

In the

ORIGINAL

Supreme Court of the United States

SHEILA RENDELL-BAKER ET AL., :
 :
 Petitioners, :
 : No. 80-2102
 v. :
 :
 SANDRA KOHN ET AL. :

Washington, D. C.

Monday, April 19, 1982

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SHEILA RENDELL-BAKER ET AL., :

4 on behalf of Petitioners, :

5 v. : No. 80-2102

6 SANDRA KOHN ET AL. :

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8 Washington, D. C.

9 Monday, April 19, 1982

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 10:05 o'clock a.m.

13 APPEARANCES:

14 ZACHARY R. KAROL, ESQ., Boston, Massachusetts; on behalf
15 of the Petitioners.

16 MATTHEW H. FEINBERG, ESQ., Boston, Massachusetts; on
17 behalf of the Respondents.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Rendell-Baker and others against
4 Sandra Kohn.

5 Mr. Karol, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF ZACHARY R. KAROL, ESQ.,
8 ON BEHALF OF THE PETITIONERS

9 MR. KAROL: Mr. Chief Justice, and may it
10 please the Court, the question in these two consolidated
11 cases is whether an ostensibly private school which is
12 retained by the state to discharge the state's
13 obligation to provide special education acts under color
14 of law when it dismisses several of its teachers for
15 criticizing the manner in which that education is
16 provided.

17 Petitioners are six former teachers and
18 counselors at Respondent New Perspectives School in
19 Brookline, Massachusetts. They allege they were
20 dismissed for fulfilling their professional duty to
21 speak out on school matters affecting the education of
22 their students.

23 Although the school is ostensibly private, all
24 50 of its students were placed there by state agencies
25 or local school committees under the Massachusetts

1 special education statute. Each child's educational
2 program was prescribed by public officials. State
3 agencies or local school committees also paid each
4 child's tuition, with the result that as much as 99
5 percent of the school's operating funds were derived
6 from public sources.

7 Thus, the school had no students except those
8 which had been placed there by public officials. It had
9 virtually no operating funds except those which had been
10 provided by public officials. It was contractually
11 obligated to implement educational programs prescribed
12 by public officials, and it had no function except to
13 discharge the Commonwealth's own obligation to provide
14 special education to students which public officials had
15 placed at the school.

16 QUESTION: Who owns the building and
17 properties?

18 MR. KAROL: The building and properties are
19 privately owned by the school's trustees.

20 QUESTION: Who selects the teachers?

21 MR. KAROL: The teachers are selected by the
22 school management, including the directors and the
23 executive director of the school.

24 QUESTION: Are any of them public officials?

25 MR. KAROL: No.

1 Under the circumstances of this case,
2 Petitioners submit that the school is subject to the
3 same constitutional obligations as an ordinary public
4 school in connection with the performance of its
5 educational activities.

6 To place the issue into its proper context, it
7 is important to understand more fully the statutory
8 scheme under which special education is provided in
9 Massachusetts. Chapter 766 of the Acts of 1972 confers
10 upon every school aged child the statutory right to
11 receive suitable, publicly funded education. If a child
12 is suspected of having special learning needs, he is
13 evaluated by a team of educators, physicians, and
14 psychologists appointed by the state. If the team
15 determines that the child does have special learning
16 needs, then it formulates an individualized educational
17 plan or IEP to meet those needs.

18 The IEP establishes educational objectives for
19 the child, and sets out in detail an educational program
20 designed to achieve those objectives. By law, the IEP
21 must be implemented by the child's regular public school
22 to the fullest extent possible. If the regular public
23 school is unable to implement the IEP, then but only
24 then may the school committee place the child in a
25 specially accredited private school, such as the

1 Respondent in this case.

2 The school must agree to implement the IEP and
3 to submit to extensive state regulation and inspection.
4 It must also report periodically on the child's
5 progress, with a view toward returning him to the public
6 school as soon as possible. For its part, the school
7 committee must pay each child's tuition, and it also
8 must monitor the child's progress and the school's
9 performance.

10 The school committee also has an ongoing
11 obligation to revise the child's IEP as the need
12 arises. If the regular public school is unable to
13 implement the IEP, and if the school committee is unable
14 to locate a suitable private school which is willing and
15 able to do so, then by law the school committee must
16 establish a suitable program of its own.

17 So, in short, every school aged child has an
18 unconditional right to suitable education, and the
19 Commonwealth has an absolute duty to provide it. It is
20 also significant that school attendance was made
21 compulsory under Chapter 766 for children entitled to
22 special educational benefits.

23 This, then, was the statutory scheme under
24 which state agencies or local school committees provided
25 the school with all of its students and virtually all of

1 its operating funds.

2 QUESTION: Did the Court of Appeals for the
3 First Circuit agree with all of your positions as to the
4 statutory law of Massachusetts?

5 MR. KAROL: I don't know of any disagreement
6 that they expressed with any of these positions.

7 The dismissals which gave rise to the
8 litigation were all alleged to have been in retaliation
9 for Petitioner's speech critical of school policies and
10 administration. It was against this background and on
11 these facts which, as I have noted, the First Circuit
12 assumed to be true for purposes of its opinion, that
13 Petitioners maintain that the school is subject to the
14 same constitutional obligations as an ordinary public
15 school in connection with the performance of its
16 educational activities.

17 QUESTION: Well, isn't that true of every
18 private school? It must meet the state standards?

19 MR. KAROL: We think that there is a critical
20 difference in this case. An ordinary private school is
21 not discharging an obligation of the Commonwealth or of
22 the state when it provides education, because the
23 children who attend that school have chosen to reject
24 the education which the state is required to offer. The
25 school in this case was clearly discharging an

1 obligation of the Commonwealth, not only in the sense
2 that the Commonwealth was paying for the education and
3 had prescribed the educational program for the child,
4 but that the Commonwealth would have had to provide this
5 education itself. These were children who had come
6 forward to claim the special educational benefits which
7 the state was statutorily obligated to provide.

8 We contend that the school is subject to
9 constitutional obligations on two principal grounds.

10 QUESTION: You say there is a great difference
11 between this situation and the situation that the Chief
12 Justice posed to you, but isn't this state by statute
13 required to furnish an education for everybody?

14 MR. KAROL: Yes, it is required to furnish an
15 education for everyone.

16 QUESTION: If somebody wants to go to public
17 school, he has a right to go to public school.

18 MR. KAROL: Yes.

19 QUESTION: By statute.

20 MR. KAROL: Yes.

21 QUESTION: And if they choose to go to private
22 school instead, why, that is at least a replacement for
23 a state obligation, isn't it? It is a substitute for a
24 state obligation, as long as the state approves it as an
25 adequate substitute.

1 MR. KAROL: It is a substitute for the
2 obligation of the --

3 QUESTION: Well, how is that different from
4 this situation, other than the financing?

5 MR. KAROL: Because the private school in that
6 case is providing education to children who have --
7 either they or their parents have chosen to reject the
8 public education which the state provides.

