OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1529

TITLE OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner V. AMERICAN HOSPITAL ASSOCIATION, ET AL.

PLACE Washington, D. C.

DATE January 15, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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OTIS R. BOWEN, SECRETARY OF :
HEALTH AND HUMAN SERVICES, :
Petitioner, :
v. : No. 84-1529
AMERICAN HOSPITAL ASSOCI- :
ATION, ET AL. :

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Washington, D.C.

Wednesday, January 15, 1986

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

APPEARANCES:

CHARLES J. COOPER, ESQ., Washington, D.C.;
on behalf of Petitioner.

RICHARD J. EPSTEIN, ESQ., Chicago, Ill.;
on behalf of Respondents American
Hospital Association, et al.

BEN W. HEINEMAN, JR., ESQ., Washington, D.C.;
on behalf of Respondents American
Medical Association, et al.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in Bowen against American Hospital Association. Mr. Cooper, you may proceed whenever you're ready.

ORAL ARGUUMENT OF CHARLES J. COOPER, ESQ.

ON BEHALF OF PETITIONER

MR. COOPER: Thank you, Mr. Chief Justice, and may it please the Court:

The question in this case is whether Section 504 of the Rehabilitation Act of 1973 prohibits a federally assisted hospital from withholding nourishment or medically beneficial treatment from a handicapped infant solely because of that individual's handicap. The Court of Appeals, relying on an earlier ruling in the University Hospital case, held that Section 504 has no application in this setting at all, no matter what the circumstances, and therefore invalidated on their face the interpretive guidelines and procedural regulations issued by the Secretary to explain the application of Section 504 in this setting.

In so doing, the Court of Appeals affirmed a nationwide injunction that prohibited the Secretary from taking any action whatsoever, investigatory or otherwise, in an effort to enforce Section 504's

non-discriminatory mandate in this setting.

Now, there is no question presented in this case concerning the application of Section 504 to any particular set of facts or circumstances. Rather, this case concerns only the facial validity of the Secretary's regulation. Now, it is our submission that the Court of Appeals was clearly incorrect in concluding that all handicapped individuals who are infants are as a matter of law outside the scope of Section 504 protection insofar as furnishing nourishment and lifesaving medically beneficial treatment are concerned. Therefore, we urge that the Court of Appeals is due to be reversed.

Now, as I shall explain, the language of Section 504 plainly prohibits a federally assisted hospital program from discriminating on the basis of handicap is this, as well as in any other context concerning a covered federally funded health services program.

And, contrary to the Respondents' claims, there is firm support for this position at every stage of Section 504's evolution, from its origins in Title 6 of the 1964 Civil Rights Act, through its enactment in 1973 and its amendments in 1974 and 1978. The Secretary's construction of Section 504 is also

supported through a consistent administrative construction.

Turning first to the text of the Act, Section 504 provides in pertinent part as follows: "No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving federal financial assistance."

Now, this language is majestic in its sweep, as one member of this Court described the almost identical language of Title 6 of the '64 Civil Rights Act, which was the model for Section 504. And this Court also noted in the Grove City case recently that it is very reluctant to read into the largely identical language of Title 9, involved in Grove City, a limitation not apparent on the face of the language.

And it is with these principles in mind that we are met at the threshold by Respondent American Hospital Association, who argues that a handicapped infant is not a handicapped individual within the meaning of Section 504.

Now, the Court of Appeals rejected that argument and agreed with us that, of course, infants are entitled no less than adults to the protection of

Section 504, that they have physical and mental impairments that limit major life activities, which is the statutory definition of what a handicapped individual is.

The court also noted, and we certainly concur, that to say otherwise defies common sense. Indeed, this Court in Smith against Robinson stated that 504 applies to all individuals without respect to their age.

The Court of Appeals below did conclude, however, that handicapped individuals are not otherwise qualified, which is also a requirement of Section 504, and that was a requirement that this Court scutinized very closely in Southeastern Community College against Davis, and there it held that an otherwise qualified handicapped individual is someone who is able to meet all of the requirements of the program in spite of his handicap.

Now, the requirement in Section 504 that a handicapped person be otherwise qualified simply reflects a Congressional recognition that a handicapping condition may be relevant, a relevant consideration, in some contexts, and that when it is relevant 504 doesn't require that it be ignored.

Thus, in the Davis case the ability to communicate effectively was very relevant to whether or

not a person could function properly in a nursing training program, and the ability to communicate effectively was a legitimate requirement of that training program, and therefore a deaf person who could not meet that neutral requirement was not admitted and 504 did not require a different result.

In the context of medical care, the principal requirement for administering treatment is that it be medically indicated, that it be beneficial to the health or to the life of the patient. That also is a neutral requirement. It applies whether the patient is handicapped or whether he is not.

And the existence of a handicapping condition may well bear, and bear very importantly, on the question of whether certain treatment strategy is medically indicated. That is, whether or not it is likely to be beneficial to the life and the health of the patient.

And when a medical professional concludes in good faith that the disabilities arising out of a handicapping condition render certain medical treatments contraindicated, that is not bereficial to the life and health of the patient, Section 504 does not require that the treatment be administered.

