TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
BILL HONIG, CALIFORNIA SUPERINTEN-DENT OF PUBLIC INSTRUCTION,	)	
	)	No. 86-728
Petitioners	)	
v.	)	
	)	
JOHN DOE AND JACK SMITH	)	

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BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION,

Petitioner,

v. No.86-728

JOHN DOE AND JACK SMITH

Washington, D.C.

Monday, November 9, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:55 a.m.

APPEARANCES:

ASHER RUBIN, ESQ., Deputy Attorney General of California, San Francisco, California; on behalf of the Petitioner.

GLEN D. NAGER, ESQ., Assistant to the Solicitor-General. Department of Justice, Washington, D.C. (pro hac vice) as Amicus Curiae; in support of Petitioner.

MS. SHEILA L. BROGNA, ESQ., San Francisco, California; on behalf of Respondents.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE REHNQUIST: Mr. Rubin, you may proceed whenever you are ready.

ORAL ARGUMENT BY ASHER RUBIN, ESQ.

ON BEHALF OF PETITIONER

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

This case involves the interpretation of two provisions of the Education for All Handicapped Children Act, the EHA. The first issue concerns the so-called "stay-put provision." That Section states, "During the pendency of any proceedings conducted pursuant to this Section, unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then-current educational placement of such child."

The Ninth Circuit has said that, "This operates as an automatic injunction in that it lists no exceptions."

The second issue involves a provision which, if I might paraphrase it, states that, "Where a local educational agency is unable or unwilling to provide services to handicapped children, the state itself must step in and provide those services directly."

The facts which gave rise to this case may be stated briefly. John Doe was released from a state mental hospital in the spring of 1980 and was enrolled in the San Francisco school

district and an Individualized Education Program was designed for him, an "IEP," and he was placed in a special school.

In October 1980, he got involved in an altercation with a child and attempted to choke a by-stander. No disciplinary action was taken at that time, although the principal and his aides tried to work with him.

Shortly afterward, on November 6, 1980 a far more serious incident occurred. He got involved this time in an argument with a child over a basketball and he jumped on this child and choked him and strangled him to the point where this other child did suffer abrasions to his neck and pain --

QUESTION: Mr. Rubin, were these other children -- were they handicapped also, or were they non-handicapped?

MR. RUBIN: They were handicapped children, Your Honor. This was a school for trainable mentally retarded children. He was in a class of about 12 children.

QUESTION: Mr. Rubin, both of the students involved in this case have now left the public schools system, is that correct?

MR. RUBIN: I have a feeling I am going to hear about mootness here. Your Honor --

QUESTION: Well, I am just asking the present status of these students.

MR. RUBIN: Your Honor, the first student, John Doe, is over the age of 21. He is no longer in the school district.

He is in a state mental hospital.

The second student left the school system, actually in another town, in 1985. He is 20 years old and conceivably could re-enter the San Francisco school district.

QUESTION: May I ask, as long as you are interrupted, whether you raised the first question in your Cert Petition, the so-called "dangerousness exception" to the statute in the courts below?

MR. RUBIN: Your Honor, we believe we did. We believe that it was not stressed at an early point. It was present in the case all the way along.

QUESTION: Well, can you refer me to anything specific so that I might satisfy myself that you indeed raised it below?

MR. RUBIN: Your Honor, in terms -- I personally did not raise it. It was raised by the Plaintiffs who raised it in all of their pleadings. It was adverted to by the district court and, of course, discussed in great detail by the Ninth Circuit. And it was this perception that the children were dangerous were reflected in many of the evidentiary documents which were submitted as Exhibits to the initial Complaint.

So, in terms of our raising it, we really focused in on it when the Ninth Circuit made clear that this was an issue that they intended to treat at some length.

QUESTION: Mr. Rubin, could you elaborate on your

statement that the 20 year old conceivably could come back into the San -- I mean, anybody in the country could conceivably could go to the San Francisco school district.

MR. RUBIN: With respect to possible mootness, Your Honor, we think that this is capable of repetition yet evading review, although within the Murphy v. Hunt requirement that there be a "reasonable expectation," in that it will recur between these parties --

QUESTION: Between these parties?

MR. RUBIN: -- I can make no representation. I believe that would be up to Respondents and know more of his circumstances. All that I can say is that I believe he is in San Francisco or in the San Francisco Bay area; he is 20 and that it is possible that he could -- these children have been in and out of services provided by the San Francisco school district. It is possible, but i cannot represent to the Court that he will in fact return. As I said, perhaps Respondents might be able to shed some light on that.

With respect to the factual situation concerning -- let me return then to the factual situation concerning John Doe. After this incident in the classroom, he was pulled off the other child; he kicked out a plate glass window and was immediately suspended from school.

Before any administrative actions could be taken, the instant action was filed in the district court.

With respect to Jack Smith we have another factual history. He was involved in certain acts of misconduct --

QUESTION: How old was he at the time?

MR. RUBIN: Your Honor, at the time. of the incident, he was --

QUESTION: John Doe?

MR. RUBIN: -- John Doe was, 17 years old, he was 6 feet tall and he weighed 195 pounds.

QUESTION: And the other one?

MR. RUBIN: The other one was 13 years old.

