

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-2120

TITLE THOMAS F. SMITH, JR., ET AL., Petitioners v.
WILLIAM P. ROBINSON, JR., RHODE ISLAND ASSOCIATE
COMMISSIONER OF EDUCATION, ET AL.

PLACE Washington, D. C.

DATE March 28, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS F. SMITH, JR., ET AL., :
Petitioners :
v. : No. 82-2120
WILLIAM P. ROBINSON, JR., RHODE :
ISLAND ASSOCIATE COMMISSIONER :
OF EDUCATION, ET AL. :
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Washington, D.C.
Wednesday, March 28, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:00 a.m.

APPEARANCES:
E. RICHARD LARSON, ESQ., New York, N.Y.;
on behalf of Petitioners
FORREST L. AVILA, ESQ., Providence, R.I.;
on behalf of Respondents.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

E. RICHARD LARSON, ESQ.,

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on behalf of Petitioners

FORREST L. AVILA, ESQ.,

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on behalf of Respondents

E. RICHARD LARSON, ESQ.,

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on behalf of Petitioners - rebuttal

- - -

1 decision in which this Court not only conclusively
2 applied the foregoing legislative history, but indeed it
3 is the same legislative history that is applicable
4 here. And in that case this Court held that a plaintiff
5 who never obtained a ruling on her substantial
6 constitutional claim nonetheless was entitled to fees
7 under Section 1988.

8 In this case, Petitioner Tommy Smith is a
9 physically and emotionally handicapped child who walks
10 with the aid of leg braces and crutches due to cerebral
11 palsy. Tommy was eight years old when this litigation
12 was commenced in 1976. Tommy at that time was enrolled
13 in a special education day program approved by the
14 Respondents and paid for by the school committee as part
15 of their education program.

16 This litigation was commenced when the local
17 school committee, with the subsequent approval and
18 support of the Respondents, proposed to exclude Tommy
19 from receiving an education solely because of the nature
20 of his handicap.

21 Respondents' consistent litigation position
22 throughout this litigation has been that the school
23 committees, including the local school committee here,
24 and the Respondents had no responsibility for educating
25 Tommy or similarly situated persons who had an emotional

1 handicap.

2 Petitioners' complaint alleged three
3 substantial federal claims. Initially, they were
4 constitutional claims. Indeed, the opening complaint
5 alleged only constitutional claims. This was a due
6 process claim -- the Petitioner was being excluded,
7 being denied an education, with no hearing whatsoever --
8 and also a straight equal protection claim -- that
9 Petitioner was being denied an education, excluded from
10 an education, in violation of equal protection.

11 Petitioners also alleged a federal claim under
12 Section 504 of the Rehabilitation Act, the language of
13 which specifically precludes the exclusion of a person
14 from receiving federal benefits in a federal program, a
15 program supported by federal moneys, solely on the basis
16 of handicap.

17 A third federal claim was also alleged in this
18 case, the '75 Handicapped Act. After the Act became
19 effective and subsequent to plaintiff's success on their
20 constitutional claims, plaintiffs added the claim that
21 the Respondents had violated the Education for all
22 Handicapped Children Act of 1975.

23 Now, there is no question in this case about
24 the appropriateness of the education that was designed
25 for Tommy. It's simply a question of exclusion versus

1 non-exclusion.

2 There also is no question in this case
3 Petitioners in fact prevailed. They prevailed initially
4 and throughout the litigation on their due process
5 claim, and they ultimately prevailed, primarily as a
6 result of a certified decision by the Rhode Island
7 Supreme Court.

8 QUESTION: Mr. Larson, you say that your
9 clients prevailed throughout the litigation on their due
10 process claim. I didn't read Judge Campbell's opinion
11 is necessarily agreeing with that.

12 MR. LARSON: The characterization of Judge
13 Campbell's opinion -- or in the opinion, is that we
14 ultimately prevailed as a matter of the Education for
15 all Handicapped Children Act. Judge Campbell does not
16 disagree whatsoever that throughout the course of this
17 litigation it was the preliminary injunction entered on
18 the due process claim pursuant to which plaintiffs
19 through the course of the litigation prevailed.

20 QUESTION: What is the difference between
21 prevailing through the course of the litigation and
22 ultimately prevailing? I take it from your argument you
23 see those as two different things.

24 MR. LARSON: No, I was saying that there is no
25 question on this record whatsoever, Justice Rehnquist,

1 about the fact that the plaintiffs prevailed. Under
2 Hensley --

3 QUESTION: Well, but the Court of Appeals
4 seems to have held otherwise.

5 MR. LARSON: Oh, no. I don't believe that
6 there is any question that the Court of Appeals viewed
7 the plaintiff as having prevailed. Indeed, in the first
8 decision to the First Circuit --

9 QUESTION: Well, I think the Court of Appeals
10 agreed that the plaintiff prevailed without a doubt.
11 But I read the Court of Appeals opinion as intimating
12 that you prevailed on the EAHCA.

13 MR. LARSON: But that is belied by the record,
14 Your Honor.

15 QUESTION: But then you're arguing about a
16 question of fact, really, where the Court of Appeals is
17 against you, and we ordinarily don't review questions of
18 fact.

19 MR. LARSON: Justice Rehnquist, it doesn't
20 matter with regard to the statutory threshold that
21 plaintiffs must meet through Hensley v. Eckerhart how
22 plaintiffs happened to prevail here. The matter of fact
23 as found by the district court is that plaintiffs did
24 prevail. Indeed, our opponents at the fee hearing
25 admitted that we had obtained the objective sought in

1 the lawsuit and that we accordingly were the prevailing
2 party.

