

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TOMMY OLMSTEAD, COMMISSIONER, GEORGIA
DEPARTMENT OF HUMAN RESOURCES, ET AL.,
Petitioners v. L.C., BY JONATHAN ZIMRING,
GUARDIAN AD LITEM AND NEXT FRIEND, ET AL.

CASE NO: 98-536 0-2

PLACE: Washington, D.C.

DATE: Wednesday, April 21, 1999

PAGES: 1-58

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

APR 29 1999

Supreme Court U.S.

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

1999 APR 29 A 9:27

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 TOMMY OLMSTEAD, COMMISSIONER, :

4 GEORGIA DEPARTMENT OF HUMAN :

5 RESOURCES, ET AL., :

6 Petitioners :

7 v. : No. 98-536

8 L.C., BY JONATHAN ZIMRING, :

9 GUARDIAN AD LITEM AND NEXT :

10 FRIEND, ET AL. :

11 - - - - -X

12 Washington, D.C.

13 Wednesday, April 21, 1999

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States at
16 10:07 a.m.

17 APPEARANCES:

18 BEVERLY P. DOWNING, ESQ., Senior Assistant Attorney
19 General, Atlanta, Georgia; on behalf of the
20 Petitioners.

21 MICHAEL GOTTESMAN, ESQ., Washington, D.C.; on behalf of
22 the Respondents.

23 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
24 General, Department of Justice, Washington, D.C.; for
25 the United States, as amicus curiae, supporting the

1 Respondents.
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	BEVERLY P. DOWNING, ESQ.	
4	On behalf of the Petitioners	4
5	MICHAEL GOTTESMAN, ESQ.	
6	On behalf of the Respondents	30
7	IRVING L. GORNSTEIN, ESQ.	
8	For the United States, as amicus curiae,	
9	supporting the Respondents	48
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 98-536, Tommy Olmstead v. L.C., by Jonathan
5 Zimring.

6 Ms. Downing.

7 ORAL ARGUMENT OF BEVERLY P. DOWNING

8 ON BEHALF OF THE PETITIONERS

9 MS. DOWNING: Mr. Chief Justice, and may it
10 please the Court:

11 Title II-A of the Americans with Disabilities
12 Act, that general language prohibiting discrimination by
13 reason of disability, cannot impose a least restrictive
14 treatment requirement on the State's provision of hospital
15 services to its disabled citizens.

16 By reenacting essentially the same language of
17 section 504 of the Rehabilitation Act of 1973, Congress
18 did not suddenly impose or allow the Department of Justice
19 to impose de-institutionalization on the States. Georgia
20 believes that this expansive new interpretation of the ADA
21 is precluded by the language of the statute, is precluded
22 by the Court's prior interpretations of section 504, would
23 require a plain statement in the statute which is
24 undeniably missing, and that the Federal Government's
25 inconsistent interpretation of its integration regulation

1 is not entitled to deference.

2 Here, the general language of the statute
3 prohibiting discrimination by reason of disability is
4 being used to bar the provision of hospital services
5 offered on a voluntary basis unless Georgia, at the same
6 time, fully funds all demand for another service, a
7 community bed. But by providing a person with a hospital
8 bed and by asking the person to wait a short time until a
9 community bed is available, Georgia does not exclude a
10 person by reason of disability, neither does Georgia
11 discriminate against her by reason of disability.

12 What Georgia did here was simply to provide
13 hospital services to two mentally disabled patients.
14 There appears to be little debate as to the involuntary
15 treatment that was provided to these patients when they
16 were eminently dangerous to themselves or others and did
17 not consent to that treatment. It would be illegal under
18 Georgia law, the Constitution, and presumably the ADA to
19 confine them involuntarily without a medical and
20 dangerousness justification. And Georgia did not do that,
21 and there appears to be little contention that they did.

22 QUESTION: Ms. Downing, just to clarify the
23 dimensions of this case, do I understand correctly that
24 you are saying these two women are appropriately placed as
25 far as medical needs are concerned in a community-based

1 facility? So, it's not that they need to institution.
2 You're not challenging that on the facts, but you're
3 saying they must wait their turn on line. Is that -- is
4 that your position? Or are you saying they may not
5 qualify for community-based facilities?

6 MS. DOWNING: Your Honor, at the point that the
7 patients were placed, they did -- they were appropriate
8 for placement in the community and they did have to wait a
9 short time in order to make their way up the waiting list.
10 There were times prior to the time that they were placed
11 when the parties would dispute whether they were
12 appropriate for community treatment or not, but at the
13 time that they were placed and for a short time before, we
14 would agree that they were appropriate.