But when a patient is denied treatment that is

medically beneficial, such as let us say corrective surgery to unblock a blocked esophagus, and is denied that treatment solely because he's afflicted by some handicap, such as Down's Syndrome, it is claimed that that individual has been discriminatorily denied the benefits of a health care program.

QUESTION: Mr. Cooper, is it true that the administrative record doesn't have any examples in it of a hospital which has refused to treat a handicapped infant when the parents have consented to treatment?

MR. COOPER: I believe that is accurate. I believe there is no --

QUESTION: So what you're really concerned about and what the record supports, I suppose, is cases when the parents have refused to give consent to treatment?

MR. COOPER: That is the circumstance which creates the problem that these regulations are designed to address, that is certainly true, but --

QUESTION: These are guidelines, are they not? Are they the same as a regulation?

MR. COOPER: There are interpretive guidelines --

QUESTION: Or a rule? I mean, what are they? What are we really looking at?

MR. COOPER: There are procedural rules, Justice O'Connor, as well as --

QUESTION: They've been adopted in accordance with the Administrative Procedures Act?

MR. COOPER: Yes, yes. They have been put out for comment, and in fact some extremely extensive comments were received, and throughout the regulatory history of this matter the thinking of the Secretary of HHS has benefited quite a bit from the comment period and from the regulatory process.

But the regulations themselves include procedural requirements --

QUESTION: The posting of a notice and the right to get records.

MR. COOPER: That's right, expedited access to records.

QUESTION: And the real focus actually is on situations where parents have refused to give consent to treatment, and in that context would you explain how the regulations operate and how you see the application of the Act?

MR. COOPER: Yes. In the context where the parents have refused to consent to a medically indicated treatment, the hospital is put to a decision, typically, and that is how do they respond to that. Obviously,

hospitals historically --

QUESTION: Well, it's also the case where the doctor agrees with the parents, isn't it?

MR. COOPER: That may or may not be true, but certainly in some of the examples that are available the doctor and the parents are in agreement with respect to withholding a particular treatment, yes.

QUESTION: Well, you can tell us about both of those situations, then.

QUESTION: And tell us, if you will, whether you think that under the statute the child is otherwise qualified for treatment when the parent has refused to give consent and therefore it would be a battery for the doctor or the hospital to give treatment.

MR. COOPER: It would certainly be a battery, Justice O'Connor, unless the parents' refusal to give consent was overridden by operation of state law and if -- and this is not uncommon in the care of infants, newborns. Oftentimes, or at least not infrequently, hospitals are faced with the responsibility essentially to seek to override parents' refusal to consent to some clearly beneficial treatment, surgery or the withholding of nourishment itself.

For example, there are many cases involving religious objections that parents may have to certain

medical treatment, medical treatment that is life saving and that is clearly beneficial, about which, you know, there's no medical difference of opinion that it's beneficial, that it's medically indicated, but the parents nonetheless will refuse the treatment.

In that context, hospitals and child protective agencies -- after all, that's essentially why we have child protective agencies in the states -- will intervene and review the parents' decision, and if it is clearly not in the best interests of the child appropriate action will be taken.

QUESTION: What has been the practice in the 50 states with regard to situations that you're concerned about, to wit the parents refuse treatment, the doctor agrees, no treatment will be provided, the hospital says no treatment. Are child protective agencies likely to intervene in those situations as a matter of state law?

What's happening?

MR. COOPER: Under those circumstances, the child protective agencies may not know about this course of conduct that's been agreed upon.

QUESTION: Well, presumably you've researched and you can tell us what is effect is happening in the various states in this regard.

MR. COOPER: Well, Justice O'Connor, the states -- what happens in the states differs, I suspect, quite widely, and it differs in the context of the very example that gave rise to these regulations, that is the Bloomington Baby Doe situation, where a child was born with Down's Syndrome and also had an esophagus that was blocked, and the decision was made by the parents, in consultation with one of the doctors, not to feed, either intravenously or otherwise enable the child to receive nourishment, and it consequently died.

In that particular instance, other doctors in the hospital disagreed very vehemently with the decision that had been made by the parents and one of the attending physicians, and --

QUESTION: Mr. Cooper, may I ask you, with regard to that particular case, if the regulations under review today had been in place at that time, would anything different have happened?

MR. COOPER: No, sir.

QUESTION: So there was no violation? That course of conduct involved in that case would have gone on exactly the same way?

MR. COOPER: I think that's accurate, Your Honor.

QUESTION: So if you have the regulations at

all, we'd have precisely the same problem that gave rise to the regulations?

MR. COOPER: In that particular circumstance, where a hospital undertook to petition the state court to have the parents' decision overridden and the court decided against it, no different result would obtain under these regulations, that's accurate, Justice.

QUESTION: Well, you haven's finished your answer to Justice O'Connor, have you?

MR. COOPER: I'm sorry. Where did I leave you, Justice O'Connor?

QUESTION: Well, have you said all you intend to say about the application of the guidelines in the circumstances we were discussing?

MR. COOPER: Well, not all I intend to say, Justice O'Connor. From what I have previously said, however, we think it's clear that Section 504 does not reach, let alone attempt to interfere with or overrule, a health care decision that is within the realm of accepted professional medical judgment, because under those circumstances it can't be said that the handicapped patient has been denied beneficial medical treatment that would have been provided but for the handicap.

