

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 84-433

TITLE SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS,
ET AL., Petitioners V. DEPARTMENT OF EDUCATION OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.

PLACE Washington, D. C.

DATE March 26, 1985

PAGES 1 - 48

AR
ALDERSON REPORTING

(202) 628-9300
20 F STREET, N.W.

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -x
3 SCHOOL COMMITTEE OF THE :
4 TOWN OF BURLINGTON, :
5 MASSACHUSETTS, ET AL., :
6 Petitioners, :
7 V. : No. 84-433
8 DEPARTMENT OF EDUCATION :
9 OF THE COMMONWEALTH OF :
10 MASSACHUSETTS, ET. AL. :
11 - - - - -x

12 Tuesday, March 26, 1985

13 Washington, D.C.

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:04 o'clock a.m.

17 APPEARANCES:

18 DAVID BERMAN, ESQ., Medford, Massachusetts; on behalf
19 of the petitioners.

20 ELLEN L. JANOS, ESQ., Assistant Attorney General of
21 Massachusetts, Boston, Massachusetts; on behalf of
22 the state respondent.

23 DAVID W. ROSENBERG, ESQ., Boston, Massachusetts; on
24 behalf of respondent Panico.
25

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

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
DAVID BERMAN, ESQ.,	
on behalf of the petitioners	3
ELLEN L. JANOS, ESQ.,	
on behalf of the state respondent	20
DAVID W. ROSENBERG, ESQ.,	
on behalf of respondent Panico	33
DAVID BERMAN, ESQ.,	
on behalf of the petitioners - rebuttal	44

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

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in School Committee of Burlington against the Department of Education of the Commonwealth of Massachusetts.

Mr. Berman, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID BERMAN, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. BERMAN: Mr. Chief Justice, and may it please the Court, on June 4th, 1979, the school officials of the town of Burlington conducted a core evaluation to determine the appropriate future placement for Michael Panico, a learning disabled child who is handicapped within the meaning of the Education of the Handicapped Act.

As a result of that evaluation, they determined that the appropriate placement for this child was a classroom in the Pine Glen School, which is a public school of the town of Burlington.

This was a classroom for children with special needs, and it was taught by a teacher named John McAleer, who had had considerable success in dealing with children of special needs, especially children with learning disabilities and reading disabilities such as

1 Michael then had.

2 The plan contemplated that Michael would take
3 mathematics sooner or later, but hopefully sooner, with
4 non-handicapped students, and that he would be
5 immediately integrated with non-handicapped students in
6 such non-academic subjects as athletics, music, and
7 art.

8 Before the plan was even committed to paper,
9 Michael's parents made up their mind to reject it, and
10 they did reject it as soon as they got it, on July 3rd,
11 1979. On July 17th, 1979, his parents appealed to the
12 Bureau of Special Education Appeals of the Department of
13 Education of the Commonwealth of Massachusetts, and
14 sought a hearing on their complaint that the IEP was
15 inadequate.

16 That date is a very important date, because at
17 least as of that date proceedings were pending pursuant
18 to the statute. In August of 1979, Michael was enrolled
19 in a private school in Lincoln, Massachusetts,
20 exclusively for children with learning disabilities,
21 known as the Carroll School.

22 QUESTION: Did he consult with the school
23 authorities before that transfer was made?

24 MR. BERMAN: He informed the school
25 authorities, Your Honor, that he was going to make a

1 transfer. He did not ask their permission to do so, and
2 he did not receive permission to do so.

3 QUESTION: Counsel, all this is five or six
4 years ago. Where is the youngster now?

5 MR. BERMAN: I am informed now, Your Honor,
6 that the youngster is in a private school in Beverly,
7 Massachusetts, called the Landmark School. At least
8 that is where he was when I was last informed of his
9 whereabouts.

10 Now, the hearing officer conducting
11 proceedings in the months of September, October, and
12 November of 1979, and on January 31st, 1980, she
13 rendered a decision, and in her decision, she made
14 certain findings and rulings which are not necessarily
15 consistent with each other.

16 But first of all, she said, yes, this IEP,
17 this individual educational plan -- I will call it an
18 IEP henceforth -- was appropriate. She said that Mr.
19 McAleer was indeed an excellent teacher.

20 She noted the Carroll School was a private
21 school exclusively for children with learning
22 disabilities, and she noted that the Pine Glen School
23 was a public school with opportunities for mainstreaming
24 a child, which is the word that is used to describe
25 taking a handicapped child, as federal law requires, and

1 putting him into the mainstream of activity with
2 non-handicapped children.

3 Nevertheless, she did not uphold the IEP that
4 was written earlier. She said, first of all, that
5 Michael needed a form of teaching reading known as
6 Orton-Gillingham, that he needed small classes, that he
7 needed a supporting peer group, meaning other children
8 who have learning disabilities, and he needed freedom
9 from distraction.

10 Now, except with respect to the supporting
11 peer group, petitioners have never doubted that Michael
12 needed all these things, but they never could understand
13 why that would be a basis for rejecting their plan,
14 since he would have received all of them at the Pine
15 Glen School from Mr. McAleer.

16 Finally, she said over a long period of time
17 these school authorities have violated any number of
18 procedural rights that belong to this child, and
19 therefore I doubt whether they have the capacity to
20 implement this plan in the future.

21 Now, again, it is very unclear just what she
22 meant by that. Did she mean that the school authorities
23 were going to yank this child out of the class in the
24 middle of the year or do something like that? No one
25 can really answer that question, I think, very well. If

1 that is what she meant, she certainly had no basis
2 whatsoever for making that kind of judgment.

3 On February 26, 1980, less than a month after
4 that opinion was rendered, the petitioners, who are the
5 School Committee of the Town of Burlington and the town
6 itself, brought an action in the United States District
7 Court for the District of Massachusetts under Title 20
8 of the United States Code, Section 1415(e)(2).

9 QUESTION: Mr. Berman, does it strike you as
10 at all odd that Congress should have given the school
11 authorities the right to appeal from the superintendent
12 of education's decision to the federal court?

13 MR. BERMAN: Well, no, it doesn't, Your Honor,
14 really strike me as odd, although I am constrained to
15 admit that it did strike me odd when I first thought
16 about the statute, and I thought, why would Congress
17 want to give the school authorities this kind of power
18 to seek review?

