SCHULDER: We don't talk about potentials
11 here. We're simply talking about access to the same
12 information.

13 QUESTION: Maybe we need to talk about this
14 potential, because that certainly figured in the case.

15 MR. SCHULDER: Well, that may have figured in
16 Congress' enactment of the statute.

17 QUESTION: Don't you think it figured in the
18 decision of the District Court or the Court of Appeals?

19 MR. SCHULDER: It may have figured as a factor
20 in the decision of the District Court, but I don't
21 believe that the Court of Appeals relied on that aspect
22 of the District Court's decision. And we do not submit
23 that the Court needs to go that far in upholding the
24 judgment of the Court of Appeals in this case.

25 QUESTION: Would it be inconsistent with the

1 Act to believe that as long as there is an individual
2 educational program and plan made for the child which is
3 within the meaning and requirements of the state plan,
4 which has been in turn approved by the appropriate
5 federal official, that that is sufficient?

6 MR. SCHULDER: No, Your Honor. The state plan
7 is simply a general administrative mechanism for the
8 state to develop to show the Secretary of Education that
9 it's in general compliance with the goals of the
10 statute. The Act provides that the free appropriate
11 public education that is to be provided the handicapped
12 children must meet the unique needs of each child.

13 QUESTION: Well, perhaps you didn't hear my
14 question. I said, is it inconsistent with the Act to
15 find that the school district has complied with it if it
16 has an individual educational plan for that individual
17 child which is in conformity with the state plan, which
18 in turn has been approved? Is that inconsistent with
19 the Act?

20 MR. SCHULDER: Is it inconsistent with the Act
21 to find that the particular school district has
22 developed --

23 QUESTION: If a court is faced with the
24 problem that it was faced with the problem that it was
25 faced with here and it determines that the school

1 district has developed an individual plan for the child,
2 considering the handicap and the requirements, and that
3 the plan, the individual plan, is consistent with the
4 state plan, is that not enough under the Act?

5 MR. SCHULDER: No, Your Honor. Under the Act,
6 the plan has to provide that the educational program
7 offered and made available to each handicapped child
8 must meet the child's unique needs. That's part of the
9 definition of the appropriate education that, as a
10 condition of receiving funds, the authorities must make
11 available.

12 QUESTION: Yes, but if the school district
13 says that it's done that by developing its individual
14 plan, why does the court have to go further and measure
15 potential and try to develop shortfall and make other
16 inquiry? Why isn't that enough?

17 MR. SCHULDER: We don't think the court has to
18 measure potential, but we do believe that the court has
19 to make an independent determination whether, in this
20 particular case, for example, the plan as developed
21 provides the child in question access to the same
22 educational opportunity available to non-handicapped
23 children.

24 And the legislative history of the Act clearly
25 supports this reading of the statute.

1 QUESTION: Mr. Schulder, do you know how much
2 federal money New York receives under this Act every
3 year?

4 MR. SCHULDER: I believe we have a footnote in
5 our brief that states that New York received in fiscal
6 year 1980 \$45 million, Your Honor.

7 QUESTION: Do you know how many children are
8 benefited by that?

9 MR. SCHULDER: I do not know offhand.

10 QUESTION: Do you know how many of these cases
11 reach the federal courts every year?

12 MR. SCHULDER: Well, there is a -- I do know
13 that there's a very minimal number of cases that reach
14 the federal or state courts, Your Honor. In the amicus
15 brief for the Association for Retarded Citizens, at
16 pages 18 to 19 there are two footnotes, 23 and 24, that
17 indicate that very, very few individual cases even get
18 into the state administrative system, and a very, very
19 small number, between 200 and 300 -- excuse me?

20 QUESTION: Does your office agree with that
21 information?

22 MR. SCHULDER: Excuse me?

23 QUESTION: Does your office agree with that
24 information in the amicus brief?

25 MR. SCHULDER: I do not have any information

1 that confirms that, Your Honor. But I believe that the
2 information was developed from sources, studies made by
3 the Department of Education.

4 The Act in question here has two basic
5 themes: One is the requirement that to the maximum
6 extent appropriate handicapped children are to be
7 mainstreamed, that is educated together with
8 non-handicapped children. The second theme of the Act
9 is, as I mentioned earlier, providing a full educational
10 opportunity for all handicapped children.

11 The legislative history, as I said, clearly
12 demonstrates Congress' intent that participating states
13 ensure that handicapped children have an equal
14 educational opportunity. In other words, in this case,
15 that they have access to the same educational program
16 that is available to other non-handicapped children in
17 the particular school.