Now, with respect to Jack Smith, the Intervenor, he had a series of acts of misconduct, and among those was -- were, stealing and a more serious incident where he grabbed another child up by the neck, pulled him into a bathroom, asked him for his money, took his wallet and took all the money that the child had, some six dollars.

So we have children here, presented by the facts here, who may reasonably be perceived to be "dangerous children." And the question is, what do you do with such dangerous children? When you suspend them, what do you do with them pending review proceedings?

Of course, to resolve this, we have got to look at the intent of Congress.

QUESTION: Before you get into that, just to refresh my recollection, before the lawsuit was filed, what was the

posture of the matter? The first plaintiff had been suspended permanently or for three or four days, or what?

QUESTION: Your Honor, he had initially been suspended for five days, but that suspension was extended by the school district with a view to referring him for possible exclusion or expulsion from the school district.

QUESTION: Was the lawsuit filed not until after that had been done, is that correct?

MR. RUBIN: It was filed before it could be done, before a hearing could be --

QUESTION: Was it while the five -- before the five-day suspension had expired?

MR. RUBIN: No, it was after that five-day suspension had --

QUESTION: So by the time. the lawsuit had been filed, he had been suspended indefinitely?

MR. RUBIN: On an extended suspension. Your Honor, that is correct, and I should add, Your Honor, the State Petitioner here is not in agreement with all the actions taken by the school district. We think they made some mistakes. And we want to quickly establish that this is not the procedural sequence that we believe should be followed in California.

QUESTION: Was this ever referred to the juvenile court?

MR. RUBIN: I am sorry, Your Honor?

QUESTION: Was this ever referred to the juvenile court?

MR. RUBIN: No, Your Honor, not to my knowledge.

QUESTION: Is there any reason why not?

MR. RUBIN: I do not know why it was not.

QUESTION: Well, is kicking out a window a crime in California?

MR. RUBIN: Your Honor, I believe initially they try to handle these things administratively. Kicking out a window I would think would be a punishable offense.

QUESTION: Well, if you kick one out would get into trouble -- you would have trouble, would you not?

MR. RUBIN: Well, hopefully, Your Honor, it would not be a manifestation of my handicap. If it were, I would seriously question whether --

QUESTION: The fact that he is handicapped does not immune him from criminal prosecution, does it not?

MR. RUBIN: Well, no, Your Honor, as a matter of fact, this is not in the Record, but later on in 1982, I believe it was, John Doe was involved in the criminal justice system and did go on to the state hospital.

I think we have got to decide how to handle this case by looking at the intent of Congress. That, of course, is our most important guide. There is nothing specific in the legislative history which touches directly on what you do with

dangerous children. But we do have some clues.

We know, for example, that Congress was heavily influenced by the Mills case and the Parks case, two district court decisions. Now, what did Mills say? In Mills the court said something that we think is directly on point here: in Mills, the court said, "pending the hearing and in receipt of notification of the decision there shall be no change in the child's educational placement, unless the principal shall warrant that the continued presence of the child in his current program would endanger the physical well-being of himself or others. In such exceptional cases, the principal shall be responsible for ensuring that the child receive some form of educational assistance and/or diagnostic examinations during the interim period. Now that is in Mills.

A comparable statement was made --

QUESTION: Mr. Rubin, with reference to that statement, is a "suspension" a "change in educational placement?" I mean, if I have a child in the 8th grade who is suspended for a week for some infraction, is he no longer in the 8th grade?

MR. RUBIN: The consensus seems to be that 10 days -- the 9th Circuit said 20 days here -- a suspension would in effect become a change in placement.

QUESTION: What do you think? Ten days? Twenty days?

MR. RUBIN: Well, a short suspension, during which you are trying to figure out what to do with the child, certainly would not be a change in placement, whether it is ten days or twenty days, I would have to say 20 days, I think, which the Ninth Circuit allowed us --

QUESTION: Mr. Rubin, I thought the Ninth Circuit referred to 30 days, not 20 days?

MR. RUBIN: Well, 30 is in a special case, Your Honor when it involves a transfer from one school from another.

QUESTION: Is there not some federal guideline that suggests 10 days is the limit?

MR. RUBIN: There is, I believe, and --

QUESTION: So that would be the administrative agency interpretation placed on it by the federal agency?

MR. RUBIN: Yes. Your Honor, I think that the significance is that after a short period of suspension, whether it is ten days or whether it is 20 days, you have got to give that child some educational services, and if you consider it an interim placement, the point is that you -- or he -- we realize he is being deprived of educational services so long as he is out of school. And it is our position you do not abandon that child; you do not warehouse the child; you do not rid yourself of some troublesome problem. You give that child services during this period. And what we are saying is, the worst thing in the world is to put him back in that

classroom where he just assaulted another child and where he is likely to repeat that conduct.

QUESTION: Well, there is a problem with the "stay-put provision," which does appear to indicate that Congress thought that a child should stay put, pending following the procedural provisions in the statute.

Now, if we were to say somehow there was a "dangerousness" exception, a school district could certainly evade the procedural protections envisioned by the statute by labelling a child "dangerous."

MR. RUBIN: Your Honor, first, I think we can look at this as not really -- an exception to the statute. We think that it is implicit in the statute. This Court in Rowley, for example, said that, "Implicit in this statute was the notion that, when a handicapped child receives benefits, that there will be some substantial benefit to that education."