9 QUESTION: Well, I know that. That may be one
10 way of talking about it, but it nevertheless is
11 discharging the state obligation in both cases.

12 MR. KAROL: Well --

13 QUESTION: At least it is a substitute for a
14 state obligation.

15 MR. KAROL: It is a substitute, but --

16 QUESTION: And furthermore, the child is
17 discharging his obligation in the same way in both cases.

18 MR. KAROL: That is correct. The child is
19 discharging his obligation to attend a school.

20 QUESTION: Yes, and the state is relieved of
21 an obligation in both cases.

22 MR. KAROL: Well, the state would still have
23 an obligation --

24 QUESTION: Or it is relieved of an obligation
25 to do it itself.

1 MR. KAROL: It is -- That is correct. The
2 important point that we wish to emphasize is that when
3 the school provides education in this case to these
4 children, it is discharging an obligation of the state
5 and performing a sovereign function as an agent or
6 instrumentality of the Commonwealth. When state
7 agencies or state employees provide services in
8 discharge of the Commonwealth's obligation, they, of
9 course, must observe constitutional standards when they
10 do so.

11 The question then in this case is whether a
12 different standard should apply when the state elects to
13 deliver those same services through a closely controlled
14 agent like the school, rather than through its own
15 full-time employees.

16 We maintain that the same standard must apply
17 in either case, because states should not have it within
18 their discretion to avoid constitutional obligations by
19 the simple expediency of farming out their statutory
20 obligations. The existence or non-existence of
21 constitutional rights must not be permitted to turn upon
22 formal distinctions between agents who are on the state
23 payroll and those who aren't. If states are permitted
24 to retain alter egos like the school to deliver
25 essential services, and if those alter egos are as free

1 to disregard constitutional rights as they -- as the
2 state chooses to permit them to be, then citizens will
3 ultimately be dependent upon nothing more than the will
4 of the state for protection --

5 QUESTION: Well, what -- suppose a city has an
6 obligation to provide roads and streets and bridges and
7 things like that, which it does, and it contracts with a
8 construction firm to build a bridge, and it has -- it
9 certainly has standards that they have to live up to.
10 They put out for bids, and they have the specifications,
11 and they agree to pay a certain amount of money. They
12 finance the entire deal. Do you think that that makes
13 that independent contractor a state instrumentality for
14 purposes of the Fourteenth Amendment?

15 MR. KAROL: Not necessarily. We would
16 distinguish cases in which the private entity is
17 performing a function on behalf of the state from
18 situations in which it is not, and we would distinguish
19 it on the basis of whether or not the private entity's
20 conduct substantially and materially affects the
21 delivery of the particular service, so that under this
22 functional analysis --

23 QUESTION: Well, suppose the fellow who is in
24 charge -- the superintendent of the job is fired. He
25 has been in charge, and midway through the building of

1 the bridge he gets discharged for a reason that he says
2 violates his due process rights. Wouldn't that have as
3 much of an impact on the delivery of the state services
4 as the discharge in this case?

5 MR. KAROL: I don't believe so. I think the
6 distinction is that when a school fires teachers for
7 failing a professional duty to speak out on professional
8 matters, on educational matters affecting students, that
9 there is not only the immediate impact of losing those
10 particular teachers, but that all teachers at that
11 school then and in the future know that they risk
12 dismissal for expressing those types of professional
13 opinions and --

14 QUESTION: What if Justice White's
15 hypothetical employee working on this bridge spoke out
16 and said that the company was not building the bridge
17 correctly, and that it might endanger the public.

18 MR. KAROL: In most cases --

19 QUESTION: Would that be any different?

20 MR. KAROL: In most cases, I would say, yes,
21 it would be different, unless --

22 QUESTION: Well, he is speaking out to protect
23 the public.

24 MR. KAROL: Unless --

25 QUESTION: He thinks he is speaking out to

1 protect the public.

2 MR. KAROL: Unless that particular individual
3 has a position of responsibility which -- under which it
4 is his job in discharging the obligation of the state in
5 this case to say what he is saying. If --

6 QUESTION: You mean, he is hired to build a
7 bridge, not to talk.

8 MR. KAROL: That's -- if he is the
9 superintendent of the job, that is correct, but if you
10 take, for example, a truck driver, or somebody who is
11 laying the concrete, and he is criticizing the design of
12 the bridge, and is speaking in public forums, I would
13 say that the private contracting company would have a
14 right to discharge that individual, because the --

15 QUESTION: But not the superintendent, you
16 think?

17 MR. KAROL: If it is the superintendent's
18 position to express opinions concerning the safety of
19 the project, then in that case I would say that he would
20 have a right to speak out, to the same extent that the
21 state engineer in charge of the project would have a
22 right to do so.

23 QUESTION: Mr. Karol, this is not a state
24 institution, is it?

25 MR. KAROL: It is a private institution. Yes,

1 Your Honor.

2 QUESTION: And the employees are not state
3 employees.

4 MR. KAROL: They are not employees of the
5 state. They are not on the state payroll.

6 QUESTION: Where do they get under -- How do
7 they get under the Fourteenth Amendment?

8 MR. KAROL: They are acting under the color of
9 law in the sense that they are agents or
10 instrumentalities of the state.

11 QUESTION: How are they agents? They are not
12 paid by the state, are they?

13 MR. KAROL: They are not on the state
14 payroll. Their funds --

15 QUESTION: They weren't hired by the state,
16 were they?

17 MR. KAROL: They were not hired by the state.

18 QUESTION: Well, how do they become state
19 officials?

20 MR. KAROL: They are paid by funds provided by
21 the state, and they are subject to the control of the
22 state.

23 QUESTION: That is true as to Harvard's, too,
24 isn't it?

25 MR. KAROL: Excuse me?

1 QUESTION: There are some people at Harvard
2 that are paid with federal funds, too, aren't they?

3 MR. KAROL: But they are not discharging --

4 QUESTION: And it is still private, isn't it?

5 MR. KAROL: That is still private. They are
6 not discharging any obligation of the Commonwealth to
7 deliver the educational services which they are
8 delivering.

9 QUESTION: I just don't understand how they
10 become state employees.

11 MR. KAROL: They don't become state employees.

12 QUESTION: And my "state" is in quotes.

13 MR. KAROL: They become instrumentalities of
14 the state --

15 QUESTION: And I think you need those quotes
16 to get under the Fourteenth Amendment.

17 MR. KAROL: Well, as the Court --

18 QUESTION: Unless you can persuade me I am
19 wrong.

20 MR. KAROL: As the Court said in Evans versus
21 Newton, and this is the quote from the opinion, "When
22 private individuals or groups are endowed by the state
23 with powers or functions governmental in nature, they
24 become agencies or instrumentalities of the state and
25 subject to its constitutional limitations." There have

1 been several opinions by this Court in which private
2 entities have been held subject to constitutional
3 obligations. For example, in Burton versus Wilmington
4 Parking Authority, the Eagle Coffee Shop was, of
5 course, private.

