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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: THOMAS K. GILHOOL, SECRETARY OF EDUCATION
OF PENNSYLVANIA Petitioner, v.
RUSSELL A. MUTH, JR., ET AL.,

CASE NO: 87-1855

PLACE: WASHINGTON, D.C.

DATE: February 23, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 THOMAS K. GILHOOL, SECRETARY :
4 OF EDUCATION OF PENNSYLVANIA :
5 Petitioner, :
6 v. : No. 87-1855
7 RUSSELL A. MUTH, JR., ET AL., :
8 -----x

9 Washington, D.C.

10 Tuesday, February 28, 1989

11 The above-entitled matter came on for oral argument
12 before the Supreme Court of the United States at 11:08
13 a.m.

14
15 APPEARANCES:

16
17 MARIA PARISI-VICKERS, Deputy Attorney General of
18 Pennsylvania, Harrisburg, Penna.; on behalf of
19 Petitioner.

20 MARTHA A FIELD, Cambridge, Mass.; on behalf of
21 Respondents.

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C O N T E N T S

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MARIA PARISI-VICKERS	
On behalf of Petitioner	3
MARTHA A FIELD	
On behalf of Respondents	22

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

2 11:08 a.m.

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 87-1855, Thomas K. Gilhool versus Russell A.
5 Muth. Ms. Parisi-Vickers, you may proceed whenever
6 you're ready.

7 ORAL ARGUMENT OF MARIA PARISI-VICKERS

8 ON BEHALF OF PETITIONER

9 MS. PARISI-VICKERS: This case is here on
10 petition for certiorari to the United States Court of
11 Appeals for the Third Circuit. The case arises in the
12 context of the Education for All Handicapped Children
13 Act of 1975. It is our contention that the court below
14 has misunderstood that statute when it held, first, that
15 it abrogates the Eleventh Amendment immunity of the
16 states from suit in federal court, and, second, that
17 Pennsylvania Secretary of Education, the Petitioner
18 here, is precluded from reviewing administrative appeals.

19 Turning to the first issue, we believe that
20 Congress has not abrogated the state's constitutional
21 immunity. In *Atascadero v. Scanlon* this Court
22 reaffirmed the concept that abrogation of Eleventh
23 Amendment immunity involves a fundamental shift in the
24 constitutional balance between the states and the
25 federal government as well as an expansion of federal

1 constitutional power of the federal courts.

2 Consequently, the court has held that
3 abrogation of immunity will not be found unless
4 Congressional intent to subject suits to -- subject
5 states to federal court suits is unmistakably clear.

6 This clear statement rule has two fundamental
7 and important reasons. First of all, it is intended to
8 provide notice to the states who, as in the EHA, have
9 voluntarily agreed to participate in a program to
10 provide equal education to handicapped children.
11 Secondly, it makes certain that Congress considers
12 directly the problems and issues which would arise if
13 states are subjected to suit in federal court and,
14 therefore, lessens the chance that Congress will act in
15 haste or without giving consideration to the
16 constitutional balance which it will be affecting with
17 its actions.

18 It is our position that this notice, which is
19 required, especially to the states, has not been given
20 to the 50 states who since 1975 have joined in this
21 Federal Government partnership to provide appropriate
22 education for every handicapped child in America.

23 The court of appeals in its opinion struggled
24 to find this clear abrogation language and in doing so
25 it pointed to the preamble of the statute found at

1 Section 1400(b)(9) which speaks in terms of the Federal
2 Government's intent to assist the states in providing
3 federal funds so that equal education can be achieved
4 for handicapped children. That is at page 6 of our
5 petition for cert.

6 It also points to section 1415(e)(2) -- page
7 11 of our petition for cert -- where the -- there is a
8 provision for a hearing, a due process hearing, to the
9 party aggrieved in the administrative hearing process,
10 and a party so aggrieved will have the right to bring an
11 action in federal court.

12 The last basis on which the court of appeals
13 stands is section 1415(e)(4)(G) which is the 1986
14 amendment to the Act, and it provides for attorney's
15 fees.

16 Looking at these provisions, it is absolutely
17 clear that there is no indication at all that states
18 were to be made liable to private parties under the
19 EHA. No state liability to private parties is
20 mentioned. The abrogation of the state's immunity is
21 nowhere mentioned. The Eleventh Amendment is nowhere
22 mentioned.

23 QUESTION: Well, now, the attorney on the
24 other side says that the Rehabilitation Act Amendments
25 of 1986 make clear that this Act is covered at least

1 after 1986. Would you agree with that?

2 MS. PARISI-VICKERS: Not at all, Justice
3 O'Connor, for two reasons. The first reason is
4 dispositive. And that is that that amendment is
5 effective for violations occurring after --

6 QUESTION: Yes. That's why I ask you about
7 after 1986.

8 MS. PARISI-VICKERS: After October 21, 1986
9 and, therefore, it has nothing to do with this
10 particular case where the violations occurred long
11 before that.

12 Secondly, as we discussed in our brief, the
13 EHA is not an antidiscrimination statute.

14 QUESTION: Well, it could be viewed as that,
15 couldn't it?

16 MS. PARISI-VICKERS: Certainly. Any time
17 Congress enacts a law which will provide equal
18 distribution of benefits, it could be deemed to be an
19 antidiscrimination statute. However, these are -- there
20 are specific statutes, those enumerated, and there are
21 other statutes which specifically are designed to
22 eliminate discrimination in particular areas. There are
23 entitlement statutes usually.

24 QUESTION: Well, this was designed to
25 eliminate discrimination against handicapped children in

1 schools perhaps.