19 But then I realized what Congress had in
20 mind. Congress realized that education of the
21 handicapped was to be a joint effort, and it was a joint
22 effort that involved the parents, that involved the
23 states, and that involved the local educational
24 authorities.

25 And I think Congress recognized that local

1 educational authorities, Your Honor, have an interest in
2 seeing that the programs that they spend vast amounts of
3 money to set up are vindicated in the courts if need be,
4 and that it is made clear through the courts that they
5 are capable of educating handicapped children, because
6 that is what they are supposed to do.

7 They are not supposed to dump handicapped
8 children on the private schools. They are supposed to
9 integrate them into the public schools. So that is why
10 I think Congress gave the local educational authority
11 that right to seek review.

12 Now, in July of 1980 -- this is about five
13 months after the action was brought -- the school
14 authorities asked Mr. Panico if he would make his son
15 available for a new evaluation that would have led
16 perhaps to a new or amended IEP. Mr. Panico flatly said
17 no, I will not do it.

18 A few months later, Mr. Panico said, well,
19 maybe I will do it, but you have to hire all new people,
20 who have no connection with your school, if you want me
21 to cooperate, and that is something that of course the
22 school authorities refused to do.

23 In February of 1981, the Department of
24 Education threatened to cut off all of the federal funds
25 to the petitioners unless they started funding Michael's

1 education, which was way past the IEP, I should point
2 out, way past the year for which the IEP was drawn at
3 the Carroll School.

4 Faced with that ultimatum, the School
5 Committee did start in February of 1981 to pay for the
6 tuition of Michael at the Carroll School, and pay for
7 his transportation, with the strict understanding,
8 however, that if the petitioners prevailed after a
9 trial, the petitioners would have that money reimbursed
10 to them, and indeed, that understanding is enshrined in
11 the first opinion that was to be rendered by the United
12 States Court of Appeals for the First Circuit in this
13 case, and that was rendered in June of 1981.

14 In May of 1982, there was a trial. The judge
15 took the hearing officer's decision as prima facie
16 evidence on all facts therein stated. She said the
17 burden of proof was on the school department,
18 petitioners here, for the year 1979-1980, and for
19 subsequent years the burden of proof was on the
20 parents.

21 The trial produced on both sides unusually
22 competent expert testimony, and -- I say both sides. I
23 should say on the side of the parents and on the side of
24 the School Committee. The Department of Education
25 offered no evidence at the trial.

1 But one thing about that testimony I think is
2 terribly important. The respondent's expert, Dr.
3 Levine, never stated an opinion as to what was an
4 appropriate placement. He wouldn't touch that subject.

5 The petitioner's expert, Dr. Kinsmore, was
6 very forthright on it. He said that not only did he
7 find the Pine Glen School to be the equal of the Carroll
8 School, he thought it was superior to the Carroll
9 School.

10 He pointed out that the progress that the
11 child had made in three years at the Carroll School had
12 been no better than the child's progress during his
13 first three years when he wasn't in any special school
14 at all, but was merely getting one hour of tutorial at
15 the Memorial School.

16 And both doctors agreed -- a very important
17 point, I dare say -- that the type of remediation that
18 would have been offered at the Pine Glen School was a
19 good remediation for this child.

20 QUESTION: Mr. Berman.

21 MR. BERMAN: Yes, Your Honor.

22 QUESTION: Do you plan to argue the legal
23 issue that we have to resolve in this case?

24 MR. BERMAN: Yes, Your Honor. I shall --

25 QUESTION: Because I didn't think that we were

1 going to review the propriety of the IEP here. I
2 thought we had granted cert to decide the legal issue,
3 whether tuition was reimbursible under 1415's
4 provisions, assuming it is decided at the trial court
5 level on remand that an adequate IEP was not offered.

6 MR. BERMAN: Your Honor, there are actually
7 two issues as to which this Court has granted
8 certiorari. One is the effect of 1415(e)(3), and the
9 second one, which is highly related to it, is whether
10 damages, or tuition reimbursement, whatever one wishes
11 to call it, can be awarded under 1415(e)(2).

12 I would like to address 1415(e)(3) first. And
13 this is a statute which says, "During the pendency of
14 any proceedings conducted pursuant to this section,
15 unless the state or local educational agency and the
16 parents or guardian otherwise agree, the child shall
17 remain in the then current educational placement of such
18 child, or if applying for initial admission to a public
19 school, shall with the consent of the parent or guardian
20 be placed in the public school program until all such
21 proceedings have been complete."

22 Now, I deliberately read both clauses of that
23 statute, not just the first clause, because one of the
24 arguments that respondents make in their briefs,
25 especially the respondent Panico, is that this statute

1 only bars the local educational agency or the state
2 educational agency from changing the placement of a
3 child while proceedings are pending.

4 It has no bar whatsoever against the parents,
5 and that can't be, because in the second clause, the
6 very same sentence of this statute, when Congress
7 intended to say that only the consent of the parents is
8 needed, it said so in very clear language. It said,
9 "with the consent of the parent or guardian." When
10 Congress wanted an agreement of both, it said so again
11 in perfectly clear language.

12 QUESTION: Mr. Berman, could you help me?
13 Where is the statute in the papers before us? I seem to
14 have trouble --

15 MR. BERMAN: Well, it is found amongst many
16 other places at Page 28B of the statutory appendix to
17 the petition for writ of certiorari. It is also found
18 in the appendix to the United States Court of Appeals
19 for the First Circuit, which is the last opinion in the
20 appendix to the petition for writ of certiorari.

21 QUESTION: It is at Page 127A.

22 QUESTION: 127A? Thank you.

23 MR. BERMAN: Now, there is yet another reason
24 why the suggested reading that the parents would give
25 this statute is untenable, because -- notice what

1 Congress says. It says during the pendency of any
2 proceeding. Now, if we turn back to Section 1415(b)(2),
3 we make a discovery that it is only the parent who can
4 actually commence proceedings, and they commence their
5 proceedings when they make a complaint about an EIP.