And therefore, in light of these facts, what

Respondents essentially seek from this Court is an exemption from the application of the statute, an exemption that permits them to make decisions that are based not only on handicap, but that are outside of the scope of professional medical judgment.

In the context again of a handicapped infant whose parents have refused to consent to treatment, the analytical mode is to different than if the refusal was based on religious scruples and the doctor happened to be the same religion and concurred in that judgment. Under those circumstances, hospitals, at least hospitals that became aware of the course of treatment or non-treatment that was agreed upon, would typically under state law be required to petition a court for review of that kind of decision.

What Section 504 does or Section -- Title 6 if -- or Title 6 of the '64 Civil Rights Act, if we are talking about medical decisions that are based on race, though candidly those are much more far-fetched than these, but in the context of a decision that is based on the existence of a handicap or a handicapping condition that in no way contraindicates the treatment that would be life saving to the handicapped individual, 504 suggests that the same procedures that are available to hospitals to review that kind of decision must be used.

They can't be --

QUESTION: Well, as a practical matter, what is likely to happen if the regulations are upheld? I assume, because you've already said, that the main focus is on cases where the parents have refused to permit treatment. And in those circumstances, the Government wants to be able to examine the hospital records to see whether the Government is satisfied that there is a valid medical reason for refusing the treatment, is that right?

MR. COOPER: Yes, Justice O'Connor.

QUESTION: And if the Government thinks there is not a valid reason for refusing the treatment, the Government would think that the hospital would have to refer the case to the state child abuse agency?

MR. COOPER: That would be the analysis that would follow, although what the Government is looking for is now whether there's been a valid reason so much as whether or not it appears that the reason is handicap, the existence of the handicap, because that is the prohibited criterion under 504. And if the hospital authorities have decided that they will not invoke the procedures, the state law procedures available to them --

QUESTION: Well, what if the hospital just

made a blanket practice of referring all such cases to the appropriate state agency?

MR. COOPER: Then there would be no violation of 504 because they would --

QUESTION: Regardless of whether the state agency wants to take any action on the situation?

MR. COOPER: Well, that --

QUESTION: That's the end of it as far as the Federal Government is concerned, is that right?

MR. COOPER: Not necessarily, Justice O'Connor, because the state child protective agencies in all 50 states are also recipients of federal financial assistance, and if they make a decision with respect to their operations in their covered programs that is based on the handicap of the child, as opposed to whether or not the handicap affects and makes contraindicated in a bona fide medical judgment the treatment that the child allegedly needs, if the child protective agency makes that decision, it too would violate Section 504.

QUESTION: Mr. Cooper, the truth is that the Federal Government is just taking over the state's function.

MR. COOPER: No, sir, Justice Marshall, with respect.

QUESTION: Explain to me why I'm wrong.

MR. COOPER: These regulations are carefully tailored to respect to the maximum extent possible the roles of the states in this area. The only thing that 504 does is prohibit discrimination based on handicap in a program that is funied through the funds of the taxpayers, just like Title 6.

The Title 6 analogy in this context is quite apt. If a decision was made in the neonatology ward that a certain child would not receive a particular treatment or nourishment because that child was black, let us say --

QUESTION: Mr. Cooper, may I interrupt. You say if the decision was made. Suppose the decision was made by the parents simply because the child had the handicap. That's the reason for the decision by the parents, but the reason for the decision by the hospital was that the parents had maie -- hai refused. Does that violate the statute or not?

MR. COOPER: I think that they could not yield to the parents' decision in that context, Justice Stevens, no more than a decision by a parent sending a child to a federally funded educational program can --

QUESTION: You say that they couldn't yield to the parents' decision? What should they do absent parental consent if they think the parents have decided

for an incorrect reason?

MR. COOPER: Well, under those circumstances, the same thing they would do if the parents had decided out of religious compulsion. If a transfusion is necessary to save a perfectly normal child, a blood transfusion -- and this happens not infrequently -- then hospitals would not yield to the decision of the parents in that circumstance.

QUESTION: And suppose that, what if the doctor agrees with the decision of the parents? The hospital will go ahead and perform the service anyway?

MR. COOPER: I think the hospital would then be -- the position of the hospital would be essentially no different. They have to make a decision: Is this course of treatment clearly not in the best interest of the child.

QUESTION: Well, supposing they agree with that, but they have a general hospital policy of never allowing surgery absent parental consent? Where is the discrimination?

MR. COOPER: I see your point. I'm sorry. There is no discrimination if the hospital would not seek --

QUESTION: Even if it's valid -- even if medical people could disagree on whether it's proper or

not?

MR. COOPER: Well, that's right. There's two points. First, if the hospital has a blanket policy, we do not get involved in court to override parental decisions, no matter how irrational, no matter how inconsistent with the interests of their child it is, then the hospital would not have to just because the child in handicapped.

But the fact is state laws in all 50 states would require the hospital in those circumstances to seek review by the appropriate authorities, either directly petitioning a court --

QUESTION: Well, but I'm asking what is the violation of federal law. We're not concerned with a violation of state law.