And the Court used the word "implicit" in the statute. We think "implicit" in this statute is the notion that Congress is saying, "We do not intend to strip away from school districts their traditional authority and responsibilities to guarantee the safety in the school -- "

QUESTION: Call it what you will, you want us to read something into the statute that is not expressly there, and that would appear at least on the face of it to read in an exception that would be at tension with the statute.

The Solicitor-General makes quite a different proposal to us than yours. Do you want to comment on the Solicitor-General's approach?

MR. RUBIN: Your Honor, I believe the Solicitor-General's approach, which I hesitate to characterize for him, is an alternative which -- has some merit to it, that is, you can give the district court the ability to weigh these matters as ordinary injunctive matters and balance equities and irreparable injury, et cetera. That is a possible approach.

But permit me, if you will, to precede to my second issue, which is the question of whether in an individual case, the state must provide direct services to a child?

The Ninth Circuit says that, "where the local educational agency is unable or unwilling to provide services to one child, to any individual child, the state must step in and provide those services." And we believe that is contrary to the language of the statute, which speaks in terms of "children residing in the area;" which talks about "programs." This is repeated in C.F.R. Section 300.360, where they talk about "children in the area served." We think that Congress meant this:

Local school districts are on the front line. They give these services, and where you have children who can be served only in a regional center like a school for the deaf or a school for the blind, that is when the state steps in. Or

where you have a small district that does not have a program in its district whatever for handicapped children. Or it is unwilling to set out a program for its district as a whole, then the state steps in.

Otherwise you have got the complaint procedures in 1415, where the child or its representative, files the Complaint and goes through those procedures which are designed to protect him and gets the services to which he is entitled.

And upon the completion of those procedures, if it ever goes to a district court, the district court has a fully developed record and can make an intelligent choice.

So, we think that in both these -- on both these issues, we are implementing the intent of Congress. On the first issue it is implicit that Congress could not have meant to take form school authorities the responsibility to guarantee a safe classroom and a safe environment. And on the second issue, that the scheme is such that the state provides direct services only when a local district acts in the manner which we have indicated.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rubin. We will hear now from you, Mr. Nager.

ORAL ARGUMENT BY GLEN D. NAGER, ESQ.

AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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

Primarily for the reasons stated by Petitioner, the United States agrees that the court below misconstrued the "stay-put" in the direct services provisions.

Even if Petitioner is wrong, we submit that the answer can only be because the courts below erred on a remedy that they issued as relief for the asserted violations.

This Court in Burlington said, "in devising a remedy for a violation of the EHA, a court should always keep in mind the principle overriding the objective of the EHA, which is the provision of free appropriate public education in the least-restrictive environment possible for all our nation's handicapped children." The decision below deserves that congressional objective and does so in the following two senses: first, if school administrators are required to maintain the placement of a dangerous child pending administrative and judicial proceedings, the incentive in the initial IEP process will be for school administrators to resist the placement of any child who has a perceived risk of dangerousness in a mainstreamed environment.

There are under this statute many children who have a risk of dangerousness. The question is whether or not they will act out those tendencies of dangerousness. We do not know until they are in the placement. If school administrators are told "you cannot take them out once they act on it," they will not put them there in the first place, and many more children

will be deprived of the benefits of this statute, the principal objective of the mainstream environment than would be the case if the "stay-put" exception were not so rigidly applied as it was by the Ninth Circuit as it was in this case.

A similar point can be made with respect to the direct services provision. The child's IEP is determined on the local level. More often than not -- indeed, in the principal number of cases, the least restrictive environment will be on the local level. If the local agency defaults, the appropriate remedy is to order the local education agency who did the IEP and has the direct services available, to provide them.

The state acts in a supervisory capacity and should be held to order the local education agencies to provide those services, but the appropriate guns placed to the local educational agencies' head, not to the state agency's head.

Let me move to each point in a little bit more detail: this Court has said on numerous occasions that equitable relief, such as injunctive relief and declaratory relief, should not issue as a matter of course. The Court has recognized that Congress can and sometimes does, restrict a court's equitable discretion, but it had said, given the history of equity practice, that the Court will not find the Congress has restricted the equitable jurisdiction of a court unless Congress says so in explicit words. And we submit that

there are no such explicit words to be found in the EHA.

Specifically we would refer the Court to 20 U.S.C. 1415(e)(2), which is the remedial provision of the statute. That is the section of the statute which says that "A court may order any appropriate relief."

This Court in Burlington said that is a broad grant of discretion to courts. And we submit that the "stay-put" provision was not intended and does not limit, the discretion with which a court may determine what is an appropriate remedy.

QUESTION: Mr. Nager, do you have a position on what the appropriate relief in this case would have been?

MR. NAGER: I can give a series of possibilities, Justice Stevens. An alternative placement would have been one which would have best simulated the placement that the child was currently in with the qualification that it would have reduced and/or eliminated the risk of dangerousness to other children or to the child.

For example, a smaller classroom with closer supervision might have been appropriate as an interim remedy. It may have been that only --

QUESTION: Is it something that the district court should have ordered?

MR. NAGER: Yes. Yes, we believe that the appropriate procedure for the district courts, since this case we do believe was appropriately in the district court, would

have been to ask the parties to submit proposals for alternative placements, and the district court should have reviewed those proposals and ordered the school district, assuming there was a violation of the "stay-put" provision, to put the child in the placement that most simulated the --

QUESTION: Do you think there was a violation of the "stay-put" provision?