6 QUESTION: Did that case say that the
7 employees were state employees? They weren't even
8 involved. The employees weren't involved in the case.

9 MR. KAROL: No, that case said that the --

10 QUESTION: Well, I am still waiting for one
11 that will help you.

12 MR. KAROL: They become --

13 QUESTION: I think that's your problem.

14 MR. KAROL: They are not state employees, but
15 I don't believe the Fourteenth Amendment requires or
16 applies only to employees. I believe that it applies to
17 persons who are acting under color of law, and that when
18 the private employee is discharging an obligation of the
19 Commonwealth --

20 QUESTION: Well, suppose the private employee
21 makes his speech to a private student. Would that be
22 protected by the Fourteenth Amendment?

23 MR. KAROL: Under the circumstances in which
24 it was -- if under the circumstances --

25 QUESTION: I gave you the circumstances. In

1 the school, he got a group of private students who were
2 paying their tuition, and told them -- made a speech to
3 them. Is that a protected speech?

4 MR. KAROL: If these were private students who
5 had not been sent there by the Commonwealth, the answer
6 is no. It would be a private speech.

7 QUESTION: Well, what was this speech made to,
8 only public students?

9 MR. KAROL: There were no students at this
10 school except students who had been sent by state
11 agencies or local school committees. All 50 of the
12 students had been placed there by the state.

13 QUESTION: Was that done after -- Was that
14 school open before the statute or after?

15 MR. KAROL: There isn't anything in the record
16 about the history of the school. I believe it was
17 opened shortly before the statute, and I don't know if
18 there is anything -- I believe there is nothing in the
19 record as to whether it ever had any students except
20 those placed by the state.

21 QUESTION: Well, go down all of the indicia of
22 a state employee, and they don't have any. Do they take
23 an oath to the state?

24 MR. KAROL: They did not take an oath, but
25 they signed a contract which provided that they would

1 discharge the obligation of the Commonwealth to
2 implement the IEP.

3 QUESTION: And so do bootleggers sign
4 contracts, too, don't they?

5 MR. KAROL: Excuse me?

6 QUESTION: The fact they sign a contract
7 doesn't have anything to do with my point. Well, did
8 they sign a contract with the state?

9 MR. KAROL: Yes, with the local school
10 committees and state agencies.

11 QUESTION: With the state?

12 MR. KAROL: Agents of the state or
13 instrumentalities of the state, state agencies.

14 QUESTION: They filed a contract to teach and
15 to be paid. Did they file that with the school or the
16 school board?

17 MR. KAROL: No, I mean the school -- perhaps I
18 misunderstood Your Honor's question.

19 QUESTION: I thought you did.

20 MR. KAROL: The school itself signs a contract
21 with the state agency.

22 QUESTION: I thought so. The state didn't
23 have anything to do with it. The state is -- they are
24 completely different groups of people.

25 MR. KAROL: They are different groups of

1 people, but the state is responsible for the students
2 being there, and it is responsible for the school's
3 existence. If I may draw an analogy to other decisions
4 by this Court, for example, Williams versus United
5 States, reported at 341 U.S. Reports, was a case where a
6 private security policeman was held subject to
7 constitutional obligations in a criminal case, the
8 counterpart of the civil statute involved here, because
9 he was acting under a license by the state, and he beat
10 up a group of private employees.

11 QUESTION: Which license gave him the right to
12 carry a gun and kill somebody.

13 MR. KAROL: Well, the --

14 QUESTION: Well, that's -- what did these
15 teachers have from the state? What license, if any?

16 MR. KAROL: They were specially accredited --
17 they were accredited by the state to teach, but that
18 does not distinguish them from ordinary public school
19 teachers. However, in order to teach in the New
20 Perspectives School or other accredited schools, you
21 must receive the same -- comparable certification to
22 public school teachers, which is a higher certification
23 than the certification required --

24 QUESTION: Isn't that true for all private
25 schools?

1 MR. KAROL: No, it is not.

2 QUESTION: Really?

3 MR. KAROL: The certification required --

4 QUESTION: For some states, it is, right?

5 Some states have the same certification.

6 MR. KAROL: I don't know the answer to that.

7 I would not be surprised. But in Massachusetts, the

8 certification requirements are now higher for special

9 education teachers in private schools than for ordinary

10 teachers. Now --

11 QUESTION: Mr. Karol, even if the school is

12 acting in a sovereign role as to the students, how can

13 you argue that the school is acting in a sovereign role

14 with regard to its personnel policies? Where is the

15 nexus --

16 MR. KAROL: The nexus --

17 QUESTION: -- for personnel policies?

18 MR. KAROL: The nexus comes from the fact that

19 it is the function of providing education which is

20 important here. Under what we would maintain this

21 functional approach to be, the school should be subject

22 to the same constitutional obligations as an ordinary

23 public school to the extent its conduct has a material

24 affect on the delivery of the service, and firing --

25 QUESTION: Mr. Karol, it is a concern, because

1 a number of cities and counties and governmental units
2 in the country are contracting with private employers,
3 if you will, to perform certain functions, for example,
4 fire protection, or garbage pickup services. This is a
5 rather widespread practice around the country. Under
6 your theory, then, all of these employees of these
7 private contractors with a city or a county would now be
8 considered to be engaged in state action. Is that right?

9 MR. KAROL: State action for some purposes,
10 not necessarily all purposes. That would be state
11 action only to the extent that the challenged conduct
12 had a material effect on the delivery of the service, so
13 that there might well be instances where the private
14 security police, for example, or the private fireman
15 would not be subject to constitutional obligations. It
16 would only be in connection with those activities which
17 the private citizen who is receiving the benefit of that
18 service will expect will have a material effect on the
19 quality of the service itself. Now, in --

20 QUESTION: Well, under your theory, I take it
21 that any labor-management dispute in the company that
22 was providing the trash service or the fire protection
23 service would affect the delivery of the service, since
24 you are basically dealing with a labor-management
25 dispute here at the New Perspectives School.

1 MR. KAROL: I think what is more important
2 than the particular episode is whether a rule of law
3 which says that the private entity may do something or
4 other might have the effect on the future delivery of
5 that service. For example, if we take a case of a
6 private maintenance company which is plowing city
7 streets, I think that if the maintenance company plowed
8 the streets in the minority ethnic neighborhoods last,
9 over and over, that that conduct is clearly affecting
10 the quality of the delivery of the service, and it
11 should be subject to a constitutional obligation.

12 However, when that same maintenance company
13 makes decisions about who it is going to hire, or what
14 equipment it is going to buy, or who it is going to buy
15 equipment from, the impact on the quality of the service
16 is substantially less, and that is why I come back in
17 this case to the point that if teachers know that they
18 may be discharged for expressing professional opinions
19 about the quality of education, then the quality of
20 education will seriously suffer.