6 They say this IEP is a bad IEP, it is not good
7 for our child, and that is how proceedings are
8 commenced. So, who is going to change -- who is
9 likeliest to change the placement of a child while the
10 proceedings are pending? Plainly it is the parents. It
11 is not going to be the School Department. Now --

12 QUESTION: Mr. Berman, your brief acknowledged
13 that there was no effective placement in effect when the
14 new IEP was drawn up. If that is so, then how was
15 1415(e)(3) violated when the parents enrolled Michael in
16 Carroll School?

17 MR. BERMAN: I don't think my brief, Your
18 Honor --

19 QUESTION: Page 42.

20 MR. BERMAN: -- acknowledges -- it says, if
21 there was no effective placement. That still would not
22 give them the right to make a change in placement.
23 There was no --

24 QUESTION: Well, it just didn't seem to meet
25 the language of the statute.

1 MR. BERMAN: There is no effective placement
2 in the sense that the parents have rejected the IEP, but
3 there is certainly a placement, Your Honor, in the
4 practical sense that there is a classroom to which this
5 child is expected to report the following September.

6 That is a placement in the sense that the
7 school authorities have made a place for this child in
8 this classroom and told the teacher to expect him there,
9 and told the parents --

10 QUESTION: And it is effective without the
11 parents' consent, in your view?

12 MR. BERMAN: Excuse me, Your Honor?

13 QUESTION: It is effective without the
14 parents' agreement, in your view?

15 MR. BERMAN: As an interim basis. We are
16 talking about an interim placement. Yes, Your Honor.
17 On an interim basis it is effective.

18 Now, I would -- I think, you know, we could
19 have a situation where the parents wanted to keep the
20 old placement, and that might raise a very different
21 situation, but of course here the parents did not want
22 the old placement kept at all, so that was never really
23 a problem. Now --

24 QUESTION: May I just be sure I understand,
25 because this is why I was looking for the statute. In

1 your view, the words "the then current educational
2 placement of the child" refer to the school he was
3 scheduled to attend in the fall rather than the one he
4 had been in in the spring?

5 MR. BERMAN: That's correct, Your Honor.

6 QUESTION: Even though he hadn't yet enrolled
7 and the parents hadn't consented?

8 MR. BERMAN: That is correct, Your Honor,
9 yes. I think that I would really suggest that the way
10 Congress has written 1415(e)(3), placement of a
11 handicapped child is a little like domicile. You never
12 lose it.

13 A handicapped child at all times has a
14 placement, which is the placement to which he will be
15 assigned some time in the future or to which he is
16 presently assigned. Just as he doesn't lose his
17 placement over the Christmas recess, so he doesn't lose
18 his placement over the summer recess simply because it
19 hasn't taken effect yet.

20 QUESTION: The words "shall remain" are a
21 little bit hard to fit into that. You are asking that
22 he remain in a place he has never been. "Shall remain
23 in the then current placement."

24 MR. BERMAN: Well, I would have to agree with
25 Your Honor that the word "remain" is a troublesome word,

1 but I think Congress in most instances considers
2 remaining in the sense of remaining in a placement that
3 has been put there on paper as opposed to remaining
4 physically in a placement.

5 QUESTION: Isn't that some support for the
6 position taken by your opponents that the purpose of
7 this subsection of the statute was to prevent the
8 removal by school authorities of a child who was in an
9 effective placement without the consent of the parents?

10 I mean, there is some justification.

11 MR. BERMAN: That is -- the use of the word
12 "remain" is some support for that, Your Honor.

13 QUESTION: Yes, it is.

14 MR. BERMAN: Yes, I agree with that.

15 Now, the question of damages. Oh, before I
16 get to that, the word "agree." Both respondents argue
17 that where the parents prevail at the administrative or
18 due process level, as it is sometimes called, there has
19 been an agreement with respect to placement.

20 I disagree with that. What they have really done when
21 they have written that is to suggest that when Congress
22 said during proceedings under this section, they really
23 meant proceedings under 1415(c). That is not what
24 Congress said. Congress did not say proceedings under
25 1415(c). It said, while proceedings under this section

1 are pending.

2 Now, what the parents really argue, and I
3 think this is the heart of their argument, is that if
4 1415(e)(3) is construed as Congress wrote it, it is
5 unworkable. It will not accomplish its purpose.

6 But I think there is a fallacy that runs
7 through that argument, and the fallacy is that most
8 placements are going to be bad; parents are going to be
9 right most of the time, school authorities are going to
10 be wrong most of the time.

11 If you take the reverse of that proposition
12 and assume that most of the time, as was the case here,
13 the school authorities will be right and the parents
14 will be wrong when they disagree, and if you allow room
15 for agreement, for a new interim placement while
16 proceedings are pending, and you allow room, as we think
17 you should, for a court to issue a preliminary
18 injunction in cases of an absolutely dreadful placement,
19 then I think the statute will not affect the efficacy of
20 1415(e)(3) at all.

21 Now, the subject of damages. We seem to be
22 involved here in a semantic argument, and I say that
23 with full remembrance of Justice Frankfurter's
24 admonition that most of the business of this Court does
25 involve semantics.

1 The parents and the School Department say,
2 well, awarding damages, awarding reimbursement is not
3 the same as awarding damages. I don't understand that
4 argument. When reimbursement is awarded for prior
5 tuition, that is as much an award of damages as any
6 other kind of damages that you may get, and indeed
7 damages in law very often involve reimbursement.

8 Reliance damages which the Court of Appeals
9 talked about from January of 1980 through June of 1980,
10 I don't understand that either. How could the parents
11 possibly have relied on a decision that they knew was
12 being appealed?

13 QUESTION: May I ask this question?

14 MR. BERMAN: Yes, sir. Yes, Justice Powell.

15 QUESTION: I am confused by your use of the
16 word "damages." Are any damages being claimed in this
17 case other than reimbursement of tuition and the
18 additional expense of sending the child to the private
19 school?

20 MR. BERMAN: No other damages are the subject
21 of the case in its present posture, Your Honor.

22 QUESTION: Yes, so that when you use the term
23 "damages," you are talking about tuition and
24 reimbursement for other expenses, not damages in the
25 tort sense that may include punitive damages under some

1 circumstances?

