

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1277

TITLE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA AND CRAIG MARSH,  
INDIVIDUALLY, AND AS SUPERINTENDENT OF SCHOOLS OF NASSAU  
COUNTY, FLORIDA, Petitioners V. GENE H. ARLINE

PLACE Washington, D. C.

DATE December 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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SCHOOL BOARD OF NASSAU COUNTY, :

FLORIDA AND CRAIG MARSH, INDI- :

VIDUALLY, AND AS SUPERINTENDENT:

OF SCHOOLS OF NASSAU COUNTY, :

No. 85-1277

FLCRIDA, :

Petitioners, :

v. :

GENE H. ARLINE :

-----x

Washington, D.C.

Wednesday, December 3, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:01 a.m.

APPEARANCES:

BRIAN T. HAYES, ESQ., Monticello, Florida;

on behalf of the Petitioners.

CHARLES FRIED, ESQ., Solicitor General, Department of

Justice, Washington, D.C.; as amicus curiae

supporting Petitioners.

GEORGE K. RAHDERT, ESQ., St. Petersburg, Florida;

on behalf of the Respondent.

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

2 CHIEF JUSTICE REHNQUIST: We will hear  
3 arguments first this morning in No. 85-1277, the School  
4 Board of Nassau County, Florida versus Gene H. Arline.

5 Mr. Hayes, you may proceed whenever you're  
6 ready.

7 ORAL ARGUMENT OF BRIAN T. HAYES, ESQ.,

8 ON BEHALF OF THE PETITIONERS

9 MR. HAYES: Mr. Chief Justice, and may it  
10 please the Court:

11 Today this Court considers whether the  
12 contagious, infectious disease of tuberculosis is a  
13 handicap under the Rehabilitation Act of 1973.

14 Additionally, a second question is presented  
15 as to one so infected is otherwise qualified.

16 Because of the split argument with the  
17 Solicitor General, I will address the facts and point  
18 two; the Solicitor General will address his remarks to  
19 point one in the brief.

20 The facts, we submit, in this case are  
21 extremely significant. And the nondisputed facts are as  
22 follows.

23 In 1977 Gene Arline was a tenured teacher with  
24 the Nassau County School system, teaching in the South  
25 Side Elementary School. The School Board had no



1 knowledge -- none -- that she had in fact suffered from  
2 TB since age 14.

3 In 1977 she had a relapse, that is, she became  
4 infectious, had a postive culture. She was suspended  
5 briefly.

6 In 19 -- in the spring of 1978, she again  
7 suffered a relapse, and at that time, Mr. Marsh, the  
8 superintendent, was contacted by the State Health  
9 Department, the local unit there in Fernandina Beach,  
10 which is in Nassau County.

11 And they, that is, the State Health  
12 Department, recommended that this teacher is an  
13 unacceptable risk; please take her out of the  
14 classroom.

15 She was not dismissed. She was removed with  
16 pay for the balance of the 1978 year; that is, it was in  
17 May, so there was only perhaps a month to go.

18 The next fall, in November, she again tested  
19 positively, making the third positive test within an  
20 18-month period.

21 At this point, once again -- now Dr. McEuen  
22 enters the case, Dr. McEuen being a superior to Dr.  
23 Lund. And Dr. McEuen, who was assistant director for  
24 the State Tuberculosis Center, came to the school board,  
25 initiated the process, and said to Mr. Marsh: This

1 woman poses an unacceptable risk.

2 She was again suspended with pay. And in the  
3 spring, late spring of 1979, the school board conducted  
4 the administrative procedure to commence her dismissal.

5 This procedure was eventually affirmed by the  
6 state court, the First District Court of Appeals in  
7 Florida.

8 In 1982 she filed her complaint in the  
9 District Court in Jacksonville, and a trial was set,  
10 alleging for the first time, of course, that she was  
11 discriminated against because of her handicap.

12 There was actually two counts in the  
13 complaint, but the only count we're concerned with is  
14 count one.

15 QUESTION: Mr. Hayes?

16 MR. HAYES: Yes.

17 QUESTION: Was she at any time hospitalized?

18 MR. HAYES: In 19 -- our -- the transcript of  
19 testimony indicates that in 1957 she was hospitalized.

20 QUESTION: I mean, during this period.

21 MR. HAYES: No, during this -- well, yes --

22 QUESTION: Well, aren't infectious people  
23 hospitalized in Florida usually?

24 MR. HAYES: They are oftentimes, Justice  
25 Marshall.

1 QUESTION: Compulsory, if necessary?

2 MR. HAYES: Yes, that's correct.

3 QUESTION: Why wasn't it done in this case?

4 MR. HAYES: It was not in this case, as we  
5 understand, largely because through Dr. McEuen's  
6 testimony, that it's no longer necessary with the new  
7 drugs since 1950.

8 They can give heavy doses of this medication,  
9 which can immediately reduce, or have an effect to  
10 attempt to reduce, the infectiousness.

11 QUESTION: That's uncontradicted?

12 MR. HAYES: That's uncontradicted, that she  
13 was not -- now, she was hospitalized, she testified at  
14 page 77 of the transcript in the trial, about her being  
15 hospitalized at age 14, at Sunland Center in  
16 Tallahassee. She she had a history of being  
17 hospitalized, although we didn't know it.

18 In any event, as I was indicating, after the  
19 -- the trial court in this case then went on and found,  
20 in an alternative type judgment, he found first of all  
21 that tuberculosis such as she suffered, and those are  
22 his words, and I'm quoting, it's the court's opinion  
23 that an infectious disease such as the plaintiff in this  
24 case had does not qualify as a handicap.

25 But then he went on to say, if it does,

1 assuming, arguendo, that it does, then the court must  
2 consider whether she's otherwise qualified.

3 This goes into our second point. If she's not  
4 otherwise qualified, she has not met her burden. The  
5 burden is clear in a handicap discrimination case, or in  
6 a case under the rehabilitation act.

7 As Justice Marshall said, as recently as  
8 Choate v. Alexander, the plaintiff must establish that  
9 she has a qualifying handicap.

10 She must establish that she is otherwise  
11 qualified. She must establish, if she's alleging  
12 discrimination, that she was discriminated solely because  
13 of her handicap.

14 Now, if she fails in any of those particulars,  
15 the case is not made out. This Court has stated in  
16 Southeastern Community College v. Davis, which is the  
17 benchmark case on "otherwise qualified," that simply  
18 means that with the handicap, or notwithstanding the  
19 handicap, he or she can meet all the of the requisite  
20 requirements, the legitimate requirements, of the job.

21 We suggest on point two that an infectious  
22 disease, where a doctor -- and this is not a doctor  
23 employed by the school board; this is the state health  
24 professional -- where that doctor says, Nassau County  
25 School Board and Mr. Marsh, don't put this teacher in a



1 classroom with young children, for two reasons. First  
2 of all, they're highly susceptible, and number two, it's  
3 an enclosed, confined room.

4 And TB, as we know -- TB may be unique. I'm  
5 not a medical expert, but we know it's communicated by  
6 breathing, by sneezing, by coughing.

7 So it's our position on point two that how can  
8 she be qualified as an elementary school teacher when  
9 she can't get down over Johnny's desk and help him with  
10 his penmanship and arithmetic without breathing, and  
11 thus creating a risk.