3 QUESTION: Well, but I don't suppose anyone
4 disputes that, but I think what the First Circuit says
5 is you prevailed on the EAHCA count; that's an
6 all-embracing statutory claim that really covers
7 everything you could have gotten on your constitutional
8 counts, and since that doesn't provide for attorney's
9 fees you can't get them.

10 MR. LARSON: The First Circuit's decision on
11 the fee issue is different from the First Circuit's
12 decision on defendant's appeal on their motion to
13 dismiss. On the first decision, the First Circuit
14 states that plaintiffs have obtained the objective of
15 their lawsuit as a matter of state law. That's on the
16 merits.

17 Subsequently in the collateral fee proceeding,
18 the First Circuit basically stated that the plaintiffs
19 have prevailed both as a matter of state law and as a
20 matter of the Education for All Handicapped Children
21 Act, ultimately prevailed.

22 QUESTION: Mr. Larson, did not the district
23 court, after the decision of the state supreme court,
24 say that you had prevailed as a result of the state
25 decision?

1 MR. LARSON: The district court --

2 QUESTION: It did?

3 MR. LARSON: -- in its final order on the
4 merits held that we had obtained the objective of cur
5 lawsuit.

6 QUESTION: That you'd obtained all the relief
7 you sought --

8 MR. LARSON: That's correct.

9 QUESTION: -- as a result of the state
10 decision.

11 MR. LARSON: That's correct.

12 QUESTION: And was it not after that decision
13 was made by the district court that you filed your
14 second amendment and alleged a 1983 action?

15 MR. LARSON: No, that's not correct, Your
16 Honor.

17 QUESTION: When did you first file that?

18 MR. LARSON: The second amended complaint was
19 filed after the summer of 1980, the June 1980 decision
20 by the Rhode Island Supreme Court.

21 QUESTION: That was after --

22 MR. LARSON: That was one year before the
23 final order on the merits.

24 QUESTION: But it was after the decision of
25 the supreme court of the state.

1 MR. LARSON: That's correct, and that
2 nonetheless related back to -- I mean, it was a motion
3 to file a second amended complaint, which was granted
4 and which relates back.

5 QUESTION: But the point is, hadn't you
6 obtained all the relief you sought before you filed your
7 amended complaint?

8 MR. LARSON: Not necessarily. On
9 certification, the decision by the Rhode Island Supreme
10 Court is essentially an advisory opinion. There was a
11 period in which we had to determine whether or not there
12 indeed was going to be compliance.

13 Now, there was never any injunction entered
14 against the Respondents directing compliance. There was
15 a January 1981 injunction issued against the -- consent
16 injunction issued against the school committee requiring
17 their compliance. It was indeed ascertained that
18 compliance would be obtained.

19 Plus there was the outstanding matter of
20 attorney's fees. The defendants tried to get out of
21 this lawsuit because they saw attorney's fees coming.

22 QUESTION: But was there a substantial issue
23 left after the decision of the state supreme court?

24 MR. LARSON: The matter of compliance, yes,
25 plus there was also the matter that on this record in

1 this case the state hearing officer decision was still
2 on the record in this case, and that plaintiffs had a
3 right to have that decision basically stricken or
4 recognized as not controlling, and that is indeed
5 something that happened in the final order.

6 QUESTION: On the same point, I also fail to
7 understand what happened and why there was a year's
8 worth of litigation after the state supreme court issued
9 its ruling, which furnished the only basis for the
10 ultimate ruling in the federal court.

11 MR. LARSON: It's true, Justice O'Connor, that
12 a year in time passed. There was not a year of
13 litigation. Immediately after the state supreme court
14 opinion, the motion for amended complaint was filed.
15 That was granted shortly thereafter, basically in July.
16 The amended complaint was then actually filed in the
17 fall, and then we're into the winter, when motions began
18 to be filed to complete the matter of relief in this
19 case.

20 During that period of time, the Petitioners
21 and the school committee worked out a consent decree,
22 basically, which included the award of attorney's fees
23 against the school committee. The state, however, was
24 not so sure that it was going to go along, and it locked
25 like further litigation might be necessary against the

1 Respondents in this case.

2 QUESTION: On what, the fee?

3 MR. LARSON: Well, basically the Petitioners
4 wanted a ruling on federal law. They of course did not
5 obtain it because the district court judge in his final
6 order said that, we don't have to reach the federal law
7 issues because we -- I recognize, the district court
8 recognizes, the plaintiff has obtained the objective of
9 the lawsuit.

10 QUESTION: You made two different types of due
11 process claims during the course of the litigation.

12 MR. LARSON: That's correct.

13 QUESTION: One was against a local school
14 committee, and that was the basis of the original --

15 MR. LARSON: Well, but that was also against
16 the --

17 QUESTION: -- injunction, I guess, the
18 preliminary injunction.

19 MR. LARSON: Yes, an injunction which was
20 continued also against the state after the state was
21 brought in.

22 QUESTION: Yes, but that was really a
23 complaint concerning the termination of funding pending
24 resolution of the dispute against the school committee.

25 MR. LARSON: Well, no. The termination of

1 Tommy's education.

2 QUESTION: The funding for the child's
3 education.

4 MR. LARSON: That's correct.

5 QUESTION: All right. And then the second due
6 process claim was against the Respondents here and had
7 to do with their serving as hearing officers in your
8 dispute with the school board.

9 MR. LARSON: It was a Gibson v. Berryhill type
10 claim, challenging the bias in the process itself, yes.

11 QUESTION: And no relief was granted under
12 that claim.

13 MR. LARSON: That's correct. But the first
14 claim, the due process claim, equally runs against the
15 Respondents as well because of the modified preliminary
16 injunction that was subsequently entered after the
17 Respondents were in this case.