2 MR. BERMAN: That is correct, Your Honor. And
3 as far as procedural damages go, everyone talks about
4 procedure in terms of the statements in Rowley made by
5 Justice Rehnquist that procedures are at the very heart
6 of this -- of EHA, and I agree with that. Petitioners
7 agree with that.

8 The problem is that when we are talking about
9 procedures, in Rowley this Court was talking about those
10 procedures in 1415 that were meant to safeguard a
11 parent's right to a due process hearing and the parent's
12 right to obtain information.

13 I don't believe this Court in Rowley, when it
14 suggested that procedures were at the heart of EHA,
15 meant any, any kind of procedure anywhere, no matter how
16 recondite, no matter how technical, to say, well, any
17 time there is a violation of that kind of procedure,
18 there will be damages under EHA.

19 I don't believe that this is what this Court
20 meant in Rowley, and I think when the Court of Appeals
21 thought it did, it went wrong.

22 Thank you. I would like to save as much time
23 as I have for rebuttal.

24 CHIEF JUSTICE BURGER: Ms. Janos.

25 ORAL ARGUMENT OF ELLEN L. JANOS, ESQ.,

1 ON BEHALF OF THE STATE RESPONDENT

2 MS. JANOS: Mr. Chief Justice, and may it
3 please the Court, this case presents two question of
4 statutory interpretation involving the Education of the
5 Handicapped Act.

6 It is the Department of Education's position
7 that the language of the Act, the history of the Act,
8 and its purpose clearly demonstrate Congress's intent to
9 allow parents to be reimbursed for private school
10 tuition at the conclusion of judicial proceedings.

11 QUESTION: What do you think Congress had in
12 mind about parents taking these steps on their own
13 initiative unilaterally, without consultation?

14 MS. JANOS: We don't think Congress intended
15 to bar parents from making traditional educational
16 choices. We don't think that the plain language of that
17 section, which clearly does not say anything about
18 reimbursement or bar, does act as a bar under an
19 otherwise appropriate award under the statute.

20 QUESTION: Do you mean Congress contemplated
21 that the parents could pick any school any place, any
22 institution they wanted?

23 MS. JANOS: Congress contemplated private
24 school placem=ents under the Act. That is certain. And
25 I don't think Congress intended to displace traditional

1 choices on the part of parents to place their child in
2 an appropriate school.

3 On the other hand, Congress intended, as was
4 followed in this case, for parents to follow all the
5 procedural requirements of the Act, that is, go through
6 the educational planning, as the parents and the town
7 did here; if they disagree, to file a claim with the
8 administrative agency, as they did here; and then wait
9 for that decision from the administrative agency, which
10 in this case, of course, was in favor of the parents;
11 and then if they are entitled to reimbursement after a
12 favorable decision, then that is when the request is
13 made.

14 QUESTION: What if the decision had been
15 unfavorable? What if the decision had been that the
16 local school's plan for the child was quite proper?

17 MS. JANOS: If the decision had been
18 unfavorable, the parents are then taking a risk by
19 appealing to state or federal court that they may not
20 prevail, and that they may not get any reimbursement.
21 So that they probably would not get reimbursement.

22 QUESTION: So they have no -- if the school is
23 providing a proper plan, the parents unilaterally may
24 not remove them and get reimbursement?

25 MS. JANOS: We believe they can remove them at

1 any time they want.

2 QUESTION: Yes. Oh, yes.

3 MS. JANOS: But they may not be able to
4 collect for reimbursement --

5 QUESTION: Exactly.

6 MS. JANOS: -- if the state finds that the
7 town's plan is appropriate, which was not the case here,
8 and if the Court ultimately finds that the town's plan
9 is appropriate.

10 QUESTION: But ultimately, ultimately there
11 was a court finding that the plan was all right.

12 MS. JANOS: That court finding has been set
13 aside, Your Honor. The First Circuit set aside the
14 decision, has remanded the case for a new trial, so that
15 there has been no final judicial determination as to the
16 appropriateness of the town's plan. The only decision
17 in effect, if you will --

18 QUESTION: What did the Court of Appeals do
19 with that plan? What did it find wrong with the
20 school's plan?

21 MS. JANOS: The Court of Appeals found that
22 the District Court failed to take into consideration a
23 number of factors that the state hearing officer had.
24 Some of those factors included substantive and
25 procedural violations on the part of the town in

1 preparing that plan and in preparing previous plans.

2 QUESTION: Well, suppose the District Court
3 considers everything it is supposed to and still rules
4 against the parents? And still holds that the plan is a
5 good plan?

6 MS. JANOS: We agree with the First Circuit's
7 decision that at least for the period, the year period
8 that the state ordered the child in the private school,
9 the parents should not be financially responsible for
10 that period.

11 For the other two years, that question remains
12 open, and the Court articulated certain criteria,
13 certain equitable factors which the District Court on
14 remand should take into consideration.

15 QUESTION: What are these procedural
16 violations that the state hearing officer and the Court
17 of Appeals felt were important?

18 MS. JANOS: The year before the town had
19 proposed a plan for the child and had in the middle of
20 the year or actually closer to the beginning of the year
21 cut the child's special education reading time in half
22 without any notice to the parents.

23 QUESTION: How did the Court of Appeals feel
24 that that bore on the plan now proposed?

25 MS. JANOS: The Court of Appeals believed the

1 District Court should consider that in determining
2 whether the town had the ability and the capacity to
3 implement that.

4 QUESTION: Does that make much sense to you?

5 MS. JANOS: To some extent it does. To some
6 extent there are repeated and continuing procedural
7 violations.

8 QUESTION: Well, were there repeated and
9 continuing procedural violations?

10 MS. JANOS: There were -- the hearing officer
11 in this case found yes, and we believe yes.

12 QUESTION: What were they in addition to the
13 one you have already given?

14 MS. JANOS: In earlier years the town had
15 failed to notify the parents regarding certain meetings
16 that were supposed to take place.

17 QUESTION: That is all now to be assessed
18 against the school board on this new plan?

19 MS. JANOS: That is all to be taken into
20 consideration in two respects on remand. In one
21 respect, whether that affected -- whether they were so
22 serious as to affect the appropriateness of the plan.

