

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-558

TITLE IRVING INDEPENDENT SCHOOL DISTRICT, Petitioner  
v. HENRI TATRO, ET UX., INDIVIDUALLY AND AS  
NEXT FRIEND OF AMBER TATRO, A MINOR

PLACE Washington, D. C.

DATE April 16, 1984

PAGES 1 thru 48

**AR**  
ALDERSON REPORTING

(202) 638-9300

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

IN THE SUPREME COURT OF THE UNITED STATES

-----x  
:  
IRVING INDEPENDENT SCHOOL :  
DISTRICT, :  
:  
JAMES C. TODD, ESQ. Petitioner :  
on behalf of the Respondent :  
v. : No. 83-558  
:  
HENRI TATRO, ET UX., INDIVIDUALLY :  
AND AS NEXT FRIEND OF AMBER :  
TATRO, A MINOR :  
-----x

Washington, D.C.

Monday, April 16, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:40 a.m.

APPEARANCES:

JAMES W. DEATHERAGE, ESQ., Irving, Texas; on behalf of  
the Petitioner.

JAMES C. TODD, ESQ., Austin, Texas; on behalf of the  
Respondent.

---

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
JAMES W. DEATHERAGE, ESQ., on behalf of the Petitioner	3
JAMES C. TODD, ESQ., on behalf of the Respondent	17
JAMES W. DEATHERAGE, ESQ., on behalf of the Petitioner -- rebuttal	40

- - -

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

2                   CHIEF JUSTICE BURGER: Mr. Deatherage, I think  
3 you may proceed whenever you're ready now.

4                   ORAL ARGUMENT OF JAMES W. DEATHERAGE, ESQ.,

5                   ON BEHALF OF THE PETITIONER

6                   MR. DEATHERAGE: Mr. Chief Justice, and may it  
7 please the Court:

8                   This case is here on writ of certiorari to the  
9 court of appeals of the Fifth Circuit. The battle lines  
10 were drawn in this case on the issue of whether or not  
11 the Education of All Handicapped Children Act requires  
12 public schools to provide and perform medical treatment,  
13 prescribed by a private physician and delegated to the  
14 school as a related service in order for the child to  
15 benefit from education, special education, and to  
16 receive a free, appropriate public education.

17                   Initially, the plaintiffs, the respondents  
18 here, filed an application for preliminary injunction  
19 seeking an order from the district court ordering the  
20 district, the Irving Independent School District, to  
21 provide a medical procedure subsequently stipulated and  
22 found to be medical treatment to the respondent, Amber  
23 Tatro.

24                   The school district denied the application --  
25 I'm sorry -- the district court denied the preliminary



1 application for injunction relief and held that the  
2 medical treatment requested did not arise from the  
3 effort to educate, and that Section 504 of the 1973  
4 Rehabilitation Act could not be converted into a statute  
5 requiring the setting up of governmental health care.

6 QUESTION: Mr. Deatherage, I guess there's  
7 some question, is there not, whether there is indeed  
8 medical treatment?

9 MR. DEATHERAGE: Justice O'Connor, the record  
10 reflects there is no question at all. Ultimately, the  
11 plaintiffs stipulated -- or the respondents stipulated  
12 in the pretrial order bound in the joint opinion that  
13 clean intermittent catheterization, the procedure in  
14 question, was medical treatment. Their position -- Dr.  
15 George Hurt, who was one of the co-authors of the  
16 document ultimately adopted by the American Medical  
17 Association -- testified it was the medical treatment of  
18 choice of a disease state suffered by Amber; that is, an  
19 urgent bladder.

20 So there's never been a question or a dispute,  
21 at least since the administrative hearing, as to whether  
22 or not the procedure is medical treatment.

23 QUESTION: If -- if a child had to have some  
24 medication administered routinely during the school day  
25 in order to remain in school would it be your position

1 that it constitutes medical treatment for someone at the  
2 school to administer the medication?

3 MR. DEATHERAGE: Under Texas law, Justice  
4 O'Connor, I don't believe that is construed as medical  
5 treatment by the school employee who gives the  
6 medication. It is medical treatment when the doctor  
7 prescribes it so that the parent or the child can go to  
8 the pharmacy and obtain the medication.

9 QUESTION: Well, isn't this the same kind of a  
10 thing? The doctor prescribes it, but it doesn't have to  
11 be administered by a physician?

12 MR. DEATHERAGE: Whether or not it has to be  
13 administered personally by the physician does not take  
14 it out of the realm of medical treatment as defined  
15 under the Texas Medical Practice Act. Under that act as  
16 amended since trial of this case, the physician -- and  
17 at the time of trial -- the physician may, in accordance  
18 with the act and the Board of Medical Examiners rule,  
19 prescribe certain medical tasks and delegate them to  
20 another party, a third party other than the patient, for  
21 performance, such as a scrub nurse in surgery, so long  
22 as that physician retains supervision and control of the  
23 delegatee and the act to be performed; but it is still  
24 medical treatment.

25 QUESTION: Well, then, is giving medication

1 medical treatment, in your view and in Texas law?

2 MR. DEATHERAGE: Prescribing it by the  
3 physician is. There is a specific statute -- even if we  
4 construe it as being medical treatment, if the  
5 schoolteacher gives what the parent had brought, the  
6 pill, in a container -- there is a Texas statute  
7 attached as an appendix to our reply brief that  
8 specifically authorizes the public school employee under  
9 certain conditions, if the parent sends the medication  
10 in its original container, that allows the schoolteacher  
11 to give that child that pill and be immune from civil  
12 liability for damages if something adverse happens.  
13 • There is no similar statute in Texas that is applicable  
14 to this type of procedure involved in this case.

15 The district court initially, as I related  
16 earlier, held that the requested medical treatment did  
17 not arise from the effort to educate and that it could  
18 not be converted into a statute requiring the setting up  
19 of governmental health care under Section 504.

20 The Fifth Circuit panel initially in Tatro I  
21 held that the district court was wrong on both counts  
22 and vacated and remanded for further proceedings  
23 consistent with what we believe -- we believe to be an  
24 advisory opinion, since the court acknowledged initially  
25 it had no facts before it.

1                   On remand, the district court, feeling  
2                   constrained by Tatro I, found that the petitioner, the  
3                   school district, could not lawfully provide the medical  
4                   treatment under Texas law without additional services of  
5                   a licensed physician; that under --

6                   QUESTION: Mr. Deatherage, let me interrupt.  
7                   The little girl Amber is a good bit older now, isn't she?