15 QUESTION: Your position is -- is as I -- if I
16 understand it correctly, is -- is much further than that.
17 I -- I understood it to be that it's up to the State to
18 decide what voluntary facilities it will make available
19 for the -- for the mentally ill, that if the State chooses
20 to have only institutional facilities, it may do that.
21 And if it chooses to have, in addition, community-based
22 facilities, it may have them in addition, but it will be
23 up to the State how many people it will put in those --
24 allow to go into those community-based facilities, because
25 we're talking here about voluntary admissions. Right?

1 MS. DOWNING: Your Honor, it's our understanding
2 that -- that it's actually the Government's position that
3 the State would not be required to have community
4 placements. In -- in Georgia, there are community
5 placements.

6 QUESTION: I'm not saying whether there are. Do
7 you think Georgia is required to have community placements
8 by this statute?

9 MS. DOWNING: We think that if Georgia is
10 required to -- to expand their community placements by
11 this statute --

12 QUESTION: That's not the question I asked. Is
13 Georgia required to have community placements?

14 MS. DOWNING: We don't think -- no. We don't
15 think that the statute requires Georgia to have community
16 placements.

17 QUESTION: I didn't think you said that. Okay.

18 MS. DOWNING: That's correct.

19 QUESTION: Now, could -- as I understand it, the
20 act provides that the Attorney General will promulgate
21 regulations, and it goes on to say that those regulations
22 will be consistent with the Disabilities Act and with
23 regulations promulgated under section 504 of the
24 Rehabilitation Act. Is that right?

25 MS. DOWNING: That's correct.

1 QUESTION: And there was a regulation adopted
2 under section 504 saying that no otherwise qualified
3 handicapped individual would be excluded from
4 participation and/or denied the benefits of or subjected
5 to discrimination, and that services had to be provided in
6 the most integrated setting appropriate to the needs. Is
7 that true under the Rehab Act?

8 MS. DOWNING: That's correct. Under the --

9 QUESTION: And the same regulation was then
10 adopted by the Attorney General under the Disabilities
11 Act.

12 MS. DOWNING: That -- that's correct.

13 QUESTION: Is there any definition of integrated
14 setting? Do we know what that is?

15 MS. DOWNING: Well, what we know is that the
16 original integration regulation was promulgated by HEW in
17 1977, and that the rule -- the notice at that point
18 described it as providing access to treatment. The
19 examples that it gave were that a Medicaid provider would
20 need to make its services available to the handicapped.
21 For instance, a doctor would need to have a ramp, a
22 wheelchair ramp, to get into the facility. That was in
23 1977.

24 In 1978, the -- a similar version was
25 repromulgated as the coordination regulation. And again,

1 the examples that were given there did not ever mention
2 least restrictive treatment or anything like it.

3 QUESTION: Well, this -- do you challenge the
4 regulation that was adopted by the Attorney General, or do
5 you challenge the interpretation of that regulation? Do
6 you say that the Attorney General lacked authority to
7 adopt that regulation?

8 MS. DOWNING: We don't say that the Attorney
9 General lacked authority to promulgate it in the way that
10 it was interpreted at the time. What we say is that the
11 interpretation that it's being given today, as of 1994 in
12 the Helen L. case for the first time, is a reversal of the
13 prior interpretation.

14 QUESTION: Well, so what this case actually
15 turns on, when you sort all other things around it, is the
16 meaning of the regulation saying it must be in the most
17 integrated setting appropriate. Is that right?

18 MS. DOWNING: Yes.

19 QUESTION: Is that what it boils down to?

20 MS. DOWNING: That's what it boils down to, Your
21 Honor, and that the new interpretation of the regulation
22 actually would be precluded by the language of the
23 statute, which requires discrimination by reason of
24 disability. It's our position that discrimination by
25 reason of disability applies to -- requires even-handed

1 treatment of the handicapped relative to the non-
2 handicapped. That was the primary focus of the act.

3 QUESTION: May -- may I ask you about that?

4 Because it seems to me that your argument in this respect
5 assumes that there is some kind of uniform and unvarying
6 class of persons who are handicapped. And it seems to me
7 that that is not so. There are all sorts of handicaps.
8 There are handicaps of all sorts of degrees, and -- and
9 recognizing the degree that is involved, let -- let me put
10 this question to you and ask you to -- to explain your
11 position in relation to it.