18 QUESTION: Well, but didn't the terms of the
19 preliminary injunction run only against the school
20 committee?

21 MR. LARSON: Initially, yes. But of course,
22 the state was involved in the funding of this process.
23 the state has the responsibility for enforcing state
24 law.

25 QUESTION: Well, but the terms of the

1 injunction did not run against these Respondents, did
2 it?

3 MR. LARSON: As state actors, acting in
4 cooperation with the local defendants --

5 QUESTION: Well, did it or not, in terms of
6 the words of the preliminary injunction?

7 MR. LARSON: In the words of the preliminary
8 injunction, it's only against the school board.

9 QUESTION: Thank you.

10 QUESTION: Well, you said a moment ago that it
11 ran initially only against the school. I gathered from
12 your answer that perhaps later it was amended to run --

13 MR. LARSON: Yes.

14 QUESTION: Is that what you meant?

15 MR. LARSON: It was the --

16 QUESTION: Could you answer the question?

17 MR. LARSON: Yes. The original preliminary
18 injunction was directed solely against the school
19 committee, because indeed the Respondents had not yet
20 been sued, and the terms of the preliminary injunction
21 were to maintain Tommy in his educational program during
22 the pendency of the exhaustion of the administrative
23 procedures.

24 Thereafter, it was extended because the
25 administrative procedures and --

1 QUESTION: I don't think you're answering my
2 question. I asked you, when you answered initially to
3 Justice O'Connor, I got the implication that at some
4 later point the injunction was amended --

5 MR. LARSON: Yes, it was.

6 QUESTION: -- to run against the state
7 defendants as well.

8 MR. LARSON: Well, the state defendants --

9 QUESTION: Now, is that true or not? Is that
10 correct or not?

11 MR. LARSON: As Justice O'Connor pointed out,
12 it did not name the state in the injunction.

13 QUESTION: So it never did run in terms
14 against the state defendants?

15 MR. LARSON: In that they were co-actors
16 responsible in this litigation --

17 QUESTION: Were they named in the injunction?

18 MR. LARSON: No.

19 QUESTION: Mr. Larson, could I bring you back
20 to something you started off with, and that was your
21 reference to Maher against Gagne.

22 MR. LARSON: Correct.

23 QUESTION: The First Circuit mentioned it once
24 in its opinion, as I recall.

25 MR. LARSON: That's correct.

1 QUESTION: Just once, and sort of by a passing
2 way. Do you think they overlooked it or didn't want to
3 face up to Maher against Gagne or what?

4 MR. LARSON: I certainly think --

5 QUESTION: Maybe I should ask your opponent
6 that question.

7 MR. LARSON: Well, I certainly do believe they
8 overlooked it. There was no analysis of it whatsoever.
9 Plus, of course, in Maher this Court set out the
10 legislative history, the relevant legislative history of
11 Section 1988, and the First Circuit never mentioned that
12 legislative history whatsoever. I think they may have
13 been unaware of the legislative history or unwilling to
14 look at it.

15 QUESTION: Well, if we thought that was error
16 and vacated the opinion and sent it back, would it be
17 open in remand for the application of the Hensley
18 principles announced last term?

19 MR. LARSON: The Hensley principles, even
20 pre-Hensley, were applied by the district court. For
21 example, Justice O'Connor --

22 QUESTION: Well, it doesn't appear to have
23 been.

24 MR. LARSON: Well, Justice O'Connor, you
25 referred to the fact that the substantive due process

1 claim with regard to the Gibson v. Berryhill issue was
2 not one on which claims prevailed. The district court
3 deducted the fees or the time spent on that issue from
4 the fee award that was granted.

5 There is a type of Hensley issue still pending
6 in the First Circuit. I wouldn't really consider it a
7 Hensley issue, but it has to do with whether or not the
8 time that was spent in the administrative proceeding and
9 the state court proceeding is correctly time which
10 should be compensated in this litigation.

11 That was not addressed by the First Circuit in
12 this appeal because of the way the First Circuit
13 disposed of the fee entitlement issue. That issue, of
14 course, would be open on remand.

15 QUESTION: Mr. Larson, I'm afraid we've not
16 given you much time to argue the case, but the point
17 that I asked you about before is central to my own
18 understanding of the case. Let me ask you one more
19 question.

20 After your view had prevailed in the state
21 supreme court and you of course had to go back to the
22 district court because the questions had been certified
23 to the state court --

24 MR. LARSON: That's correct.

25 QUESTION: -- did you ask the district court

1 on your return to it to give you any relief that the
2 state supreme court had not given you?

3 MR. LARSON: There was a motion filed with
4 regard to the due process claim involving the lack --

5 QUESTION: When you say a motion --

6 MR. LARSON: -- of impartiality --

7 QUESTION: -- a motion filed, was this in your
8 complaint that had already been filed some time before,
9 or did you -- what did you request specifically when you
10 went back?

11 MR. LARSON: We requested that the hearing
12 process itself be declared violative of due process
13 because of interested persons acting as hearing
14 officers. We sought further relief on that and we were
15 denied that.

16 That is in the complaint and it was part of a
17 separate motion subsequent to the Rhode Island Supreme
18 Court's decision.

19 QUESTION: The district court, though, still
20 said that you had won everything you ever sought?

21 MR. LARSON: There is no question that the
22 major issue in this case was Tommy's education. I think
23 the district court was correct in its finding of fact
24 that plaintiffs had obtained the result sought, and I
25 think the First Circuit in its appeal on the merits was

1 correct in also making that same finding of fact.

2 QUESTION: And you did not file your 1983
3 claim until after, according to the district court, you
4 had won everything the plaintiff sought?