2 MS. PARISI-VICKERS: Well, this is actually --
3 you could view this as a discrimination statute because
4 it focuses particularly on one group and gives them
5 benefits which other children may not be entitled to, or
6 other groups may not be entitled to. For those reasons,
7 we believe that it's not a statute which can be lumped
8 into the category of antidiscrimination statute, and,
9 therefore, the Rehabilitation Act Amendments does not
10 apply, both on the merits and as to the applicable date.

11 QUESTION: Now, suppose we were to agree with
12 you, that at least as to the claims that arose before
13 1986 that there is an Eleventh Amendment bar here. You
14 raise a second question dealing with the authority of
15 the Secretary?

16 MS. PARISI-VICKERS: That is correct.

17 QUESTION: But you did not challenge the lower
18 court's ruling that lack of finality and delay caused by
19 the remand violated federal regulations, did you?
20 That's not challenged?

21 MS. PARISI-VICKERS: That is not. And,
22 Justice O'Connor, we address that concern in a footnote
23 in our brief where we pointed out that there is a
24 decision of the Third Circuit. The Third Circuit
25 affirmed on all counts the district court's opinion

1 except --

2 QUESTION: Well, what --

3 MS. PARISI-VICKERS: -- for the attorney's
4 fees.

5 QUESTION: Well, what that means is that the
6 Third Circuit's Judgment with respect to the Tuition
7 Reimbursement Board award would stand regardless of what
8 we do on the Eleventh Amendment question.

9 MS. PARISI-VICKERS: That is not so because
10 there is an attorney's fee award which depends on the
11 number of claims which Mr. Muth would be successful on.
12 So that that --

13 QUESTION: Well, it would stand at least
14 insofar as the tuition reimbursement is concerned.

15 MS. PARISI-VICKERS: As to the amount --
16 assuming that the Eleventh Amendment to be --

17 QUESTION: It certainly stands as against the
18 school district. So, how do we ever get to the second
19 question about the Secretary? I'm not sure we can.

20 MS. PARISI-VICKERS: Well, Justice O'Connor,
21 we do have an order of the Third -- of the district
22 court which was appealed to the Third Circuit on the
23 issue of attorney's fees. And that has been remanded.
24 The attorney's fees issue was improperly decided by the
25 district court and there is a remand on that.

1 And, therefore, in deciding the issue of the
2 Secretary we will now be able to know whether or not the
3 Commonwealth has prevailed on one or two issues, and
4 that affects the attorney's fees determination.

5 Going back to the examination of the statute,
6 this court has long since held, at least since 1973,
7 that merely because states have been included among a
8 class of actors is not enough to strip them of their
9 sovereign prerogative of immunity from suit. And an
10 award of attorney's fees in an amendment such as the
11 1986 Amendment to the EHA is not sufficient either.

12 In addition, the Third Circuit used the
13 language of the statute regarding the ability of the
14 federal courts to grant appropriate relief under this
15 Act to find further support for its position that the
16 appropriate relief should be tuition reimbursement. We
17 note parenthetically that it took a decision of this
18 Court in Burlington to determine that tuition was an --
19 tuition reimbursement was an appropriate relief at all
20 against a school district. And in that case there was
21 no Eleventh Amendment protection.

22 We suggest that the power of the federal
23 courts in fashioning appropriate relief is constrained
24 by Eleventh Amendment jurisprudence, and that the
25 barrier of sovereign immunity was not removed by the

1 EHA. And the reason that it was not removed is that
2 Congress did not need to do so. It could achieve the
3 purposes of the EHA by providing other remedies,
4 remedies which it included in the statute and which are
5 available to children and parents.

6 Primary among those remedies is the fact that
7 parents, together with their children, participate fully
8 at every stage of the formulation and implementation of
9 the individualized program of education for a child. If
10 they're unhappy with that program of education, they can
11 appeal the decision of the school district to an
12 administrative hearing. If they're unhappy with that,
13 there is a judicial remedy -- a judicial review in the
14 courts.

15 Now, once in the courts there is a judicial
16 remedy at least against the school districts. And in
17 the overwhelming number of cases the tuition
18 reimbursement remedy will be available to litigants
19 because the school districts are the ones which are
20 usually the entities which formulate the IEP and are in
21 dispute with the parent. Therefore, in the overwhelming
22 number of cases there will be a tuition reimbursement
23 under the Act.

24 Moreover, if there is an ongoing violation of
25 federal law, state officials can be enjoined. So, there

1 is injunctive relief at that level.

2 QUESTION: Counsel, could I -- maybe I'm
3 coming back to the same question that Justice O'Connor
4 asked, but I hadn't understood, or, it wasn't clear from
5 your brief, whether if we find for you on Point 1 in
6 your brief, you also expect us to go on to Point 2?

7 MS. PARISI-VICKERS: That is correct, Justice
8 Scalia. And --

9 QUESTION: Although -- was there any relief
10 granted below other than money damages?

11 MS. PARISI-VICKERS: No. It was just money
12 damages and the attorney's fees.

13 QUESTION: And attorney's fees?

14 MS. PARISI-VICKERS: That's correct.

15 QUESTION: The validity of which would depend
16 upon the validity of the money damages?

17 MS. PARISI-VICKERS: The validity of which
18 would depend in --

19 QUESTION: Well, if you had no -- right? If
20 you couldn't get -- if you couldn't -- if you couldn't
21 get money damages, you couldn't -- you couldn't get
22 attorney's fees I assume.

23 MS. PARISI-VICKERS: Conceivably there could
24 be attorney's fees for the violations -- the procedural
25 violations and the claim which plaintiff did prevail.

1 QUESTION: No, but plaintiff would lose. I
2 mean, if the only thing at issue was money damages and
3 you say, "No, Plaintiff, you can't get money damages,"
4 therefore you lose, you couldn't then go on and say,
5 "But I'm going to give you attorney's fees," could you?