MR. COOPER: There would be no violation of federal law under those circumstances.

QUESTION: Well, I thought your position was that the violation was in not reporting it to the state agency. At least that's what you had told me in response to my question. Are you saying something else to Justice Stevens?

MR. COOPER: I don't think so, Justice O'Connor. The point is if the hospital is set up to deal with these kind of problems for kids who aren's

handicapped, such as --

QUESTION: You said that the law in all 50 states requires the hospital to be set up to do that.

MR. COOPER: I think that's right, and so therefore I don't think it is possible for a hospital to engage in the kind of policy that has been articulated by Justice Stevens.

QUESTION: All right, so it's your position that what the hospital must do is refer it to the child abuse agency.

MR. COOPER: That's right.

QUESTION: And otherwise, and if they don't, it's discrimination because in non-handicap situations they must under state law.

MR. COOPER: I don't know of any state law that makes a distinction between whether the child is handicapped or not. But that's exactly our point.

QUESTION: And if they treat the handicaps different, your position is that's discrimination?

MR. COOPER: That's right. If they treat the handicappe child because of his handicap, for the reason that he is afflicted by this handicap --

QUESTION: Does the record, the administrative record, contain any instances of discriminatory nonreporting of this kind?

MR. COOPER: Oh, yes, Justice Stevens, there are. The administrative record and the preamble to the regulations, which is contained in the joint appendix, as well as very recently the hearings in Congress in connection with the amendments to the 1984 Child Abuse Act, where Congress recognized the very real factual basis to the concerns in this area and legislated in a way that requires state child protective agencies to have procedures in place in order to receive complaints or allegations that someone is being denied treatment because of his handicap, and also to ensure that all of the mechanisms of state law are entirely available to the child protective agency in that consequence.

So Congress has very directly focused on this and has --

QUESTION: Well, just to clarify, you say the administrative record contains reference to examples of discriminatory nonreporting of this kind. How many such examples in the record?

MR. COOPER: I do beg your pardon. I misunderstood. The examples that are contained are generally examples that have been reported. If they're not reported --

QUESTION: I was asking about discriminatory -- the focus of the regulations as I understood is to be

sure that these cases are properly reported, that they report the handicapped child's case as well as the non-handicapped child's case, the same rule is applied to both.

MR. COOPER: Yes.

QUESTION: And I was asking you if there are examples, and if so how many, of cases in which hospitals have failed to report cases of this kind, but they report cases of other kinds.

MR. COOPER: There is testimony certainly in that administrative record, comments, as well as a host of studies by professionals in the field themselves which acknowledge the fact that oftentimes situations like this are not reported, that in fact the handicapped -- the course of treatment or non-treatment that is agreed upon runs its course and there is no reporting.

But to come back momentarily, Justice Marshall, to your question, the regulations do reflect a very sensitive regard for the role of the state in this respect, and in fact one of the key features of those regulations is to encourage hospitals, federally funded hospitals, to set up infant care review committees, so that decisions of this kind can routinely be looked at by professionals and others in the field to determine --

QUESTION: That's not involved here.

MR. COOPER: Excuse me?

QUESTION: That's not involved here, is it?

MR. COOPER: Well, the validity of the regulations --

QUESTION: The only thing that's involved here is the right of the Federal Government to move into what for centuries has been a state matter, namely how to operate a hospital.

MR. COOPER: Justice Marshall, certainly it is true that until Section 504 was passed there was no foundation whatever for the Federal Government to inquire in any way into these kinds of decisions, except to the extent perhaps that a decision in a state hospital might be unconstitutional, relying on this Court's recent ruling in the Cleveland County case. But that's another matter entirely.

The whole point is the 504, and in 1973 when it was passed, is the first occasion for the Federal Government's inquiry into this, just as prior to 1964 and the passage of Title 6 the Federal Government had no role at all inquiring into whether or not health services were provided on a non-discriminatory basis to people of all races.

QUESTION: Under the regulations now, who's

going to finally make the decision about whether there's been discrimination against the handicapped? It's reported to the state agency and then what happens?

MR. COOPER: In the first instance, Justice White, if the recipient of federal funds finds merit in the Secretary's suggestion that an infant care review committee be assembled and put in place, then that is the first instance where the initial decision is reviewed, and if they disagree with it then it would automatically go to the child protective services agency.

QUESTION: If who disagrees with what?

MR. COOPER: If the infant care review committee decided that this decision is outside the scope of legitimate medical judgment

QUESTION: All right. What if it decides that it's within the scope of?

MR. COOPER: Then --

QUESTION: Is that the end of it?

MR. COOPER: That would be the end of their role.

QUESTION: All right. If the review committee disagrees, it goes to the agency?

MR. COOPER: If the review committee disagrees, it would go to the child protective agency.

QUESTION: And then what happens?

MR. COOPER: And then the decision -- the inquiry would be the same there.

QUESTION: All right. And what if they disagree with the hospital, too?

MR. COOPER: If they disagree with the parents and the doctor, then presumably they would undertake those state court procedures necessary to override the decision of the parents and the doctor and have the treatment or the nourishment administered to the child.

QUESTION: When they go to state court on it, they're applying a federal standard, aren't they?