23 QUESTION: How could procedural violations in
24 a preceding year affect as plan that is now up on the
25 merits?

1 MS. JANOS: It might affect the town's ability
2 to implement a new plan. If they have shown in the past
3 -- it may not, of course. I mean, we need to flesh
4 these out at trial and see exactly what they were. It
5 may not. But it may affect the town's ability to
6 implement the plan.

7 Mr. Rosenberg will address in more detail the
8 parents' right to move their child to a private school,
9 and I would just like to address the District Court's
10 statutory authority under Section (e)(2) to award
11 tuition reimbursement for private school tuition.

12 I would just like to state in response to Mr.
13 Berman that we disagree vigorously that the state
14 hearing officer found the plan appropriate.

15 She did not. She found the plan inappropriate
16 based on, among other things, the ability of the
17 classroom teacher to teach this particular child, and
18 she felt that the type of children that were in this
19 class were not suited to the child that is involved in
20 this case.

21 So, she found the plan inappropriate, and then
22 she found other procedural violations as well.

23 QUESTION: Who ultimately passes on the
24 appropriateness of the amount of the cost?

25 MS. JANOS: I believe the First Circuit has

1 instructed the District Courts to determine at the
2 conclusion of the judicial proceedings what would be the
3 appropriate amount of reimbursement if indeed
4 reimbursement is sought, and instructed the District
5 Courts to take into consideration the prevailing party,
6 of course, and other traditional equitable factors. So
7 it would be the District Court.

8 QUESTION: Well, I would assume that if the
9 parents unilaterally decided that some specialist in
10 Paris or Geneva was the best remedy for the problem, if
11 they sent the child off abroad, they might have
12 difficulty collecting all the costs. Is that not so?

13 MS. JANOS: They might have difficulty in that
14 situation, yes.

15 The factual circumstances surrounding the
16 placement of the child in a private school should and
17 will be considered by the District Court if and when the
18 town requests reimbursement from the parents.

19 The First Circuit told the Court to look at
20 the totality of the circumstances, and that is what we
21 are really talking about when you are seeking an award
22 under statutory language that allows the Court to grant
23 appropriate relief.

24 Is it appropriate under the facts and
25 circumstances of this case? And that is really all the

1 First Circuit has said, and we believe that that is a
2 fair reading of the statute, that, Number One, tuition
3 reimbursement, given the design and nature of the
4 statute, that is, that handicapped children are entitled
5 to a free and appropriate public education, that that
6 means education at no cost to parents, without charge,
7 that an award of tuition reimbursement under appropriate
8 circumstances is simply the allocation of financial
9 responsibility for an appropriate placement.

10 And here, of course, we have a placement that
11 has been in effect for the last five years that the
12 state ruled was the appropriate placement. Ultimately
13 the District Court, of course, can review that, but in
14 the meantime we have a period of five years in which the
15 child has been in a placement ordered by the state
16 educational agency.

17 QUESTION: Ms. Janos, in your reading of
18 Section 1415(e)(3), do you think that the language of it
19 should be interpreted to mean that the state in this
20 case and the parents have agreed?

21 MS. JANOS: Yes, that's correct, Your Honor.

22 QUESTION: And it is your position that the
23 state as such by virtue of the board's ruling has agreed
24 with this placement?

25 MS. JANOS: That's correct. We also agree

1 that in this particular case, the town and the parents
2 have otherwise agreed that the placement which was in
3 effect, the then current educational placement, was not
4 the appropriate placement for the child, so that there
5 really in this case have been two agreements.

6 QUESTION: Now, if we were to disagree with
7 the Court of Appeals on the meaning of 1415(e)(3), do I
8 understand that Massachusetts has a state law that would
9 allow reimbursement of tuition in any event?

10 MS. JANOS: That's correct, Your Honor.

11 QUESTION: Regardless of how we decide --

12 MS. JANOS: Well, this case --

13 QUESTION: -- 1415 should be interpreted?

14 MS. JANOS: Not exactly. This case was
15 brought under both the state and federal statute. The
16 First Circuit in the first go-round dismissed the state
17 case and allowed this case to proceed only under the
18 federal statute.

19 QUESTION: It said it was preempted.

20 MS. JANOS: Yes.

21 QUESTION: The state statute was preempted.

22 MS. JANOS: That's correct. And allowed it to
23 dismiss only -- to proceed only under the federal
24 statute.

25 QUESTION: All right, so that question is not

1 before us, the --

2 MS. JANOS: No, it is not. It is not. I
3 would, in my remaining few minutes, because I am going
4 to yield to Mr. Rosenberg, who will discuss in more
5 detail (e)(3), I would like to emphasize that tuition
6 reimbursement does not impose any additional financial
7 burdens on the town. It imposes only that financial
8 responsibility for providing an appropriate placement,
9 and that is clearly what Congress intended and what the
10 Act requires.

11 In many cases, and this is one of them,
12 tuition reimbursement would be the only appropriate
13 relief, the only meaningful relief for parents who
14 choose to exercise their rights and go through the
15 administrative process as they have done here.

16 In response to your question earlier, Justice
17 Rehnquist, we do agree that we think it is odd that
18 Congress would have allowed towns to appeal to federal
19 court, at least, and embroil the federal courts into a
20 dispute between the towns and the state as to the
21 appropriate educational placement.

22 QUESTION: Yet it seems to have done that.

23 MS. JANOS: It seems to have done that.
24 Perhaps it really means the towns should appeal to state
25 court and let the state court deal with those internal

1 problems as opposed to the federal courts.

2 We believe the legislative history, at least
3 on -- and I am addressing myself to (e)(2), the right to
4 tuition reimbursement -- supports our reading of the
5 plain language of the statute. And as I stated, the
6 purpose of this statute is to provide handicapped
7 children with a free and appropriate public education.

8 Requiring parents to choose either a free or
9 an appropriate education could not be what Congress
10 intended. Awarding tuition reimbursement would
11 encourage towns at the outset to provide an appropriate
12 plan that the child will be in an appropriate placement
13 during the pendency of the proceedings.

14 And we believe that the equitable criteria,
15 the factors articulated below, that is, that the parties
16 should cooperate with each other, they should act in
17 good faith towards each other, those traditional
18 equitable factors should be considered in an award of
19 tuition reimbursement.