6 MS. PARISI-VICKERS: If the court found that
7 the money damages -- money damage award is barred
8 because of the Eleventh Amendment bar --

9 QUESTION: Right.

10 MS. PARISI-VICKERS: -- It is conceivable that
11 it could find an ongoing violation. There is no
12 declaratory relief granted in this case.

13 QUESTION: Was it asked for?

14 MS. PARISI-VICKERS: I believe it was, but it
15 was not granted.

16 QUESTION: Well, it looks to me like if we --

17 MS. PARISI-VICKERS: All of the remedies I
18 mentioned are further buttressed by the one remaining
19 remedy, which is if money damages are going to be
20 effective against the state, then certainly this remedy
21 is the most effective one of all. And that is, the
22 financial sanctions which the United States Secretary of
23 Education can impose on the states if they do not comply
24 with the state plans and with the regulations and
25 statute of the EHA. And that sanction is found at 16 --

1 at Section 1416.

2 However, the goals of the statute must -- to
3 be realized must in the end rely on the good will of the
4 state and on the fact that the states have agreed to
5 voluntarily participate in this program. They have
6 chosen to join with Congress in participating. And
7 their participation is a substantial commitment. In
8 fact, the states are not getting a free ride here if
9 they are not found to be amenable to suit in federal
10 court for money damages by an individual who has gone
11 through the process, as Mr. Muth has, because the states
12 are -- the entities which provide most of the funding
13 for education, and traditionally it has been so and I
14 think this Court can take judicial notice of that fact.

15 I would like to conclude by simply stating
16 that just as the Congress abrogated the immunity of the
17 states in the Rehabilitation Act Amendment of 1986, it
18 could have done so just as easily when it amended the
19 EHA to add an attorney's fees. Congress knows how to
20 abrogate the Eleventh Amendment in unmistakably clear
21 language and it was simply not done so here.

22 The teachings of this Court have told us that
23 in addressing an area as vital to our system of
24 government as the states' immunity, the Constitution
25 requires certainty. Not inferences, not speculation.

1 And I think that that is what the Third Circuit has
2 engaged in in arriving at its holding.

3 Congress must indicate in unequivocal terms
4 in the statute that it has considered deliberately a
5 goal that it sets for itself, that this goal so
6 transcends the constitutional balance between the
7 Federal Government and the states that it must be
8 shifted in some fashion. There is no evidence here
9 whatsoever that the shift has occurred in the enactment
10 of the EHA. Therefore, the court of appeals' attempt to
11 expand its jurisdiction with that Congressional
12 authority should be rebuffed.

13 QUESTION: May I just ask one question? Do
14 you concede that the Education for All Handicapped
15 Children Act is a statute with respect to which Congress
16 could abrogate the states' Eleventh Amendment immunity?

17 MS. PARISI-VICKERS: Yes, Justice Stevens.

18 QUESTION: And that's because it's a statute
19 that the Congress has special power under the Fourteenth
20 Amendment to deal with?

21 MS. PARISI-VICKERS: That's correct.

22 QUESTION: And is that because it's an
23 antidiscrimination statute?

24 MS. PARISI-VICKERS: No. Because it's a
25 statute passed pursuant to the Fourteenth Amendment.

1 However, not all statutes under the Fourteenth Amendment
2 are antidiscrimination statutes.

3 QUESTION: What part of the Fourteenth
4 Amendment authorized this statute?

5 MS. PARISI-VICKERS: Section 2 -- Excuse me,
6 Section 5 of the Fourteenth Amendment. It is -- As I
7 mentioned, Justice Stevens, any statute where government
8 is distributing benefits and attempting to do so in a
9 rational fashion -- any statute can be deemed to be a
10 statute which -- in fact, we hope that all statutes
11 enacted by legislatures will encourage and have as their
12 goal the equal protection of the rights of all citizens.

13 However, I believe that the antidiscrimination
14 statutes are peculiar statutes which are addressing a
15 particular evil in our society and they require -- they
16 do not require the type of affirmative action which is
17 being -- which is found in the EHA. But they require
18 distribution in an equitable fashion of funds that the
19 Federal Government is giving to the states. I think
20 they're just different statutes.

21 QUESTION: Well, a statute simply outlawing
22 discrimination against handicapped would not have
23 brought in its wake all of the procedural provisions and
24 so forth of the EHA, which really requires special
25 treatment of the handicapped, doesn't it?

1 MS. PARISI-VICKERS: That's correct, Mr. Chief
2 Justice. And I tried to say that by saying -- when I
3 said that in fact the EHA is a discriminatory statute in
4 favor of the handicapped because it provides so many
5 more procedures than what students would be entitled
6 under the Equal Protection Clause.

7 QUESTION: Then I don't understand why you
8 say, or, why it's so evident to you that Congress can
9 eliminate states' sovereign immunity under the
10 Fourteenth Amendment. I mean, the point is you can't
11 have it both ways.

12 This is either a statute aimed at
13 discrimination, in which case you can eliminate states'
14 sovereign immunity under the Fourteenth Amendment.

15 MS. PARISI-VICKERS: You can, but the Congress
16 did not do so. We did not say that --

17 QUESTION: Oh, I understand that. But -- but
18 Justice Stevens asked you whether you conceded that
19 Congress could eliminate.

20 MS. PARISI-VICKERS: It could. It has the
21 power to do so.

22 QUESTION: Why? Well, I'm just reiterating
23 what Justice Stevens said and I haven't heard a good
24 answer to it. You tell us, on the one hand, that it's
25 not a discrimination statute. But you say, on the other

1 hand, that it is. Because there is no Fourteenth
2 Amendment power unless it's directed at discrimination.