5 MR. LARSON: No, the 1983 claim was the first
6 claim in the case.

7 QUESTION: Yes, but you've been paid for that
8 work.

9 MR. LARSON: No. I mean, the 1983 equal
10 protection claim, which the trial court found to be
11 substantial, is a claim that is encompassed within the
12 initial complaint that was filed, yes, against the
13 school committee. But thereafter the Respondents came
14 in and stood in the shoes of the school committee. We
15 know the responsibility of the state for education and
16 it came in and the litigation continued thereafter.

17 QUESTION: Well, why was it necessary, then,
18 for you to amend your complaint, the second amended
19 complaint?

20 MR. LARSON: The first amended complaint added
21 the Education for All Handicapped Children Act claim,
22 because that had then become an effective federal law.
23 And the third amended complaint added the 504 claim.

24 QUESTION: And when did you add the Section
25 1988 claim?

1 MR. LARSON: The Section 1988 claim was in the
2 first amended complaint and also in the second amended
3 complaint. Section 1988 with regard to fees, as a
4 matter of fees law, need not necessarily be pled. There
5 was a boilerplate request for such further relief in the
6 first complaint, and that in the Court of Appeals has
7 been held as sufficient to encompass a request for
8 fees.

9 As I have stated, I believe that because of
10 the legislative history and because of the unanimous
11 decision by this Court in Maher v. Gagne, this case is
12 conclusively -- or it should be resolved in favor of
13 Petitioners here.

14 QUESTION: On that point, Mr. Larson, the
15 Court didn't discuss, and I don't believe the briefs do,
16 cases such as Brown against the GSA and Pryzer versus
17 Rodriguez, where this Court has said that a detailed
18 comprehensive statute precludes remedies under the
19 broader 1983 type claim.

20 And I wonder if that's applicable here with
21 the Education for the Handicapped Act.

22 MR. LARSON: We believe that those cases are
23 inapposite.

24 QUESTION: Why?

25 MR. LARSON: The First Circuit here applied

1 Middlesex County. Middlesex County, with its
2 comprehensiveness test, applies only to the "and laws"
3 issue. There is no "and laws" issue here. The
4 Education for All Handicapped Children Act is not being
5 proposed to be asserted through the "and laws" language
6 of 1983. It simply is not relevant.

7 Nonetheless, a little bit more relevant, but
8 still inapposite, are the preemption doctrine and the
9 implication by -- repeal by implication doctrine. All
10 of those doctrines, both the preemption doctrine and the
11 repeal by implication doctrine, as well as the Middlesex
12 County comprehensiveness test, bottom out on the
13 legislative intent.

14 Each of those tests is based upon the
15 legislative intent. Now, first of all with regard to
16 fees --

17 QUESTION: Can't you define legislative intent
18 by the fact that the Congress has enacted a very
19 specific, detailed plan for these education for the
20 handicapped provisions, and refer to that instead of
21 1983?

22 MR. LARSON: No. Neither preemption nor
23 repeal by implication allows this Court to use a test
24 without going to the legislative history. The test is a
25 substitute for the legislative history.

1 For example, in *Brown v. GSA* the Court looked
2 at the legislative history and what had Congress done in
3 1972. It had said there is no remedy for employment
4 discrimination in the federal sector because of
5 sovereign immunity, and it cited *Blaze v. Moon* in the
6 Fifth Circuit, it cited a number of other sovereign
7 immunity cases.

8 Congress was aware from its perception that it
9 was operating on a blank sheet, and it thereby enacted
10 comprehensive legislation. The legislative history here
11 is totally different in several respects.

12 First of all, with regard to fees, the fee
13 statutes at issue here were enacted, Section 1988 was
14 enacted, in 1976, a year after the '75 Act. Section 505
15 was enacted three years later, in 1978. I mean, there
16 is no doctrine of repeal by implication or preemption
17 which allows a Congress sitting in 1975 to preempt acts
18 that the Congress takes in the future.

19 With regard to the substantive rights, it is
20 even less likely that Congress could have preempted, for
21 a variety of reasons. First of all, this is a spending
22 statute which is optional with the states. It's almost
23 as if, to follow through on this preemption or repeal by
24 implication argument, if it's worth anything, that
25 Congress delegated to the states whether or not the

1 states wanted to repeal the applicability of 504. So if
2 the state opts out of this, they're covered by 504. We
3 know that New Mexico is not covered by the 1975
4 Handicapped Act. Yet 504 and 1983 fully apply there.

5 I mean, it would be absolutely unheard of for
6 Congress to delegate to the states the repeal of federal
7 statutes, much less the enforcement of constitutional
8 rights.

9 And finally, of course, what is ultimately
10 controlling is the legislative history itself. The
11 legislative history -- the Senate report alone has 22
12 paragraphs spanning 16 pages discussing the existence of
13 preexisting and concurrent remedies in this situation.
14 There is absolutely full awareness of these preexisting
15 remedies, and the case couldn't be farther away from
16 *Brown v. GSA*.

17 This is really a *Jones v. Mayer* type of case or
18 a *Johnson v. REA* type of case. Congress was aware and
19 did not at all preempt or repeal by implication those
20 remedies. There has to be a clear statement. It is not
21 here whatsoever.

22 We believe, on the basis of *Maher v. Gagne*,
23 that this case should be conclusively resolved in
24 Petitioners' favor. In *Maher* there was a substantial
25 constitutional claim which was not addressed. There was

1 also a substantial federal statutory claim which did not
2 necessarily have a fee authorization attached to it.

3 The plaintiffs were determined to have passed
4 that statutory threshold of having prevailed without
5 ever receiving an adjudication on their constitutional
6 claim, and this Court unanimously held that plaintiff,
7 because of the fact that she had raised a substantial
8 constitutional claim, was entitled to fees under Section
9 1988. And the same result flows here, not only under
10 Section 1988 but also under Section 505.