20 This statute requires a long-term partnership
21 between towns and parents. They must work together year
22 after year devising educational plans, and in a request
23 for tuition reimbursement it is certainly appropriate to
24 take into account factors such as good faith and
25 compliance with the Act.

1 QUESTION: May I ask this question?

2 MS. JANOS: Yes.

3 QUESTION: Assuming there has been
4 cooperation, and finally in the end the parents and
5 school district disagree. Which of those two parties
6 has the burden of proving the appropriateness of its
7 position or the parents' position?

8 MS. JANOS: The party who is appealing from
9 the state agency decision should bear the burden of
10 overturning that state agency decision.

11 QUESTION: That means the parents?

12 MS. JANOS: In this case, of course, the town
13 appealed. The parents won at the state agency level,
14 and the town appealed, and we believe that the town
15 bears the burden of showing that in fact it had an
16 appropriate plan for the child.

17 QUESTION: The parents in this case finally
18 placed the child in a school that had not been approved
19 by the school district?

20 MS. JANOS: That was not in the plan. That's
21 correct. It had been approved by the state once the
22 parents filed their appeal and went to the state
23 hearing.

24 QUESTION: Yes.

25 MS. JANOS: The parents, of course, are in a

1 difficult choice at that point when they have -- in this
2 case there was advice from the child's teacher and the
3 child's doctor that the school could not offer an
4 appropriate placement. This was in the summer. And
5 they had a choice to make.

6 And if we take petitioner's reading of that
7 statute, that child would still be in that what we
8 consider to be the inappropriate placement for the next
9 five years. We don't think Congress intended to keep
10 children in inappropriate placements, and we think that
11 an award of tuition reimbursement under appropriate
12 circumstances --

13 QUESTION: Are you suggesting that unless we
14 agree with you, the local school would have left the
15 child in that placement that the parent and the locals
16 agreed was inadequate, was not right?

17 MS. JANOS: If we take the petitioners'
18 reading of that statute, the parents cannot move their
19 child --

20 QUESTION: Well, I thought --

21 MS. JANOS: -- and the child would have had to
22 remain in that --

23 QUESTION: Well, that's right, but the school
24 wouldn't have left him in that inappropriate placement.
25 The school would have implemented their proposed

1 placement, I suppose.

2 MS. JANOS: Well, it is their proposed
3 placement which our state found inappropriate, so
4 that --

5 QUESTION: Well, that may be. The school
6 easily could have moved him to another school.

7 MS. JANOS: They could have, of course, but
8 then they would need to go through all of the procedures
9 for removing the child.

10 QUESTION: We are only dealing here with the
11 proposed placement --

12 MS. JANOS: That's correct.

13 QUESTION: -- that the school district had
14 proposed.

15 MS. JANOS: That's correct.

16 QUESTION: And which the parents and the state
17 have found was inappropriate.

18 MS. JANOS: That's correct, and which is now
19 going back for trial to determine that.

20 I will yield the rest of my time to Mr.
21 Rosenberg. Thank you very much.

22 CHIEF JUSTICE BURGER: Mr. Rosenberg.

23 ORAL ARGUMENT OF DAVID W. ROSENBERG, ESQ.,

24 ON BEHALF OF RESONDENT PANICO

25 MR. ROSENBERG: Mr. Chief Justice, and may it

1 please the Court, I want to address the three factual
2 points that will, I hope, place the question of the
3 appropriate construction of 1415(e)(3) in proper context
4 for the Court.

5 First of all, the question of whether in this
6 particular case the town and the parents otherwise
7 agreed that the then current placement of Michael Panico
8 should be changed, about that point I think there should
9 be no dispute. The child was in a school known as the
10 Memorial School.

11 He was in a particular kind of placement known
12 in the jargon as a 502.2 prototype, which means that he
13 was in a class, a regular class at least 75 percent of
14 the time, and he was going to be in a special class 25
15 percent of the time.

16 Now, in the spring of 1979, what the school
17 proposed was to change that placement, to change his
18 then current placement in two senses of the word.
19 First, physically. They were going to move him to a
20 totally different school, the Pine Glen School.

21 Secondly, they were going to put him in a
22 different type of prototype, namely, a 502.4 prototype,
23 which means that the child would have been in a
24 substantially more restricted placement in which he was
25 in the school in a special class at least 75 percent of

1 the time.

2 Now, the parents and the school both agreed
3 that the child's then current placement was not
4 appropriate, so on the facts of this case it appears to
5 me that the entire operation of 1415(e)(3) does not even
6 come into play.

7 QUESTION: Of course, you and your opponent
8 disagree on what the then current placement was.

9 MR. ROSENBERG: I understand that we
10 disagree. I am simply saying that under 1415(e)(3), the
11 then current educational placement is not a really
12 mystical concept. It is a factual question. What was
13 the child's --

14 QUESTION: Do you think it is perfectly clear
15 that during the summer vacation period, which is what we
16 are talking about, the then current period refers to the
17 past rather than the future?

18 MR. ROSENBERG: That is my --

19 QUESTION: It seems to me one can argue it
20 either way, is all I am suggesting.

21 MR. ROSENBERG: In my view, the then current
22 placement was where the child was at the time the IEP in
23 question --

24 QUESTION: He was on vacation. He was on
25 vacation, wasn't he?

1 MR. ROSENBERG: Not at the time the individual
2 educational plan which is the subject of this entire
3 proceeding, was being constructed. He was in another
4 school. The plan was proposed for the next school year,
5 and that is what this long litigation has been all
6 about, what the next school year's plan and subsequent
7 years' would be.

8 QUESTION: Don't we -- excuse me.

9 QUESTION: There is something else that is not
10 clear. The proposal was not in writing. Was there an
11 actual proposal --

12 MR. ROSENBERG: Yes, there is --

13 QUESTION: -- a concrete proposal?

14 MR. ROSENBERG: There is --

15 QUESTION: Verbal?

16 MR. ROSENBERG: Yes, Your Honor, there --

17 QUESTION: It was verbal?

18 MR. ROSENBERG: The proposal which the town
19 made is found in the joint appendix. It is an
20 individual educational plan. It goes on for eight or
21 ten pages. And it contains elements of an individual
22 educational plan. The placement, that is, once you
23 write the plan, where do you put the child, that is not
24 or may not be specifically in the written language, but
25 that was going to be in this gentleman, Mr. McAleer's

1 class.