MR. COOPER: No, sir. No, sir. The federal standard is what requires them to go to state court, but it is certainly true that it would be the state child abuse and neglect standard that obtains there in the state court.

QUESTION: Except that I thought you said if the state child protective services agency did not employ the standard that the Federal Government thinks is appropriate, the Federal Government would then withhold funds from the child protective services agency. So if the Federal Government doesn't agree with what the child protective services agency does, it will try to withhold funds.

MR. COOPER: If the Federal Government --

QUESTION: So there is a federal standard provided that either must be satisfied or funds are withheld?

MR. COOPER: The federal standard that governs the conduct of the recipient of federal funds, which is the child protective --

QUESTION: Yes.

MR. COOPER: -- agency. Yes, sir, that standard, a non-discrimination standard, would govern.

QUESTION: Yes, but how do you tell about discrimination? You are looking over their shoulders as to what standard a doctor uses or the hospital uses for withholding treatment.

MR. COOPER: Justice White, there will be many instances where --

QUESTION: Is that right or not?

MR. COOPER: -- in order to determine whether a decision --

QUESTION: There has been discrimination, yes.

MR. COOPER: -- has been based on an impermissible criterion, you must look at the decision itself, that is certainly true.

CHIEF JUSTICE BURGER: Mr. Epstein.

ORAL ARGUMENT OF RICHARD L. EPSTEIN, ESQ.,
ON BEHALF OF RESPONDENTS AMERICAN
HOSPITAL ASSOCIATION, ET AL.

MR. EPSTEIN: Thank you, Mr. Chief Justice, and may it please the Court:

May I take the opportunity first to present a brief overview of the three basic points that I wish to make.

The first is that a decision to withhold medical treatment in a specific individual case, while it may constitute unlawful medical neglect at its worst under the laws of all of the states, it cannot constitute discrimination under Section 504 of the Rehabilitation Act. Our anti-discrimination laws, our view of discrimination, concerns the disparate treatment of people according to categories or classifications, such as race and sex and age. Medical treatment decisions do not constitute disparate treatment by category, but rather are based on the medical treatment needs of the individual, and no two persons' needs are the same.

Second, in the face of the Government's struggle, if you will, to divine Congressional authority for its regulations under Section 504, the Child Abuse Act Amendments of 1984 demonstrate to us two things:

First, that Congress has the capacity to speak clearly to this issue when it so desires; and that when in fact it did so in the fall of 1984, Congress acted to reaffirm the primacy of state regulation.

And lastly in this overview, may I suggest that under the Government's asserted view that medical treatment of every seriously ill hospitalized person is a matter for potential intervention under Section 504, and every such individual's treatment choices could thereby be subject to federal scrutiny.

The vehicle, the vehicle that the Department sought to employ for statutory authority to enter the neonatal intensive care unit of a hospital nursery where critically ill newborns are being medically attended by teams of pediatricians and other specialized physicians and their devoted parents, was Section 504. We do not agree that Congress acted to confer that authority.

In grasping at Section 504 for its alleged authority, it was necessary for the Department to characterize the parental responsibility for making private choices as acts of alleged discrimination. But the fact is that the activities of analyzing, the activities of monitoring and choosing and medically attending infants afflicted with severe illnesses are not matters of discrimination.

These illnesses include such things as low birth weight, respiratory distress syndrome, compromised --

QUESTION: Well, Mr. Epstein, at least in the Bloomington case, don't you think it's at least possible to say that there was some kind of discrimination on the basis of handicap there?

MR. EPSTEIN: Not under our interpretation of discrimination. What there may have been at worst --

QUESTION: But the language of 504 is broad, and it would seem to me you have to come to grips with the fact that the language could be interpreted as the Government suggests.

MR. EPSTEIN: Justice O'Connor, in the case of the Bloomington episode, at worst there may have been what would be a case of medical neglect which is cognizable under the Child Abuse Amendments of 1984, which is their very purpose.

QUESTION: But it also could theoretically be discrimination within the meaning of Section 504, viewed in its broad provisions.

MR. EPSTEIN: Not, I would suggest, if the Rehabilitation Act of 1973, which is what we contend, does not apply to cases of medical treatment decisionmaking, and that's where 504 is to be found. If

we can't connect it --

QUESTION: But normally the Court would at least defer to any reasonable interpretation by the adminitrative agency charged with the enforcement of the statute.

MR. EPSTEIN: If we get into that posture, which could have been the case in Bloomington, and that is where the administrator of the hospital, who was in disagreement with the parents' refusal to provide consent, had after the appointment of the guardian had a different result in the process of moving the matter along, where ultimately it was decided, not by a child abuse agency, but by the courts in Indiana, that the decision that was made on the basis of the record that that court had privy to was one that was reasonable; and so the final decision that was made there was one by the courts.

Now, this does not of course preclude the child abuse protective agency under the present regime and under the amendments of 1984 from monitoring and being intimately involved in any case -- and this indeed is their responsibility, Justice O'Connor -- to intimately involve themselves in any cases of medical neglect.

QUESTION: Of course, here we're dealing I

suppose with a facial challenge, in effect, to the application of Section 504 to any conceivable situation.