3 MS. PARISI-VICKERS: All right. Well, I think
4 it's -- it's a distinction which is not -- comes more
5 from the appellations given to the group of statutes,
6 rather than a fundamental difference. There are
7 statutes which are, for example, Age Discrimination in
8 Employment Statutes, Discrimination in Housing. There's
9 particular statutes which give -- do much -- do less
10 than the EHA does. The EHA is an affirmative program
11 which goes much out of its way -- it does more than
12 simply establish equality in -- it has much greater
13 goals than that.

14 That's the best I can do, Mr. -- Justice --

15 QUESTION: Are you saying there are certain
16 statutes that are designed to alleviate the injuries
17 that have been caused by discrimination, but you don't
18 call those antidiscrimination statutes?

19 MS. PARISI-VICKERS: The --

20 QUESTION: I think he's trying to help you. I
21 --

22 (Laughter.)

23 QUESTION: I'd take that one and go with it.

24 (Laughter.)

25 MS. PARISI-VICKERS: The difficulty -- the

1 difficulty, I think it's one of nomenclature and not
2 substance. I think that the antidiscrimination statutes
3 have the same goal as the EHA, which is to promote equal
4 access of opportunities for children.

5 I would like to turn to the second issue on
6 which certiorari has been granted, and that is whether
7 the EHA precludes Pennsylvania Secretary of Education
8 from reviewing the educational due process hearings. We
9 will agree with the court of appeals that the review
10 procedures require the same degree of impartiality as
11 the initial hearing.

12 And, consequently, in the words of the statute
13 at 1415(b)(2), page 8 of our main brief, "No hearing
14 shall be conducted by an employee of such agency or unit
15 involved in the education or care of the child." This
16 is the standard of impartiality which --

17 QUESTION: Well, the language of 1415(b) and
18 1415(c) are different. Isn't that right? 1415(c)
19 governing appeals does not explicitly state --

20 MS. PARISI-VICKERS: That's correct.

21 QUESTION: -- that employees of the state
22 agency may not serve as review officers.

23 MS. PARISI-VICKERS: That's correct.

24 QUESTION: It doesn't say that. The language
25 is different.

1 MS. PARISI-VICKERS: That's correct. For
2 purposes of this argument, we have conceded that the
3 interpretation of the Department -- U.S. Department of
4 Education, that the level of impartiality shall be the
5 same as what we will adopt.

6 What we do not agree, however, is that the
7 Department -- Pennsylvania's Department of Education is
8 such an agency or unit involved in the education or care
9 of the child because the Department is, in Pennsylvania,
10 is charged with the generalized supervision of education
11 over 501 school districts -- it is the school districts
12 which actually teach the approximately 1.8 million
13 children in Pennsylvania, 271,00 of whom are special
14 education children.

15 The Department is supervising. It's not
16 actually teaching. It is not actually promulgating the
17 IEP or not getting into disputes with parents over the
18 individual placement of a child. It is the
19 responsibility of the Department to enforce the
20 regulations promulgated by the Board of Education to
21 approve curriculum, to establish standards, to approve
22 school district plans for special education and
23 distribution of state and federal funds in accordance
24 with those plans.

25 The Department does not have hands-on teaching

1 responsibilities for the child, and the statute -- the
2 language of the statute says education of the child.
3 That language arises in the context of an IEP dispute,
4 dispute for individual placement of a child. Therefore,
5 it's certainly common sense to conclude that the
6 Department is not involved to the extent that the
7 statute requires. And, therefore, the Secretary, who is
8 the head of that agency, would be a suitable review
9 officer.

10 Theoretically, of course, the Department is
11 involved in the care of every child -- education and
12 care of every child in Pennsylvania. But the Department
13 is not a party to these disputes. It is the school
14 district which is involved with the parent.

15 From a common sense approach, if we asked the
16 parent who is involved in the care of your child, you're
17 going to hear that it's a teacher or a principal,
18 perhaps the school district.

19 Neither common sense nor traditional concepts
20 of administrative law preclude the Department from
21 reviewing these administrative appeals. In fact, in the
22 EHA the Department of Education is the pivotal player
23 answering to the Federal Government in its supervision
24 of the state plan as it is implemented by the school
25 districts. And, therefore, it has responsibility both

1 to the Federal Government and supervisory
2 responsibilities over the school districts.

3 The Secretary of Education in Pennsylvania has
4 the same powers of financial sanctions over the school
5 districts for failure to comply with state plans, than
6 the United States Secretary of Education has over the
7 state. Certainly, we cannot conclude from this
8 statutory framework that the Secretary of Education in
9 Pennsylvania and the school districts will be on the
10 same side or have any particular sympathy for each other
11 when it comes to deciding an individual child's
12 placement.

13 Moreover, the participation of the Secretary
14 is salutary for the goals of the EHA. When the
15 Secretary of Education participates in the review
16 process, he learns how the policies which he may have
17 implemented, the regulations promulgated by the
18 Department, the Board of Education -- how they actually
19 affect an individual case. And so he can learn. If a
20 policy is challenged, even if it's a policy that he
21 himself makes -- has made -- this is an opportunity for
22 him to rethink, reexamine the challenge and come to an
23 appropriate decision.

24 We submit that the Secretary of Education,
25 bound as he is to observe the law, and as explained by

1 this Court and by the courts of the state, will not
2 ignore those laws.

3 We urge, therefore, for this Court to find
4 that the Secretary is an impartial decisionmaker because
5 the agency which he heads is not involved in the
6 education and care of the child. And, moreover, because
7 clearly as a constitutional officer appointed by the
8 governor he is not an employee of the agency.

9 Thank you very much.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
11 Parisi-Vickers.

12 Ms. Field, we'll hear from you.

13 ORAL ARGUMENT OF MARTHA A. FIELD
14 ON BEHALF OF RESPONDENTS

15 MS. FIELD: Mr. Chief Justice, and may it
16 please the Court:

17 We don't think you need to reach the
18 partiality issue in this case, and for that reason I
19 think I'm going to put off talking about it until the
20 end of my argument. Just to say why I don't think you
21 need to reach it, as Justice O'Connor said, the remand
22 violation which is established is sufficient to support
23 the reimbursement. And I really don't think that a rule
24 that attorney's fees depend on the percentage of success
25 of the attorney below means that this Court has to hear

1 questions that are otherwise irrelevant to the case.