8                   MR. DEATHERAGE: Yes, Justice Blackmun.

9                   QUESTION: Do you know -- maybe I should ask  
10                  your opposing counsel -- is she able herself to  
11                  administer CIC at this point?

12                  MR. DEATHERAGE: I have no personal knowledge  
13                  of that, Justice Blackmun. She may be. I know it was  
14                  one of the -- it has been and always has been one of the  
15                  goals for Amber through occupational therapy and other  
16                  specialized instruction to -- where she can ultimately  
17                  do that. Whether or not Friday at school she was able  
18                  to take care of herself, I have no personal knowledge.

19                  QUESTION: Let me get back to Justice  
20                  O'Connor's question, because it was going to be mine if  
21                  she hadn't asked it, and I'm not sure of your answer.

22                  Suppose this were a prescription drug, and it  
23                  was just a question of the -- someone in the school  
24                  digging it out every four hours and handing it to  
25                  Amber. You would say this was not medical treatment.



1                   MR. DEATHERAGE: Under Texas law, Justice  
2 Blackmun, I don't think so. I don't believe so. There  
3 is a distinction. When the doctor writes a prescription  
4 for medication, he writes the prescription directed to  
5 the pharmacist to fill this prescription. He does not  
6 direct that prescription to the public school employee  
7 and does not delegate to the public school employee the  
8 administering of that pill. That's dedicated to the --  
9 the prescription is written to the pharmacy.

10                   The parent may choose to bring the medicine in  
11 its original container, under the state statute, and in  
12 writing authorize the school employee to give out of  
13 that original container that medication in accordance  
14 with the label on -- on the container. But in that  
15 instance, you see, the employee of the school is making  
16 no judgments, forming no judgments, is not exercising  
17 any medical judgment in merely removing the capsule and  
18 giving it to the student with the consent of the parent,  
19 because the prescription is not directed to the school  
20 employee.

21                   QUESTION: May I ask a followup on that  
22 question? Your reply brief has the statute about the  
23 immunity from liability if they follow that procedure.  
24 Is it your suggestion that until that statute was  
25 passed, it would have been a violation of law for that

1 procedure to have been followed?

2 MR. DEATHERAGE: The public school employee at  
3 that time was subjected individually to claims for  
4 damages --

5 QUESTION: I understand. Had no immunity from  
6 liability. But assume that there was no negligence, and  
7 all the employee did, they didn't follow -- there's no  
8 statute to protect them -- but could not the employee  
9 have performed the procedure without doing anything  
10 unlawful? Just without immunity is all.

11 MR. DEATHERAGE: That was -- yes. They've  
12 done it for years.

13 QUESTION: But there's no immunity issue in  
14 this case, is there?

15 MR. DEATHERAGE: No, Justice Stevens, there's  
16 not.

17 Under the Texas Medical Practice Act, the  
18 district court found a physician may prescribe medical  
19 treatment and delegate its performance to a nonlicensed  
20 person or institution that he deems qualified subject to  
21 control, supervision and adequate monitoring by the  
22 physician; that the physician may prescribe the medical  
23 treatment to be furnished by the public school if he  
24 believes the school has personnel qualified to perform  
25 it.

1           The school employee was found -- or the school  
2 was found to employ professional nurses that with  
3 sufficient training, the court found, the school's  
4 nurses are capable of performing the medical treatment,  
5 and that when the medical treatment is performed by such  
6 nurses in accordance with a valid doctor's prescription,  
7 it would not constitute the unlawful practice of  
8 medicine. Until that occurs, the court had found,  
9 relying on an amicus brief of the Texas Medical  
10 Association attached to its memorandum opinion --  
11 opinions, that if the school had provided  
12 catheterization without a doctor's prescription valid  
13 under Texas law, it would have unlawfully been  
14 practicing medicine.

15           Also, the court found that if these conditions  
16 are met, the medical treatment then becomes services  
17 provided by a qualified school nurse or other qualified  
18 person, which is the definition of school health  
19 services under the regulations implementing the  
20 Education of All Handicapped Children Act.

21           Therefore, these are school health services  
22 and are therefore related services because also under  
23 the regulation they define related services to include  
24 school health services, and that's not mentioned in the  
25 statute.

1           The district court, based on these findings,  
2           ordered the petitioner to: one, secure the services of  
3           sufficiently trained persons to allow a trained doctor  
4           to prescribe medical treatment to be furnished by the  
5           school, and to modify Amber Tatro's individualized  
6           education plan to provide for the medical treatment as  
7           prescribed by her personal physician.

8           The Fifth Circuit --

9           QUESTION: Mr. Deatherage, is it your position  
10          that under the Education for the Handicapped Act that if  
11          you're correct and the school does not have to provide  
12          CIC in a regular school, do you agree that nevertheless  
13          the state must provide then some kind of special,  
14          separate school for Amber's education?

15          MR. DEATHERAGE: The state and the Irving  
16          Independent School District must provide Amber Tatro  
17          with a free, appropriate public education as that's  
18          defined in the statute, as interpreted by this Court in  
19          Rowley; and that may include all gamut of specialized  
20          instruction. It can include instruction in a regular  
21          classroom. It may include resource room instruction.  
22          It may include itinerant instruction. Whatever the  
23          committee of professional school employees, with  
24          sufficient parental involvement, can reach as being an  
25          appropriate plan to meet Amber's individualized



1 educational needs is their duty, at least to the basic  
2 floor of opportunity this Court articulated in Rowley.

3 QUESTION: Is that likely to cost more than to  
4 keep her in the public school and provide CIC?

5 MR. DEATHERAGE: In relation to the cost of a  
6 person to insert and withdraw the catheter two times a  
7 day, and if that's the only cost, the catheterization,  
8 certainly it probably will. But that is their  
9 obligation under the Act.

10 The Fifth Circuit on second appeal, feeling  
11 constrained by Tatro I, affirmed, which brings us to  
12 this Court. The Education of All Handicapped Children  
13 Act was enacted by Congress to assist the states in  
14 their efforts to educate handicapped children. It was  
15 enacted to encourage the states to provide more and  
16 better programs for handicapped students. It mandates  
17 that the recipient of the funds provide handicapped  
18 children such as Amber a free, appropriate public  
19 education and an individualized education plan which is  
20 to include specialized instruction to meet her unique  
21 needs.