12 But this isn't our opinion. This is an  
13 opinion of a state health professional.

14 So as a matter of law, we suggest, the record  
15 amply supports the trial judge's finding that if it's  
16 not a handicap, then she's not otherwise qualified.

17 QUESTION: Did the school board consider  
18 whether she would be qualified to teach in the high  
19 school?

20 MR. HAYES: Yes. As the testimony of  
21 Superintendent Marsh says in this case, that she did not  
22 have a certificate. In our reply brief, we've addressed  
23 that, Justice Powell.

24 She was certified K through -- K through 6,  
25 which is the basic elementary certification. That's our

1 next question under otherwise qualified.

2 Could we have accommodated her -- that's the  
3 next inquiry -- by letting her teach high school? Well,  
4 there's two factors there.

5 Number one, she wasn't certified to teach high  
6 school.

7 QUESTION: She did not have a certification to  
8 teach beyond the elementary level?

9 MR. HAYES: Absolutely, and she did not seek  
10 to get it. On page 77 of the transcript, I asked her at  
11 the trial -- this is not in the Joint Appendix -- on a  
12 full page, Mrs. Arline, did you consider during the  
13 intervening four years going and taking the nine or  
14 twelve hours in French or -- whatever you need?

15 She said she did not.

16 But that's only the first part of that  
17 question. We would have a different inquiry, and it's  
18 not before the Court, had she been certified. And  
19 then we'd be faced with Dr. McEuen's testimony that the  
20 risk is real as to all persons, but it's certainly an  
21 unacceptable risk as to elementary school teachers.

22 So in a way, we have not reached that question  
23 of, had she been certified because she has not. We  
24 simply suggest that the regulation is quite clear, under  
25 the duty to accommodate.

1           There have been no cases of this Court --  
2       there have been some lower court cases -- but in  
3       referring to the duty to accommodate, the regulations  
4       specifically refer, and I'm talking about 45, the code  
5       of Federal regulations, 84.4 KL.

6           And it says: The duty to accommodate a  
7       handicapped person, who with reasonable accommodation  
8       can perform the essential functions of the job in  
9       question.

10          Now the job in question, we suggest, is an  
11       elementary school teacher, in an elementary school  
12       setting.

13          So it's our position, therefore, that she is  
14       not otherwise qualified for the position.

15       QUESTION: Mr. Hayes?

16       MR. HAYES: Yes, sir, Justice Scalia.

17       QUESTION: On your point that she is not a  
18       handicapped individual, you're not merely arguing that  
19       she was discriminated against by reason of her handicap,  
20       but you're also asserting that she is not a handicapped  
21       individual.

22       MR. HAYES: Yes, sir.

23       QUESTION: Yet you say that she has been, by  
24       reason of a disability produced by the tuberculosis,  
25       hospitalized on several occasions.

1 MR. HAYES: In -- the evidence was, and the  
2 Solicitor General will speak to that extensively,  
3 sometime in the past, in 1957, which we didn't know  
4 about, as it turns out, until the trial -- so that goes  
5 to the question of solely by reason of; did we use that  
6 as a basis.

7 QUESTION: Okay, but I'm not concerned about  
8 "solely by reason of" right now.

9 MR. HAYES: Okay.

10 QUESTION: I'm concerned about whether she's  
11 handicapped.

12 MR. HAYES: Well, that goes to the question,  
13 the definitions of impaired. If a person was  
14 hospitalized sometime in the past, and then we get into  
15 the question of whether or not she had a --

16 QUESTION: Had a record of such impairment.

17 MR. HAYES: That's correct. Or a record of  
18 such impairment.

19 QUESTION: Well, now, what does it take to  
20 establish a record of such impairment, beyond being in  
21 the hospital?

22 MR. HAYES: Well, the impairment -- the  
23 question there would be whether or not the impairment  
24 related to the contagiousness, or to the disease of  
25 tuberculosis. We think that's a difference. And Mr.



1 Fried will --

2 QUESTION: Well, that goes to whether she was  
3 dismissed because of it. It doesn't go to whether she  
4 was a handicapped individual or not.

5 MR. HAYES: Well, there is a question --  
6 there's no question in the record that as a child she  
7 was hospitalized for this disease. And that's  
8 undisputed.

9 It's also in the record --

10 QUESTION: So you have to say she was a  
11 handicapped individual, don't you?

12 MR. HAYES: We -- we -- as the trial judge --

13 QUESTION: Or else you tell me what else that  
14 phrase, has a record of such -- right now she wasn't  
15 impaired. She was teaching, she was doing fine.

16 MR. HAYES: That's correct.

17 QUESTION: But she had a record of being so  
18 debilitated by tuberculosis that she had to be  
19 hospitalized.

20 MR. HAYES: Correct.

21 QUESTION: Now, what does that language mean  
22 if it doesn't cover that?

23 MR. HAYES: We would, at this time, at least  
24 for point two, suggest that we would accept, as the  
25 trial judge did, that if she was indeed -- if she was

1 indeed impaired or had a record of such impairment by  
2 hospitalization, for the purposes of point two, we  
3 suggest it's not important, because she would be not  
4 otherwise qualified.

5 Mr. Fried will now address the Court on that  
6 issue.

7 Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
9 Hayes.

10 General Fried.

11 ORAL ARGUMENT OF CHARLES FRIED, ESC.,

12 AS AMICUS CURIA ON BEHALF OF THE PETITIONERS

13 MR. FRIED: Thank you, Mr. Chief Justice, and  
14 may it please the Court:

15 The United States is concerned that  
16 handicapped persons get the full measure of protection  
17 intended for them by Congress in enacting and amending  
18 Section 504.

19 There is also concern that Section 504 be kept  
20 within manageable bounds. And that means that it not be  
21 invoked to deal with all manner of social problems which  
22 were no in Congress' mind when it enacted that statute.

23 In particular, we think it is important that  
24 Congress had no intention to displace the web of local,  
25 state, and Federal responses to the very different and

1 the very difficult problem of contagiousness and  
2 epidemic.

3 That problem, and that difficulty, is well  
4 illustrated by this case. In this case, the school  
5 board, acting at the instance, indeed, at the  
6 insistence, of county, state -- county and state health  
7 authorities, removed from a third grade classroom the  
8 respondent, Ms. Arline.

9 Having complied with these state directives,  
10 the school board now faces a suit under Section 504 for  
11 handicapped discrimination.

12 We maintain that this cannot be what Congress  
13 had in mind when it passed Section 504 and amended it.

14 When Congress amended Section 504 in 1974, it  
15 extended the coverage to cover not only persons who are  
16 presently handicapped, but persons who have a record of  
17 handicap, and also persons who are believed to be  
18 handicapped.

19 Further, Congress expanded the definition of  
20 handicapped to include any, quotes, impairment which  
21 substantially limits one or more major life activities.

22 But in the original enactment, as well as in  
23 the amendment, one feature remained constant: that to  
24 come within the statute at all, to count as handicapped  
25 discrimination or exclusion at all, the exclusion must

1 be, quotes, solely by reason of handicap.

2 And this phrase is what keeps the statute  
3 within manageable bounds. This phrase is what keeps it  
4 from covering exclusion on all manner of other kinds of  
5 grounds, good or bad.