2 This case is of central importance to children
3 with handicaps and their parents. It used to be that
4 parents whose children were born with handicaps
5 sometimes had to give up their parental rights or even
6 institutionalize their child in order to obtain
7 necessary education or medical treatment.

8 In 1975 in enacting the Education for All
9 Handicapped Children Act, Congress opted instead to
10 allow parents to participate fully in decisions
11 concerning the education of their child. Mr. Muth, the
12 Respondent, exercised that right when after three and a
13 half years of attempting to obtain an appropriate
14 education from the school district he decided instead to
15 place his child in a school which specializes in
16 language disabilities, a school at which his son Alex in
17 fact made substantial progress. When Muth took this
18 step, school authorities were not offering an
19 appropriate education, as the hearing officer
20 subsequently held.

21 The remedy of reimbursement in appropriate
22 cases is necessary in order to allow parents to
23 participate effectively because otherwise parents would
24 have to accept whatever education school officials
25 offered them during the period of administrative

1 review. That period can be a significant one. In this
2 case, the period of administrative decisionmaking took
3 more than a year.

4 Alex needed an education during that year.
5 The development of handicapped children cannot be
6 shifted to hold while the decisionmaking process
7 unwinds. A year in an inappropriate education or
8 without necessary services can be a devastating
9 experience to any child, and handicapped children --

10 QUESTION: Well, I guess our decision in
11 Burlington addressed whether tuition reimbursement could
12 be allowed, and indicated that it could. But I think
13 the question here is not so much that as whether the
14 state's Eleventh Amendment immunity has been abrogated.

15 MS. FIELD: That's right.

16 QUESTION: So that the state itself could be
17 held liable for it.

18 MS. FIELD: That's right. This Court has
19 unanimously recognized that tuition reimbursement is
20 important to the functioning of the EHA.

21 I'd really like to make two points about
22 that. One is that even though, as Mrs. Vickers said,
23 the school districts are often available as defendants
24 in these cases, that is not in any event invariably so.
25 And so it's important that the same rule as to the

1 availability of tuition reimbursement be -- be applied
2 against states as defendants.

3 And I also would like to show you that the
4 Education of the Handicapped Act in 1975 did expressly
5 waive states' immunity.

6 QUESTION: Well, it certainly didn't meet the
7 kinds of requirements that Atascadero would have
8 imposed, did it?

9 MS. FIELD: Well, we think it did. If
10 Atascadero is read to require some particular formula of
11 words, Congress acting ten years before Atascadero did
12 not use any particular formula of words which it could
13 not have anticipated. But, in fact, the language of the
14 1975 EHA does constitute a clear statement that Congress
15 intends to waive states' immunity. And it's much
16 clearer than the statute involved in Atascadero was.

17 Indeed, it's also clearer than Title VII,
18 which this Court unanimously held in Fitzpatrick v.
19 Bitzer -- did clearly and effectively abrogate states'
20 immunity. In Atascadero, just to make that comparison,
21 the Rehabilitation Act provision at issue said that any
22 recipient of federal assistance should be liable. That
23 phrase, "any recipient of federal assistance" did
24 literally include states. It also, however, included
25 many thousands of private companies.

1 The statute involved in Atascadero did not
2 mention states. The EHA, the 1975 EHA, by contrast,
3 mentions states more than 50 times. More important than
4 that, the only possible defendants under the EHA are
5 states, and the school districts which they set up,
6 control, and supervise.

7 As the Petitioner itself stresses, under the
8 EHA states are the only parties with ultimate
9 responsibility for seeing that every child receives an
10 appropriate education. In these circumstances, every
11 member of Congress had to have been aware in enacting
12 the EHA that its remedies would be enforceable against
13 the states. The language of the EHA -- we're not
14 relying on the legislative history, but the language of
15 the statute itself -- carries clear and unmistakable
16 notice. This is the key fact that separates this case
17 from Atascadero.

18 The specific language that is helpful is not
19 only the Section 1400 which Mrs. Vickers read from, but
20 there are clear provisions in Section 1412 particularly,
21 but also elsewhere in the statute, imposing duties upon
22 the states, recognizing that states are the responsible
23 party -- indeed, are the only ultimately responsible
24 party, and recognizing that states will directly provide
25 the education in a good many situations.

1 And after that, Section 1415 expressly gives
2 parents the opportunity to present a complaint with
3 respect to any matter in a due process hearing with
4 judicial review in state or federal court -- this is by
5 the parent against the state -- for any appropriate
6 relief.

7 So, there is clear language, although it may
8 not be phrased exactly the way that Congress --

9 QUESTION: Ms. Field, it isn't certainly
10 phrased in terms of money damages either, is it? I
11 mean, I think Ms. Vickers made the point that until our
12 Burlington decision it was not entirely clear that you
13 could get an award for tuition reimbursement even
14 against a school district.

15 MS. FIELD: Yes. It's not -- It's phrased in
16 terms of appropriate relief. I think Congress really
17 rather wisely didn't spell out the bounds of appropriate
18 relief in the statute.

19 One thing that is clear is that under the EHA
20 many varied situations can arise. For example, your
21 case last year in Honig v. Doe that Congress could not
22 possibly have anticipated. And courts, by devising
23 appropriate relief and molding it to the facts of each
24 particular case, can come up with more appropriate
25 remedies than Congress could have thought about in 1975.