22 The statutory provision in question here is  
23 found in Section 1401(17) of the Act. It defines  
24 related services to mean in pertinent part  
25 transportation and such developmental, corrective and

1 supportive services, including medical services, as may  
2 be required to assist the handicapped child to benefit  
3 from special education.

4 But there is a limitation placed by Congress  
5 in its definition as it relates to medical services, and  
6 it limits medical services to diagnosis and evaluation  
7 only. The implementing regulations define medical  
8 services to mean services of a licensed physician for  
9 diagnosis, evaluation of a handicapping condition only.

10 The question then becomes -- has become in the  
11 lower courts whether or not clean intermittent  
12 catheterization, stipulated to be medical treatment,  
13 found by the court to be such, is a school health  
14 service -- that is, services of a qualified -- of a  
15 school nurse or a qualified person -- or medical service.

16 Finding that it fits under either  
17 classification doesn't answer the question. The  
18 question is did Congress intend that the nature and  
19 purpose of a particular procedure that is medical  
20 treatment be provided by the states and by the local  
21 educational agencies. And we submit there is nothing in  
22 the Act, its legislative history or its stated purpose  
23 to reach that conclusion.

24 QUESTION: Do you suppose we have to look, Mr.  
25 Deatherage, at what is a medical service to federal law

1 for defining that for purposes of this Act without  
2 regard to how Texas law might treat it?

3 MR. DEATHERAGE: If I understand your  
4 question, Justice O'Connor, at least -- yes, I think --  
5 I think you must -- I think this Court is going to have  
6 to look, and all the courts in this area, to some degree  
7 to state law in determining perhaps what is medical  
8 treatment.

9 QUESTION: Well, that's my question. Would we  
10 have to decide what is a medical service with reference  
11 only to federal law, or do we have to look to state law  
12 to determine that?

13 MR. DEATHERAGE: I submit that is answered by  
14 looking to the state plan that is agreed to by the state  
15 and the Secretary under the Act, that's called for for  
16 the Act, in order for the state to get those -- to get  
17 the federal funds; that the content of a state plan will  
18 address what the state provides as medical services,  
19 school health services, which is then agreed to by the  
20 Secretary.

21 QUESTION: Do you think it can vary from state  
22 to state then --

23 MR. DEATHERAGE: Yes, Justice O'Connor. I  
24 think --

25 QUESTION: -- Under the Education for the

1 Handicapped Act?

2 MR. DEATHERAGE: I think it does.

3 QUESTION: The district court, I notice on  
4 page 11A of your petition, cited a commentary which  
5 indicated that in footnote 12 that it agreed with you;  
6 that the statute tolerated state-to-state variance.

7 MR. DEATHERAGE: Yes, Justice Rehnquist.  
8 That's included in the cites of part of the implementing  
9 regulations.

10 QUESTION: Do you think the statute also  
11 admits school district to school district variations,  
12 depending upon the personnel that are available?

13 MR. DEATHERAGE: Justice O'Connor, I don't see  
14 how that could apply, because the state is the one that  
15 enters into the contract with the federal government,  
16 and a part of that state contract is they require the  
17 local school district to -- applying for funds to adhere  
18 to the provisions of a state plan. So I -- I don't  
19 believe -- I can't envision a situation or a set of  
20 circumstances in which one school district is not  
21 required to provide certain services and another school  
22 district is within the same state.

23 Thank you.

24 CHIEF JUSTICE BURGER: We'll resume here at  
25 1:00, counsel.



1 (Whereupon, at 12:00 p.m., the hearing was  
2 recessed for lunch, to be reconvened at 1:00 p.m., the  
3 same day.)

1 AFTERNOON SESSION

2 CHIEF JUSTICE BURGER: Mr. Todd, you may  
3 proceed whenever you're ready.

4 ORAL ARGUMENT OF JAMES C. TODD, ESQ.,

5 ON BEHALF OF THE RESPONDENT

6 MR. TODD: Mr. Chief Justice, and may it  
7 please the Court:

8 The true issue of this case before the Court  
9 is one of access to public education; more specifically,  
10 whether an eight-year old girl of normal intelligence  
11 who is capable of doing schoolwork in regular public  
12 elementary school will be able to attend class in a  
13 regular public elementary school alongside her  
14 nonhandicapped age group peers.

15 If she is to receive a free public education  
16 in the public schools, it's been found as a fact that  
17 she must be provided the safe, simple, quick, effective  
18 and inexpensive service of clean intermittent  
19 catheterization.

20 As was brought out this morning in questioning  
21 by Justices O'Connor and Blackmun, the service of clean  
22 intermittent catheterization is closely analogous to the  
23 dispensing of medication by school personnel during the  
24 school day to permit a handicapped child to attend  
25 school. And that service, even the petitioners concede,

1 is not medical treatment within the meaning of the Act.

2 For example, an orthopedically handicapped  
3 child who suffers arthritic pain may have his physician  
4 prescribe for him aspirin at regular intervals during  
5 the school day. Without the provision of that  
6 medication, the pain that is a symptom of his handicap  
7 may prevent him from participating in a public  
8 education. With the provision of the medication, the  
9 child has access to a free public education.

10 A similar analogy would be the child disabled  
11 by the handicap of epilepsy whose physician prescribes  
12 anti-seizure medication during the school day.

13 • QUESTION: What if you had a pupil who had a  
14 lower back disk problem or a cervical disk problem and  
15 had to be in traction periodically? Would you think  
16 traction would be required as a related --

17 MR. TODD: Probably not, Your Honor, in that  
18 the traction would actually remove the child from the  
19 public educational setting, so that this would not be a  
20 service.

21 QUESTION: You could have some kinds of  
22 traction right in the classroom.

23 MR. TODD: Right. Well, the -- to the extent  
24 that medical equipment -- equipment is involved, the  
25 school district would not be required to provide the

1 equipment, just as it is not required to provide the  
2 catheter in this case, and just as it is not required to  
3 provide, for example, a hearing aid. However, the  
4 school district would have to make some accommodations  
5 so that a -- a child who is in traction, and if there  
6 are not other reasons to remove him, would be able to  
7 attend and participate.

8 I think that the -- what makes the  
9 catheterization so analogous to the type of service we  
10 talked about this morning is that although it is  
11 prescribed by a physician, it is actually delivered  
12 quite easily by nonmedical school personnel. And  
13 although it can be said to treat a health-related  
14 symptom of the handicapped, it is a service that's  
15 needed to enable the child to have access to the public  
16 education.