11 In conclusion, we believe that there is little
12 question on this record and as a matter of law that the
13 First Circuit erred here and the plaintiffs are entitled
14 to fees. Now, as Justice O'Connor pointed out, this
15 doesn't have anything to do with the amount of fees,
16 which is still an issue or will be an issue on remand in
17 the First Circuit.

18 I would like to reserve the remainder of my
19 time, unless there are any questions.

20 CHIEF JUSTICE BURGER: Mr. Avila.

21 ORAL ARGUMENT OF FORREST L. AVILA, ESQ.

22 ON BEHALF OF RESPONDENTS

23 MR. AVILA: Mr. Chief Justice and may it
24 please the Court:

25 I think that the Court has indicated some

1 interest in, in essence, the travel of this case, so I
2 want to explain a little bit of the history of this so
3 we see how this case came into focus.

4 I want to point out here that I represent the
5 Commissioner of Education and not the local school
6 committee in this action. What happened --

7 QUESTION: You mentioned travel of the case.
8 Is this a Rhode Island expression?

9 MR. AVILA: That's I think common in the First
10 Circuit, too. I think I see it all the time.

11 QUESTION: We've come across it in one other
12 case.

13 MR. AVILA: I was not aware that it was an
14 unusual expression, Your Honor. It's always been cur
15 usual term for it.

16 QUESTION: You never find it in California,
17 anyway.

18 MR. AVILA: In this case, long before the
19 Commissioner of Education became involved in it, what
20 happened was the local school committee agreed that the
21 child concerned should be placed at Bradley Psychiatric
22 Hospital, and so the school committee did that. Then
23 the school committee looked at the situation and
24 reevaluated it and made a determination that there was
25 another -- there was a state agency, the Rhode Island

1 Department of Mental Health, that it felt under certain
2 statutes was responsible for this child's -- or should
3 be responsible for educating or placing this child at
4 Bradley Hospital.

5 So the school committee told the parents that
6 the school committee was not going to fund that
7 placement, not going to provide any more funds for that
8 placement, which of course would result in that
9 placement being ended.

10 At that point what happened in the case was
11 the plaintiffs in this action filed a complaint in the
12 federal district court, and I don't believe that this
13 first complaint speaks of equal protection. If I
14 remember it correctly, I think it solely speaks to
15 procedural due process, and more particularly, the basic
16 argument of this complaint was simply that Rhode Island
17 regulations, Rhode Island special ed regulations, which
18 even though the Handicapped Act was not yet in effect
19 apparently we had some pre-knowledge of what these
20 regulations would look like, so it looks as if the
21 regulations we were using at the time really matched the
22 ultimate federal handicapped regulations.

23 Under those regulations, a placement couldn't
24 be changed unless the parents consented to it or unless
25 they were granted a hearing and as a result of that

1 hearing a change was ordered. Well, what happened in
2 this case was the plaintiffs felt that they weren't
3 going to be granted that hearing, even though they had
4 asked for it, so they filed the complaint in federal
5 district court.

6 The federal district court judge looked at the
7 complaint and he said, yes, under Rhode Island
8 regulations you have a right to a hearing before the
9 placement can be terminated, and this funding, potential
10 funding dispute between the state agencies was exactly
11 that sort of funding dispute or that sort of change in
12 placement dispute that should be adjudicated through the
13 available state administrative procedures.

14 So the federal judge issued a preliminary
15 injunction to keep the child at Bradley Hospital at the
16 expense of the school committee and then required the
17 school committee to conduct a due process hearing as
18 required by Rhode Island administrative special
19 education regulations, and also that opportunity should
20 be given the parties to appeal to the Commissioner of
21 Education.

22 So that's what happened in this case, Your
23 Honors. There was a hearing before the local school
24 committee, an administrative sort of hearing. The
25 school committee took evidence and looked at the matter,

1 and they resolved in a written decision that they were
2 not responsible because a state agency was responsible.

3 That decision was then appealed to the
4 Commissioner of Education, who held a de novo hearing,
5 acting as a hearing officer, and listened to both
6 sides.

7 Now, the Rhode Island Supreme Court in a case
8 -- and by then, by the time the matter reaches the
9 Commissioner of Education, the Handicapped Children's
10 Act is in force. And you'll note if you look at the
11 record, one of the complaints the plaintiffs had against
12 the Commissioner, and an issue on which they lost, they
13 were arguing that he couldn't act as a hearing officer
14 under the Education for all Handicapped Children's Act.
15 So there is no doubt here, the plaintiffs have even
16 agreed, that this was a hearing pursuant to the
17 Education for all Handicapped Children's Act at that
18 stage.

19 What happened was, the Commissioner heard the
20 matter. And the Rhode Island Supreme Court had
21 indicated at the time that this was a difficult question
22 and it had not yet resolved the issue. So that left the
23 Commissioner in the position of having to make his own
24 decision.

25 So what the Commissioner did was, he found

1 that the Rhode Island Department of Mental Health should
2 have been educating this child. That was his decision.
3 Now, what happened after that was the plaintiffs
4 appealed the matter to federal district court. They
5 took the matter up there, arguing that, no, it was not
6 the Department of Mental Health, but rather the school
7 committee, that should be responsible.

8 Now, with that Rhode Island Supreme Court
9 prior precedent that I mentioned, indicating that this
10 was a difficult issue, I was involved in the case at
11 that point and I suggested to the court that the matter,
12 the question, be certified to the Rhode Island Supreme
13 Court for a determination as to who was responsible and
14 who wasn't. And so then the Rhode Island Supreme Court
15 came down with a decision indicating that, that in fact
16 the local school committee was responsible.