2 QUESTION: Mr. Rosenberg, don't we have
3 another threshold question as to what is the relevant
4 date for deciding what the last current placement was?
5 Because you are referring to the date of the plan, which
6 would have been during the earlier year. He refers --
7 your opponent refers to the date the proceedings had
8 started, I think, July, and the statute says during the
9 pendency of any proceeding, the then current placement
10 shall be --

11 MR. ROSENBERG: Well, I --

12 QUESTION: Isn't there room for argument on
13 which is the right date to focus on?

14 MR. ROSENBERG: There is room for argument
15 because it has been argued. I don't frankly concede the
16 point that what Congress was looking at at this
17 particular statute when they used the word "the then
18 current educational placement" is the one that was in
19 place in the summer after the parents had initiated the
20 administrative procedure to challenge the plan, which is
21 exactly, of course, what Congress intended the parents
22 to have the right to do.

23 So, the second fact that I would like to
24 emphasize --

25 QUESTION: Could I just -- excuse me. Even if

1 you are right, the parent and the school agreed that his
2 present placement was inappropriate.

3 MR. ROSENBERG: That's correct.

4 QUESTION: But the placement was still --
5 there was still a placement.

6 MR. ROSENBERG: That's right.

7 QUESTION: And just because they disagreed, or
8 just because they agreed on that and disagreed on the
9 new placement didn't remove the fact that there was a
10 placement.

11 MR. ROSENBERG: Well, there was a placement,
12 and it was in the Memorial School --

13 QUESTION: So I don't understand how you can
14 argue that there is no room for 1415(e)(3) at all,
15 because there was a placement.

16 MR. ROSENBERG: There was a placement, and it
17 would be the height, I think, of absurdity to have the
18 child placed in a placement, the Memorial School, which
19 both the town and the parents had agreed was
20 inappropriate.

21 QUESTION: Well, it may also be absurd then to
22 say that therefore 1415(e)(3) has no place at all
23 because you cannot consider the new placement.

24 MR. ROSENBERG: It may well be.

25 QUESTION: It certainly -- at least there was

1 a placement. The school didn't want him out of the
2 school system.

3 MR. ROSENBERG: That's correct.

4 QUESTION: And that is certainly one -- one
5 aim of the Act is to have the public schools provide
6 these placements.

7 MR. ROSENBERG: That's correct. But the
8 primary aim of the Act, in my view, is to make sure that
9 a child is provided with a free, appropriate public
10 education, and in the summer of 1979, the parents of
11 Michael Panico were faced with a dilemma.

12 They had been told by, among other people, a
13 reading specialist in the school, the Burlington
14 schools, a Catherine Black, that the proposed --
15 placement proposed by the town was not appropriate for
16 that child.

17 And they had, based on that recommendation,
18 plus recommendations from neurologists at Massachusetts
19 General Hospital, rejected the plan and exercised their
20 rights in complete conformity with Massachusetts and
21 federal regulations to trigger an administrative
22 hearing.

23 Now, that hearing was, through no fault of the
24 parents, not going to be scheduled until well after
25 September of 1979, and consequently in September of 1979

1 or more appropriately late August they had a dilemma.
2 Do they place the child in the proposed placement which
3 their -- the people they had consulted, including a
4 school teacher, had informed them was inappropriate for
5 the child, or do they in fact place the child in the
6 placement they believed was appropriate, go through the
7 hearing process, and if at the end of the hearing
8 process their decision or their belief was upheld, then
9 the hearing officer or eventually the court in their
10 view would retroactively grant them tuition
11 reimbursement from the beginning of the year.

12 QUESTION: What if the child is being
13 mainstreamed under this type of program and has been in
14 placement in a sixth grade, in a school district which
15 has an elementary school that goes only through sixth
16 grade, then in the next year he would normally be
17 expected to go to junior high school, in a different
18 building, a different school.

19 Now, I think these things probably arise
20 during the summer. What is the child's current
21 placement during the summer between sixth grade and
22 seventh grade?

23 MR. ROSENBERG: Well, Your Honor, they do not
24 in the normal case, with all due respect, arise in my
25 view if people are doing -- following the regulations

1 properly in the summer. They arise in --

2 QUESTION: Well, whether they arise or not,
3 what is the child's placement during the summer between
4 the sixth and seventh grades?

5 MR. ROSENBERG: It is the prior placement.
6 The then current placement, I think, is what was
7 intended.

8 QUESTION: And would it be a new placement for
9 the child to move in the normal progress of age to the
10 seventh grade?

11 MR. ROSENBERG: Well, in that case, Your
12 Honor, I think if he was simply moving from the same
13 type of class, let's say a regular sixth grade to a
14 regular seventh grade class, I believe it would be
15 difficult for me to maintain that the sixth grade was
16 the correct placement.

17 In this case we are dealing, as I have
18 explained, I think, before, that the school wanted the
19 child placed in a totally different kind of educational
20 environment. Now, let me --

21 QUESTION: In other words, placement may not
22 refer at all to the normal progression of a child within
23 the same type of class in the public school system. But
24 a change would refer to the type of educational
25 program.

1 MR. ROSENBERG: That's what I believe.

2 Now, let's assume because it is really the
3 difficult task in front of this Court that it is clear
4 that the child's -- that the parents did something that
5 the town characterizes as "violating" 1415(e)(3). Let's
6 assume that the placement was changed unilaterally by
7 the parents.

8 Now, in my view, the statute on its face does
9 not contain the sanction or the bar or the
10 jurisdictional elements that the town would urge this
11 Court to accept. There is nothing on the face of the
12 statute which says, if you "violate" the statute, you
13 lose your right to reimbursement.

14 Now, I have argued in our brief that the real
15 point of this section was that in fact prior to the
16 passage of the Act there was a practice of excluding
17 children from the public schools who were handicapped
18 and excluding or, more appropriately, dumping children,
19 as the phrase is called, into inappropriate classes.

20 I believe that this statute was in fact
21 enacted based on the consent decree, as in the Mills and
22 Park case, which I have cited, to prevent a school
23 department from excluding the child without parental
24 consent during the pendency of those actions.