17 QUESTION: Well, I didn't understand from your  
18 colleague on the other side that under Texas law that a  
19 nonmedical person would be allowed to administer -- to  
20 perform the CIC.

21 MR. TODD: Oh, under Texas law it's quite  
22 permissible, and as a matter of fact --

23 QUESTION: I don't mean a doctor. I mean how  
24 about a nurse?

25 MR. TODD: Well, or even someone other than a



1 nurse such as the aide.

2 QUESTION: Well, my question really is will  
3 the school have to employ somebody that they ordinarily  
4 wouldn't employ in order to carry out this procedure?

5 MR. TODD: No, Your Honor, they would not. As  
6 a matter of fact, the --

7 QUESTION: Well, what if they did?

8 MR. TODD: Well, they could choose to. They  
9 could choose --

10 QUESTION: I know. What if it were -- what if  
11 they -- what if under the law or in their judgment in  
12 order to carry out this procedure they would have to  
13 hire an additional person that they wouldn't ordinarily  
14 do?

15 MR. TODD: That would still not offend the  
16 Act, Your Honor, in that if you'll notice --

17 QUESTION: Well, would the Act require them to  
18 do that?

19 MR. TODD: Yes. And, for example --

20 QUESTION: Even though it wouldn't require  
21 them to buy a piece of equipment like a catheter.

22 MR. TODD: Right. And the example I wanted to  
23 give you, the Act specifically requires physical  
24 therapy, occupational therapy, speech pathologists and  
25 audiologists, and then it states that state standards

1 must determine the qualifications of these individuals.

2 A licensed physical therapist is the person  
3 who must provide physical therapy. In the past, school  
4 districts were not required to hire physical  
5 therapists. Now they are. This is something that  
6 Congress recognized needed to be done. It was -- it was  
7 discussed and considered that one of the implications of  
8 the Education of the Handicapped, as amended, is that  
9 school districts would be doing things they had not done  
10 in the past and would be hiring certain types of  
11 personnel.

12 One type of personnel they don't have to hire  
13 is a physician, but we haven't asked them to do that.  
14 The -- the -- the service of catheterization, it has to  
15 be remembered, is so simple, it's so simple that a  
16 person of average intelligence can be trained to do it  
17 in about 30 minutes.

18 QUESTION: Have you ever been catheterized?

19 MR. TODD: I never have, Your Honor. The --

20 QUESTION: And it's so simple?

21 MR. TODD: Well, I'm relying upon the record  
22 and the testimony of the people who have at least been  
23 engaged in providing it. For example, it's undisputed  
24 in the evidence that almost certainly and probably very  
25 soon Amber will be able to provide this service herself,

1 possibly --

2 QUESTION: I asked your opposition whether at  
3 her now more advanced age she is able to do this herself.

4 MR. TODD: She's not quite able to do all the  
5 steps, but she's very close. She can actually do the  
6 insertion, for example; and it's not inconceivable that  
7 this summer she may even be able to do it. So that at  
8 base, what the petitioner's claim comes down to is that  
9 a service which an eight-year old handicapped child can  
10 -- can do is so complicated, so burdensome, so expensive  
11 that a -- and so medical that a school district  
12 shouldn't be required to do it.

13 Surely this is not among the greater burdens  
14 that a school district will ever be required by the  
15 Education of the Handicapped Act to incur.

16 QUESTION: Don't we have to decide this case  
17 on the assumption that the entire procedure must be  
18 performed by someone else?

19 MR. TODD: Yes, Your Honor. That -- that she  
20 needs adult assistance in the sense that, for example,  
21 obviously it's clear from the record that clean  
22 intermittent catheterization functions as a substitute  
23 for voluntary urination. No child could attend school  
24 throughout a school day without provisions made for  
25 certain normal bodily functions like eating, like toilet

1       --

2               QUESTION: Do Texas schools provide a nurse  
3 for every school, or do they have a visiting nurse that  
4 moves around from one to another?

5               MR. TODD: It varies -- it varies from -- from  
6 district to district. But the -- the --

7               QUESTION: Well, if there were a school nurse  
8 in the building, that would solve the problem, wouldn't  
9 it?

10              MR. TODD: If -- well, actually the problem  
11 wouldn't even be there unless you assume that a school  
12 nurse had to do it. But certainly if there is a school  
13 nurse present and -- and it's preferred that a nurse do  
14 it -- certainly a nurse is among those who can -- then  
15 that makes it much easier. Other arrangements --  
16 because it is such a simple service, we're not facing  
17 the type of situation as, for example, school districts  
18 where there is a shortage of physical therapy  
19 personnel. It's -- it's unquestionable in the Act that  
20 they have to provide physical therapy to those children  
21 who need it in order to benefit from education, and  
22 there are arrangements for the state to assist local  
23 districts who don't have the resources themselves.

24              But we're not even faced with that problem  
25 here because we're dealing with a service, and even the

1 -- which even the amicus brief which is attached as an  
2 appendix to the district court opinion that was by the  
3 Dallas Medical Society and the Texas Medical  
4 Association, recognized that average lay people with a  
5 minimum of training can provide this service. It's --  
6 it's not one that requires highly technical training,  
7 highly specialized credentials or a great deal of  
8 trouble.

9 QUESTION: But would this not mean that that  
10 person, after training, would be required to be there at  
11 least five hours a day? Is that the school day in Texas?

12 MR. TODD: Well, probably --

13 QUESTION: Five or six hours a day.

14 MR. TODD: -- Within range. Certainly  
15 available. There should be somebody who will be  
16 available at the times needed. There is some  
17 variation. This is why it's so much more feasible for  
18 the -- for the school district to employ personnel to do  
19 it and why in many cases it -- it just simply can't be  
20 done unless the school provides personnel to do it. And  
21 if it's not done, the child doesn't go to school. And  
22 this is what must be balanced. Whenever examining  
23 whatever burden it's concluded this service imposes on  
24 the school district --

25 QUESTION: Well, from what you just said, Mr.



1 Todd, then would your answer to Justice White's earlier  
2 question -- does the school district have to hire  
3 someone who would not have to be hired without this  
4 provision -- wouldn't that be yes?