17 So in this case I would suggest that what you
18 really have, it's not a normal special ed case. What
19 you have is a state level hearing officer who heard a
20 case and he decided the case in a way that ultimately
21 was not -- that was held to be wrong by the Rhode Island
22 Supreme Court.

23 Now, because he --

24 QUESTION: As a matter of state law?

25 MR. AVILA: As a matter of state law, Your

1 Honor.

2 And the strange thing about -- I shouldn't say
3 -- the interesting thing about this case, if you read
4 one of the later opinions of the district court in this
5 matter, he said -- what finally happened in this case
6 was, once the Rhode Island Supreme Court rendered its
7 decision, which from my perspective ended it -- I don't
8 think you can presume that state agencies are not going
9 to follow their own supreme court. Plaintiffs, though,
10 perhaps wishing to have some sort of order on the
11 record, looking forward to some sort of attorney's fees,
12 requested a declaratory judgment declaring that the
13 Commissioner's decision was wrong. I still don't know
14 the point of doing that, other than trying to form a
15 basis for fees.

16 Now, the court ultimately entered that sort of
17 decision and declared, for whatever purpose, that the
18 Commissioner's decision was wrong. But that was a
19 decision by the Commissioner of Education really taken
20 entirely, I would say, in essence in his judicial
21 capacity.

22 And you'll note in one of the district court's
23 opinions, the district court makes the point that it is
24 not ruling against the Commissioner -- and it uses these
25 words -- "on any basis that the Commissioner ever failed

1 to enforce state law or failed to see that state law was
2 carried out."

3 No, the court rejected that, said that that
4 was not the reason. It said the reason why it was
5 acting in the case was because the Commissioner had
6 rendered this decision, and it gave the date for the
7 decision.

8 So I would say there's no doubt that all we
9 have in this case is a pure Education for all
10 Handicapped Children's matter, where a hearing officer
11 acting under that Act has rendered a certain decision.

12 QUESTION: May I go back to the beginning
13 again? I want to be sure I have this thing in the right
14 sequence. The very beginning of the litigation, as I
15 understand it, the child was about to be -- the funds
16 were about to be withdrawn and the child was about to be
17 transferred to a different facility.

18 MR. AVILA: The funds were about to be
19 withdrawn, and I don't know, we don't know, what the
20 results would have been.

21 QUESTION: But the allegation is --

22 MR. AVILA: But the local school committee had
23 withdrawn the funds.

24 QUESTION: But the allegation in the complaint
25 was that there was a risk the child would be

1 transferred, wasn't that right?

2 MR. AVILA: Well, I think the --

3 QUESTION: At least the funds were going to be
4 withdrawn?

5 MR. AVILA: The funds were going to be
6 withdrawn, which would terminate that placement. But
7 the Rhode Island Commissioner of Education was not
8 involved in the dispute at that point.

9 QUESTION: Well, I understand. But at that
10 point the district judge entered an injunction
11 maintaining the status quo.

12 MR. AVILA: Yes, Your Honor, that's exactly
13 what he did.

14 QUESTION: And that action rested entirely on
15 federal law, did it not?

16 MR. AVILA: No, Your Honor. I would say that
17 what the -- if you look at his decision, he said that
18 where the school committee has gone wrong in this case,
19 it's not following state regulations. And I think
20 failure to follow state regulations -- and I don't know
21 how valid it is -- failure to follow state regulations
22 is a violation of federal due process, so I'm going to
23 require --

24 QUESTION: But at least the theory of the
25 complaint was that the failure to follow the correct

1 procedures violated due process and therefore there was
2 a 1983 claim.

3 MR. AVILA: Enough to keep the --

4 QUESTION: Well, that's really the only claim
5 in the original complaint.

6 MR. AVILA: That's the only, that procedural
7 due process was being violated.

8 QUESTION: Was the only claim in the original
9 complaint.

10 MR. AVILA: As I understand the original
11 complaint.

12 QUESTION: And that is what maintained the
13 status quo. Then all these other things developed after
14 that.

15 MR. AVILA: Exactly, Your Honor, and that's
16 what happened. And it wasn't -- and indeed, the
17 district court at one point observed --

18 QUESTION: If at least there's a colorable
19 argument that it was based on 1983, why doesn't that
20 support a fee award?

21 MR. AVILA: Your Honor, that might well, as
22 the First Circuit indicated, might -- I'm not conceding
23 the point -- might support a fee award against the
24 school committee. But the school committee has already
25 settled this matter, and you note what the school

1 committee is paying for is for the fees for the
2 preliminary injunction, by their agreement, fees for the
3 preliminary injunction and fees for the hearing before
4 the school committee.

5 And what the plaintiffs are trying to obtain
6 from the Commissioner are fees for the hearing which the
7 Commissioner conducted. And perhaps he ruled in favor
8 of the school committee, but he ruled, that was the
9 position of the school committee. I think we were just
10 acting in a straightforward judicial capacity.

11 QUESTION: Mr. Avila, why did the Court of
12 Appeals not address the Maher versus Gagne type approach
13 and talk about the substantiality of the constitutional
14 claim and the meritorious nature of the statutory claim
15 under 504?

16 MR. AVILA: Well, I think, Your Honor, they do
17 mention that decision, and why they did not -- why they
18 did not follow it is simply this. In this case, as the
19 plaintiffs, as the Petitioners indicate, they are not
20 arguing that the Education for all Handicapped
21 Children's Act is enforceable under 1983. Now, that
22 would be the straightforward way to get fees, to argue
23 that it's enforceable under 1983 and therefore under
24 1988 you should get fees.