18 QUESTION: Is there any recognition whatever
19 in your submission that the degree of disability varies
20 very widely? Sadly, there are some children with IQ's
21 of 40, deaf and dumb. What is a state required to do
22 with respect to such a child?

23 MR. SCHULDER: Well, Congress realized that
24 there were wide ranges of handicapping conditions and it
25 did not --

1 QUESTION: Would it have to set up a special
2 school?

3 MR. SCHULDER: Congress did not fix into the
4 statute a particular standard.

5 QUESTION: But this court has prescribed a
6 standard, the Court of Appeals for the Second Circuit.

7 MR. SCHULDER: Well, the Court of Appeals was
8 dealing with a particular child and it decided that this
9 particular child has above average intellectual ability,
10 and for her to be receiving an equal educational
11 opportunity --

12 QUESTION: So it's your position that the
13 standard of the Second Circuit is not a general
14 standard, although you've been using it throughout your
15 argument, but applies only to this case?

16 MR. SCHULDER: Not that it applies only to
17 this case, but it would apply to cases of children with
18 average or above average intellectual abilities. In
19 other words --

20 QUESTION: Who determines average or above
21 average ability? A court?

22 MR. SCHULDER: I think the court would make
23 the ultimate determination, but would clearly rely on --
24 excuse me?

25 QUESTION: Excuse me for interrupting you.

1 MR. SCHULDER: But would rely on information
2 developed by local school authorities and professional
3 experts. In fact, in the development of an
4 individualized education program there are several
5 factors that must be taken into consideration. One is
6 the specific testing and evaluation of the student
7 involved. The other is professional expertise
8 concerning appropriate programs that are available.

9 QUESTION: And so federal courts would be
10 reviewing decisions of state boards of education in
11 every one of these cases in which the parents chose to
12 bring a suit?

13 MR. SCHULDER: We're not here to defend the
14 wisdom of the statute, but this is what Congress appears
15 to have enacted, Your Honor. And we feel that, for the
16 reasons that we've stated here and in our briefs, that
17 the decision of the Court of Appeals should be
18 affirmed.

19 QUESTION: May I ask one follow-up question to
20 what I believe Justice Blackmun asked you about cost. I
21 don't recall the exact figure you gave, but I think
22 there's something in the brief to the effect that this
23 particular district received about \$27,000 for I think
24 140 or 150 handicapped children, which means they get
25 somewhere between \$150 and \$200 a child.

1 Is that what would be the typical amount of
2 federal support?

3 MR. SCHULDER: No, Your Honor. Congress was
4 aware that providing educational servides for
5 handicapped children would require substantial
6 expenditures. And I believe the estimates that were
7 developed by Congress or at hearings before Congress
8 prior to passage of the Act indicated that the average
9 cost of educating a handicapped child would be
10 approximately 1.9 or 2 percent times the average cost of
11 educating a non-handicapped child.

12 The brief, the amicus brief of the Cerebral
13 Palsy Association contains statistics that show that the
14 actual average cost that statistics have been prepared
15 for since the Act has been in effect show that the cost
16 has been within the range that Congress had anticipated
17 when it enacted the statute.

18 QUESTION: That's cost to the state school
19 district. My question really concerned what is the
20 magnitude of the federal support per child. What is the
21 federal contribution?

22 MR. SCHULDER: I believe that the goal of the
23 Congress was to provide a base of 25 percent of the
24 total cost, but I believe that that percentage was
25 supposed to be increased from year to year, from the

1 beginning. The first year that the Act was to take
2 effect, which was I believe three years --

3 QUESTION: Are you able to tell me -- and if
4 you're not it's perfectly all right -- how many dollars
5 per handicapped child in this school district Congress
6 actually provided? The federal contribution is based on
7 the number of handicapped children in the district,
8 right?

9 MR. SCHULDER: That's correct.

10 QUESTION: Do you know or does the record tell
11 us how much was given to this school district per
12 child? In other words, how much of the burden of paying
13 for the interpreter has the Federal Government assumed,
14 is what I'm trying to find out.

15 MR. SCHULDER: I am not aware of the
16 particular information. But if the school district
17 believes that it is, as a result of the statute, being
18 placed under an unnecessary burden, it is free to opt
19 out of the program.