MR. NAGER: Well, our position is that there was not, because --

QUESTION: Well, then there should have been no relief, I guess?

MR. NAGER: That is correct, although the state -- the local education agency still would have had a continuing obligation under the EHA to provide --

QUESTION: I am focusing on what the district judge should do when they come into a court in this kind of emergency. Your view is that they should have done nothing?

MR. NAGER: Because there was a basis for claiming that the children were dangerous here, it is correct that the district court, we did not believe, should have directed the local education agency as to which alternative placement would have been most appropriate.

If this had not been a dangerous child, however, and the school had tried to change the placement of the child, we believe that there would have in fact been a violation of the

"stay-put" provision and the district court should have awarded an appropriate placement would be, but more likely than not it would have been to order them to put the child back in the classroom.

QUESTION: Is there anything in the Record of expert information?

MR. NAGER: No, and that is part of our point in this case, Justice Marshall. There was no expert testimony put in by the plaintiff when she --

QUESTION: On either side?

MR. NAGER: On either side, that is correct. We, just like the state, yes, we do. That is part of our point -- just like the state, we do not believe that the local educational agency acted properly here. We believe that their actions frustrated the purposes of the EHA as much as the district court's ultimate remedy and the court of appeal's ultimate judgment.

Our point is simply that, when you have a dangerous child, Congress did not remove the discretion of the federal courts to allow the school to safeguard the interests of the other children in the classroom, and certainly would not have intended that an equitable rule be issued such that in the future all school administrators within the jurisdiction of that court would resist ever placing the child who has any dangerous tendencies in an environment where the child might

act out on those dangerous tendencies. Because the school district would have their arms tied behind their back.

QUESTION: Is it your position then that the "stay-put" provision just is not violated when the school suspends a violent student?

MR. NAGER: The short answer is "yes," Justice White. We do not believe that Congress --

QUESTION: Whether it is for 30 days or 100 days or anything else?

MR. NAGER: No. They do not violate the "stay-put" provision by suspending. They would violate the EHA by not providing an appropriate placement -- a continuing appropriate placement for that child.

Now, if the Court were to determine, however that it was a violation of the EHA, then our argument which we presented in our brief would kick in and we would suggest that, nevertheless even thought there that violation would be a abuse of discretion for the district court to order the child to be placed back in the classroom if the child had a continuing risk of dangerousness.

QUESTION: But I take it, then, that a district court in a case like this should say, "well, the "stay-put" provision is not violated by a suspension of a violent student, but I have got to make sure that the school is promptly taking care of this?

MR. NAGER: Yes. Yes. The qualification being that if the "stay-put" provision is not violated, then the district court's -- the appropriate relief for the district court to order is to order the parties to go through the IEP process and the EHA review procedures because it is in that process where the correctness or the appropriateness of the procedure should be determined.

However, if a court were to find that it was a violation of the EH -- of the "stay-put" provision to suspend the dangerous child, then the court would have authority, because it would have a violation of the statute, to require the parties to bring in expert testimony, so it could determine as best it could what the best interim placement would be, because it would have authority to issue some remedial order.

QUESTION: Why is this case not moot?

MR. NAGER: The United States is inclined to believe that it is moot. The reason why I say "inclined," is because as amicus we really do not have access to the facts. It is clearly moot in ordinary mootness principles in the sense that this is a question about interim relief and the children ultimately went through the IEP process and had a final placement. But under -- in terms of capable repetition yet evading review, there is no circumstance in which it could be capable of repetition.

QUESTION: There were claims for damages, but they

were rejected, I take it?

MR. NAGER: Yes, the district court held that there was sovereign immunity for the state; there was a settlement with regard to the local school district with regard to damages; and the court of appeals found that there was qualified immunity for the state officials.

QUESTION: But there was a settlement on damages, but was that contingent on liability or what?

MR. NAGER: Not to my knowledge, Justice White. In the local education is --

QUESTION: What do you mean, if the local -- if the school authorities win this case like you think they should, are they just going to pay the damages?

MR. NAGER: I believe they have already been paid, but I am not privy to the information whether the monies have been forthcoming.

The local education agency that made that settlement did not petition to this Court and is not a Party before the Court. The question of mootness would be with respect to the parties before the case.

The only plaintiff who it could be capable of repetition yet evading review is Respondent Jack Smith, and Respondent Jack Smith is 20 years old and is no longer in the public school system, unless Respondent's counsel is going to represent to this Court that he intends to enter into the

school system, we do not say it is capable of repetition yet capable of evading review. Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nager. We will now hear from you, Ms. Brogna.

Ms. Brogna, did your clients file a cross-petition for Certiorari or not here?

MS. BROGNA: We did not, Your Honor.

ORAL ARGUMENT BY SHEILA L BROGNA, ESQ.

ON BEHALF OF RESPONDENTS

MS. BROGNA: Mr. Chief Justice and may it please the Court: I will begin right to the beginning by saying in fact John Doe is 24 years old. He is in a state hospital. It may be possible under California law that has just come out within the last ten days that he remain eligible for education by the State Department in California.