MR. EPSTEIN: In the sense that, in the sense that, Section 504 we maintain was promulgated without authority from the Congress, and so in that sense it is a facial challenge. And any regulation which is promulgated without authority would lend itself to being vulnerable to the same kind of challenge.

QUESTION: And you think that we should not look at the interpretation by the agency charged with its enforcement in helping us know whether the statute is applicable?

MR. EPSTEIN: We believe that that interpretation rests with the judiciary, Your Honor, and not with an agency, which may embark on its own --

QUESTION: Well, doesn't the Court normally defer to a reasonable interpretation by the agency?

MR. EPSTEIN: Not in all circumstances, Your Honor, and certainly not in a situation where an agency has undertaken, as in this case in 1982, on a directive to promulgate a regulation to regulate medical treatment to severely ill newborns, and reached out for some kind of statutory nexus on which to allegedly hang that claimed authority, and used Section 504 in the process.

Somebody needs to monitor that kind of endeavor by any department. It's our position that in grasping at 504 that it sought to cloak itself with the authority of a statute which didn't grant that authority to the department.

We are dealing, as I have pointed out, with examples of severely ill newborns, and among those were the examples that I have mentioned, which include in addition meningitis, spinal bifida, malformed brain stem, and a variety of countless forms in which these illnesses may combine.

And they are not matters of discrimination, if you please; they are matters of medical care and guidance and parental choice concerning and individual infant. Our awareness of these conditions, their variety, their occurrence in different combinations, and their differences in degree of severity, underscore the necessarily individualized nature of each such helpless human being's maladies, and the critical need to attend each case in an intensively individualistic manner.

These are not the stuff of which discrimination has been viewed in our society or by the Congress.

In conclusion, the Respondents would be remiss if they failed to call the Court's attention to an

additional and I believe compelling consideration to help guide us in this complex arena. Were the decision of the lower court to be reversed, the federal regulatory agencies might conclude that in promulgating regulations they need not be confined to the four corners of the authorizing statute or the Congressional intent behind it.

Let me be specific and illustrate that. Suppose in the case of a reversal of the court below the Department of Health and Human Services would go next to the other end of life's spectrum and go from the neonatal intensive care unit to the geriatric ward to review how families and appointed surrogates of elderly incompetent patients and their physicians are implementing state-authorized living wills in performing their private and familial duties.

Indeed, every seriously ill hospitalized patient could fall within the reach of the Department's view of handicap, and every medical treatment decision, every medical treatment decision, could be subject thereby to departmental scrutiny.

QUESTION: Is your submission that these regulations may not validly apply to any handicapped person, any medical decision to treat a handicapped person, whether it's a baby or not?

MR. EPSTEIN: The regulations endeavor to apply to severely ill newborns. We do not equate handicap with the severe illnesses that we are talking about, and we're talking about cases of medical treatment of medical neglect, which is scrutinized at the state level by the appropriate state agency.

QUESTION: But you wouldn't think that the medical treatment of just any handicapped person is beyond the reach of the Act?

MR. EPSTEIN: Beyond the reach of which Act, Your Honor?

QUESTION: Well, the Act that Title 4 was passed under.

MR. EPSTEIN: There are protections for persons in the regulatory scheme under the Act, for persons to have access to hospitals, to health services, to care. But nowhere there, and not even in the Medicare statute, is there any allowance for the Department or for any federal agency to get involved with the decisions that are characterized as the medical treatment decisionmaking.

QUESTION: So you would say that it wouldn't make any difference. Your position is that it wouldn't make any difference how old the handicapped person is?

MR. EPSTEIN: That is correct.

This Court has clearly held that the principles of statutory construction demonstrate that, in view of the comprehensive regulation of the field by the states, Congressional authority should not be imputed without a clear indication of a Congressional intent to do so. That clear expression of intent is not present in this case.

For these reasons, the Respondents respectfully request that the Court hold Section 504 not applicable to cases of medical treatment for severely ill newborns, and further respectfully requests that the judgment of the court below be affirmed.

CHIEF JUSTICE BURGER: Mr. Heineman.

ORAL ARGUMENT OF BEN W. HEINEMAN, JR., ESQ.,
ON BEHALF OF RESPONDENTS AMERICAN
MEDICAL ASSOCIATION, ET AL.

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

The judgment below enjoins the Secretary from using Section 504 to investigate and regulate directly individual treatment decisions relating to severely impaired newborns. There are three types of treatment decisions at issue in this case: decisions by parents not to consent to treatment; decisions by providers when parents do not consent; and decisions by providers when

parents do consent, which was raised really for the first time in brief to this Court by the Government, and on which Mr. Cooper conceded in the answer to Justice O'Connor there is nothing in the record to suggest that providers do not give treatment when parents consent to it.

State child abuse and neglect laws have historically regulated the first two decisions and addressed the vexing and sensitive questions of when states should override parents' treatment decisions for their children and when physicians should come between parent and child under state law and report to state authorities parents for possible medical neglect.

The Secretary's intrusive regulatory regime, which is not discussed in the briefs and which Mr. Cooper did not discuss before this Court today, has been aimed exclusively at these two treatment decisions historically regulated by the states. Most strikingly, HHS has initiated at least 49 direct federal investigations, including 17 onsite inquiries, to see if parent and physician decisions are correct under state law.