6 And it's this phrase which demonstrates why  
7 respondent's suit was properly dismissed in the trial  
8 court.

9 QUESTION: Mr. Fried, what is the handicap of  
10 someone who's diseased? Is it the disease, or is it the  
11 manifestations of the disease, or what?

12 MR. FRIED: The statute couldn't be clearer,  
13 Justice O'Connor. The handicap is defined as any  
14 impairment which substantially limits one or more major  
15 life activities.

16 QUESTION: Is employment a major life  
17 activity? Or association with other people?

18 MR. FRIED: Those are all major life  
19 activities. But it would be to argue in a circle to say  
20 that if one is excluded, for instance, by reason of  
21 contagiousness, from associating with others, then that  
22 exclusion constitutes an impairment, when the question  
23 you're asking is, whether the exclusion itself is by  
24 reason of handicap.

25 That's a totally circular argument which lifts



1     itself by its bootstraps. The impairment has got to be  
2     in respect to an activity which is defined and  
3     considered apart from the exclusionary action which is  
4     the subject of the lawsuit, of the complaint.

5             Now, contagiousness and handicap are obvious  
6     different things. Some people are contagious without  
7     being handicapped; others are handicapped without being  
8     contagious.

9             They often go together; but not always.

10            Other characteristics, as well, may often go  
11     together with handicapped. For instance, age;  
12     occupation; poverty; lifestyle.

13            Exclusion on the basis of any of these was not  
14     intended by Congress to count as exclusion solely by  
15     reason of handicap.

16            In this case, nothing could be clearer than  
17     that the exclusion which took place was solely on the  
18     basis of contagion. The school board did not know that  
19     there was any impairment in Ms. Arline whatsoever.

20            They had no reason to think that she had --  
21     was unable to perform her duties; there was no  
22     absenteeism; there was no deficiency in her work. The  
23     first they heard of this matter was when they were  
24     contacted by the local health authorities and told --

25            QUESTION: Mr. General, how do you respond to

1 Justice Scalia's question? How about her record of  
2 hospitalization?

3 MR. FRIED: Well, she's plainly a handicapped  
4 person.

5 QUESTION: Oh, you do --

6 MR. FRIED: Oh, plainly a handicapped person;  
7 no question of that.

8 The point that we insist on is that the  
9 exclusion can't possibly be viewed as having been solely  
10 by reason of handicap. Indeed, it wasn't by reason of  
11 handicap at all.

12 QUESTION: Well, Mister --

13 QUESTION: If you had -- if you had removed  
14 the handicaps, she wouldn't have been excluded. If  
15 there had been no history of tuberculosis, she would  
16 have still had her job, wouldn't she?

17 MR. FRIED: Oh, indeed not. Indeed not.  
18 Because, so long as she was contagious -- and it's quite  
19 clear that it's possible --

20 QUESTION: She wouldn't be contagious if she  
21 didn't have tuberculosis.

22 MR. FRIED: Oh, yes. But you can have a  
23 contagious -- you can be in a contagious condition with  
24 tuberculosis, and if not tuberculosis, with a number of  
25 other diseases, without being in the least bit impaired.

1           Indeed, the American Medical Association, at  
2 page 6 of their brief, recognizes the phenomenon of the  
3 asymptomatic carrier, that is to say, the person who is  
4 infectious, who can spread the disease to others, but is  
5 in now way impaired himself.

6           And in that case, if the action is taken on  
7 the basis of that contagiousness, the fact that the  
8 person is or is not handicapped is simply irrelevant to  
9 the lawsuit under Section 504.

10          So if Ms. Arline had been an immune carrier, a  
11 sort of a medical phenomenon which is well recognized,  
12 and she had been removed because she was an immune  
13 carrier, a Typhoid Mary, as it were, that would plainly  
14 not be exclusion on the grounds of handicap. It would  
15 be exclusion on the grounds of contagiousness.

16          The fact that she was also a handicapped  
17 person does not mean that the exclusion, which plainly  
18 was on the basis of the contagiousness, all of a sudden  
19 becomes exclusion on the basis of a handicap.

20          QUESTION: And you would say -- you would say  
21 that she would not have been a -- the only reason you  
22 acknowledge that she's a handicapped person is because  
23 of the prior history of hospitalization. And she had  
24 not been hospitalized and been functioning perfectly  
25 well, although she had tuberculosis, then you would say

1 she was not a handicapped person?

2 MR. FRIED: So far as the record indicates,  
3 there is no other basis for concluding that she's  
4 handicapped.

5 But another basis might exist. She may have  
6 had shortness of breath. She may have had night  
7 sweats. She may have had some of the other symptoms of  
8 tuberculosis. But the school board knew nothing of  
9 this. The school board did not act in response to any  
10 of this.

11 And therefore, whether she was handicapped or  
12 not was irrelevant to the school board's action, and  
13 should be irrelevant to this action.

14 QUESTION: General Fried, wasn't she otherwise  
15 qualified, within the words of the statute?

16 MR. FRIED: We believe she was not, Justice  
17 Marshall.

18 QUESTION: Why not?

19 MR. FRIED: She was not otherwise qualified,  
20 because a person who poses a risk --

21 QUESTION: You did rehire her twice. And you  
22 rehired her because she was no longer contagious.

23 MR. FRIED: At the time she was terminated,  
24 she was contagious. And she had been --

25 QUESTION: But before that, she had taken time



1 off, and had been rehired twice.

2 MR. FRIED: I believe so, Justice Marshall,  
3 that's correct.

4 QUESTION: Well, then, wasn't she otherwise  
5 qualified?

6 MR. FRIED: Not at the time her -- not at the  
7 time she was excluded from the classroom.

8 QUESTION: Why not?

9 MR. FRIED: At the time she was excluded from  
10 the classroom, she was in a contagious condition. And a  
11 person in a --

12 QUESTION: Well, wasn't she in a contagious  
13 condition that first time?

14 MR. FRIED: Not to the knowledge of the school  
15 board.

16 QUESTION: Well, I thought that your opponent  
17 said that twice she was released on full salary.

18 MR. FRIED: Oh, she was released on full -

19 QUESTION: And why was she released?

20 MR. FRIED: She was released --

21 QUESTION: Because she was contagious.

22 MR. FRIED: She was released from the  
23 classroom, Justice Marshall.

24 QUESTION: Because she was contagious.

25 MR. FRIED: Yes, Your Honor.

1 QUESTION: So she was otherwise qualified.

2 MR. FRIED: I don't believe so, Your Honor.

3 QUESTION: Why not?

4 MR. FRIED: Because the exclusion was the  
5 exclusion from the classroom. And she was --

6 QUESTION: Well, what other reason was she  
7 excluded from the classroom?

8 MR. FRIED: Because of her contagiousness. No  
9 other reason.

10 QUESTION: That's what I -- well, that makes  
11 her otherwise qualified. Or we're talking about  
12 something I don't understand.

13 MR. FRIED: Forgive me, I think I  
14 misunderstood. She was qualified in other respects,  
15 except her contagiousness; quite correct. That is so.

16 But in respect to her contagiousness, this was  
17 a properly disqualifying characteristic.

18 QUESTION: Mr. Fried, suppose someone has an  
19 accident, is burned, and becomes hideously disfigured.  
20 And the employer does not want to have anyone disfigured  
21 in the office and lets them go.