5 MR. TODD: No, it does not have to hire  
6 someone. I think the answer would be no. The aide or  
7 the teacher --

8 QUESTION: Who -- whom do they use?

9 MR. TODD: There are adults present in the  
10 school environment. They could choose to, if they --

11 QUESTION: You mean make the teacher leave the  
12 class or what?

13 MR. TODD: Or aide. There are classroom --  
14 one of the provisions under the Act is that there be  
15 classroom aides to assist handicapped children to be in  
16 -- in regular classrooms. The preference in the Act is  
17 wherever it can be done, handicapped children be  
18 educated alongside nonhandicapped children. One way of  
19 facilitating that is that there are classroom aides who  
20 assist the teacher; and since we're only talking about a  
21 small amount of time, the aide could -- I think it could  
22 be feasibly arranged -- there are certainly more  
23 difficult arrangements in other cases that have to be  
24 made -- for an adult already present in the educational  
25 environment to assist Amber with this.

1           Now, if it should turn out that the only  
2     feasible way to do it is to hire an additional person,  
3     the additional person that's hired does not have to be a  
4     highly specialized, i.e., expensive, person to hire.  
5     And there's -- just the fact of having to hire  
6     additional personnel does not offend the Act because of  
7     --

8           QUESTION: Mr. Todd, did you stipulate that  
9     it's a medical service?

10          MR. TODD: It was stipulated that it can be  
11     called a medical treatment, and if I could, I would like  
12     to address that.

13          One of the things that's led to so much  
14     misunderstanding is the assumption that the word  
15     "medical" has a fixed meaning from one context to  
16     another, and I'd like to give you an example.

17          In the Education of the Handicapped Act,  
18     medical service is defined not to include physical  
19     therapy, occupational therapy, speech pathology,  
20     audiology, psychologic services.

21          Now, in another act of Congress, the Medicaid  
22     statute, 42 U.S. Code 1396 and the sections following,  
23     those very same services, by name, are defined as  
24     medical services. So it's obvious that Congress is not  
25     using the word "medical" with as much scope in each

1 situation. And it was the task of the Department of  
2 Education to determine in the first instance where to  
3 draw the line.

4 And I think what the Department did was to  
5 balance two policies that are clear in the Act. One is  
6 the policy of nonexclusion, or as this Court pointed out  
7 in the Board of Education v. Rowley case, the inclusion  
8 into public school of previously excluded handicapped  
9 children.

10 On the other hand, balanced against that was  
11 that strictly medical services are not included in the  
12 array of related services. And the way they drew the  
13 line was to define medical services as the services of a  
14 licensed physician. That protects the school district  
15 from the most expensive type of medical services they  
16 might be called upon to provide and --

17 QUESTION: But you stipulated that it was such  
18 a service?

19 MR. TODD: That it can be -- it's -- it was --  
20 well, I didn't do the stipulation, but it was stipulated  
21 that it's medical in the sense that a physician  
22 prescribes it for medical reasons, but that -- just as a  
23 physician might prescribe physical therapy, for example,  
24 for a medical treatment purpose, for example, the  
25 prevention of the atrophy of muscle tissue. But that

1 would not exclude it as a service that is also needed  
2 during school hours to enable the child to be educated.

3 We're not asking here that a school district  
4 cure the child of the handicap. And so the amount of  
5 catheterization that Amber happens to receive during the  
6 school day would not by itself be enough to accomplish  
7 the complete medical purpose, because she still needs it  
8 elsewhere. But it is what she needs in order to be  
9 present in class.

10 The related services include those supportive  
11 services which are needed to assist the child to benefit  
12 from education; and this Court in the Rowley case  
13 stressed educational benefit as the crux of an  
14 appropriate education.

15 It's clear from the --

16 QUESTION: Is there also a requirement that it  
17 not be an undue burden on the state?

18 MR. TODD: Yes -- well, there is the  
19 requirement discerned by this Court in the Southeastern  
20 Community College v. Davis case concerning Section 504  
21 that the accommodations -- that a state cannot be  
22 required to undertake undue burden in order to  
23 accommodate someone who's not an otherwise qualified  
24 handicapped individual. However, in this case, Amber is  
25 -- clearly falls within the definition of an otherwise

1 qualified handicapped individual. She meets all the  
2 requirements that are needed to qualify a child or make  
3 a child eligible for a free public education. Given  
4 that, there are some accommodations that need to be made  
5 to permit her access to public school.

6 Here --

7 QUESTION: But under the Act, not medical  
8 services.

9 MR. TODD: Right. As used in the Act. And  
10 this has been the -- right. As medical services are  
11 treated in the Act -- and remember again that medical  
12 services is defined -- is used in such a way that it  
13 doesn't include physical things like physical therapy,  
14 which usually requires a doctor's prescription;  
15 occupational therapy, which in some states requires a  
16 doctor's prescription; audiology, some of whose  
17 functions require a physician's prescription. And  
18 exercising its discretion as the executive agency  
19 charged with implementing the statute, the Department of  
20 Health, Education and Welfare, looking at the total  
21 situation, drew the line at physician-provided services.

22 QUESTION: Is that the current definition?  
23 And at the present time has the Department of Education  
24 focused specifically on CIC to define whether that is or  
25 is not a medical service?



1           MR. TODD: The Department of Education  
2 considered -- considered excluding clean intermittent  
3 catheterization, or at least they took up the question  
4 of whether or not it should be, because it was receiving  
5 a lot of discussion.

6           There's a passage from the most recent  
7 Department of Education commentary on this point that's  
8 quoted in part, in part by the petitioner's reply  
9 brief. The very next sentence of that passage, which is  
10 not included in the petitioner's reply brief, states  
11 that "Clean intermittent catheterization will continue  
12 to be a service for which a state can be reimbursed  
13 • under the Education of the Handicapped Act."

14           So the Department of Education has not made  
15 any definitive ruling to exclude it. They've considered  
16 the question, they've heard a lot of arguments on both  
17 sides just as this Court is hearing, but there is no  
18 policy ruling that excludes it.

19           QUESTION: Do you think your -- the case is  
20 over if we agree with you that this is not a medical  
21 service? Isn't there still a -- isn't there still an  
22 argument that the kind of supportive services that the  
23 -- supportive services covered by the related services  
24 provision are services connected with the learning  
25 process?

1           QUESTION: Well, I think that the answer to  
2 the first question is no -- is I don't believe the case  
3 is completely over, but I do think that when you go  
4 through the analysis of what a related service is  
5 supposed to do, it still supports the decision of the  
6 district and circuit court.

7           The statute requires those supportive services  
8 that are needed to assist the child to benefit from  
9 education, and I think there are three ways that have  
10 been identified.

11           QUESTION: Of course, you wouldn't -- if  
12 you're right, they wouldn't needed to have listed  
13 transportation at all, would they?