20 QUESTION: The district can, or the state?

21 MR. SCHULDER: No, the district I believe can,
22 as well as the state, Your Honor.

23 Thank you.

24 CHIEF JUSTICE BURGER: Thank you.

25 Do you have anything further, Mr. Kuntz?

1 REBUTTAL ARGUMENT OF RAYMOND G. KUNTZ, ESQ.
2 ON BEHALF OF PETITIONERS

3 MR. KUNTZ: Just a few brief comments in
4 rebuttal.

5 In answer to two questions raised by Justice
6 Stevens, the Government's brief states that -- I think
7 you have the figures correctly -- around \$27,000.
8 Consequently, the cost is about \$160 per handicapped
9 child. That does comport with the national average,
10 which is between \$150 to \$200. And the State of New
11 York received \$45 million for approximately 200,000
12 children. So consequently the statistics show that a
13 significant portion of that burden is not borne by the
14 Federal Government.

15 The records also show, developed by Congress
16 through the reports submitted to Congress and required
17 by Congress and submitted by the Secretary, that the
18 percentage of funding is on a decreasing level. It's
19 now down to, in this last fiscal year, approximately
20 eight percent of the cost of educating the average
21 child.

22 I also wanted to deal just for a moment, too,
23 with your question before to counsel for the Respondents
24 about whether the decision requires every child to have
25 a sign language interpreter. The court made, in our

1 view, an unwarranted leap from an audiological test
2 conducted in isolation in a laboratory setting, which
3 found that Amy only could hear 59 percent -- it was a
4 word discrimination test.

5 The court leapt from that fact to a conclusion
6 which we believe is unwarranted, that is that Amy
7 understands only 59 percent of what transpires in her
8 class. We say that the unrebutted evidence is that she
9 understands nearly all of what transpires in her class.

10 Now, the court was able to reach the decision
11 it did by adopting the philosophical approach of the
12 Respondents in this case, and that approach was that
13 every deaf child does better with a sign language
14 interpreter in their class. Amy is deaf, consequently
15 she does better. They adopted that syllogism. The
16 rationale for that syllogism was presented by the
17 Respondents' experts at the trial court.

18 As a matter of fact, when the case was tried
19 before the independent hearing officer the Respondents'
20 case consisted of three witnesses and a total of about
21 13 pages of testimony. Those witnesses established
22 these facts: Amy is deaf, Amy's parents were deaf,
23 Amy's parents wanted a sign language interpreter in her
24 class, and written evidence -- that is, expert opinion
25 -- was to the effect that a sign language interpreter

1 was required for every deaf child.

2 The parents introduced no evidence whatsoever
3 at either the trial before the independent hearing
4 officer or at the trial before the District Court as to
5 how Amy was doing in class, because in their view that
6 consideration was irrelevant because of the
7 philosophical premise adopted by the particular theory
8 of deaf education promulgated by the experts brought to
9 testify on Amy's behalf, none of whom had ever seen Amy
10 in the classroom.

11 And to the contrary, all of the experts
12 testifying on the district's behalf, all had observed
13 Amy in the classroom. And we refer you to the joint
14 appendix, where we have put the testimony by one of the
15 witnesses at the independent hearing and one of the
16 witnesses before the district court. And we think that
17 that's moving and convincing testimony that Amy
18 understands nearly all of what transpires in her
19 classroom.

20 Thank you very much.

21 QUESTION: Mr. Kuntz, where will I find in the
22 record the best statement of the school board's policy
23 on this particular matter?

24 MR. KUNTZ: If you're referring to what
25 services the school district provided, I believe that

1 --

2 QUESTION: What is their program? What is
3 their program? Where can I find exactly what they
4 propose to do about handicapped children, specifically
5 deaf children? Is there anyplace I can find it?

6 MR. KUNTZ: The school district took no
7 philosophical position on what it should do for deaf
8 children as a class. What it did was in this particular
9 case, which it believes it's required to do under the
10 procedure --

11 QUESTION: Is it on an individual basis?

12 MR. KUNTZ: It was on an individual basis. It
13 then developed a program in accordance with the state
14 plan, based upon Amy's unique needs. It believes that
15 it met the tests of the state and it believes that it
16 succeeded almost beyond expectation in achieving --
17 building bridges of understanding and meaning to Amy so
18 that she could succeed in her classroom.

19 Thank you.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.
21 The case is submitted.

22 (Whereupon, at 11:12 a.m., the above-entitled
23 matter was submitted.)

24 * * *

25

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DIST., WESTCHESTER COUNTY, ET
vs. AMY ROWLEY, BY HER PARENTS AND NATURAL GUARDIANS, CLIFFORD AND NANCY ROWLEY, ESQ. #81-1002

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

BY Suzanne Young

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