21 QUESTION: What if one of several supervisors
22 of a private fire company that is employed by a city to
23 furnish fire protection services makes a statement to
24 the press that this organization is poorly run from top
25 to bottom and follows antiquated fire protection

1 procedures, and we ought to get rid of top management?

2 MR. KAROL: I think that this is similar to
3 the question before about the bridge supervisor. If
4 this person is simply an individual who is expressing
5 his own opinions, and is not in a position which confers
6 upon him the responsibility to express opinions about
7 type, then when he is discharged for expressing such
8 opinions, he is -- the company discharging him is
9 exercising a private function. He is performing a
10 private function because this particular individual's
11 speech is probably not any significantly more important
12 than any other individual's speech insofar as that
13 quality of service is concerned, and you do have to
14 separate the functions of the private entity which are
15 private from the functions of the private entity which
16 are public.

17 I think the state action requirement, the
18 primary purpose is to protect a zone of privacy, to
19 establish a zone of privacy, and it is a sensitive
20 balancing of interests which is involved here.

21 QUESTION: Well, you would have, I would
22 think, a stronger case if there had been some express
23 permission. Say a state statute said, you may fire any
24 of your people without a hearing without losing your
25 grant, without losing your -- and the school fired

1 somebody without a hearing.

2 MR. KAROL: I think --

3 QUESTION: But there isn't even that here, is
4 there?

5 MR. KAROL: No. What there is is an
6 abdication of responsibility, and I think that that is
7 akin to the situation you had in the so-called White
8 Primary cases, where the Democratic Party, particularly,
9 for example, in Terry versus Adams, was not retained by
10 the state to determine voter eligibility requirements in
11 general elections, but the state in effect abdicated
12 responsibility to the Party to permit it to determine
13 eligibility requirements in the only elections which
14 counted, namely, the Democratic pre-primaries, so that
15 in that case, the party was held subject to
16 constitutional obligations to the extent the state
17 permitted it to perform that function.

18 So that I think abdication of responsibility
19 or, as in this case, an express delegation of
20 responsibility is a substitute for the kind of
21 regulatory involvement that the Court has dealt with
22 from time to time, where the private entity is ordered
23 to do something. We are certainly not dealing with a
24 case where a private entity has been ordered to do
25 something. We are dealing with a case where the state

1 has expressly retained the private entity to discharge
2 an obligation of the state to provide an essential
3 service.

4 QUESTION: Mr. Karol, would your argument be
5 the same if this particular school had only one or two
6 students out of the public sector for which the state is
7 paying?

8 MR. KAROL: In that case, I think we would
9 acknowledge that the school would be performing a dual
10 function. To the extent it is providing education to
11 those one or two students, certainly it is discharging a
12 public obligation, but it is also performing a private
13 obligation. The parents who send their children to that
14 school voluntarily do have a right, an important right
15 to have those children taught in a manner and by people
16 that they are comfortable with.

17 I think that to the extent you can separate
18 the dual nature of the function, you should do so. For
19 example, I think it would be unconstitutional for the
20 school you describe to threaten one student with
21 dismissal for writing a letter to a local paper if that
22 one student --

23 QUESTION: What about this case? If the
24 school had only one student publicly funded, would you
25 think that your regulatory argument would stand up here?

1 MR. KAROL: I think in that case you would
2 have to say which function predominates it. In that
3 case, I would say the private function predominates. I
4 would say that the likelihood is in that case that the
5 school had taken that one student more as an
6 accommodation to the state than in order to provide for
7 its own continued existence, and that would be a
8 different case than the one we have here, where the
9 school obviously was depending upon the state for its
10 very existence, because all of its students were
11 provided by the state.

12 I would like to reserve the balance of my time
13 for rebuttal.

14 QUESTION: Excuse me. Do they get any private
15 money? Is it in the record?

16 MR. KAROL: I think -- There are two years
17 covered in the discovery. In one year it was about 9
18 percent. In the second year, it was 1 percent.

19 QUESTION: Of --

20 MR. KAROL: Of operating funds. I don't know
21 what the endowment is of the school. I don't believe
22 that is in the record. But in the second year with
23 which this case is concerned, 99 percent of the
24 operating funds were provided by the state.

25 Thank you.

1 CHIEF JUSTICE BURGER: Mr. Feinberg.

2 ORAL ARGUMENT OF MATTHEW H. FEINBERG, ESQ.,

3 ON BEHALF OF THE RESPONDENTS

4 MR. FEINBERG: Thank you. Mr. Chief Justice,
5 and may it please the Court, the New Perspectives School
6 is a private, autonomous, independent private school.
7 It retains all of the essential characteristics of a
8 private school. Nothing in its operation or in the
9 operation of the Massachusetts special education
10 statute, Chapter 766, alters the essential private
11 nature of that school.

12 The school was incorporated in 1971, prior
13 to --

14 QUESTION: Most private schools don't get 99
15 percent of their funds from the state, either.

16 MR. FEINBERG: That is correct, Your Honor.
17 The fact, however, that the school gets that kind of
18 money through the state in no way alters the essential
19 private characteristics of the school. That is to say,
20 with regard to who goes to the school, who teaches at
21 the school, and what the teachers teach at the school,
22 the school itself and only the school retains the
23 decision-making authority.

24 QUESTION: You mean the state board of
25 education has no jurisdiction over the school at all?

1 MR. FEINBERG: The state board of education
2 has regulatory authority.

3 QUESTION: I thought so.

4 MR. FEINBERG: But it does not have direct
5 control in the sense that it does not have any control
6 over the decision-making powers of the school in its
7 day-to-day operation, who it hires, who it fires, and
8 indeed, who even goes to the school.

9 QUESTION: Well, do you suggest that the
10 students are selected only by the school and not
11 assigned by the state?

12 MR. FEINBERG: That is absolutely correct,
13 Your Honor. What happens in the admission policy of the
14 school is as follows. A referring public agency, such
15 as a school committee, will send over to the school the
16 child and usually, in fact always, the child's parents.
17 An interview is arranged. A certain amount of testing
18 is accomplished, and at that point a -- what is known as
19 the individual educational plan is developed. That plan
20 is looked at by the school, and a decision is made
21 whether or not to admit that child to the school. The
22 school may at that --

23 QUESTION: Is that the school committee?

24 MR. FEINBERG: I'm sorry?

25 QUESTION: Is that the school committee?

1 MR. FEINBERG: That is not the school
2 committee, Your Honor.

3 QUESTION: Well, what does the school
4 committee do?

5 MR. FEINBERG: All the school committee does,
6 the ultimate -- the last responsibility of the school
7 committee is to refer a child whom they have deemed to
8 be qualified for a private placement outside of the
9 public school system.

10 QUESTION: And that is a public committee, not
11 a private committee.

12 MR. FEINBERG: The referral itself is the
13 public function of the school committee. The decision --

14 QUESTION: Pursuant to state law?

15 MR. FEINBERG: That is correct, under the
16 chapter.

17 QUESTION: Pursuant to state law.

18 MR. FEINBERG: That is correct. The decision,
19 however, whether or not to accept that child rests with
20 the school.