25 But they never raised that issue in this

1 case. So I respectfully submit they're trying to bring
2 the fee award in through a constitutional back door.
3 What they're saying is --

4 QUESTION: Well, my question was just why you
5 think the Court of Appeals didn't come to grips with the
6 test --

7 MR. AVILA: I think they did come to grips
8 with it, Your Honor. What they did is, they said that
9 if you have an action that's entirely bottomed on a
10 federal act, such as the 1983 action, which in itself in
11 their judgment wouldn't be enforceable under 1983, they
12 in essence felt that if you couldn't find any
13 Congressional intent to enforce it through 1983 you
14 shouldn't be allowed to take a back door approach.

15 QUESTION: Well, do you think that is
16 consistent with the approach in Maher versus Gagne in
17 all respects?

18 MR. AVILA: I think it is, Your Honor, when
19 you're dealing with a case where in our judgment the
20 constitutional claims are really the same, they're
21 consubstantial. They're really the same claim as the
22 statutory claim. It's not really that they are in any
23 way different.

24 In this case the handicapped procedures, those
25 administrative regulations, that was resolved in that

1 process who was responsible for educating that child.
2 That was resolved through a statutory procedure.

3 QUESTION: Well, if there's no repeal of 1983
4 by implication, in effect, for these purposes and the
5 two avenues of relief are open, then you have to
6 determine the substantiality of the 1983 claim, I guess,
7 if that's your position.

8 MR. AVILA: Well, I think there are two
9 positions there. One, I would think, I would argue that
10 in fact you have look at the Education for All
11 Handicapped Children's Act as having preclusive effect.
12 Just looking at the wide-ranging nature of that Act --

13 QUESTION: Under a Brown versus GSA type of
14 approach?

15 MR. AVILA: That sort of left it that this Act
16 was obviously meant -- it prescribes things that are
17 never going to be prescribed constitutionally. It
18 involves the development of individualized education
19 programs and provision of related services.

20 It's a very, very comprehensive Act, and I
21 just don't see how 1983 comes into play.

22 QUESTION: Well, I didn't think the Court of
23 Appeals held that there wouldn't be a 1983 action, or it
24 didn't hold that this Act precluded any parallel
25 remedies anywhere else. They just said it precluded

1 attorney's fees. That's the issue in the case.

2 MR. AVILA: Well, what they were saying is
3 that the only reason why these constitutional claims
4 were added from the Commissioner's perspective was sort
5 of transparently, I would suggest, for the purpose of
6 getting attorney's fees.

7 The interesting sort of issue in the case is
8 this: You could raise this sort of constitutional
9 issue, whatever it may have been -- I don't think in my
10 mind it was ever, assuming that it existed, it was ever
11 that well articulated -- and there was no real way that
12 anyone could ever get at it.

13 I think that in the old Siler case this Court
14 established a rule about avoiding deciding
15 constitutional questions, and the purpose of that rule
16 was because the Court for prudential reasons wanted to
17 turn away from deciding those issues, recognizing the
18 problems you get with constitutional constructions.

19 When you've got a state -- when you've got a
20 federal statute like the Handicapped Children's Act,
21 it's so wide-ranging, realistically no one is turning
22 away from deciding the difficult constitutional issue.
23 That's not really involved in the case. Everyone's
24 attention is simply focused on the statute.

25 So that rule seems to be potentiating here

1 into something that it was never intended to involve,
2 the fee award question. What I'm suggesting is that
3 when the alleged 1983 constitutional claim is
4 coextensive with the Education for All Handicapped
5 Children's Act, we can't believe the 1988 fee provision
6 is applicable.

7 MR. AVILA: I also want to point out briefly,
8 Your Honor, that we've raised the contention that the
9 Commissioner here is not liable for fees because he was
10 acting in a judicial capacity. I won't belabor that
11 point.

12 I just want to point out that we would contend
13 that if administrative hearing officers are going to be
14 put in a position where they or their agencies are going
15 to have to pay fees depending upon how they decide the
16 case, that's really not going to contribute to fair and
17 equal due process for anyone.

18 Finally, Your Honors, I'd like to suggest that
19 this Court's recent decision in the Pennhurst case may
20 have some applicability to this matter. To the extent
21 that this question was ultimately decided on state law
22 grounds, that decision suggests that perhaps the federal
23 district court shouldn't have gotten involved in the
24 matter in the first place, at least in relation to the
25 Commissioner's decision.

1 Now, we have to concede that we're here on a
2 motion for attorney's fees, but I would suggest that if
3 there's some Eleventh Amendment immunity applicable in
4 this case that it should be applicable even now on the
5 question of attorney's fees, because the effectiveness
6 of that ruling is best served by avoiding -- by
7 nullifying federal judicial actions, which in essence,
8 on the basis of a state court, state supreme court
9 decision, it just goes out of its way to reverse, for no
10 very good reason perhaps, a decision of an
11 administrative hearing officer.

12 QUESTION: Would that argument suggest that it
13 was error for the district court to certify the question
14 it did to the Rhode Island Supreme Court?

15 MR. AVILA: I would be -- well, that might be
16 true. I'm hard-pressed to say that since I, in the
17 original case, I was the one that moved it in the first
18 place, and we thought it was a serious issue that should
19 be decided by the Rhode Island Supreme Court.

20 QUESTION: In retrospect, it seems you were
21 quite wrong, doesn't it, under Pennhurst?

22 MR. AVILA: Well, Pennhurst was -- could have
23 been, could be wrong. But I think that it was something
24 we'd still have to do again, because it's a vital state
25 issue, and the Rhode Island Supreme Court had to have, I

1 think properly had to have, the final say on that
2 issue.

3 If there are no further questions.

4 CHIEF JUSTICE BURGER: Very well.

5 Do you have anything further, Mr. Larson?

6 REBUTTAL ARGUMENT OF E. RICHARD LARSON, ESQ.

7 ON BEHALF OF PETITIONERS

8 MR. LARSON: Yes, Mr. Chief Justice.

9 My adversary seemed to imply that the claims
10 in this case, the 504 claims and the constitutional
11 claims, were kind of back door claims to get attorney's
12 fees. I respectfully disagree.