12 Let's assume that there is a class of
13 handicapped persons who, because of their handicaps, are
14 simply unsuited to live outside of an institution. Assume
15 secondly that there are a group of handicapped individuals
16 who can perfectly well live outside the institution
17 despite the handicap. And, of course, assume, three,
18 there's a general population of people who don't live in
19 institutions.

20 If the Government treats the second group, those
21 whose handicaps are irrelevant to institutionalization,
22 the same way it treats the first group, those who have to
23 live in institutions because of the handicap, isn't that
24 -- and they do so on the grounds that there is a handicap,
25 even though it does not require institutionalization, in

1 that case isn't the Government engaging in the
2 discrimination on the basis of handicap to the -- in -- in
3 relation to the second group?

4 MS. DOWNING: We would say no, that the --

5 QUESTION: Why not?

6 MS. DOWNING: -- the second group which you
7 posited needs a certain level of treatment, that this
8 level of treatment can be provided appropriately in the
9 hospital and that the person can benefit from that
10 treatment provided in the hospital.

11 QUESTION: So, you're saying that if
12 hospitalization would provide some appropriate treatment,
13 that in effect renders irrelevant the fact that an
14 individual can live outside the institution and presumably
15 get the treatment on a -- on a day care basis or something
16 of that sort. That's basically your argument.

17 MS. DOWNING: We wouldn't say that it renders
18 irrelevant. However, we would say that the mere fact that
19 the person could also be treated in the community would
20 not make hospital treatment discriminatory. In fact, the
21 very structure of the Medicaid Act presumed that this was
22 the case, and under the Medicaid Act, Congress has always
23 favored institutional treatment over community treatment.

24 QUESTION: Well, do you accept the position,
25 just as a matter of statutory interpretation, that -- I'll

1 assume for -- for my question that your -- your answer
2 gives one version of -- of what might be regarded as
3 discrimination. I'll -- I'll accept your answer as a --
4 as a possible interpretation.

5 Do you also take the position that your
6 interpretation is the only possible way of construing
7 discrimination within the statute? In other words, do you
8 say that -- although your answer is a legitimate one, do
9 you also say that in my hypothesis it -- it simply would
10 not be a legitimate interpretation of the statute to say
11 on my hypothesis that there was discrimination because the
12 middle group was treated like the first, not the third?
13 Is -- is my interpretation impossible?

14 MS. DOWNING: Well, I believe that --

15 QUESTION: Or unreasonable?

16 MS. DOWNING: Respectfully I believe that it is,
17 that --

18 QUESTION: Why is it unreasonable?

19 MS. DOWNING: It presumes that the person's
20 disability is irrelevant to their hospitalization.

21 QUESTION: Well, that's right. That's the
22 hypothesis of -- of the very question.

23 MS. DOWNING: Respectfully we would say that --
24 that the person's disability is -- is directly relevant
25 to their hospital treatment and the --

1 QUESTION: Well, in other words, you're changing
2 my question. But my -- let's -- let's just stick to my
3 question for a minute. Assuming there is this middle
4 group of individuals who have handicaps in some respect
5 but whose handicaps do not require hospitalization any
6 more than I require hospitalization or you do, assuming
7 there is such a middle group, would it be a possible
8 reading of the statute, a reasonable reading of the
9 statute to say that the Government discriminates against
10 them when it says we're going to put you in the hospital
11 anyway, even though you don't have to be there? Is that a
12 possible -- possibly reasonable reading of the statute?

13 MS. DOWNING: In -- in an involuntary setting,
14 that would be a reasonable reading of the statute, where
15 there's involuntary treatment being provided or where the
16 person is being confined against their will involuntarily
17 and there were no medical reason for it and the person
18 were not dangerous to themselves or others, yes, that
19 would certainly violate the ADA.

20 QUESTION: But --

21 QUESTION: It would violate the Constitution.
22 You wouldn't need the ADA to prevent that from --

23 (Laughter.)

24 MS. DOWNING: That's right.

25 QUESTION: But the -- the voluntary character of

1 the hospitalization then is what -- what takes us out of
2 -- of the situation that you and I have just been
3 describing?