1 As this Court said in Burlington, appropriate
2 relief does include reimbursement. We're not arguing
3 that it includes money damages. It's not clear whether
4 or not it includes money damages, though most lower
5 courts have said in some situations it does. But it's
6 not necessary in this case to find that appropriate
7 relief includes damages, but only reimbursement. And I
8 believe in Burlington this Court drew the distinction
9 between reimbursement and damages saying at least
10 reimbursement was available under the EHA.

11 QUESTION: Well, you agree, do you not, that
12 reimbursement would be barred by the Eleventh Amendment
13 if Congress had not sought to abrogate the immunity?

14 MS. FIELD: That's -- that's correct. What --
15 what we are saying -- we're certainly not asking you to
16 alter Edelman v. Jordan, but we're simply saying that
17 appropriate relief within the EHA includes reimbursement.

18 One thing that is clear from the history of
19 the EHA, both in 1975 and again in the 1986 Amendments,
20 is Congress knew that in imposing this obligation upon
21 the states that they were requiring states to spend
22 money. That -- that was absolutely clear. And, indeed,
23 the main -- the main relevance of the 1986 EHA
24 Amendments here which are not directly relevant because
25 they concerned only attorney's fees -- but they again

1 showed that Congress was willing to require states to
2 spend money to achieve appropriate education.

3 The reason is that although special education
4 is expensive, it really is highly cost-effective. And
5 -- for many -- for many of the persons who receive
6 special education under the EHA, it makes the difference
7 whether they can function as productive and law-abiding
8 citizens. So, I think this -- this is the attitude
9 which caused Congress to make the judgment that states
10 should spend money for appropriate education if they
11 opted to be included in this EHA program.

12 QUESTION: I guess Congress enacted the means
13 whereby it could enforce its requirement on states that
14 they spend money. They can withhold financial aid if
15 states don't do what they're required to do.

16 MS. FIELD: Well, they can withhold financial
17 aid.

18 QUESTION: I mean, there are enforcement
19 procedures available against the states themselves by
20 federal action.

21 MS. FIELD: Well, that enforcement procedure
22 is available and prospective relief would be available.

23 QUESTION: And presumably prospective relief.

24 MS. FIELD: Yes. This Court in Burlington
25 held that prospective relief and the withholding of

1 Federal Funds was not a sufficient remedy. And, really,
2 the remedy of withholding federal funds is patently not
3 a remedy that will secure appropriate education in every
4 child's case. One problem, of course, is that
5 withholding funds removes education, it doesn't provide
6 it.

7 But even more than that, funds will not be
8 withheld because -- because of individual violations.
9 Indeed, Section 1416 says that states should -- that
10 funds should be withheld only if states are
11 substantially out of compliance with the -- with the
12 statute.

13 The point of the EHA, by contrast, is to
14 provide an appropriate education in every child's case.
15 And the point of the reimbursement remedy is to empower
16 parents, who otherwise would have to accept whatever
17 education school authorities offered them, to have their
18 perspective reflected in the educational plan which is
19 ultimately adopted --

20 QUESTION: But these --

21 MS. FIELD: -- in each case.

22 QUESTION: -- parents -- this parent will get
23 reimbursement regardless of our holding?

24 MS. FIELD: That's right. This parent will
25 get reimbursement from the school district because the

1 school district did not seek certiorari. And I think
2 it's for that reason that the attorney's fees of the
3 lawyer who represented Mr. Muth in district court
4 several years ago would not be reduced or would not --
5 would not disappear regardless of what this --
6 regardless of what this Court does.

7 I also think his attorney's fees would not be
8 affected by -- by any ruling on partiality.

9 Even though the school district is available
10 in this case to pay -- to pay tuition reimbursement and
11 will be regardless of what this Court holds, it is
12 important to a proper construction of the EHA that it
13 also be recognized that the state is liable for
14 reimbursement. The Petitioner's interpretation, saying
15 that school districts can be held liable but not states,
16 would leave many handicapped children with no
17 possibility of a reimbursement remedy, and, accordingly,
18 no possibility of effective parental participation.

19 Many children do receive education directly
20 from the state. Indeed, some of the children who
21 receive education directly from the state are the most
22 severely handicapped children, which the EHA is -- gives
23 priority to. The -- the statute shows that there is an
24 important policy that the most severely handicapped not
25 be omitted from the -- from the program.

1 Not only would the children which -- who were
2 250,000 last year who receive education directly from
3 the state lose their right to tuition reimbursement, but
4 also, when appropriate education is denied because of
5 reasons having to do with state policy or even state
6 procedural violations, it would not be appropriate in
7 those cases for the school districts to be held liable
8 for tuition reimbursement. That is the type of issue
9 that is involved in a good many of these cases. The
10 challenges are sometimes to state statutes, state
11 policies, state procedures, as in this situation. And
12 the state, in that situation, is the only appropriate
13 defendant.

14 QUESTION: Well, it's possible that the Rehab
15 Act Amendments of '86 have changed the rules --

16 MS. FIELD: For --

17 QUESTION: -- prospectively.

18 MS. FIELD: -- the future.

19 QUESTION: Sure. So it isn't as though our
20 decision here is going to determine that issue
21 necessarily.

22 MS. FIELD: No. Your decision here would
23 determine that issue if a different construction were
24 given to the Rehabilitation Act, as the state has
25 contended for. And it also would determine that issue

1 In the handful of cases that exist where the EHA is the
2 only statute that can be -- that can be relied on.

3 Is also is relevant, I think, that even when a
4 school district is a defendant that the remedy be able
5 to run against the state because school districts can be
6 set up in such a way that they are an arm of the state
7 for Eleventh Amendment purposes. The intermediate units
8 in Pennsylvania, for example, which are sometimes the
9 defendants in these cases rather than the local school
10 districts if the types of services that the dispute is
11 about are services that are handled by the intermediate
12 unit -- the intermediate units have been held to be arms
13 of the state for Eleventh Amendment purposes.