14           MR. TODD: Well, I think they were listing  
15 those as -- as examples.

16           QUESTION: Well, they only listed one -- one  
17 specific supportive service.

18           MR. TODD: Well, they listed -- they gave an  
19 example. They gave a limited set of examples. If you  
20 take seriously the requirement that the school districts  
21 are going to meet the unique needs of handicapped  
22 children on an individualized basis, it has to be  
23 recognized that in 1975 Congress couldn't have listed  
24 all the services that might have been provided.

25           QUESTION: No. I agree.

1           MR. TODD: They gave an illustrative list.  
2     And if the -- if I can, I think there are three ways  
3     that I can discuss in which this service is needed to  
4     assist Amber to benefit from special education.

5           Congress clearly envisioned a number of types  
6     of educational benefit. One, of course, is the benefit  
7     of an academic instruction in the classroom; and we've  
8     discussed how this is needed in order to get Amber to  
9     the classroom and allow her to remain there, just as  
10    physical therapy might work with a child's mobility so  
11    that a child can move from room to room or so that a  
12    child can get into a desk and get out of it.

13           But there's another important educational  
14    benefit to which Congress attached at least as much  
15    importance, and that's the benefit derived from just  
16    being in that classroom with nonhandicapped children,  
17    with sharing the normal educational experience in public  
18    schools that shapes most people and prepares them for  
19    independent life in the community.

20           That's a key benefit, and so much stress is  
21    laid on it in both the legislative history and the key  
22    words of the Act that it's clear that -- in fact, it  
23    even goes so far as to say that a child is not to be  
24    denied that benefit unless it just can't be provided,  
25    even with the use of supplementary aids and services.

1 So that the only children who should be removed from  
2 this normal educational experience are those whose  
3 special instructional needs are so complex and so  
4 special that they can only be provided in an environment  
5 that's separate.

6 But here there's no question but that the type  
7 of instruction that Amber can benefit from, not to  
8 mention the extracurricular activities that the National  
9 School Board Association amicus referred to, all the  
10 attributes of normal public school experience, that for  
11 Amber the type of instruction needed is precisely the  
12 kind that can be provided in a regular public school  
13 setting. And for that reason, the Act mandates that she  
14 be given a service, especially a service as simple as  
15 this, which in a certain amount of time she'll even be  
16 able to do for herself.

17 QUESTION: What if you had a paraplegic  
18 patient?

19 MR. TODD: Excuse me?

20 QUESTION: A paraplegic pupil.

21 MR. TODD: Right.

22 QUESTION: And it required a wheelchair with a  
23 special lift onto a bus or car.

24 MR. TODD: Yes.

25 QUESTION: And then assistance in leaving at

1 the time when he arrived at the school. Would that all  
2 be covered by transportation?

3 MR. TODD: It is covered. And while we're on  
4 the subject of wheelchair, let me recall a very  
5 important example that's given in the legislative  
6 history by both the principal co-author of Section 504,  
7 Senator Humphrey, and one of the major co-authors of the  
8 Education for All Handicapped Children Act, Senator  
9 Stafford.

10 They gave the example of a building that's  
11 architecturally inaccessible, and said -- each of them  
12 said it's still discrimination not to do something, even  
13 if -- whether it's a ramp or whether it's adult  
14 assistance to go and get the child and bring the child  
15 up; that for a school district -- a school district is  
16 still violating both acts by failing to extend that  
17 additional service needed to overcome this obstacle.

18 Now, in Amber's case, the obstacle is  
19 different, but it's an obstacle posed by the handicap;  
20 that is, to get through a school day she needs adult  
21 assistance with her toileting function. If she receives  
22 that adult assistance, which involves a very small  
23 amount of time and trouble, then she can share with  
24 other children the public school experience that  
25 Congress wanted to make available to the maximum extent



1 practicable to handicapped children. If she doesn't  
2 receive the service, then she can't be there.

3 And the cost -- it was brought out in  
4 questioning this morning, I believe by Justice O'Connor,  
5 as to the disparity in cost between excluding her and  
6 segregating her from the regular public school system.

7 I'd like to say that the cost is not only in  
8 terms of the extra amount of dollars which the taxpayers  
9 have to pay to support her in this expensive private  
10 school; there's a cost in frustrating the intent of  
11 Congress. Congress made the judgment that the --  
12 whatever additional burdens are required to admit  
13 handicapped children and integrate them into the normal  
14 public school experience is more than offset by the  
15 savings in that by being part of this normal experience,  
16 which is social as well as instructional, they are  
17 better prepared to be independent in later life, which  
18 means that for the rest of their lives they don't have  
19 to be paid, for example, supplemental security income,  
20 or they don't have to be paid as much; they don't have  
21 to be institutionalized; they don't have to have as many  
22 adults or as many publicly paid caretakers to assist  
23 them.

24 And this also is -- it's a policy judgment  
25 Congress made, for better or for worse. Looking at that

1 policy and trying to judge the facts of this case in  
2 terms of it, it's clear that -- I think, that the  
3 balance should be struck in favor of Amber to provide  
4 this service, allow her to participate, and that this  
5 falls well within the meaning of the Act, especially as  
6 illuminated by the regulations involved. And it also is  
7 a reasonable accommodation under the nondiscrimination  
8 against the handicapped statute.

9 QUESTION: Is there an issue about -- about a  
10 violation under another statute?

11 MR. TODD: Yes, Your Honor. The courts below  
12 also found a violation under Section 504 of the  
13 Rehabilitation --

14 QUESTION: And you defend that?

15 MR. TODD: Yes, sir. It's the -- it -- the  
16 Section 504 prohibits discrimination on the basis of  
17 handicap against a qualified handicapped individual by  
18 recipients of federal financial assistance. And it was  
19 stipulated that these -- that this school district does  
20 receive federal financial assistance for its special  
21 education program.

22 Amber is an otherwise qualified individual.  
23 All she needs to be to be otherwise qualified at a  
24 preschool or elementary school level is that she's of  
25 the proper age and in the jurisdiction of the school

1 district.

2 QUESTION: Didn't our Davis case pretty much  
3 say there was -- there was no affirmative action  
4 requirement?

5 MR. TODD: Your Honor, the Davis case did  
6 address the question of affirmative action, but in that  
7 case you had a college student seeking to have the  
8 standards of admission altered so that she could qualify  
9 for a program that she didn't qualify for.