21 QUESTION: And if the child is rejected, how
22 does the state -- the school board discharge its
23 obligation to provide special education?

24 MR. FEINBERG: It must discharge its
25 obligation by referring that child to another school,

1 another school whereby that child's individual
2 educational plan is more consonant with that other
3 school.

4 QUESTION: And if this process ends up that no
5 other school will take the child, then how is the child
6 educated?

7 MR. FEINBERG: Then the public school must
8 establish its own program for the school within the
9 public school system. There is no -- There is an
10 obligation upon the public school system to do something
11 for that child, but it is not necessarily so that the
12 child must go to the New Perspectives School or any
13 other privately operated institution.

14 QUESTION: Actually, in the two years involved
15 here, how many of the children at New Perspectives
16 School were referred by some public school board?

17 MR. FEINBERG: I believe the percentages were
18 -- well, it was over 80 percent. Forty-three students
19 were referred by public school systems; seven students
20 came through other state agencies. The other state
21 agencies, Your Honor, were the --

22 QUESTION: Well, are there any of them who had
23 not been referred by some state agency?

24 MR. FEINBERG: Not in the two years in
25 question, Your Honor. All 50 of these students were

1 referred by some state agency. However, the school
2 did have --

3 QUESTION: How many referred children were
4 rejected?

5 MR. FEINBERG: The record is totally silent
6 with regard to that, Your Honor. It is clear, however,
7 that the school has the authority to reject students.
8 It has the authority as well to admit private referrals
9 that have -- that are outside of the system of special
10 education within the Commonwealth, and in the two years
11 in question the record is again silent with regard -- is
12 not silent with regard to that. There were none in the
13 two years in question with regard to that.

14 QUESTION: Mr. Feinberg, putting Section 1981
15 and Runyan against McCrarry to one side for the purpose
16 of my question, do you think the school could,
17 consistently with the Fourteenth Amendment and 1983,
18 reject children on the basis of race?

19 MR. FEINBERG: For these purposes, yes, Your
20 Honor.

21 QUESTION: Yes.

22 MR. FEINBERG: I would suggest to the Court
23 that for these purposes, this school is a private
24 school, and is protected by the First Amendment's rights
25 of free association, and a right to pursue an

1 independent educational policy, including that kind of
2 discriminatory policy. Now, in addition to McCrarry,
3 there is also, of course, state law which would preclude
4 them in this instance from that kind of discrimination
5 on the basis of race, and if there were such
6 petitioners, they would have their remedy under state
7 law.

8 QUESTION: Do you rely at all on the fact that
9 this is a teacher discharge case rather than a student
10 rejection case?

11 MR. FEINBERG: I am not sure I understand
12 the --

13 QUESTION: Well, do you think the
14 constitutional issue would be any different if the
15 plaintiff were not a teacher who was denied employment
16 for speaking out against the school policy, but rather
17 were a child who had been denied admission because of
18 his race or religion?

19 MR. FEINBERG: I think, Your Honor, that it
20 would certainly be a different kind of a case, in the
21 sense that at least with regard to the child, the
22 entitlement program would certainly -- is directed
23 toward providing services to the child, as the First
24 Circuit distinguished the child from the teacher, but
25 for purposes of the state action requirement, that

1 threshold inquiry would be the same, Your Honor, and
2 under that threshold inquiry, the argument of the
3 Respondents here would be that the school still would
4 retain its private quality, and it would make no
5 constitutional difference.

6 QUESTION: Well, putting perhaps the same
7 question in a little different form, if the Wilmington
8 Parking case had not involved discrimination against a
9 patron, but rather had been firing an employee or
10 something, you would say that case would still equally
11 apply to a discharge of an employee? You don't think
12 the Constitution draws any distinction based on the
13 character of the claim, anyway, when you are analyzing
14 the state action issue?

15 MR. FEINBERG: No, not necessarily, Your
16 Honor. What I would suggest, however, is that the
17 Wilmington case is substantially different from this
18 case in the sense that in the Wilmington case, we are
19 talking about the closeness of the relationship between
20 the entity and the state, whereas here the major
21 argument of the Petitioners is that there has been a
22 delegation or a farming out, as Mr. Karol indicated, of
23 the function, and under that kind of analysis, the
24 public function doctrine concept under Flagg Brothers
25 and under the election cases, that kind of analysis

1 would indicate that we would have to have here a
2 delegation, a whole full delegation of the public
3 function, a function that was exclusively given over to
4 -- in the state's hand. That is exactly the opposite of
5 what we have here.

6 In this instance, what we have is a situation
7 in which historically the education of handicapped
8 children has never been a public function.
9 Historically, indeed, the education of such handicapped
10 children has always been in private hands, and such
11 children were routinely excluded from the public sector.

12 QUESTION: When you say always, you are
13 talking about all 50 states?

14 MR. FEINBERG: No, I am talking about
15 Massachusetts, Your Honor.

16 QUESTION: You didn't say so. I thought
17 you --

18 MR. FEINBERG: I'm sorry. My expertise and
19 knowledge in this area is limited to the Commonwealth of
20 Massachusetts for these purposes, but within that
21 context, the state has never entered into this field
22 until the very recent past, and when it did, under
23 Chapter 766, what it did was to encourage an outreach to
24 the private sector rather than incorporate it into its
25 public school system. What it was doing here by

1 establishing a special education program was to say, we
2 cannot do it alone, and we establish an entitlement
3 program whereby if we can't do it, we will seek in every
4 way we can to find an appropriate placement for a child
5 in the private sector, and pay for it, and that is
6 exactly what has happened in this instance.

7 QUESTION: Well, now I can see why the answer
8 to Mr. Justice Stevens' question by you, you couldn't do
9 that on race.

10 MR. FEINBERG: I'm sorry, Your Honor, I'm --

11 QUESTION: Gaines against Missouri says, if
12 you've got a school, you can't relegate the Negro to
13 some other school. You have to let him in that school.

14 MR. FEINBERG: But, Your Honor --

15 QUESTION: So I see why you don't want to get
16 to admission in there.

17 MR. FEINBERG: But, Your Honor, even though --
18 I would suggest to the Court that when we talk about
19 discrimination cases, we are not talking about the same
20 generic kind of case that this is. This is a state
21 entitlement program that is neutral on its face. It is
22 not a situation in which we are dealing at all with a
23 discriminatory practice by the school with regard to the
24 admission of students, and in that sense we don't have
25 to face any of the issues that are raised in those

1 cases. Your Honor --

2 QUESTION: Would you concede, Mr. Feinberg,
3 that the school acts in the form of state action with
4 respect to any function at all?