Nevertheless, Jack Smith is 20 years old. As I am sure you know, the EHA extends the right for education to handicapped children through the age of 22. Therefore, he still is eligible for education from the Unified School District, and certainly under the auspices of the State Department of Education. We suggest, therefore, that the case is not moot, although I cannot represent whether in fact wither of these students will ask for further education from the Petitioners.

I think, as young people, they both look to this

decision to find out what will happen after that.

QUESTION: That would not ordinarily be enough, would it, to meet our standards?

MS. BROGNA: It may not be, given the inclination of the Court to say that, while it is technically possible for a Petitioner to come within the circumstances again, if in fact it is not likely that they will, then the case could be moot.

We suggest, however, caution in that area, because of the very unique nature of the EHA, there is, as this Court has recognized, a very involved administrative process which involves a series of informal meetings and administrative review at the state level. Levels of either and/or both, state and federal review. It is not, I think, a coincidence to see that the only two cases that have come to this Court on substantive issues of education under the EHA involve children who started the dispute when they were in kindergarten. The cases of Tatro and Rowley were both small children.

In cases at least like this, where we are dealing with the interplay and discipline in education, it is not unreasonable to expect that the children will be somewhat older than that when the process starts against them.

QUESTION: What about sending it back and find out what they do want? We are not in a position to decide what they want. You do not know what they want. Why not sending back to the lower court to see if indeed if it is moot?

MS. BROGNA: Perhaps that would --

QUESTION: Would it not be moot if both of them said, "we are not interested in education?" Would it not be moot?

MS. BROGNA: I do not believe it would because the gravamen of the injury here, Your Honor, was in fact the absence of a state policy and a practice of the state to sanction actions like the Unified School Districts in continuing to treat handicapped children under the regular discipline code.

QUESTION: Well, you do not have any person before us who wants that right enforced.

MS. BROGNA: Well, with due respect, Mr. Justice Marshall, that is not true.

QUESTION: Well, who wants it enforced?

MS. BROGNA: Jack Smith is within the age when he can continue to be educated. He has not --

QUESTION: Has he asked to be placed in an education?

MS. BROGNA: He has not asked to go back to the Unified School District.

QUESTION: Then how is he asking?

MS. BROGNA: He remains eligible under the federal Act.

QUESTION: Is anybody that is eligible old enough to bring this suit?

MS. BROGNA: Well, they would have been at the time

it started because San Francisco or the State of California did not allow any handicapped child who was disabled --

QUESTION: Well, at this stage, so far as I am concerned, I would be satisfied if he told you that he wanted this case decided. Did he?

MS. BROGNA: Yes, he did, Your Honor.

QUESTION: He told you that?

MS. BROGNA: Yes.

QUESTION: That he wanted this case in this Court decided?

MS. BROGNA: Yes, Your Honor. As I understand, they are both --

QUESTION: Now that you understand --

MS. BROGNA: I have spoken to both of my clients within the last two weeks. They both are aware that their cases are coming before this Court for consideration. As the Petitioner represented, John Doe is in a state hospital. He is still under the auspices of the state. He is entitled to education.

Jack Smith is within the State of California. He lives in the Bay Area; he has not graduated from high school.

QUESTION: Well, does he not need a committee or somebody to represent him? How is that done in California? Who represents an insane person? Who?

MS. BROGNA: Jack Smith has not been found insane.

QUESTION: I am not talking about Jack Smith; I am talking about the one that is in the insane asylum.

MS. BROGNA: He does not need -- as a matter of fact, he does not need a guardian or a conservator, if that is what you are suggesting. He has not been conserved.

QUESTION: Is Respondent Smith living in the San Francisco school district now.

MS. BROGNA: He is not living in the school district, although his guardians still are. He lives in a small town about 20 miles outside of San Francisco.

QUESTION: So, for this case to recur, we have to assume that Jack Smith is going to move back to San Francisco; that he is going to be placed by the San Francisco school district in a program that cannot handle violent children; and that this same episode will repeat itself. Not very likely.

MS. BROGNA: We have to see. Well, I do not know which part of it is not very likely.

QUESTION: Either one.

MS. BROGNA: I think it is likely that he could ask for education because he in fact has not graduated, and it is his right; he is a handicapped student and needs some training.

QUESTION: Fine. Let us assume that he asks for it and he asks for it in San Francisco. He would have to move back to San Francisco first, right? There are a lot of people living within 20 miles of San Francisco whom we do not expect

to move there in the immediate future, right. But he comes back in.

We also have to assume that the state is going to be foolish enough -- or the city -- is going to be foolish enough at this point to place this individual that had this record of violence that they are worried about, in a program that cannot cope with that kind of a student, and then go through the same routine that they go through here -- suspend them and what-not. Is that really capable of repetition in the sense that we have said in our caselaw?

MS. BROGNA: Your Honor, I would like to believe that it is not. But I have the Petitioner here before this Court saying that, if they are given this judicially-created exception that they seek here, that that is exactly what they would like to do for handicapped students like Jack, so I --

QUESTION: Put them in a program that they know cannot handle them? Petitioner is not saying that.

MS. BROGNA: Well, the more difficult problem, Your Honor, is that they want to put them in a program that they unilaterally have selected, and that is the concern more than any other, we feel, that proposition violates congressional intent. Congress particularly enacted the EHA to include parental involvement in the planning for handicapped children. The bottom line problem with the well-meaning intentions of the Petitioner are that they want to be allowed to select the

program for handicapped children themselves without the involvement of the parents; without the involvement of the other professionals.