14 So, even though in those situations one would
15 not be suing the state and it would be a local school
16 district within the meaning of the EHA, any immunity
17 that the state had from tuition reimbursement would be
18 shared by those defendants. And there --

19 QUESTION: Do you agree --

20 MS. FIELD: -- are other --

21 QUESTION: -- that the Rehab Act Amendments of
22 1986 are not retroactive?

23 MS. FIELD: We agree that the Rehabilitation
24 Act Amendments are not retroactive. We thought that it
25 was -- that it could be relevant to your consideration

1 that this issue is taken care of for the future. We now
2 find that there is not total agreement, that it is taken
3 care of for the future. And I do think that the phrase
4 in the Rehabilitation Act which refers to all other
5 federal recipients of -- all other federal recipients of
6 financial assistance does include the EHA.

7 I think also the suggestion in the
8 Petitioner's brief that this opens some sort of
9 Pandora's box is not to be taken seriously. We looked
10 as far as we could for statutes that prohibited
11 discrimination by recipients of federal financial
12 assistance and the only statute we could find that met
13 that description was the EHA because --

14 QUESTION: How about Title IX?

15 MS. FIELD: I believe Title IX's
16 nondiscrimination duty is not phrased in terms of
17 recipients of federal financial assistance. There are
18 many other statutes that impose a duty not to
19 discriminate. But the duty not to discriminate is
20 usually not imposed in terms of recipients of federal
21 financial assistance, but -- but in some other term.

22 QUESTION: Well, what does -- what does Title
23 IX prohibit then? It prohibits discrimination on -- I
24 thought on the part of people who received federal
25 funds. Perhaps I'm wrong.

1 MS. FIELD: I'm afraid I don't have that --
2 that --

3 QUESTION: Don't worry about it.

4 MS. FIELD: -- information. So that we
5 believe that the Rehabilitation Act Amendments would
6 take care of this for the future, but that the EHA
7 imposes a duty of -- abrogates states' immunity under
8 the 1975 Act, which is what applies to this case. And
9 because many -- because many students will be -- or,
10 many handicapped children will be subject only to the
11 possibility of actions against the state and not
12 entities which are local for purposes of the Eleventh
13 Amendment, that it is necessary to fulfill the purposes
14 of the EHA as well as to satisfy its clear language,
15 that the Burlington holding that school districts are
16 liable be applied also to states as defendants.

17 We do think that it would create several
18 unfortunate consequences if the anti-reimbursement
19 position were adopted. One, there would be an extremely
20 unfortunate procedural consequence in those situations
21 where the state is the responsible party because parents
22 would have to then bypass the administrative procedure
23 altogether and go directly to district court to obtain
24 preliminary injunctive relief if reimbursement were not
25 available. That would be the only avenue available to

1 parents to obtain the appropriate placement at public
2 expense, which the statute -- which the statute offers
3 them.

4 So, that would be one way in which the system
5 just wouldn't work well if states were removed as
6 possible defendants in these actions.

7 QUESTION: Is it clear that they could do
8 that? Is it clear that they -- well, this is all
9 hypothetical anyway because with the '86 Act it doesn't
10 matter. Right?

11 MS. FIELD: That --

12 QUESTION: For the future?

13 MS. FIELD: -- certainly is --

14 QUESTION: This is --

15 MS. FIELD: -- correct --

16 QUESTION: Right.

17 MS. FIELD: -- if you accept our construction
18 of the '86 Act --

19 QUESTION: Correct.

20 MS. FIELD: -- which I hope that you will.

21 QUESTION: But this is -- but this is one
22 reason why the original Act should not be read in this
23 fashion. Because you say it would have created this
24 situation.

25 MS. FIELD: That's right. And there are a

1 substantial number -- number of cases where preliminary
2 injunctive relief is sought even now. So that -- but
3 this would make it the only possible avenue, once it was
4 known that states were no longer --

5 QUESTION: It's clear that there's no obstacle
6 to seeking such relief in the federal district court
7 without going through the procedures?

8 MS. FIELD: It's clear -- if there is a
9 irreparable harm. And what the holding would do is make
10 it absolutely clear that there would be irreparable harm.

11 The other disadvantage of the
12 anti-reimbursement position is, of course, that it would
13 leave parents and children without any effective means
14 to obtain appropriate education during the period of
15 review. And it would create incentives for school
16 districts to delay in meeting their obligations when the
17 placement sought was an expensive one. Children, then,
18 would lose their right to education for as long as the
19 decisionmaking process continued.

20 Because we think there is a clear statement in
21 the EHA, it would be appropriate for this Court to
22 uphold Mr. Muth's tuition reimbursement award for 1983
23 to '84. And the Court really need not decide any more.

24 However, the Court either alternatively or
25 additionally could rest affirmance on the ground that

1 the courts below relied on, and that is the substantial
2 procedural violations in the administrative process that
3 was employed in this case. The Act has rather strict
4 time limitations, either 45 days or 75 days, depending
5 which review scheme the state chooses to follow. In
6 this case, the administrative process because of
7 illegalities dragged out for more than a year longer
8 than the strict time limitations in the Act allowed.

9 Mr. Muth suffered serious harm as a result of
10 that, as the court below found. For that reason we
11 really are not talking about punitive damages. We don't
12 think punitive damages would be appropriate relief under
13 the EHA. We think we are talking neither about damages
14 nor about something that was punitive. And so it would
15 be appropriate for this Court to uphold the
16 reimbursement award on that ground.

17 Even if you uphold it on that ground, it's not
18 necessary to reach the partiality matter on which the --
19 on which the state sought certiorari because the remand
20 fully -- fully justifies the reimbursement of remedy.