10 Here, you have the -- the public secondary and  
11 elementary context, and we're not asking for the  
12 lowering of standards. Congress, at the elementary and  
13 secondary level, has already made the judgment, and  
14 state laws have already made the judgment that it's a  
15 free public -- that everyone should have access to it.  
16 So it's not a question of lowering standards in order to  
17 enable people who were not otherwise qualified to become  
18 qualified, as has been sometimes the issue in some of  
19 the affirmative action cases dealt with by this Court --

20 QUESTION: I think Davis goes a little further  
21 than that, indicating that it's a question of not  
22 discriminating rather than providing special services.

23 MR. TODD: Right.

24 QUESTION: And I think the argument -- I think  
25 that your argument is much stronger under the first act

1       than it is under this act.

2               MR. TODD: Well, if -- if -- the Davis case  
3       went on to say that technological advances can bring  
4       about services which can accommodate the needs of the  
5       handicapped at no undue burden. And I think this case  
6       is a very good illustration of just such a service.

7               Its predecessor, sterile catheterization, was  
8       burdensome and somewhat expensive. The technology has  
9       produced a service which is very easy, which even a  
10      ten-year old child can do, and which makes all the  
11      difference in the world to the -- to the child's  
12      acceptance and admission.

13              And the legislative history covered not only  
14      the kind of overt discrimination when you put up a sign  
15      that say no handicapped need apply, but it also covered  
16      this example of failure to remove barriers that prevent  
17      an otherwise qualified handicapped person from admission.

18              However, as to whether -- as to which basis  
19      relief is grounded on, obviously our primary concern is  
20      that Amber receive the service and that she be enabled  
21      to participate in public school and receive this  
22      education.

23              QUESTION: Would you just automatically say  
24      that anything that violates -- that because it violated  
25      the Education Act that it violates Section 504?

1 MR. TODD: I wouldn't automatically say that,  
2 no, Your Honor. There are some --

3 QUESTION: Well, then, you -- you -- you --  
4 you think you could have just proceeded under 504 alone.

5 MR. TODD: Or under --

6 QUESTION: And -- and would have won.

7 MR. TODD: Under Education of the Handicapped  
8 Act alone also. Either -- I think that that -- and  
9 there are cases sometimes where the plaintiffs choose to  
10 go under one or the other. Here, the plaintiffs, you  
11 know, sought relief under every statute that might --

12 QUESTION: Well, has -- has it been held that  
13 -- that the Education of the Handicapped Act is not  
14 exclusive? I know that the lower court here held that.

15 MR. TODD: Right. I believe this Court  
16 recently heard arguments on that point. The --

17 QUESTION: Do you think -- and do you  
18 anticipate that that case may settle this particular  
19 issue?

20 MR. TODD: Well, it could. If you ruled that  
21 the Education of the Handicapped Act preempts 504, then  
22 that would settle that. However --

23 QUESTION: It preempts attorney's fees, too,  
24 then.

25 MR. TODD: Well, that would -- that would



1 certainly be a consequence.

2 I may say this, although I don't know in what  
3 detail you want me to argue the preemption issue, if you  
4 look at the legislative history --

5 QUESTION: Well, it's just a question of how  
6 worried you are about it.

7 (Laughter.)

8 MR. TODD: It's a long story. Actually, it's  
9 someone else's fees that are at stake.

10 (Laughter.)

11 CHIEF JUSTICE BURGER: And the fact that you  
12 have three minutes left.

13 MR. TODD: Okay. Thank you, Your Honor.

14 I think that I can just summarize by going  
15 back to the original point. This is really an access  
16 case. This is a case that poses the question of whether  
17 a child who's capable of doing schoolwork in the public  
18 schools, who's entitled by law, will be given the simple  
19 and safe and inexpensive service that will permit her  
20 access and prevent her exclusion and segregation.

21 Thank you.

22 CHIEF JUSTICE BURGER: Do you have anything  
23 further, Mr. Deatherage?

24 ORAL ARGUMENT OF JAMES W. DEATHERAGE, ESQ.,  
25 ON BEHALF OF THE PETITIONER -- REBUTTAL

1 MR. DEATHERAGE: Mr. Chief Justice, and may it  
2 please the Court:

3 Let me answer one issue or, as counsel says,  
4 the only issue, and that is access. If I read this  
5 Court's opinion in Rowley and if I read the intent and  
6 purpose of the Education of the Handicapped Act, it is  
7 -- I don't find any -- anything -- any authority to say  
8 that it's to guarantee access to any particular,  
9 specific class, program or activity. But as I believe  
10 this Court said in Rowley, it is access to special  
11 education and to an appropriate public education.

12 The underlying theory or philosophy of the  
13 Education of the Handicapped Act, in addition to its  
14 purpose of providing for early identification, proper  
15 evaluation and appropriate placement, is the  
16 individualization of an education plan for a child. And  
17 as Rowley again said, I believe in footnote 4 of that  
18 opinion, Congress recognized that not all children are  
19 going to be able to be safely educated in what is  
20 referred to as the least restrictive environment. It  
21 recognizes the health and safety conditions of a child.

22 So to characterize the issue in this case as  
23 access to a particular classroom is to disregard a  
24 record made in this case since June of 1979 which has  
25 been always, until counsel's brief, whether or not

1 medical treatment required to be prescribed by a private  
2 physician is mandated by Congress to be provided as a  
3 related service by the public schools. That is the  
4 issue.

5 QUESTION: Well, I suppose -- I suppose,  
6 Counsel, that physical therapy can often be by -- on  
7 prescription of a physician and nonetheless required to  
8 be provided by the public school under the Education for  
9 the Handicapped Act.

10 MR. DEATHERAGE: Yes, Justice O'Connor, it may  
11 be, depending on the doctor's purpose in the  
12 prescription and to the degree whether it's related to  
13 benefitting from special education. But to merely  
14 prescribe a particular physical therapy may or may not  
15 in a given case fall within the requirements of the  
16 Education of the Handicapped Act.

17 Further, the recitation of physical therapy in  
18 the statute doesn't have the limiting language volume as  
19 medical services does, which says except for diagnosis  
20 and evaluation only.

21 As to what other courts deal with the extent  
22 or parameters of physical therapy, I would not represent  
23 to this Court today. But certainly, there would appear  
24 on the face of the statute exceptions, and there are in  
25 the state plan.