22 Now, the act just doesn't cover that. Because  
23 the exclusion in your view is on the basis of the  
24 employer's dislike of the disfigurement.

25 MR. FRIED: I believe that is correct, Justice

1 O'Connor. The regulations appear to cover that case.

2 QUESTION: Well, they do. And so it's very  
3 hard to understand where your argument would take us  
4 with regard to irrational reasons for excluding  
5 handicapped people.

6 MR. FRIED: In regard to irrational reasons  
7 for excluded, handicapped reasons, I hope that our  
8 argument would say that those are not sufficient  
9 reasons, and they constitute discrimination. But --

10 QUESTION: Well, what about the person who's  
11 just disfigured as a result of a previous injury?

12 MR. FRIED: In our view, that person is not  
13 handicapped because, to quote the statute, that person  
14 is not impaired in respect to a major life activity,  
15 except by virtue of the exclusion.

16 But that's that circular argument again.

17 QUESTION: What do we do about the  
18 regulations, then? Just ignore them, or what?

19 MR. FRIED: That particular phrase in the  
20 regulation, in our view, exceeds the purpose and the  
21 language of the statute, Your Honor.

22 QUESTION: You don't even think it's a  
23 reasonable reading of the statute?

24 MR. FRIED: We think it's an incorrect reading  
25 of the statute. It's an incorrect reading, which once

1 again causes the statute to burst those manageable  
2 bounds, and to start dealing with a whole lot of other  
3 subjects which were not in Congress' contemplation at  
4 the time.

5 QUESTION: Mr. Fried, what about a person who  
6 loses one arm. I have a friend who's lost an arm and  
7 who's able to do everything I can do. He can do every  
8 major life activity you can think of. Is that person  
9 handicapped or not?

10 MR. FRIED: Such a person is -- would clearly  
11 be considered handicapped.

12 QUESTION: Why?

13 MR. FRIED: Because there are some life  
14 activities, if I may traverse the assumption --

15 QUESTION: Some of these people do magnificent  
16 achievement, and are able to do things that everyone  
17 else can do. But that -- if they achieve the level of  
18 skill that the average person has, would they not cease  
19 to be handicapped?

20 MR. FRIED: I don't believe so. I think there  
21 would still be some activities which a one-armed person  
22 could not perform in the same way that a two-armed  
23 person could.

24 QUESTION: Major life activities?

25 MR. FRIED: I believe so. I believe so.



1 QUESTION: But employment is not one of them?

2 MR. FRIED: Well, employment certainly is one  
3 of them. But if the question is, are you able to carry  
4 out the employment? Ms. Arline was able to carry out  
5 the employment but for the exclusion.

6 The only reason she couldn't teach third grade  
7 was that they wouldn't let her. Now, that kind of  
8 inability surely can't be what the statute referred to,  
9 because that is your circular argument.

10 QUESTION: Well, what if the parents of the  
11 children wouldn't let the children enter the classroom  
12 because they were afraid of contracting the disease?  
13 Would that impair her ability to teach?

14 MR. FRIED: Well, that -- it would certainly  
15 interfere with it. But it would not impair her ability  
16 --

17 QUESTION: You would have to have some pupils  
18 in order to be able to teach, I suppose.

19 MR. FRIED: If I may, I'd wish to reserve the  
20 balance of the time for Mr. Hayes' rebuttal.

21 QUESTION: Mr. Fried, may I inquire before you  
22 sit down about the last part of the section defining  
23 handicapped individual, which says someone, a person  
24 with an impairment, who is regarded as having an  
25 impairment is a handicapped person.

1                   How broadly does that sweep, do you say?

2                   MR. FRIED: That sweeps no more broadly than  
3 the term, impairment. You have the definition of an  
4 impairment, and that is something that restricts you in  
5 a major life activity, your ability to perform a major  
6 life activity. And if you are regarded --

7                   QUESTION: Or who is regarded as having such.

8                   MR. FRIED: Then you are regarded as not being  
9 able to engage in a major life activity. So if the  
10 school board had thought that by reason of her  
11 tuberculosis Ms. Arline was unable to teach third  
12 graders -- not that they wouldn't let her teach third  
13 graders, but that she was unable to do so -- then she  
14 would be regarded as having --

15                   QUESTION: And you don't think that if the  
16 school board thought that one manifestation of  
17 tuberculosis was contagiousness, and because of the  
18 tuberculosis, which they regarded as her impairment,  
19 that that puts her under the act?

20                   MR. FRIED: No, I don't think so, Justice  
21 O'Connor, because tuberculosis is not the impairment.  
22 The impairment is whatever prevents you, the very  
23 condition, the shortness of breath, the hospitalization,  
24 whatever, which prevents you from engaging in the  
25 activity.

1           The word, tuberculosis, is perfectly  
2           ambiguous. It can cover the condition of being  
3           contagiousness without any impairment, or it can cover  
4           the impairment as well. And I think we mustn't get  
5           caught up in that ambiguity.

6           CHIEF JUSTICE REHNQUIST: Thank you, General  
7           Fried.

8           We'll hear now from you, Mr. Rahdert.

9           CRAL ARGUMENT OF GEORGE K. RAHDERT, ESQ.,

10          OH BEHALF OF THE RESPONDENT

11          MR. RAHDERT: Thank you.

12          Mr. Chief Justice, and may it please the  
13          Court:

14          Both issues presented on this case are  
15          narrowly drawn, and present the Court with the identical  
16          choice.

17          The petitioners, as they have framed the issue  
18          in their cert petition, would have this Court enact a  
19          per se rule which categorically excludes people with  
20          infectious, contagious tuberculosis from coverage under  
21          the Rehabilitation Act.

22          The second question --

23          QUESTION: That's not quite true. That's not  
24          quite true. They couldn't be -- they couldn't be  
25          dismissed by reason of their disability.

1 MR. RAHDERT: Justice Scalia --

2 QUESTION: As I understood both arguments, if  
3 the reason for the firing is that the person is not able  
4 to teach because they're ill now and then, or something  
5 of that sort, a person with tuberculosis would be  
6 covered, just as a person with any other disease that  
7 causes impairment would be covered.

8 What they're arguing is simply that dismissing  
9 that person because of the threat of contagion would not  
10 be covered.

11 That's quite different from saying that a  
12 person with tuberculosis is not covered at all, isn't it?

13 MR. RAHDERT: Justice Scalia, if I can refer  
14 to the first question presented on review, which was  
15 presented in the cert petition of the school board:  
16 Whether the contagious, infectious disease of  
17 tuberculosis constitutes a handicap within the meaning  
18 of Section 504.

19 The issue that was initially briefed by the  
20 petitioners was a per se issue. The petitioners  
21 analyzed legislative history to suggest that since  
22 contagious diseases were not specifically included, they  
23 are excluded from the coverage of the Act.

24 QUESTION: Well, I think everybody agrees on  
25 the point, as you've -- as you've just put it. Unless



1 that question means whether the contagiousness is  
2 covered by the handicapped act.

3 That's the only point that's being argued  
4 here.

5 MR. RAHDERT: The question as originally  
6 presented was a per se question. If the petitioners are  
7 receding at the per se question, and we are looking at  
8 contagiousness, it is our contention that contagiousness  
9 goes to the second question presented, which is whether  
10 Mrs. Arline was qualified.