QUESTION: Ms. Brogna, when you say "the bottom-line intent of the Petitioner," the Petitioner here is the State Superintendent, is that right?

MS. BROGNA: That is correct, Your Honor.

QUESTION: The San Francisco Unified Schools have never petitioned for Certiorari.

MS. BROGNA: They did not, Your Honor, that is correct.

QUESTION: So what then we are talking about here is really Jack Smith's possible relationship, not to the San Francisco Unified School District, but to the State of California and to the Superintendent of Education, are we not?

MS. BROGNA: That is correct. However, the EHA, we believe, makes very clear and in particular the regulation interpreting the statute at 34 C.F.R. 300.600 does very clearly state that the State Department of Education is the ultimately responsible agency for the education of handicapped children.

QUESTION: Yes, but what I am suggesting for the purposes of mootness, are the State of California is the one involved here. It is not really just the San Francisco Unified School District.

MS. BROGNA: Well, that is correct, and I certainly

point --

QUESTION: The Chief Justice is trying to help you, Ms. Brogna, and I think --

[Mirth.]

MS. BROGNA: We would point out that there are final Orders that would continue to be in effect against the School District; the injunctions do stand and have not been appealed.

However, in fairness, given the amount of concern that this case has generated, I think you can see that many, many school districts that were not -- would not be, under the Orders of thee lower court would like to try to return to the pre-1975 days of unilaterally deciding where handicapped children should be placed.

QUESTION: Ms. Brogna, the State of California has conceded, however, has it not, that the procedures employed here were in some respects not correct.

MS. BROGNA: Apparently they have.

QUESTION: So again, even if the State is the only party, do you think there is a real likelihood that the same thing would occur in another school district in California?

MS. BROGNA: I submit I cannot predict what they would do. I certainly would hope not. We are of the opinion that the district court injunction is a well-reasoned injunction where she did balance the equities and determined that the balance of hardships tips in favor of keeping

handicapped children in the current placement while the dispute is resolved.

However, the vehement opposition that the district court's injunction has engendered leaves me unable to say that with surety. The fact that Petitioner now says they think that what the School District had done was wrong, is very heartening for us.

However, I do want to point out to this Court that aside from all the conversations about what sorts of placement the child should be moved in, the facts of this case were very different. There was not a dispute about alternative placement going on. What happened in the San Francisco Unified School District and what was sanctioned by the California State Department of Education, was that these children were turned out of school; they were provided no alternative education, no tutors, no special programs. They were proposed to be excluded, out of any educational services. And were it not for the orders of the district court that is exactly what would have happened.

So we need to look at the idea that Congress was aware of a history of discrimination of discrimination and exclusion on the part of handicapped children, and in fact, the exception that the school districts and the State Department of Education is asking for here could very easily result in that exclusion again

The fact that this Court has recognized the genesis of the Act out of the cases of Mills and Park, as this Court observed, cases which arose from parents' concern about the exclusion of their children, did in fact have an exception for dangerous children, which the Petitioner referred to you.

We feel it is tremendously significant that, when Congress adopted the due process procedures that had been outlined by the district courts, it specifically did not allow that exclusion at a principal's recommendation to be codified in a federal law.

QUESTION: Ms. Brogna, when you say, "it specifically did not," referring to Congress, are you suggesting that there is evidence that this proposal was made to Congress and Congress said, 'no, we do not want that in it?" Or that it just omitted it?

MS. BROGNA: There is not a discussion about that in particular, although there are many, many references in the congressional history, Your Honor, to the fact that Congress reviewed the consent decrees in Mills and Park in quite detail, and provided all the other due process rights that had been written up and drawn together as the scheme in the Mills Court in particular, notice and opportunity for a hearing, the right to be accompanied by counsel; the right to have a transcript; the right to appeal into state or federal court -- all of those due process procedures you will find in the consent decrees in

Mills and Parks, and you will also find in 20 U.S.C. 1415.

The only thing that you will not find is the exclusion at the principal's determination that child is dangerous.

And we think when you read that in conjunction with the federal definition which appears with 1401, of who are "handicapped children," the inclusion by Congress of emotionally disturbed children leads, we believe extricable to the conclusion that the kind of behavior that is being so cavalierly characterized as "dangerous" here, was in fact behavior that was not unreasonably expected to occur by Congress. Congress did not leave school administrators helpless in the face of emotionally disturbed children.

QUESTION: Well, Ms. Brogna, you say "cavalierly characterized as 'dangerous.'" Are we to take it from that that you do not agree that this particular incident could be described as being "dangerous?"

MS. BROGNA: No, I want to --

QUESTION: "No," what?

MS. BROGNA: I am not saying that it was not or could not, have been dangerous, Your Honor. What I am saying is, these children should not be labelled as "dangerous."

QUESTION: Despite the fact that they are?

MS. BROGNA: Well, I think, as perhaps Justice Scalia was suggesting, if appropriate programs and appropriate

planning has been made for these children, the types of outbreaks of behavior that we had in this situation should not properly occur. There are many, many other methods that school administrators can use to keep the behavior of children under control.