1 Another issue or a matter to keep -- that's  
2 invlved in this case is remembering what qualified  
3 Amber for special education under the Act in the first  
4 place. That was an orthopedic impairment. That is what  
5 entitled her to special education. The medical  
6 treatment prescribed by the doctor in this case is for  
7 treatment of a condition completely unrelated to what  
8 qualifies her for special education. And there's never  
9 been a dispute in that in this case, and in fact, that  
10 has been stipulated to as to the orthopedic impairment,  
11 and that the neurogenic bladder to which this case is  
12 designed is not related to that.

13 Under the court's reasoning below, whatever --

14 QUESTION: Is it your position that a child  
15 with the spina bifida condition cannot qualify as a  
16 handicapped child under the Act?

17 MR. DEATHERAGE: No, Justice O'Connor, I'm not  
18 saying it cannot qualify. I only say the record in this  
19 case indicates that only the orthopedic impairment with  
20 some speech impairment is what qualified. In another  
21 case it very well could, in a more severe case.

22 QUESTION: May I ask what the orthopedic  
23 impairment was? There seems to be a great mystery about  
24 it?

25 MR. DEATHERAGE: Developmental delays in gross

1 and fine motor skills, which is why the physical therapy  
2 was designed for the improvement of gross motor skills,  
3 so the child can benefit from special education, can  
4 participate in physical activities, i.e., physical  
5 education classes offered by the school district;  
6 occupational therapy designed to develop and improve  
7 fine motor skills in which Amber was developmentally  
8 delayed, so she can grasp a pencil to write, so some day  
9 she can learn to grasp a catheter and take care of her  
10 own self.

11 QUESTION: Well, we've had comments all  
12 through the argument about an orthopedic impairment, and  
13 no one ever said what it was. Because it seemed to me  
14 we're talking basically about a urological problem, and  
15 urology and orthopedics are somewhat different.

16 MR. DEATHERAGE: Correct, Justice Blackmun.  
17 And my point is that the urology problem is not what  
18 qualifies her for special education, but is what the  
19 respondent seeks the medical treatment for.

20 QUESTION: Well, to the extent this case turns  
21 on whether -- whether under state law administering CIC  
22 is a medical service, aren't we -- aren't we entitled to  
23 rely on the court of appeals for that?

24 MR. DEATHERAGE: Justice White, let me answer  
25 it this way. As I said in my opening argument, the



1 history of this case has been a battle as between  
2 whether this is a medical service or whether it is a  
3 school health service.

4 We submit to the Court that the question is  
5 whether or not this medical treatment is required. It's  
6 not who may be qualified to perform it under either the  
7 federal act or the state act. It is the nature and  
8 purpose of the treatment.

9 QUESTION: Well, so let's suppose that it was  
10 -- that you just agreed that this was not a medical  
11 service within the -- within the meaning of -- of the --  
12 of the Act. It was not medical service. Then would you  
13 concede that this is a -- another supportive service?

14 MR. DEATHERAGE: If the fact situation in  
15 another case were different, Justice White --

16 QUESTION: Well, no. For this case.

17 MR. DEATHERAGE: In this case I cannot concede  
18 that, because the district court found that the school  
19 could not lawfully provide this treatment without a  
20 doctor's prescription.

21 QUESTION: Well, I know, but the court -- that  
22 may be true, but the court of appeals nevertheless said  
23 it was not a medical service within the meaning of the  
24 Education for the Handicapped Act, didn't it? And that  
25 nothing in state law made it so. It had to hold that.

1 MR. DEATHERAGE: The court of appeals had no  
2 facts and did not have the facts that this Court has  
3 before it now. It had no record. But in that regard,  
4 Justice Goldberg in the Tatro I opinion in his  
5 three-pronged test in dealing whether a life support  
6 system is a related service, said that excluded from the  
7 term "related services" are those health-related  
8 activities which must be performed by a licensed  
9 physician that are not provided to determine a child's  
10 medically related handicapping condition which results  
11 in the child's need for special education.

12 By looking at Texas Medical Association brief  
13 requested by the trial court, made a part of its  
14 memorandum opinion, page 25 and 6 of our brief are  
15 listed numerous services of a licensed physician that  
16 are required in this case in order for the school  
17 district to provide what is prescribed. And we have  
18 listed some seven or eight Texas Medical Association --

19 So by -- under the Fifth Circuit's own  
20 reasoning and its exclusion, in this case this medical  
21 record falls within that exclusion, because it requires  
22 the services of a licensed physician.

23 Under the reasoning of this -- of this case  
24 and of the courts below, whether the treatment  
25 prescribed by the doctor is simple or complex, whether

1 it is costly or cheap, will have to be provided by the  
2 public school, whether that treatment might be sterile  
3 catheterization, which prior to CIC was considered the  
4 treatment of choice. If a doctor, who may not be  
5 knowledgeable of the current standard of practice,  
6 prescribes sterile catheterization or another procedure  
7 to empty the bladder called purveying the bladder, and  
8 delegates that treatment to the school, under the  
9 reasoning of the courts below, the school will have to  
10 provide it or will have to challenge that prescribing  
11 physician over his standard of medical practice.  
12 They'll either have to do it or be subjected to having  
13 knowledge it's not the current treatment of choice and  
14 get going on and doing what the doctor prescribed.

15 QUESTION: Are you -- are you confident that  
16 you're not asking us to disagree with the court of  
17 appeals on a matter of Texas law?

18 MR. DEATHERAGE: I'm sorry, Justice White. Am  
19 I comfortable or --

20 QUESTION: Are you confident that you are not  
21 asking us to disagree with the court of appeals on a  
22 matter of Texas law, strictly Texas law, about Texas  
23 doctors and medicine and things like that?

24 MR. DEATHERAGE: Justice White, I'm not asking  
25 you to disagree with the interpretation of Texas law.

1 The district court looked to the Texas Medical Practices  
2 Act to answer the question. Our position is it should  
3 have looked to the state plan approved by the Secretary  
4 to answer the question.

5 CHIEF JUSTICE BURGER: Your time has expired.

6 Thank you, gentlemen.

7 The case is submitted. We'll hear arguments  
8 next in Davis against Scherer.

9 (Whereupon, at 1:37 p.m., the case in the  
10 above-entitled matter was submitted.)  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

## CERTIFICATION

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

#83-558 - IRVING INDEPENDENT SCHOOL DISTRICT, Petitioner v. .

---

HENRI TATRO, ET UX., INDIVIDUALEY AND AS NEXT FRIEND OF AMBER  
TATRO, A MINOR

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

BY

Sharon R. Connelly

(REPORTER)



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

'84 APR 23 P1:38