5 MR. FEINBERG: I would not, Your Honor. I
6 would not in the following sense. With regard to all of
7 its essential functions, and I have already gone through
8 the admission practice, but in addition, with regard as
9 well to its educational plan, and with regard to its
10 personnel practices, and I would suggest to the Court
11 that those are the three major functions of any school,
12 private or public, in terms of its decision-making
13 authority, that the private board of directors and the
14 privately employed staff of that school make those
15 decisions, who goes to the school, what is taught at the
16 school, the philosophy of the school, the educational
17 program, and who indeed teaches at the school, who is
18 hired and fired.

19 QUESTION: Do you think that the court of
20 appeals adopted such an extreme view in its opinion?

21 MR. FEINBERG: I believe the court of appeals
22 concerned itself with the question of whether or not
23 indeed if a student was making a claim against a school,
24 the circumstances might be different for purposes of a
25 state action analysis, and indeed, under the nexus

1 theory of this Court, that, I would concede that that
2 would be a very, very different question. We are here,
3 however, under a public function doctrine analysis
4 primarily, and I have assumed that the Petitioners have
5 largely conceded the nexus argument under Jackson and
6 the symbiosis argument under Burton for purposes of this
7 argument, and it is for that reason that I have focused
8 on the exclusivity aspect of this school's functioning,
9 or the lack of exclusivity, and the other aspects and
10 elements of that doctrine.

11 QUESTION: Do you know of any other
12 governmental function that is in private hands that the
13 government pays 99 percent of the costs?

14 MR. FEINBERG: Your Honor, I could not cite
15 that for you, but I would suggest strongly that there
16 are a number of companies, for example, the
17 bridge-building company, that may very well depend
18 almost exclusively on the state for its funding. There
19 are certainly many areas in the private sector, for
20 example, a drug store that provides --

21 QUESTION: I didn't know that bridge-building
22 was a governmental function.

23 MR. FEINBERG: I would agree with you, Your
24 Honor, that it is not. When we talk about the
25 question --

1 QUESTION: I mean, for example, could you turn
2 the police department over to a private company?

3 MR. FEINBERG: I would suggest, Your Honor --

4 QUESTION: And give that company 99 percent?

5 MR. FEINBERG: I would suggest, Your Honor,
6 that you would have a very different case in that
7 instance, because it would be a delegation of something
8 that we would all agree would be a traditional and
9 almost exclusively governmental function.

10 QUESTION: Well, how long has Massachusetts
11 been in the business of educating? I know since 1855.

12 MR. FEINBERG: It has been in the business of
13 educating, Your Honor, for some 300 years.

14 QUESTION: That's what I thought.

15 MR. FEINBERG: And the first 100 years of that
16 educating was done exclusively in the private sector.
17 It was only approximately 200 years ago that the public
18 school system began to arise within the Commonwealth,
19 and it has always been a parallel function ever since.

20 QUESTION: Well, do you think that helps you?

21 MR. FEINBERG: I think, Your Honor, the fact
22 that there is --

23 QUESTION: Well, why did they all of a sudden
24 shop it out? Why did they all of a -- have they shopped
25 out any other part of the educational system?

1 MR. FEINBERG: Certainly, Your Honor, in the
2 sense that since the 1860's public funds have been made
3 available to private schools for the purpose of
4 educating handicapped children, there has always been a
5 relationship between the public and private sector when
6 it came to handicapped children.

7 QUESTION: I thought you said that this was
8 the first time the state took over the education of
9 handicapped children.

10 MR. FEINBERG: I am sorry, Your Honor. That
11 is not my position, and it is not in fact the historical
12 truth. The reality is that the state has had a trickle
13 of public funds involved in the education of these
14 children for some years.

15 QUESTION: Now, to my question. What other
16 part of public education has Massachusetts shopped out
17 to somebody else?

18 MR. FEINBERG: Well, I would suggest, Your
19 Honor, that the phrase --

20 QUESTION: I don't want a suggestion. I want
21 an answer.

22 MR. FEINBERG: I don't believe that the
23 Commonwealth of Massachusetts has shopped out its
24 educational function in this instance, Your Honor, and I
25 don't believe that it has shopped out its function in

1 any instance other than in the sense that private and
2 parochial schools and private schools such as the New
3 Perspectives School are assisting the state in carrying
4 out a function --

5 QUESTION: Did the state set up parochial
6 schools?

7 MR. FEINBERG: No, it does not, Your Honor,
8 but certainly --

9 QUESTION: Well, the state set this one up,
10 didn't it?

11 MR. FEINBERG: No, it did not, Your Honor.

12 QUESTION: It just passed a statute.

13 MR. FEINBERG: It did not -- This school, Your
14 Honor, was set up prior to the passage of the statute.

15 QUESTION: How much prior?

16 MR. FEINBERG: 1971, Your Honor.

17 QUESTION: How many years is that?

18 MR. FEINBERG: That was three years prior to
19 the operation of the statute.

20 QUESTION: That is a long time.

21 MR. FEINBERG: Your Honor, it is long enough
22 to indicate to Respondents --

23 QUESTION: That somebody can make some money.

24 MR. FEINBERG: Your Honor, if Your Honor
25 please, it is long enough to indicate to the Respondents

1 that the purpose of the school was not set up to take
2 advantage of the Chapter 766, but was set up by a group
3 of private parents to obtain an alternative, an
4 alternative in the private sector for children who are
5 either incapable or unable to attend public school, and
6 in that sense, Your Honor, this school fulfills a
7 function in the best tradition of the pluralistic,
8 creative aspects of the private sector. It is a school
9 which performs an important service, not a public
10 function in the exclusive state sense, but an important
11 service in the public interest sense, and in that sense,
12 Your Honor, Chapter 766 did not intend that this school
13 be incorporated into the public school system. It only
14 intended that this school become a partner with the
15 public school system to assist in the education of the
16 most difficult children to educate in the Commonwealth
17 of Massachusetts.

18 QUESTION: You made a mistake. You said,
19 become a part of the educational system.

20 MR. FEINBERG: I'm sorry. I said a partner.

21 QUESTION: Oh, oh. I'm sorry.

22 MR. FEINBERG: A partner in the educational
23 system.

24 QUESTION: Mr. Feinberg, before this school
25 was organized and before the statute was passed, what

1 happened to children such as those that now go to the
2 school?

3 MR. FEINBERG: Some of those children, Your
4 Honor, did not go to school. Some of them were
5 routinely excluded from school. Some, if they could,
6 paid for private schools at their own expense, at their
7 families' expense, and indeed, it was not until the
8 passage of this statute that it was made compulsory that
9 such children attend school at all, so that there was a
10 variety of dead ends, if you will, for such children
11 other than those who could afford to pursue a private
12 education.

13 QUESTION: Are the other schools in
14 Massachusetts identical to this particular school?

15 MR. FEINBERG: Yes, Your Honor. There is a
16 list at the back of amicus's brief that would indicate a
17 wide variety of schools, some of which are well known
18 throughout the country, such as the Perkins School for
19 the Blind, that have been providing private education
20 for literally over 100 years in Massachusetts to
21 children such as the children at New Perspectives
22 School. The only difference between these schools is
23 the amount and degree of public referral. The New
24 Perspectives school fortuitously, and I suggest that it
25 is fortuitous, the New Perspectives School in the two

1 years in question had such substantial public funding.