QUESTION: Well, Ms. Brogna, we are dealing with situations that are not always predictable and human beings do not always operate with perfection, as we know. But if a case such as this is properly before a district court, do you not agree that the district court, if it is asked for injunctive relief, should make the kind of balancing traditionally made by courts in granting an injunction, as suggested by the Solicitor-General? Is that not proper?

MS. BROGNA: It is absolutely proper. We have no argument with that.

QUESTION: Did the district court make that kind of a balancing inquiry here, do you think?

MS. BROGNA: Yes, she did, Your Honor. You will find it in the Appendix at pages 64 through 66. And again, at I believe 263, in both the issuance of the preliminary and the later issuance of the permanent, injunction.

The argument that we see with the Solicitor-General's position is that (e)(3) is not and does not and was never intended and has not been interpreted, to act as an automatic injunction on the district courts. It is, however, intended to

act in the nature of an injunction on unilateral action by the school officials. It addresses itself to the parties in the dispute. There is no question under 1415(e)(2), as well as under traditional notions of judicial power that a district court could balance the equities, could take the facts before it, and could, by judicial Order, change the placement pending the determination of an ultimate proceeding. We have never argued with that.

QUESTION: Had you ever presented the court a plan that would take care of the situation?

MS. BROGNA: Certainly, Your Honor, and in fact you will notice at --

QUESTION: Did you -- a plan? I did not see where there is a plan.

MS. BROGNA: Yes, Your Honor. at page -- I believe it is in the Appendix at page 64, when the district court is talking about "balancing the interests," she remarked about the fact that "plaintiff himself came forward -- "

QUESTION: I want to know what is the plan to handle a kid that has a habit of choking other people?

MS. BROGNA: There are many other plans. In fact, with Doe, the Plaintiff --

QUESTION: Like what?

MS. BROGNA: He was returned to his classroom and in this case, under court Order, with an aide in the classroom and

it is important to note that he finished the school year without incident.

There are other ways to deal with --

QUESTION: What plan was used to prevent him from choking people?

MS. BROGNA: He cooperated with his psychiatrist and with the school officials. There was the addition of an aide in the classroom. There was some understanding, I hope, in the classroom teacher, of the frustration. But, in fact, there were no other incidents. This may have been solely an isolated incident.

QUESTION: Ms. Brogna, may I ask you about the government's proposal which you accepted here, do you think it is correct that the district court has discretion despite the language of the statute to use some other placement if that is more appropriate? That seems like a very nice resolution in this case, but if you allow that to happen, you are saying that, "even though the School District violated the law, the remedy for that violation cannot be putting him back in the same classroom, right? The district court may give a different remedy?

MS. BROGNA: I would say, the district court, having viewed the particular circumstances of a case before it, Your Honor.

QUESTION: Right, but the next suit, in the next

suit, it will have been established that the school district and its officials violated the law by taking him out of that particular placement. And those individuals will then be subject to civil liabilities, will they not, if they take him out of that placement? And merely using the injunctive powers of the court does not solve that problem, so you are ultimately going to end up with an interpretation of the statute that prohibits the school district from removing him from that placement, even if he is dangerous.

MS. BROGNA: Prior to receiving a court Order or reaching agreement of the parents, I agree with you.

QUESTION: So, in the future, although in this one case, the injunctive powers of the court would solve the problem, it will not solve the problem in the future, because we are going to be imposing civil liability on people who take the "dangerous student" out, if you will accept that characterization, out of this particular placement.

MS. BROGNA: Your Honor, with respect, I believe that Congress has already made that determination. Congress has said, "students shall remain in mandatory and very clear language.

QUESTION: I agree with you, but let us just be clear what we are saying, if we say that only the injunction -- only the injunction remedy exists.

MS. BROGNA: Yes, we think that the statutory scheme

is set up so that, for example, when a child acts out in the classroom, the school districts may immediately suspend him. California currently -- you are allowed an immediate suspension of up to five days. And in some cases longer. During those five days we suggested that the school administrators should be looking at what adaptations or program changes seem to be necessitated by the behavior, if any. They have that time. to work on the addition of related services, corrective services, behavior modification techniques -- any other teaching methods which may be brought to bear on the behavior.

QUESTION: Is that because suspension is not a change in placement? Is that it?

MS. BROGNA: That is correct, Your Honor, and it was never in dispute. The short-term --

QUESTION: Why would it -- a 100-day suspension be a change?

MS. BROGNA: Well, as Justice O'Connor observed, there is a regulatory ruling that suspensions of more than five -- ten, days probably --

QUESTION: We are construing a statute here. You are saying that a suspension under the statute is not a change in placement and does not violate the "stay-put' rule.

MS. BROGNA: That is correct in the interpretation that comes from the comments that interpret the language of 1415 that talks about change of placement. It is clear that

Congress did not want to completely bind the hands of school officials and what they have done in the comments --

QUESTION: How do you pick out five days or 30 or 40 or 50?

QUESTION: We pick out five days from California State provision for suspension; we pick out ten days from this Court's ruling in Goss v. Lopez and the interpretations by the United States Department of Education. We think anything beyond that will rise to a level of a change in placement.

QUESTION: And that is just because of the -- you are just saying --

MS. BROGNA: It is a juxtaposition of the state and federal --

QUESTION: Despite the language of the statute, suspensions may be put into effect and the child excluded from school --

MS. BROGNA: Well, Your Honor, you will see that --

QUESTION: -- for a length of time without violating the "stay-put" position?