13 This is an exclusion case. There could be no
14 stronger case for an equal protection claim on this
15 record. The original complaint sought relief under the
16 Constitution in general, and it did specify due
17 process. The subsequent complaints can all be read as
18 having, no question about it, an equal protection claim
19 in it.

20 The 504 claim is as substantial as a 504 claim
21 can be. This is, again, an exclusion case. The
22 language of 504 bars exactly what happened in this case,
23 exclusion on the basis of handicap.

24 Now, as attorneys representing the plaintiffs
25 we had the responsibility to allege not only substantial

1 claims, but claims which we believe we can win on. In
2 this case we had three sets of --

3 QUESTION: Weren't you obliged to allege them
4 in the original complaint?

5 MR. LARSON: The 504 claim could have been
6 alleged in the original complaint.

7 QUESTION: Well, weren't you obliged to do
8 it?

9 MR. LARSON: No, we were not obliged to do
10 it.

11 QUESTION: You mean you should hold one of
12 them back?

13 MR. LARSON: There was no intentional holding
14 back, Your Honor.

15 QUESTION: For sandbagging purposes? For
16 sandbagging purposes?

17 MR. LARSON: No, this was no sandbagging, Your
18 Honor.

19 QUESTION: For fee purposes?

20 MR. LARSON: No, Your Honor. The fees were in
21 this case from the beginning to the extent that there
22 was a substantial constitutional claim stated on the
23 face of the initial complaint.

24 I should also point out that the trial court
25 here made as an ultimate finding of fact the finding

1 that the equal protection claim was substantial, and
2 that was deferred to -- a similar finding was deferred
3 to in the majority opinion by this Court in Maher v.
4 Gagne in footnote 10, and in the concurring opinion by
5 Mr. Justice Powell there is a statement saying that, we
6 have no occasion to, because of the settlement, to
7 evaluate further the constitutional cause of action.

8 There is no question that plaintiffs were
9 prevailing plaintiffs in this case.

10 I would also like to address the fact with
11 regard to the question that Justice Powell raised with
12 me earlier about the chronology. I'm not sure that I
13 answered it quite clearly enough. The state defendants
14 were added in this case after the administrative
15 procedures had been exhausted, prior to the
16 certification order. And, as Mr. Avila pointed out, it
17 was the Respondents who came in and sought the
18 certification.

19 Plaintiffs had three winning federal claims
20 and we were more than happy to win on any one of those
21 claims. The trial court, in a model of deference to
22 comity and to federalism, did grant the certification
23 order.

24 No Pennhurst issue was involved in this case
25 whatsoever. Instead, what the court did was it avoided

1 not only the federal statutory issues, but it also
2 avoided the constitutional issue. This Court only
3 yesterday in Scambia County cited with approval
4 Ashwander once again in order to avoid deciding
5 unnecessarily constitutional --

6 QUESTION: But Mr. Larson, how can you say
7 there is no Pennhurst issue? How can you say that? He
8 based the decision on state law when he could have done
9 it on federal grounds, and there was a state defendant
10 in the case.

11 MR. LARSON: There is no --

12 QUESTION: Why isn't that directly -- isn't
13 that exactly what Pennhurst prohibits?

14 MR. LARSON: -- no federal court
15 interpretation whatsoever of the state law. It's a
16 certification that happened on defendants' application.

17 QUESTION: Well, I know it was done on
18 defendants' application, but it doesn't mean it's
19 consistent with Pennhurst, does it?

20 MR. LARSON: Pennhurst for Eleventh Amendment
21 purposes, as I understand Pennhurst, bars a federal
22 court order based upon state law, an injunctive order
23 requiring state officials to comply with state law.
24 There was no such order in this case.

25 QUESTION: Well, I thought --

1 MR. LARSON: Jurisdiction was alleged solely
2 on our 1983, 504, and '75 Education Act.

3 QUESTION: Well, I thought earlier in the
4 argument it was developed that all of the relief was
5 based entirely on state law, as you eventually got
6 through. But that isn't right?

7 MR. LARSON: Plaintiffs obtained the
8 objectives sought in this lawsuit.

9 QUESTION: Against state defendants, based on
10 the state law, in a federal court.

11 MR. LARSON: As a result of a state court
12 ruling.

13 QUESTION: But the Court of Appeals said that
14 the relief really rested on a federal statute.

15 MR. LARSON: In their second opinion, yes,
16 they did.

17 QUESTION: And so they interpreted,
18 reinterpreted the whole run of events and said that it
19 was under the Education for the Handicapped Act.

20 MR. LARSON: The State of Rhode Island
21 decision, because it starts out with several paragraphs
22 discussing the federal law --

23 QUESTION: Could you tell me in a word why you
24 think you're entitled to fees for the state
25 administrative proceedings?

1 MR. LARSON: It gets into an interpretation of
2 this Court's decision in New York Gaslight versus Carey
3 as to whether or not there has to be a mandatory
4 exhaustion proceeding or whether fees are also
5 available --

6 QUESTION: Yes, but the mandatory exhaustion
7 proceeding is under a statute that doesn't provide for
8 fees.

9 MR. LARSON: That issue is not before this
10 Court. That's something that the First Circuit would
11 have to deal with on remand. It was raised before the
12 First Circuit and not reached by the First Circuit.

13 QUESTION: All right.

14 CHIEF JUSTICE BURGER: Thank you, gentlemen.
15 The case is submitted.

16 (Whereupon, at 10:50 a.m., argument in the
17 above-entitled case was submitted.)

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