11 Essentially, the questions framed in this --  
12 in this appeal pose first the question of coverage, and  
13 second, the question of whether there is a remedy,  
14 whether Mrs. Arline is qualified.

15 We would argue that the contagiousness goes to  
16 the second question, is very properly part of the  
17 analysis of whether Mrs. Arline is qualified to remain  
18 as a teacher in the Nassau County School System, but it  
19 doesn't go to the question of coverage and whether she  
20 is excluded.

21 If that first issue has been conceded in oral  
22 argument, I think the focus should be on whether she is  
23 otherwise qualified.

24 QUESTION: Well, Mr. Rahdert, on that first  
25 point for a moment, as I understand it, the Eleventh

1 Circuit held that all people with tuberculosis are  
2 handicapped.

3 Do you support that holding of the Eleventh  
4 Circuit?

5 MR. RAHDERT: Justice O'Connor, as I read the  
6 Eleventh Circuit opinion, and I will concede that there  
7 are -- there are some loose dicta preceding their actual  
8 holding -- they are saying that someone who is afflicted  
9 with infectious, contagious tuberculosis, such as Mrs.  
10 Arline, can be covered because that --

11 QUESTION: Well, let me phrase it another way.

12 Do you agree with me, then, that not all  
13 people with tuberculosis are handicapped?

14 MR. RAHDERT: I certainly agree with that  
15 proposition. And I would refer to the AMA brief.

16 QUESTION: And if the Eleventh Circuit meant  
17 something broader than that, they were wrong.

18 MR. RAHDERT: If that's the reading of the  
19 Eleventh Circuit opinion, it certainly stands to be  
20 clarified.

21 Our position is that someone with infectious,  
22 contagious tuberculosis, certainly someone such as Mrs.  
23 Arline, who as the Eleventh Circuit observed, has a  
24 condition that fits neatly within all three categories  
25 of the definition of a handicapped person, should be

1 considered covered, and should be allowed the analysis  
2 of the second issue, whether she's also qualified.

3 Whether her contagion prevents her from being  
4 qualified, and as the --

5 QUESTION: Mr. Rahdert, maybe there's not as  
6 much agreement on the first question as I thought.

7 The question reads, whether the contagious,  
8 infectious disease of tuberculosis constitutes a  
9 handicap.

10 Now, does that ask whether it always  
11 constitutes a handicap, or whether it can ever  
12 constitute a handicap?

13 MR. RAHDERT: I interpret it -- and if you  
14 will read the petitioners' initial brief, the petitioner  
15 initially argues that it can never constitute a  
16 handicap, because Congress meant to exclude all  
17 contagious diseases from the coverage of 504.

18 What has happened is that I think the Justice  
19 Department position, their gloss on the rehabilitation  
20 act, takes an effect from the cause, contagion caused by  
21 tuberculosis; analyzes that in a vacuum, somehow  
22 segregated, separated from the underlying impairment,  
23 and argues that contagion alone, discrimination against  
24 contagion alone, and in their words, whether reasonable  
25 or not, constitutes discrimination that is not covered

1 by the act.

2 We would suggest that contagion should be  
3 analyzed in terms of the qualified question. If someone  
4 who has a contagious impairment can have medical  
5 management of that impairment and be qualified.

6 Justice O'Connor asked the question of  
7 preceding counsel whether irrational reasons could be  
8 reached under this contagion analysis. And I quote page  
9 23 of the Government's brief, suggesting that if the  
10 reasons -- if the discrimination is focussed solely on  
11 contagion, whether reasonable or not, in the  
12 Government's language, that would elude coverage.

13 I know that the AID's memo has been lodged  
14 with the Court. That is the genesis of the Government's  
15 position.

16 And in that document the Government has  
17 written, Section 504 simply does not reach decisions  
18 based on fear of contagion, whether reasonable or not.

19 That -- Justice O'Connor asked where this  
20 question would carry us, this theory of justice would  
21 carry us. And I submit, it would carry us to exactly  
22 that point, where irrational fear eludes the act.

23 And Mrs. Arline argues that that is completely  
24 contrary to the legislative history and intent.

25 QUESTION: Suppose somebody, an employer, is



1       superstitious, and thinks that left handed people are  
2       unlucky, and chooses not to hire left handed people.

3               Is that covered by the act?

4               MR. RAHDERT: As a matter of fact, left  
5       handedness has been ruled in the lower courts not to be  
6       a handicap.

7               QUESTION: Now, that's pretty irrational,  
8       isn't it?

9               MR. RAHDERT: It's an irrational  
10      consideration, but it's not a consideration of a  
11      condition of impairment.

12              QUESTION: Ah, that's exactly what's being  
13      argued here. That the fact that it's irrational has  
14      nothing to do with whether it's covered by the act.

15              You can make some very irrational and unfair  
16      decisions as an employer, you would acknowledge, and not  
17      be covered by the act.

18              MR. RAHDERT: Justice Scalia, certainly the  
19      act does not reach all irrational decisions. But we  
20      contend that irrational decisions which are related to  
21      an impairment, a handicapping condition such as  
22      tuberculosis, should and would be reached.

23              And the error in Justice's position is that it  
24      is taking a condition of an impairment, isolating that  
25      condition, and suggesting that discrimination can be

1 addressed to that condition in the abstract.

2 We contend that a consideration of contagion  
3 necessarily is a consideration of the impairment of the  
4 -- impairing conditions as defined.

5 QUESTION: Mr. Rahdert, the Government, as I  
6 understand it, contends that the handicapped act, one  
7 way or the other, was not intended to reach what they  
8 describe as the web of local and state regulations  
9 governing communicable diseases.

10 Don't we have something of the same kind of  
11 question here that was involved in our Penhurst decision  
12 of a few years ago? Congress grants money to state and  
13 local governments, and says, you take it on these  
14 conditions. And then all of a sudden it turns out, ten  
15 years later, that maybe the conditions are construed far  
16 more broadly than the governments thought they were at  
17 the time they took the money.

18 MR. RAHDERT: I think the act is clear. And  
19 as the Court has analyzed, I believe in the Choate case,  
20 that there is a quid pro quo; that the receipt of  
21 Federal monies requires some accommodation of the  
22 handicapped.

23 With respect to the web of state and local  
24 regulations of communicable diseases, we suggest that  
25 far from impairing that process, the question of

1 wheth8er Mrs. Arline or someone with tuberculosis is  
2 fact specific, those are medical facts which should be  
3 considered.

4 And it would be a very important part of the  
5 qualification issue.

6 QUESTION: But does that bring each individual  
7 person who is perhaps quarantined in some way by the  
8 local governments, does that bring her into Federal  
9 court for a case-by-case determination under this act?

10 MR. RAHDERT: If there were discrimination, it  
11 would be subject to review in the courts. If that  
12 person -- if that person were handicapped as defined,  
13 they would have coverage under 504.

14 QUESTION: Well, supposing someone had scarlet  
15 fever, if people still get scarlet fever anymore, and  
16 they're quarantined for three weeks or something like  
17 that.