2 At base, indeed, the Petitioners' petition
3 comes down to just that, to the question of whether or
4 not this school falls within the state action rubrick of
5 the Fourteenth Amendment on the grounds of its
6 substantial public funding, and in that sense, I would
7 suggest to the Court that this school is no different
8 from any other state entitlement program, and in that
9 sense, the amount of funding is not a relevant
10 consideration here, given the nature of this entity.

11 For example, with regard to what we have in
12 Massachusetts as a Medicaid program, there is -- the
13 same analogy can be made. That is to say, in the
14 Medicaid program, a beneficiary qualifies for services.
15 The state then will provide those medical or health
16 services, and make a direct payment to the health
17 provider. That health provider is no different in its
18 service and the importance of its service to the
19 community than the New Perspectives School.

20 QUESTION: Then you are suggesting that if the
21 Petitioners' argument were adopted, possibly private
22 hospitals which receive a large percentage of their
23 income from government sources might likewise be subject
24 to the state action?

25 MR. FEINBERG: Absolutely, Your Honor. I

1 would suggest that that is precisely the result. In
2 fact and indeed, I think we could come to the absurd
3 result of the corner drugstore dispensing a Medicaid
4 prescription being subject to the state action
5 requirement, and being subject to the Fourteenth
6 Amendment.

7 QUESTION: But your opponent conceded that if
8 it were simply one out of 50 students in the school
9 which got state aid, he wouldn't argue for the state
10 action application.

11 MR. FEINBERG: I would suggest, Your Honor,
12 that to play that numbers game would be a very dangerous
13 game. In the first place, of course, whether there is
14 one or 100 students in the school who are publicly
15 funded, the nature of the school remains the same.

16 QUESTION: But we have one here where 100
17 percent of the children are assigned by the state, and
18 where one point less than 100 percent of the money comes
19 from the state. That is this case, and no numbers game
20 will help you on that.

21 MR. FEINBERG: That is correct, Your Honor,
22 but --

23 QUESTION: Would you answer my question when
24 you have a chance?

25 MR. FEINBERG: Thank you, Your Honor.

1 QUESTION: With that in mind.

2 (General laughter.)

3 MR. FEINBERG: The second -- The realities of
4 dealing with a mixed school are that the party or the
5 child who comes to that school because it is the correct
6 school for that child perhaps or perhaps not
7 fortuitously, depending upon the percentage and the
8 cutoff point, has an entire school subject to state
9 action and the Fourteenth Amendment, and what I would
10 suggest to the Court are the considerable restraints
11 that would be imposed on a more freewheeling educational
12 policy at that school, and in that sense, certainly such
13 a result would impact adversely and unfairly upon the
14 private person who simply wants to obtain the best
15 placement for his child, his or her child.

16 I might also add, Your Honor, that to play
17 with percentages, all a school need do to avoid the
18 restraints of the Fourteenth Amendment would be to hold
19 open two or three or five or whatever number of places
20 would be necessary for a private referral in order to
21 avoid the Fourteenth Amendment, so that what we have in
22 dealing with that kind of problem is a situation in
23 which the Fourteenth Amendment is either on the one hand
24 easily circumvented, or on the other hand a system in
25 which the schools are fortuitously either in or out of

1 the Fourteenth Amendment, simply depending upon what
2 percentage this Court would impose upon the school as
3 one which triggers the Fourteenth Amendment.

4 The two other aspects of this case that I
5 think are important to bring forward are that in no
6 sense does this school perform a delegated function
7 under the public function doctrine. There has been no
8 delegation in the ordinary sense that that word is used,
9 for example, in the Flagg Brothers versus Brooks case,
10 the election cases in Marsh versus Alabama. In those
11 cases, there was either on the one hand a complete
12 abdication of the state's functioning, or on the other
13 hand a total absence of the state, for example, in the
14 company town situation.

15 As I have already indicated, Chapter 766,
16 rather than abdicate responsibility, if it stands for
17 nothing else, it stands for an expansion of the state's
18 responsibility in the area of educating handicapped
19 children, and in that sense, it certainly did not
20 delegate to the private school a function which it
21 assumed. Finally, in the sense in which the statute
22 creates a special education program, it does not
23 delegate any of those functions. It does not delegate
24 the function of approving the school or of placing the
25 school -- I'm sorry, of placing the child with a

1 particular school. It does not delegate to the New
2 Perspectives School the function of identifying children
3 who have special needs, and it certainly does not
4 delegate to the school the function of -- other than
5 educating the child, any of the other functions
6 established by the statute as being those functions that
7 the state is responsible for, that is to say, the
8 identification, testing, and eventual placement of the
9 child.

10 QUESTION: How is the identification done, Mr.
11 Feinberg?

12 MR. FEINBERG: I'm sorry?

13 QUESTION: How is the identification done?

14 MR. FEINBERG: The identification is done,
15 Your Honor, within the -- if it is a public referral, it
16 is done within the context of the public school system.

17 QUESTION: Well, precisely how in the public
18 school system are the children identified who are then
19 sent to New Perspectives?

20 MR. FEINBERG: Usually they are identified, at
21 least with regard to New Perspectives School, as
22 children with severe behavioral problems, children who
23 have either alcohol problems, drug problems, and the
24 like.

25 QUESTION: Yes, and who precisely does the

1 identification?

2 MR. FEINBERG: The public school system would
3 in the first instance identify a child who is incapable
4 of continuing on in the public school.

5 QUESTION: Do the parents get into that act
6 too?

7 MR. FEINBERG: The parents are absolutely in
8 that act, Your Honor. In fact, one of the major goals
9 of Chapter 766 is to involve the parents as advocates
10 and as participants in the process, and I might add that
11 if the parents do not approve of the placement at the
12 New Perspectives School, they have administrative
13 remedies to have the child go to some other school on
14 their own, quite apart from --

15 QUESTION: And suppose the school decides not
16 to make the referral, are there administrative remedies
17 for the parents to have that reviewed?

18 MR. FEINBERG: Yes, there are. In other words
19 -- absolutely, Your Honor.

20 QUESTION: By whom is the review made?

21 MR. FEINBERG: It is, in the first instance,
22 an administrative review, and ultimately it is a
23 judicial review by the courts, so that both -- the
24 school itself does not necessarily get into the act of
25 approving until the parents have already decided that

1 this would be an appropriate placement, and they have
2 the --

3 QUESTION: Until the parents or the school
4 board has decided?

5 MR. FEINBERG: Both.

6 QUESTION: But the school board has to decide,
7 does it not, that such a referral is appropriate?

8 MR. FEINBERG: I would say a referral is
9 appropriate, whether to the New Perspectives School or
10 some other school. Indeed, Your Honor, placements can
11 be made outside the state of Massachusetts to other
12 private entities in New Hampshire or adjoining states if
13 that were the only placement that this child --

14 QUESTION: Does that happen very often?

15 MR. FEINBERG: It does not happen often, but
16 it is not an uncommon experience, for example, for the
17 town of Brookline to be paying for a child's education
18 -- I know of one example in the state of Maine, where a
19 child is going to school in the state of Maine at the
20 expense of the town of Brookline.