These highly intrusive investigations, which have found no 504 violations, come at a time when parents and physicians are struggling with traumatic and

highly complex issues.

The Government's briefs are striking in their failure to cite any legislative history that Congress when it enacted 504 intended federal officials to supplant the state child abuse and neglect system and themselves determine, using state law standards, whether parents' refusal to authorize treatment and providers' response to that refusal are correct.

QUESTION: Well, Mr. Heineman, it does strike me that the Respondents in this case just aren't coming to grips with what might be of real concern to us, and that is the breadth of the language, the fact that there's nothing in the legislative history that expressly says Congress did not intend to cover this area, and the fact that we normally defer to the administrative agency's interpretation.

And it's all well and good to parade a series of horrible examples before the Court, but I wonder how we deal with it in terms of our normal application of interpretation of statutes and deference to agency interpretation.

MR. HEINEMAN: There are substantial reasons not to defer to the agency in this case, Justice O'Connor. There are at least four.

There is a fundamental test when we are

construing 504, announced for this Court by Justice Marshall in Alexander v. Choate, about whether the modification in the recipient's program is substantial or reasonable. Federal Baby Doe squads arriving in the hours after birth is a substantial modification of the program.

There's a second rule of construction. The agency will have leeway to regulate when it has shown a particularly significant problem. There is to administrative record in this case that the state system is not effectively monitoring any problem of reporting.

I said there were three kinds of decisions: decisions of parents; the Government concedes that parents are not federal fund recipients and their decisions cannot be directly regulated. Decisions of providers when parents do consent to treatment. Mr. Cooper effectively conceded just a few minutes ago that there's nothing in the administrative record saying that that is ever a problem. They've never cited a single instance of failure by a physician to provide once there has been a consent by the parent, although that is basically the way their brief is written to this Court.

That leaves then the question, because the final judgment regulates treatment decisions, it doesn't regulate child protective service agencies. It

regulates treatment decisions by parents and providers. That leaves the question then of what providers are supposed to do when there is a lack of consent by parents.

The Government has shown no significant problem, pursuant to the rule of construction in Alexander v. Choate, with respect to that situation. Moreover --

QUESTION: Well, the Government says it has cited studies that are supportive of its concern in this area. Now, what if the hospital or the physicians just made a routine policy of referring cases of non-consent by parents to the appropriate state agency? Doesn't that solve any federal concern?

MR. HEINEMAN: Yes, yes. But if I may speak to those studies, they go to what doctors may or may not do. They do not go to the fundamental question here of whether there is any problem with the states not effectively monitoring doctor decisions.

There's a third reason, beside these two rules of 504 construction, why no deference would go to the agency here, and that is the fundamental rule of General Electric versus Gilbert about inconsistent agency interpretation. As I indicated, what we're talking about here precisely, the hook on which the Federal

Government tries to get into these intensive care nurseries, is where parents haven't consented what is the responsibility of the provider?

In 1982 when the notice was first put out on this subject, they said the responsibility of the provider was to discharge the infant from the hospital. There was an outcry about this, because that would obviously be inhumane and incorrect.

In 1983 when they put out an interim final regulation, they said the responsibility of the provider was to override the treatment decision of the parents and provide treatment, neglecting the fact that, as I think Justice O'Connor pointed out, that would of course be a battery.

So by the time they got to put out the final reg, they then go to this question of whether they can investigate whether providers are discharging their state law reporting duties.

We also indicate in our brief at great length why this is not an appropriate area for the Federal Government to be in, because state law reporting duties are state law reporting duties. They are the responsibility of a state to monitor and enforce, and absent a clear showing -- again, there's a long line of cases that we cite in our brief.

Absent a clear showing by the Congress --

QUESTION: Mr. Cooper indicated that the administrative record shows that there was a substantial problem of non-reporting of cases in this category, as opposed to other cases. Do you agree with that?

MR. HEINEMAN: I disagree with that. What is in the record are some old studies, at least eight to ten years old, discussing physician attitudes, not specific cases, and never addressing the question of whether the state child abuse and neglect system was functioning correctly.

Those are strictly attitudinal studies of physicians. They are not real cases, and they do not address the fundamental question of whether or not the state system is not functioning correctly.

But in any event, there is a fundamental rule of construction here that, where the Federal Government is coming in to enforce state law -- in other words what the Federal Government is purporting to do when it comes into these hospitals is to see if the providers are discharging their state law duties, duties established under child abuse and neglect statutes by state law to report.

They are seeking to enforce those duties, to see if there is in fact liability. That is preeminently

the function of state authorities, not federal authorities.

QUESTION: So what's your bottom line? Are you just talking about whether there should be deference?

MR. HEINEMAN: I'm saying that there should be no deference, for a variety of reasons.

QUESTION: Let's assume there shouldn't be any deference. You still have to conclude that the regulation is outside the reach of the statute.

MR. HEINEMAN: Yes, Again, Justice White, the final judgment here goes to three kinds of decisions: parents, but basically they have conceded that parents are not federal fund recipients.

QUESTION: I understand that.