18 When they have scarlet fever, are they  
19 handicapped?

20 MR. RAHDERT: Your Honor, that would depend on  
21 the medical facts pertaining to that impairment, whether  
22 it fits within the three-part criteria. I don't know  
23 that much about scarlet fever.

24 QUESTION: The mere fact that it's contagious  
25 would not cause it to be a handicap?

1 MR. RAHDERT: Contagion alone is not a  
2 self-defining, an automatic definition of handicapped.  
3 A handicapped person is someone who has an impairment  
4 which substantially limits major life activities, such  
5 as working and breathing, under the regs.

6 Or whether that person has a history of such  
7 an impairment, or whether that person is regarded as  
8 having such an impairment.

9 So it would be a fact question in the first  
10 instance to determine coverage. And no, not all  
11 contagiousness is a handicap.

12 But certainly --

13 QUESTION: Well, if a discharge or termination  
14 is by reason of the contagion, which isn't itself a  
15 handicap, why -- why is there coverage?

16 MR. RAHDERT: Justice White, we suggest that a  
17 decision based on contagion is not going to be made  
18 abstractly, or isolated from the underlying impairment.

19 As in this case, with any medical analysis of  
20 contagion, assuming that decisions will be made on  
21 medical facts, there will be an evaluation of the  
22 medical history of the particular person, part two of  
23 the definition.

24 Each case depends on whether -- what is in the  
25 minds. If there are irrational assumptions being made,



1 stereotypes --

2 QUESTION: Well, I take it, if you find the  
3 person who has tuberculosis, but there's no -- the  
4 person is just a carrier. Let's assume there's no  
5 impairment --

6 MR. RAHDERT: If I can --

7 QUESTION: -- but she's contagious, or he's  
8 contagious.

9 MR. RAHDERT: If I can respond to that on the  
10 specifics of tuberculosis. My understanding of  
11 tuberculosis, and it's detailed in the AMA and the  
12 American Public Health Association briefs, is that to be  
13 contagious, you must have pulmonary tuberculosis. It  
14 has to be in and around the lungs. You have to have an  
15 impairment.

16 QUESTION: Yes. But what is the impairment?

17 MR. RAHDERT: The impairment would be a  
18 respiratory system dysfunction, which is specifically  
19 defined under the regulations.

20 QUESTION: So anyone who has -- any contagious  
21 person who can transmit person, you say, is a  
22 handicapped person?

23 MR. RAHDERT: It's a serious impairment when  
24 it reaches the contagiousness stage. There have been 15  
25 million Americans who have been exposed to tuberculosis

1 who have been infected by it and who are not active  
2 carriers.

3 I would draw a distinction between those  
4 people and the few who have pulmonary dysfunction as a  
5 result of tuberculosis.

6 Incidentally, pulmonary dysfunction is defined  
7 elsewhere in the Act, for other purposes, as a severe  
8 handicap, specifically.

9 QUESTION: Well, what about a different  
10 disease where the person is not handicapped, not  
11 impaired, but is a carrier?

12 MR. RAHDERT: With respect to a different  
13 disease, it would depend on the medical facts of that  
14 disease, as well as how that person is regarded.

15 QUESTION: Yes, assuming the person is not  
16 physically impaired.

17 MR. RAHDERT: It still is a fact question,  
18 first as to coverage, whether the person is regarded in  
19 some manner as being impaired. It's a case-by-case  
20 question, simply one that doesn't admit to per se rules.

21 With respect to that hypothetical person,  
22 there would be a further question, which would be a  
23 medical fact question of whether that person is  
24 otherwise qualified; whether than condition would  
25 require some job modification or accommodation, or

1 whether it could not be reasonably accommodated.

2 I would make the point that the AMA has made  
3 in their brief. Contagion is simply not a monolithic  
4 concept. It varies in degree.

5 QUESTION: (Inaudible.)

6 MR. RAHDERT: Justice White --

7 QUESTION: Which I thought you said awhile ago.

8 MR. RAHDERT: I would suggest that contagion  
9 itself is not a handicap, but the underlying impairment  
10 to which it is inextricably bound, could be a handicap.

11 QUESTION: What's the impairment? Is the  
12 impairment tuberculosis?

13 MR. RAHDERT: Yes, Your Honor.

14 QUESTION: Why isn't the impairment the  
15 consequences of tuberculosis?

16 MR. RAHDERT: The impairment is defined in  
17 terms of --

18 QUESTION: In other words, you have three  
19 things. You have a disease, tuberculosis. One  
20 consequence, impairment. And another consequence,  
21 contagion.

22 And what the statute prohibits is dismissing a  
23 person or affecting a person because of the former  
24 consequence, impairment; and not because of the latter  
25 consequence, contagion.

1 I think that's what the other side is arguing  
2 here. Now, why is that wrong?

3 MR. RAHDERT: The point -- I agree with you  
4 that impairment has consequences. In fact, under part  
5 one of the definition, under the statute, the  
6 consequences are looked to to define whether it is a  
7 covered impairment, whether it substantially affects  
8 major life activities.

9 But are argument is that there is no such  
10 thing in the real world as discrimination, whether  
11 reasonable or not, based solely on contagion. It's  
12 going to be based on -- if it's based on any kind of a  
13 reasonable and factual analysis, it will be based on the  
14 medical history, which any doctor would take; and more  
15 importantly, the fearful response to contagion is a  
16 fearful response to the underlying impairment.

17 I would --

18 QUESTION: Is the impairment due to the  
19 difficulty in breathing or to whatever other --

20 MR. RAHDERT: Certainly.

21 QUESTION: -- physical difficulty there is?  
22 No. It's a response to tuberculosis. Now, tuberculosis  
23 is the disease --

24 MR. RAHDERT: That's right.

25 QUESTION: -- which produces impairment and



1 also produces contagion. Now, you could be afraid of it  
2 or treat someone adversely because of it for either of  
3 those two reasons, either because of the impairment that  
4 it produces, or because of the contagion that it  
5 produces, couldn't you?

6 MR. RAHDERT: I would --

7 QUESTION: And it can produce contagion  
8 without impairment, or impairment without contagion.

9 MR. RAHDERT: I would submit that the  
10 impairment is tuberculosis. And the fearful reaction to  
11 contagiousness is a fearful reaction to tuberculosis and  
12 what it can do; that we really have a very clear case of  
13 coverage when there's a severe case of tuberculosis as  
14 here.

15 QUESTION: Well, what about if it's in  
16 remission?

17 MR. RAHDERT: If the tuberculosis were in  
18 remission and not contagiousness, coverage would depend  
19 on part two, which is history, and part three, how that  
20 person is regarded.

21 And that's very important. Congress meant  
22 broad coverage in the instances of irrational fear, of  
23 stereotype, of assumption.

24 And so coverage would be defined by the act of  
25 discrimination of the act of assumption.

1 As Choate notes, very often -- very often  
2 discrimination is not invidious animus, but  
3 indifference, assumption; and the legislative history  
4 suggests discrimination is often based on stereotype and  
5 fear.

6 To allow contagion to be separated out and be  
7 the basis of discrimination would be to completely  
8 eviscerate the Act in its purpose of preventing  
9 stereotype discrimination.

10 Justice Marshall, in your opinion in Choate,  
11 you talked -- you analyzed the Tennessee Medicare rules  
12 in that case in terms of whether they were facially  
13 neutral, or whether they had an exclusionary effect on  
14 the handicapped.