21 QUESTION: And what kind of school in Maine, a
22 public school?

23 MR. FEINBERG: No. Oh, no, these would all be
24 private schools, Your Honor.

25 QUESTION: Private.

1 MR. FEINBERG: In conclusion, Mr. Justice
2 Marshal in the Jackson case stated, "Private parties
3 performing functions affecting the public interest can
4 often make a persuasive claim to be free of the
5 constitutional requirements applicable to governmental
6 institutions because of the value of preserving a
7 private sector in which the opportunity for individual
8 choice is maximized. The Fourteenth Amendment stands as
9 both a shield and a sword. It is a restraint against
10 state power but at the same time it is a protection for
11 the right to privacy and the right of free association
12 of private institutions such as the New Perspectives
13 School to be free to follow an independent educational
14 policy, free from state interference.

15 Part of the purpose of Chapter 766 was to
16 bring the diversity and the individuality and the
17 creativity of the private sector to bear upon an
18 important community problem, the need to upgrade the
19 educational opportunities of handicapped and disabled
20 children. The Fourteenth Amendment, it is submitted by
21 the Respondents, was never intended to burden this kind
22 of outreach by the Commonwealth of Massachusetts to
23 private schools such as New Perspectives School.
24 Rather, the Fourteenth Amendment and the First
25 Amendment, Respondents suggest, encourages that kind of

1 outreach. The Fourteenth Amendment ought not to be
2 invoked to challenge the school's authority to pursue an
3 independent educational policy. Rather, the Fourteenth
4 Amendment here acts as a shield to protect and nurture
5 such private schools from interference by the state.

6 Thank you, Your Honor.

7 CHIEF JUSTICE BURGER: Do you have anything
8 further, Mr. Karol?

9 ORAL ARGUMENT OF ZACHARY R. KAROL, ESQ.,
10 ON BEHALF OF THE PETITIONERS

11 MR. KAROL: Yes, thank you.

12 CHIEF JUSTICE BURGER: You have about three
13 minutes remaining.

14 MR. KAROL: Thank you. I would like to
15 respond first briefly to the argument that the provision
16 of education by the school in this case is
17 constitutionally indistinguishable from the provision of
18 any other service subsidized by the state. When the
19 state provides service -- financial assistance to
20 persons in need of services, such as medical care, it
21 ordinarily does not thereby assume any obligation to
22 provide the service itself.

23 Therefore, unlike the provision of education
24 by the school in this case, a private physician is not
25 discharging an obligation of the state when he provides

1 medical care to Medicaid recipients.

2 However, under the statutory scheme we are
3 dealing with here, the school committee is the one who
4 as a last resort must provide the education if it cannot
5 find anyone else to do so.

6 QUESTION: But we still get back to the
7 provision of streets and roads in the city. Do you
8 think that is a public obligation?

9 MR. KAROL: I believe it is in most
10 circumstances. Certainly --

11 QUESTION: Well, how about -- then we are back
12 to our superintendent of the job, aren't we?

13 MR. KAROL: Well, again I would say that he
14 must separate the function, that if a company is
15 retained by a city to repair potholes in streets --

16 QUESTION: So your position necessarily goes
17 that far, anyway.

18 MR. KAROL: Yes, it goes that far, not for all
19 purposes, but to the extent the private entity is
20 performing services which affect the quality of the
21 service that the state is itself obligated to provide,
22 then citizens have a right to expect that that service
23 will be provided in accordance with the same
24 constitutional obligations as the state.

25 QUESTION: Mr. Karol, I notice in the amicus

1 brief that lists all the members of this association
2 under the behaviorally disordered group of schools,
3 there are three that I notice, St. Ann's Home, St.
4 Mary's Home for Children, St. Vincent's Home and
5 School. Assume they got most of their students from the
6 state. I don't know whether that is true or not. Could
7 they decline to take any except Catholic children?

8 MR. KAROL: Yes, I would apply a balancing
9 approach to that kind of a problem where --

10 QUESTION: You would balance the First
11 Amendment on this?

12 MR. KAROL: Balancing rights protected by the
13 First Amendment, including freedom of religion and
14 freedom of religious association, against freedom of
15 speech. It is the kind of problem that the Court
16 alluded to in Norwood versus Harrison, under which it
17 was considered impermissible to lend textbooks to
18 private schools which segregated on the basis of race,
19 but it was not impermissible --

20 QUESTION: Under your analysis, these schools
21 would be engaged in a state function. It would be state
22 action. And they could discriminate among students, and
23 how about their employees? They could only hire a
24 person of the same faith, for example.

25 MR. KAROL: Yes. I would make an exception

1 for countervailing First Amendment interests based upon
2 freedom of religion. I think that would be a necessary
3 exception.

4 QUESTION: How about -- Could you make the
5 students salute the flag?

6 MR. KAROL: I think that the rule there would
7 be the same as it would be in the ordinary public
8 school, and I understand that to be no.

9 QUESTION: Or a school prayer?

10 MR. KAROL: There, too, the answer would be
11 no, unless there was --

12 QUESTION: Well, but supposing the Catholic
13 schools required that as a part of the training program.

14 MR. KAROL: With the exception that if it is
15 organized as a sectarian school, yes, then the First
16 Amendment would create that exception, or we would
17 recognize that exception because of the First Amendment
18 protection of freedom of religion.

19 QUESTION: Just one more question, Mr. Carol.
20 Except for the source of payment, is the relationship of
21 the teachers in this school any different, or is it the
22 same as the relationship of teachers in other private
23 schools? I am talking of the relationship between the
24 school and the teachers now.

25 MR. KAROL: It is a contractual relationship.

1 I don't believe that the teachers in the school would be
2 protected by, for example, the tenure provisions of the
3 Commonwealth's education law, so in that respect the
4 relationship would be different. These would be, as I
5 understand it --

6 QUESTION: I am not comparing the public
7 schools. Are the teachers in this school, the
8 relationship of the teachers in this school the same as
9 other private schools to the teachers?

10 MR. KAROL: I know of no differences except
11 the additional certification requirements.

12 QUESTION: And except that the source of the
13 funds is different here.

14 MR. KAROL: Certainly, and that the teachers
15 must implement educational programs prescribed by the
16 state rather than by the school itself.

17 CHIEF JUSTICE BURGER: Thank you, gentlemen.
18 The case is submitted.

19 (Whereupon, at 11:07 o'clock a.m., the case in
20 the above-entitled matter was submitted.)

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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:

SHEILA RENDELL-BAKER ET AL., Petitioners, v. SANDRA KOHN ET AL.
No. 80-2102

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

BY Reene Hammond

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