MR. HEINEMAN: And then provider decisions when parents do consent. So the only issue is the provider response when parents do not consent, and that is a state law duty which the states should monitor. So that is why in this context --

QUESTION: You still have to conclude that Congress just flatly didn't intend to reach that.

MR. HEINEMAN: That's correct. We have no -- I have no question about that, and I think if I may --

QUESTION: But there's no evidence in the

statute, the legislative history, that affirmatively says Congress did not intend to reach that, is there?

MR. HEINEMAN: No, that is correct.

QUESTION: There's just an absence of a focus on it. There's broad language in the statute, so it isn't an easy case, is it?

MR. HEINEMAN: Well, I think it is an easy case if we take the proper steps, in this sense, that when 504 was enacted in 1973 it was aimed at employment and education, and that there was -- Congress made detailed findings that there was handicap problems in those areas in the states.

The states have historically regulated medical care. There has never been any findings by the Congress that there was discrimination in individual treatment cases that warranted a federal involvement.

And if I might go to Justice White's question a moment ago, the bottom line question in this case is who should decide, and I believe you asked that who should decide whether individual treatment decisions are correct? Should the Federal Government and HHS for the first time in our history, going back to Justice Marshall's point --

QUESTION: Well, that may be a good question for Congress. But you still have to convince us that

Congress intended to exclude any medical decisions about handicaps, handicapped people.

MR. HEINEMAN: No, I believe that what I have to do is say that the law does not authorize it clearly, to be sure. The legislative history, the examples in the legislative history, speak only to access to health facilities. They do not remotely touch the question of the Federal Government making individualized treatment decisions.

QUESTION: Well, you do have, just by way of silence, to narrow the reach of the language that forbids discrimination against the handicapped.

MR. HEINEMAN: Correct.

QUESTION: Isn't that right?

MR. HEINEMAN: Yes, and the legislative history narrows it by indicating that when they were talking about health services they were only talking about access to health facilities. There's only one reference, specific reference in the 1974 Senate report, which is the only Congressional legislative history on the question of what "health services" means, and that relates to admission to a nursing home for handicapped individuals.

It speaks nothing about an area historically regulated by the state. But I would then get, of

course, to the rules of construction, and there are a number of rules of construction, as we indicate in our brief, and at least four as to why this regulation is clearly invalid under 504 rules of construction.

QUESTION: Before you move to those, I'm not entirely clear what your position is where the physicians think treatment is desirable, if not indeed imperative, and the parents flatly refuse?

MR. HEINEMAN: The only duty of the physician in those circumstances under state law is to report the parents to the state child abuse and neglect agency for possibly being guilty of medical neglect, medical neglect meaning --

QUESTION: Your position is that under Section 504 the Federal Government has no right to intervene there either?

MR. HEINEMAN: That is correct. It is not authorized to investigate that decision by the physician, which is a state law duty, to see whether the physician is discharging his state law duty, that's correct, Justice Powell.

Let me say also that Justice O'Connor asked the question of whether the Baby Doe of Indiana case possibly raised a question of discrimination under 504. I think Justice Stevens asked a similar question and Mr.

Cooper indicated that the answer was clearly no, and the reason it was clearly no is that the parents didn't consent to treatment.

The hospital took the parents to state court. A state court decided that the parents had made a decision which was in the reasonable range of discretion. A county prosecutor then brought a second suit, and the state courts decided again that the parents had made a reasonable choice. So that is that instance there is --

QUESTION: Well, what if the hospital and the medical treatment personnel just took the position that in every case of a newborn with Down Syndrome they're not going to under any circumstances refer a refusal to treat to a child protective services agency? Is that denial of access to medical treatment within the meaning of Section 504?

MR. HEINEMAN: If it was a general policy --

QUESTION: Yes. Let's just assume that.

MR. HEINEMAN: Yes, Again, I have a hard time assuming it since physicians and parents are basically in the business of helping children, not trying not to help them.

But that kind of generalized policy, stated as a policy, might give rise to a 504 violation. But

that's not here, and that I don't think is affected by the -- I don't think that's affected by the judgment below.

QUESTION: Well, we have a facial challenge here. We don't have any specific cases before us. We just have a facial challenge.

MR. HEINEMAN: Right. The holding below, which basically animates the judgment, the holding below is that it has no authority to investigate and regulate individual treatment decisions. That's what we're talking about here. That's what the final judgment's about, individual treatment decisions.

QUESTION: I thought the judgment below was that 504 just didn't authorize any of --

MR. HEINEMAN: Investigation and regulation of individual treatment decisions relating to the severely impaired newborns.

QUESTION: At least that's the way you interpret the decision below, and that's all you're defending?

MR. HEINEMAN: Right, individual treatment decisions.

QUESTION: And if it's any broader than that you don't defend it?

MR. HEINEMAN: Well, I would be -- yes, I

would be prepared to defend it, but that is not what we believe the judgment below is about.

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

(Whereupon, at 11:02 a.m., oral argument in the above-entitled case was submitted.)

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:

84-1529 - OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, Petitioner

v. AMERICAN HOSPITAL ASSOCIATION, ET AL.

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

BY Paul A. Richardson

(REPORTER)