15 And you looked to whether they were based on  
16 criteria that were a test, judgment or trait -- and the  
17 Court used the word trait -- of handicapped to determine  
18 the propriety of the rules and whether they were  
19 violative of the Act.

20 Contagion is exactly the same question.  
21 Contagion is a trait of the underlying impairment. And  
22 we contend that there is no reality in the real world of  
23 someone acting irrationally but parsing it down so  
24 finely that it is directed to contagion in the abstract.

25 QUESTION: Mr. Rahdert, do you intend to

1 explain how someone who is actively contagious with an  
2 impairment of tuberculosis can be otherwise qualified to  
3 teach small children?

4 MR. RAHDERT: I intend to present that to the  
5 District Court, Justice O'Connor. The question is a  
6 fact-bound question, as has been universally recognized.

7 If you look at the regulations on otherwise  
8 qualified, they deal in facts. Medical facts are  
9 obviously the key issue in this particular case and in  
10 many handicapped cases. And so --

11 QUESTION: If someone is actively contagious  
12 with tuberculosis, how can that person be otherwise  
13 qualified to teach small children?

14 MR. RAHDERT: We would not contend for a  
15 moment, Justice O'Connor, that an actively contagious  
16 person -- tuberculosis sufferer should be in a  
17 classroom.

18 And I want to correct one misstatement of the  
19 record by the Solicitor General. There was no record  
20 evidence in this case to indicate that at the time of  
21 termination she was contagious.

22 What happened in this case was, as soon as  
23 they found out about the recurrence, she was -- she was  
24 put on leave and was discharged several months later  
25 through administrative proceedings.

1           At that time, there was no specific evaluation  
2 of her current condition. The only evidence we have in  
3 this very sparse record concerning Mrs. Arline and her  
4 contagiousness was that at the time of trial she had  
5 been free of contagion for quite some time.

6           And the medical expert testified that she had  
7 not received reports of positive tests indicating  
8 current contagion since 1979.

9           QUESTION: When was the trial?

10          MR. RAHDERT: The trial was in 1983.

11          QUESTION: And when was Mrs. Arline discharged  
12 or suspended?

13          MR. RAHDERT: At the end of the school year,  
14 1979, I believe.

15          QUESTION: Well, do you think that's terribly  
16 relevant that she was found not contagious in 1983 when  
17 the question is whether it was a discriminatory  
18 discharge in 1979?

19          MR. RAHDERT: I think the relevant question  
20 would be, was her contagion revealed in I believe  
21 November of 1978 under control at the time that her  
22 future in her career as a teacher was being weighed and  
23 determined.

24          And we suggest that there should be  
25 accommodation that should be considered. We suggest



1 that in this case, on this record, it appears there was  
2 no consideration of accommodation during the termination  
3 process.

4 There was a judgment made --

5 QUESTION: Well, do you think accommodation  
6 requires finding another job for the person? Or doesn't  
7 it relate to the job the person has?

8 MR. RAHDERT: I think accommodation primarily  
9 refers -- and whether she's otherwise qualified, it's  
10 essentially the same question -- refers to medical  
11 condition primarily.

12 With respect to other jobs, we're not  
13 suggesting that affirmative action, simply that  
14 evidently in this case, as the District Court seems to  
15 have found, there were job transfer options that were  
16 policies of this school.

17 And we merely ask that she be considered, just  
18 like a nonhandicapped person would be, for the usual and  
19 routine policies of the school board.

20 But our point on whether she is otherwise  
21 qualified is that if you look at the standards of this  
22 Court, in fact, which suggest, for example, in Choate, a  
23 balancing test; in Davis, looked at very detailed  
24 efforts to evaluate and see if the person could fit into  
25 the program and whether the program would be --

1 QUESTION: Well, are you suggesting that one  
2 form of accommodation that the statute might require was  
3 that even if she were contagious, she could continue to  
4 teach elementary school children?

5 MR. RAHDERT: Not at all. Not at all. If she  
6 were continuously contagious, I would conceded she's not  
7 otherwise qualified.

8 We're suggesting that tuberculosis is a  
9 condition that medical science has made great progress  
10 in, and as the AMA has pointed out, 95 percent of the  
11 cases of active contagion, pulmonary tuberculosis, can  
12 be rendered noncontagious within two weeks of proper  
13 chemotherapy.

14 That possibility certainly should be explored  
15 in Mrs. Arline's case, and was not.

16 But no, as a -- a person actively contagious  
17 could not teach at that time. Perhaps the school  
18 board's normal leave policies would allow an  
19 accommodation to return this woman to productive  
20 participation in her career, which is the underlying  
21 objective of the statute.

22 The question Justice O'Connor raised about  
23 cosmetic disfigurement is a very --

24 QUESTION: Excuse me, before you go on, Mr.  
25 Rahdert, that fact-bound question would become a Federal

1 question in every case, if your argument's right,  
2 correct? And all state health measures of quarantine or  
3 dismissal because of contagion would be in the Federal  
4 courts?

5 MR. RAHDERT: Justice Scalia, I don't think it  
6 would be that severe, because if proper medical  
7 procedures were followed -- we don't have a record of  
8 that precision in this case -- I would suggest that  
9 following state health guidelines, as the state health  
10 guidelines are constituted would not in any manner  
11 constitute discrimination.

12 QUESTION: Well, I can think of a lot of, you  
13 know, nice questions that can be raised about the  
14 remedies you suggest.

15 For example, you say, within two weeks of  
16 chemotherapy. But how quickly can she be analyzed as  
17 having become contagious again and whatnot? It would be  
18 necessary to do a test everyday or whatever.

19 I don't know what the answers are. I don't  
20 care. I'm just saying, it raises a lot of fact-bound  
21 issues which would all be dumped into the Federal  
22 courts.

23 MR. RAHDERT: Justice Scalia, the questions  
24 you raise, first of all, there are instantaneous testing  
25 methods for tuberculosis. The frequency of those

1 methods, those testings, would be established by disease  
2 control standards.

3 The Center for Disease Control, cited in the  
4 APHA brief, talks about getting people -- treating  
5 tubercular patients on an individualized basis, getting  
6 them back into work as quickly as possible. That's  
7 Florida law. That's Arizona law.

8 So I would suggest as a practical matter, if  
9 the public health standards were followed, and followed  
10 consistently, there just simply wouldn't be a floodgate  
11 of litigation; that that would be an appropriate means  
12 of accommodating an impaired person.

13 We very much endorse a medical determination  
14 of Mrs. Arline; a medical determination of all  
15 tuberculosis patients.

16 And by extending coverage, and by allowing a  
17 remedy under this broad remedial Federal legislation, we  
18 would encourage exactly this process of not reacting to  
19 public sentiment; not reaction to parents; not reacting  
20 to members of the school system personnel, which  
21 occurred in this case and is part of the record; but  
22 evaluating specifically on medical considerations.

23 QUESTION: Well, Mr. Rahdert, that is what was  
24 asserted to have happened here with the State public  
25 health officer, who said she wasn't -- she shouldn't be



1 allowed in the classroom.

2 MR. RAHDERT: Justice O'Connor, it's not clear  
3 on this record whether the state officer said, at this  
4 time; whether she said, this lady should be terminated  
5 completely for all times.