25 And there is some support beyond my simply

1 asserting it in the Department of Education's own
2 interpretations of this section, although it is a scant
3 reference to it. There is an appendix to the
4 regulations in which the department gives interpretive
5 rulings.

6 One of the interpretive rulings deals with
7 what this section means, and says, among other things,
8 if because of the disagreement over the IEP a hearing is
9 initiated by either the parents or agency, the agency
10 may not change the child's placement unless the parents
11 and agency agree otherwise.

12 Now, in my view, if the Court were to reach
13 the reverse result, that the parents were disabled from
14 receiving tuition reimbursement once they had
15 "unilaterally withdrawn" the child from the school
16 system, and if two years later that child is eventually
17 found by the hearing officer to have been -- or, more
18 appropriately, the parents' placement was appropriate,
19 and the school's chosen placement was inappropriate,
20 then for that two-year period that child will have been
21 denied either the appropriate portion of the free
22 appropriate public education to which he or she had been
23 entitled, or if the parents pay for that placement
24 during the two years, then the child will have been
25 denied the free portion of the free, appropriate public

1 education.

2 QUESTION: In that event I suppose the state
3 will have to pay the parents.

4 MR. ROSENBERG: The state?

5 QUESTION: Or the local school district.

6 MR. ROSENBERG: Well, that is my view. The
7 town's view is that if you once use what they
8 characterize as self-help, then forever after you are
9 barred as a parent from seeking reimbursement for
10 tuition under the provisions of 1415(e)(2).

11 Thank you very much.

12 CHIEF JUSTICE BURGER: Do you have anything
13 further, Mr. Berman?

14 ORAL ARGUMENT OF DAVID BERMAN, ESQ.,

15 ON BEHALF OF THE PETITIONERS - REBUTTAL

16 MR. BERMAN: Briefly. May it please the
17 Court --

18 QUESTION: Is that your position, the position
19 that the gentleman has stated?

20 MR. BERMAN: No, it is not, Your Honor. We
21 are not saying that they are forever barred. We believe
22 that the Fourth Circuit in the Rowe case, Rowe against
23 the Henry County School Board, used exactly the right
24 format. They said, let's see whether the later change
25 -- whether the change is still related to the unlawful

1 change. If it is not, we will take another look.

2 QUESTION: Let's suppose you completely lose
3 in all respects what is on the remand to the District
4 Court, on the new trial.

5 MR. BERMAN: Yes.

6 QUESTION: Let's assume it is found that
7 whatever plans you had were wholly inadequate. The
8 state was quite right. Do you then -- do you still say
9 then that you are entitled -- that you didn't need to
10 reimburse the parents for tuition?

11 MR. BERMAN: Yes, we do say that, Your
12 Honor.

13 QUESTION: That is what I thought.

14 MR. BERMAN: Yes. Certainly not for the year
15 1979-1980, and that is the only year that should be
16 considered, because that is the only year for which
17 there is an IEP in effect. They couldn't draw one for
18 subsequent years.

19 As far as the remedy for violating 1415(e)(3),
20 if the remedy is not to cut off the right to tuition,
21 what remedy is there for 1415(e)(3)? How is 1415(e)(3)
22 going to be implemented at all? Are we going to say to
23 parents in effect, well, you were very naughty, you did
24 something you shouldn't have done, but it doesn't make
25 any difference?

1 And I would like to point out, by the way,
2 since we have talked about procedure, that procedure is
3 a two-way street. Yes, there are procedures, and local
4 educational agencies must comply with those procedures.

5 QUESTION: Mr. Berman, just a minute. You
6 went too fast for me. You say it doesn't make any
7 difference, but it would make a difference if they
8 ultimately found the IEP to be a good IEP, wouldn't it?
9 Then they would be stuck with the costs.

10 MR. BERMAN: Yes, I understand that, Your
11 Honor, but --

12 QUESTION: Then you can't say it is totally
13 without remedy.

14 MR. BERMAN: It is, though, because if the
15 local -- if the IEP is found to be a good IEP, they are
16 always stuck with the cost.

17 QUESTION: Are you saying that if it is
18 ultimately found to have been a bad IEP, they had a duty
19 to leave the child there for the entire period it takes
20 to litigate the question?

21 MR. BERMAN: Your Honor, they had a duty to --

22 QUESTION: Is that your position?

23 MR. BERMAN: Well, they certainly -- yes, they
24 had a duty to leave the child there at least --

25 QUESTION: No matter how bad the IEP might

1 have been?

2 MR. BERMAN: -- it was --

3 QUESTION: No matter how bad the IEP might
4 have been?

5 MR. BERMAN: Except for one thing, Your
6 Honor. I do believe they have a right to go to a court
7 of competent jurisdiction and try to obtain preliminary
8 relief. That I have no doubt about.

9 QUESTION: But until they get a court to act
10 or judicial relief of some kind, the child must remain
11 there at all --

12 MR. BERMAN: The child must remain in his
13 current placement. And as I say, I start out on the
14 supposition that most of the time the school authorities
15 are going to be right, not wrong. And in those cases
16 where they are wrong, I think, you know, there are
17 various bases for getting relief without using
18 self-help.

19 With respect to Justice O'Connor's question to
20 me, I did look at Page 42 of our brief. My point there
21 was that there was no placement in effect when the IEP
22 was drawn up, not that there was no placement in effect
23 when Michael was enrolled in the Carroll School.

24 Those are two entirely separate things. The
25 IEP was drawn up on June 4th, and he was enrolled in the

1 Carroll School in August.

2 With respect to two years later when the
3 hearing officer renders an opinion, why, the regulations
4 require that an opinion be rendered within 40 days, and
5 if the hearing officers in the various states are
6 violating that provision, then it is high time the
7 Secretary of Education stepped right in and said, you
8 violate that provision, you will have no federal
9 funding.

10 Thank you.

11 CHIEF JUSTICE BURGER: Thank you, counsel.

12 The case is submitted.

13 (Whereupon, at 11:04 o'clock a.m., the case in
14 the above-entitled matter was submitted.)
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION.

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

#884-433 - SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, ET AL.,
Petitioners V. DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS,
ETT AL.

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

BY Paul A. Richardson

(REPORTER)

85 APR -2 P2:00

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