MS. BROGNA: You will see the comment at --

QUESTION: Is that not right? That is your --

MS. BROGNA: There is no language in the statute that talks about suspension, you are correct. There is, however, a comment at 300.513 that says, "the intent of 1415(e)(3), the "stay-put" provision, is that while a placement may not be

changed, the school district may use its normal procedures for dealing with a disruptive child."

We submit that, under state law, the normal procedure is the short-term, five-day suspension.

QUESTION: Who is that comment by?

MS. BROGNA: It is by the -- well, it was issued by the Department of Health, Education and Welfare, prior to the change in the Administration. But it is an officially-published comment to the regulations issued in 1978.

QUESTION: Ms. Brogna, if your position is correct on the statute and that there is no authority for the school district to make any exception for a dangerous child, other than the five-day suspension in California, will not the inevitable effect be that a school would want to place such a child in the most restrictive environment at the outset, rather than run the risk that it otherwise would, that it could change the placement if the child acts out?

MS. BROGNA: Well, Justice O'Connor, we would certainly hope not, because one of the main purposes of the Education for the Handicapped Act was to mainstream these children and have them educated with non-handicapped to the maximum extent possible, so that --

QUESTION: Yes, but if you are going to be held liable -- if you make a misjudgment in the placement, then it seems to me it is human nature that would cause the school to

be very conservative in making the placements in the first instance, so I think the result you may get could be one you would not want.

MS. BROGNA: It could be. We would suggest that the Act has been very expansive in providing funding and the impetus for training personnel for innovative teaching techniques for looking at related services and all sorts of alternative educational programs to deal with and address the handicaps of these children. One would hope that they would not take the sort of low risk alternative of simply returning to the 1975s, where as this Court recognized, handicapped children were simply warehoused, or segregated in separate programs.

QUESTION: Well, it is not that they cannot get them out of the program. They can get them out of the program but only with the consent of the parent --

MS. BROGNA: That is, of course, always the problem.

QUESTION: And one would assume that the parent would not want to leave them in a program where he is likely to choke somebody.

MS. BROGNA: That is an assumption we have always made also, but it is predicated upon the school district offering in good faith a reasonable alternative. Again, I have to remind the Court that, in this case, no such alternative was offered to the Plaintiffs. En fact, no discussion of related

services, no discussion of alternative programs was ever proposed, and we suggest that makes the difference.

In viewing the comprehensive nature of this statute, I would finish by saying that the court's Order under the direction of 1414(d) that, in some circumstances, the State Department of Education would be held responsible for provision of services to a handicapped child directly is in keeping with this comprehensive nature and purpose of the statute, that above and beyond all else, handicapped children should receive an education. We submit that 1414(d) does contemplate a situation exactly like what happened in 1980 in San Francisco when you have a local school district to follow the law; unwilling to maintain a handicapped student in the current placement; unwilling to abide by the provisions of (e)(3) -- we believe it was correct for the district court to say that in circumstances such as that, the State Department as the ultimately responsible agency, must step in, provide education to that handicapped child in the interim, to ensure that, regardless of which agency is ultimately responsible, the child, at least, does not suffer a lack of education while the dispute is being resolved. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Brogna.

Mr. Rubin, you have two minutes remaining.

MR. RUBIN: Your Honor, Respondent in answering a question from Justice Marshall, indicated that it was

significant that when an aid was placed in a classroom with John Doe, there were no further incidents during the year. That is not correct. At Docket No.84, there is a document which states "there has been one violent incident involving other students in the TMR school since the instructional aide began." So there was an incident even after the aide was put in there.

With respect to Justice O'Connor --

QUESTION: With an emotionally disturbed child, I mean, one expects that that is occasionally the problem. Was it an incident that reached the point of real danger to another that the previous incidents have?

MR. RUBIN: Your Honor, all we have in the Record is that it was a "violent incident." However, we do have this: "subsequently," and this is also in the Record at Docket No.137, "he was enrolled in a more restrictive placement called "Challenged Learning." He barricaded himself in a room; he came out; he knocked out three windows; he attacked a teacher." This is not just disruptive conduct which we ordinarily will expect from handicapped children. This is violent, dangerous conduct. That is all in the Record.

Justice O'Connor asked about what -- whether the district court did balance the equities and did undertake to do that. We think that the district court did not do so. She made certain conclusionary statements having to do with

irreparable injury, stating that it was -- irreparable injury had been shown by the Complaint and the Exhibits. We do not think that that is the kind of balancing that must be undertaken in a finding for an injunction.

QUESTION: Well, but her language -- sentences, considering, after going on both sides of all of these factors, the court finds that the balance of these hardships in the public interest way in favor of allowing Plaintiff in there. Is that not the way you end up a balancing --

MR. RUBIN: Yes, Your Honor, but it was not based on the presentation of the evidence before the court or on trial.

QUESTION: -- of dangerousness because apparently it was not argued.

MR. RUBIN: Well, Your Honor, I would simply say that that is a conclusionary finding by the court not based on evidence. Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rubin. The case is submitted.

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-728

CASE TITLE: BILL HONIG, CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION v. JOHN DOE AND JACK SMITH

HEARING DATE: November 9, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States, and that this is a true and accurate transcript of the case.

Date: November 9, 1987

Margaret Daly

Official Reporter

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