6 That simply -- that analysis which should be  
7 done was not done; is not evident on the record.

8 Moreover, and more importantly, the District  
9 Court assumed, based on his -- the Judge's assumption of  
10 Congressional intent, which is really not -- to which no  
11 citations were given -- that there was a per se  
12 exclusion.

13 And I think if the Court reads the District  
14 Court's opinion, it will read it to be a very broad  
15 exclusion of contagious people from the Act; and a  
16 further assumption that contagious people can never be  
17 -- or people who have at some point a contagious  
18 impairment, can never be qualified.

19 So there were no findings of fact by the  
20 District Court of a sufficient nature to decide this  
21 highly fact-bound question.

22 And we contend that the Eleventh Circuit Judge  
23 Vance appropriate remanded, based on that kind of  
24 record, and based on a decision that went off much like  
25 an order on a motion to dismiss on erroneous legal

1 points.

2 Justice O'Connor asks about cosmetic  
3 disfigurement. That has been in the regs since 1977.  
4 It is a clear example of discrimination, stereotyped, or  
5 in the government's terms, whether rational or not, a  
6 reaction to a condition of handicap.

7 And the reaction to the condition simply  
8 cannot be parsed out and separated and segregated from  
9 the reaction to the condition itself. Justice described  
10 that, in their initial brief, as anomalous, and  
11 suggested that cosmetic disfigurement discrimination  
12 could come under the Act if there was a perceived or  
13 actual nexus to the impairment.

14 QUESTION: What about just substantial  
15 ugliness? I mean the person is not just disfigured, but  
16 just not a handsome person? And an airline, let's say,  
17 you know, said we would prefer to hire good looking  
18 stewards and stewardesses. We don't want any ugly  
19 people.

20 Now would that -- if -- if it is enough that  
21 people associate with you less readily, if that is  
22 enough to constitute a disability, why wouldn't -- why  
23 wouldn't just homeliness be a disability?

24 MR. RAHDERT: The regulations answer that  
25 question in terms of -- defining an impairment as a

1 medical deficiency. And so ugliness would not, but  
2 someone with facial burns who suffered an anatomical  
3 loss, would.

4 QUESTION: Now how do you get that from the  
5 statute?

6 MR. RAHDERT: From the regulations, Your Honor.

7 QUESTION: Well, where do the regulations get  
8 it from the statute?

9 MR. RAHDERT: The regulations get it from a  
10 substantial impairment of a major life activity, of --

11 QUESTION: But if a major life activity is  
12 associating with other people, and people shun you  
13 because - I don't know why --

14 MR. RAHDERT: It would have to be --

15 QUESTION: -- ugliness produced by burns is  
16 any different from people shunning you just because of  
17 run-of-the-mill homeliness.

18 MR. RAHDERT: To just answer this question, it  
19 would be an impairment. An impairment is the  
20 handicapping condition. And impairment is not just not  
21 fitting the norm cosmetically, but having something  
22 physiologically go wrong in your life which, in turn,  
23 substantially limits major life activities.

24 I would suggest that cosmetic disfigurement  
25 from a cause such as a facial -- severe facial burn

1 would be such an impairment and have the limitation on  
2 life activities that ugliness would not.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
4 Rahdert.

5 Mr. Hayes, do you have something more? You  
6 have five minutes remaining.

7 REBUTTAL ARGUMENT OF BRIAN T. HAYES, ESQ.,  
8 ON BEHALF OF THE PETITIONERS

9 MR. HAYES: Yes, sir, if I may, Mr. Chief  
10 Justice.

11 To answer some questions that were raised  
12 during direct, or the argument of the respondent, we  
13 would like to remind the Court on page 18 of our brief,  
14 we did make the statement, Justice Scalia, I'm quoting:

15 In short, it is evident that while certain of  
16 the individuals having tuberculosis may be obviously  
17 impaired by the disease, others may not.

18 We have not made a per se statement that  
19 everybody in the world who has tuberculosis will never  
20 be impaired.

21 I want to also go into some of the medical  
22 problems that have --

23 QUESTION: What about the person in this case?

24 MR. HAYES: Well, this is a situation --

25 QUESTION: Did this person have a handicap?



1 MR. HAYES: If she had a handicap, Justice  
2 White, it would only be on the basis of a past record--

3 QUESTION: Well, then, you -- I take it the  
4 Solicitor General said that this person was a  
5 handicapped person.

6 MR. HAYES: Yes.

7 QUESTION: You don't agree with that?

8 MR. HAYES: Yes. We suggest --

9 QUESTION: Yes what?

10 MR. HAYES: We suggest, Justice White, that  
11 she can be -- for purposes of this argument, she can be  
12 considered handicapped, that is, get by the threshold  
13 question, so we can explore then the question of, solely  
14 by reason of, and the question of, otherwise qualified.

15 QUESTION: I know she can be, but is she?

16 MR. HAYES: No.

17 QUESTION: Is she handicapped?

18 MR. HAYES: I don't think, as a matter of  
19 fact, there's any record that she was impaired in any  
20 way. She taught for 13 years. There's no evidence that  
21 she missed a day of class.

22 QUESTION: The statute doesn't require --

23 MR. HAYES: I understand that.

24 QUESTION: It just requires that she have a  
25 record. She was not able to teach for some period of

1 time. She was hospitalized, right?

2 MR. HAYES: I concur, the petitioners concur  
3 100 percent with the Solicitor General, who says, those  
4 regulations, to that extent --

5 QUESTION: Why don't you give it away, Mr.  
6 Hayes? She's handicapped, isn't she? She had a record  
7 --

8 MR. HAYES: She had a record of handicap;  
9 there's no question about it, Justice Scalia.

10 But we want to address that, on the  
11 tuberculosis questions, the American Medical Association  
12 stated very clearly in their brief, they said the same  
13 thing essentially that we did, they said the disease of  
14 tuberculosis manifests itself through a variety of  
15 symptoms. Some diseased people have no symptoms at all.

16 One of the real problems in this case -- the  
17 actual question raised by Mr. Rahdert as to why the  
18 doctor recommended, I think Justice Marshall, that she  
19 be removed, not just suspended again and again and  
20 again, was this.

21 The question was asked at page 13 of Dr.  
22 McEuen, and she said -- you know, the attorney for Ms.  
23 Arline asked her, and Dr. McEuen said, quote: Because  
24 small children are considered highly susceptible to  
25 tuberculosis, and because the pattern of relapse

1 suggested that there may be a possibility of further  
2 relapses.

3 This gets into the other testimony about one  
4 of the difficulties in diagnosing when a person is  
5 infectious. That is the test where they take a sputum  
6 test. It often is six or eight weeks.

7 And so you're diagnosed, if you will, in  
8 arrears, in arrears of the judgment.

9 Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
11 Hayes.

12 The case is submitted.

13 (Whereupon, at 12:01 p.m., the case in the  
14 above-entitled matter was submitted.)  
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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:

#85-1277 - SCHOOL BOARD OF NASSAU COUNTY, FLORIDA AND CRAIG MARSH, INDIVIDUALLY, AND

SUPERINTENDENT OF SCHOOLS OF NASSAU COUNTY, FLORIDA, Petitioners V.

GENE H. ARLINE

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

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