21 QUESTION: Why -- why is that ground not
22 affected by the Eleventh Amendment problem?

23 MS. FIELD: That ground is affected by the
24 Eleventh Amendment problem. That is -- there is no
25 reimbursement available against the state unless you

1 find that the EHA provides a clear statement. So, that
2 -- that really is the crucial -- the crucial decision in
3 this case.

4 If you find that there is abrogation, then Mr.
5 Muth is entitled to reimbursement on either of two
6 grounds. One, the school district did not provide an
7 appropriate education during the 1983 to '84 school
8 year. There has been some attempt to create some
9 factual disputes around whether an appropriate education
10 was provided, but we're really quite happy with the
11 statement of facts as it appears in the Petitioner's
12 brief on page 14. They mention that the school district
13 at the outset of the year came in with a plan for
14 education which the hearing officer held was
15 inappropriate. Not necessarily inappropriate in its
16 placement but inappropriate in the services that were
17 offered to the child.

18 The school district at that point wrote Mr.
19 Muth a letter saying that they would not offer those
20 services until the administrative review was final. And
21 the school district appealed from the award for those
22 services, saying that it -- saying that it really wasn't
23 necessary for them to provide those services to the
24 child at all.

25 It wasn't until April of 1984 -- when the

1 school year in question here is 1983 to 1984 -- in April
2 of 1984 the school district came up with an appropriate
3 education plan. A plan that was subsequently in July of
4 '84 held to have been appropriate for the '83-84 school
5 year if it had been put into effect.

6 But we don't think that the fact that on April
7 26th of the 1983-84 school year the school district then
8 came up with an appropriate education plan should mean
9 that during 1983 to 1984 it was all right to leave Alex
10 without any appropriate education.

11 QUESTION: May I --

12 MS. FIELD: So I think the --

13 QUESTION: May I ask you one question? If you
14 lose on your statutory argument, have you abandoned
15 Point 1 in your brief?

16 MS. FIELD: Which is Point 1? The Burlington
17 ground?

18 QUESTION: This Court should overturn Hans
19 against Louisiana.

20 MS. FIELD: Oh.

21 QUESTION: You no longer subscribe to that --

22 MS. FIELD: No, I do.

23 QUESTION: -- composition?

24 MS. FIELD: I do. I do subscribe to that.

25 There --

1 QUESTION: You haven't argued it very
2 vigorously.

3 (Laughter.)

4 MS. FIELD: If -- well, it's not clear to me
5 that if we lost on the clear statement ground, that the
6 overturning of Hans by itself would make all -- all the
7 difference.

8 QUESTION: Why did you argue it then in the
9 brief?

10 MS. FIELD: We argued it because I think it is
11 relevant to your decision, whether you view Hans v.
12 Louisiana as -- or, whether you view sovereign immunity
13 as a constitutionally based doctrine or a doctrine that
14 flows from something else.

15 QUESTION: I wonder if you're acting as an
16 academic or an advocate on that part of your brief.

17 MS. FIELD: Well, I'm acting as a little bit
18 of both. But -- but I think it's -- well, an analogy
19 could be made to Erie Railroad v. Thompkins in which the
20 decision that the Court made didn't change the results
21 of the case. But the only thing inappropriate about the
22 Court deciding that issue was that the parties hadn't
23 raised and argued it.

24 I think it's an important issue of Eleventh
25 Amendment jurisprudence which could affect the outcome

1 of this case, but would not necessarily affect the --
2 affect the outcome of this case.

3 Perhaps I'll take a moment to talk about the
4 partiality issue in case you do reach it. If you do, we
5 think we -- we hope that you would hold, as other courts
6 have, that the EHA, unlike the conventional
7 administrative scheme, does not permit the head of the
8 agency to be the final administrative decisionmaker.

9 Instead of relying on general principles of
10 administrative law in enacting the EHA, the EHA created
11 its own procedural scheme, which is really at the heart
12 of the Act. There's very little in the way of
13 substantive requirements in the EHA. No definition of
14 appropriate education, for example. But the procedural
15 scheme is at the heart of the Act.

16 One reason that the Secretary should be
17 eliminated as the reviewing officer, as the court below
18 held, is that he has a clear financial interest in the
19 outcome of the dispute. In this case, for example, if
20 Alex had been given the placement that he sought, under
21 Pennsylvania law the tuition would have then come out of
22 the state agency's budget. On the other hand, if Alex
23 --

24 QUESTION: You don't mean a personal financial
25 -- but his agency has a financial interest?

1 MS. FIELD: That's right. That's right. If
2 -- If, on the other hand, Alex lost, the local school
3 district would be responsible for the tuition. So,
4 there's that kind of financial involvement on the part
5 of the Secretary of Education.

6 Moreover, as a policymaker, the Secretary has
7 a clear conflict of interest under the Act. The
8 Petitioner wants to use due process hearings in order to
9 make policy. That's really its argument. But the EHA
10 does not permit policy to be made in this fashion.
11 Instead, the due process hearing is supposed to be a
12 neutral unbiased determination on the facts of the
13 particular case, depending on the programs offered and
14 the facts concerning the needs of the particular child
15 as to what the appropriate education is.

16 Thank you.

17 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Field.

18 Ms. Parisi-Vickers, do you have rebuttal? You
19 have three minutes remaining.

20 MS. PARISI-VICKERS: I have nothing on
21 rebuttal.

22 CHIEF JUSTICE REHNQUIST: Very well. The case
23 is submitted.

24 (Whereupon, at 12:05 o'clock p.m., the case in
25 the above-entitled matter was submitted.)

CERTIFICATION

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

Thomas A. Gilhool, Secretary of Education of Pennsylvania Petitioner,

v. RUSSELL A. MUTH, JR., ET AL., Case No. 87-1855

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

BY Judy Freilicher

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