4 MS. DOWNING: Well, it's the voluntary -- the
5 voluntariness of it is certainly a very key part of it.

6 QUESTION: But is -- is that -- does the -- does
7 the voluntariness, in effect, negate the possibility of
8 discrimination on the argument that, look, if they're
9 doing this voluntarily, you can't say that the Government
10 is discriminating against them because they themselves are
11 responsible for the -- for the treatment that they're
12 receiving. Is -- is that the nub of the argument?

13 MS. DOWNING: That -- that's one -- one aspect
14 of the argument. There -- another aspect of the argument
15 is that the person in the hospital can leave the hospital.
16 This person was not confined in the hospital, and in fact
17 she did leave the hospital during the day and received
18 community treatment.

19 QUESTION: Well, but their point was that if
20 they left the hospital, then they -- under your scheme,
21 they couldn't get any treatment at all.

22 MS. DOWNING: No.

23 QUESTION: Wasn't that their --

24 MS. DOWNING: No.

25 QUESTION: Wasn't that their point?

1 MS. DOWNING: No. Excuse me. Actually in fact
2 she did leave -- one of these patients left the hospital
3 during the day and then returned at night.

4 QUESTION: No. I meant if she left the hospital
5 permanently. If she said, I don't want to stay in the
6 hospital at all.

7 MS. DOWNING: It's also -- that's also untrue
8 under the facts of this case. Under the facts of this
9 case --

10 QUESTION: What we're trying to do is to test
11 what your legal theory is, and it's still not quite clear
12 to me.

13 Suppose you have a classification of disabled
14 people who are partially paralyzed and need
15 catheterization during the day. They need some fairly
16 constant care, but it is provided and can be provided in
17 an integrated setting. Assume that. Then assume that the
18 State says, any blind person is ineligible for this
19 integrated treatment and must remain in a hospital. Is -
20 - is that a permissible judgment?

21 It seems to me that you are saying that it is.

22 MS. DOWNING: No. We would not be saying that.
23 If that would actually reach what we say would be covered
24 by the ADA, which is that -- that services that are
25 available to one class of disabled cannot be excluded from

1 -- by another class based on the disability itself. We
2 would --

3 QUESTION: I thought that's what the respondents
4 were saying.

5 MS. DOWNING: No.

6 QUESTION: And if you say, well --

7 MS. DOWNING: No.

8 QUESTION: -- there are -- there are reasons why
9 they should be in the hospital because it's involuntary
10 medication sometimes in some context, then that's quite
11 different.

12 I thought that you were saying that the State
13 has the capacity to decide what kind of treatment it will
14 grant to discrete kinds of disabilities, and if hospital
15 treatment is in -- in a sense excessive treatment, so be
16 it. The State can make that distinction disability by
17 disability. That's the way I read your brief.

18 MS. DOWNING: The State's position is that if a
19 person were excluded from hospital treatment or community
20 treatment by reason of a disability, for example, if the
21 person had AIDS and were prohibited from going into the
22 hospital or if were prohibited going into community
23 treatment because of that disability, that would violate
24 the ADA, and that would violate it under the terms of the
25 statute which require that a person not be excluded by

1 reason of disability.

2 QUESTION: I guess the person who's not admitted
3 to the hospital because the State determines that the
4 condition is not serious enough to be treated in the
5 hospital is not being discriminated against because of his
6 disability. He's being discriminated against because of
7 his lack of disability, isn't he?

8 MS. DOWNING: Well, Your Honor, I believe that
9 whenever you get into decisions about treatment of the
10 disabled, every -- every decision is going to be made by
11 reason of the person's disability. Now, that does not
12 mean that every -- every treatment decision is
13 discriminatory, and nor does it mean that the ADA applies.

14 QUESTION: No, but he's not -- he's being
15 excluded from -- from institutional treatment in the
16 hypothetical I gave you not because of the disability he
17 has, but because he does not have an additional
18 disability. Right?

19 MS. DOWNING: The -- the person must be
20 qualified to receive the services. The person must meet
21 the requirements for qualification --

22 QUESTION: Does the State have to treat all
23 disabilities?

24 MS. DOWNING: No, the State does not. The State
25 does not have to treat all disabilities under the ADA.

1 QUESTION: Now, does it therefore discriminate
2 against people on the basis of their disability if it
3 offers no treatment for -- I don't know -- dyslexia?

4 MS. DOWNING: No. That would not constitute
5 discrimination.

6 QUESTION: If it says half the people who have
7 dyslexia have to sit at a special table, I guess that
8 would be discrimination, wouldn't it? We have the special
9 dyslexic table or we have the special table where all the
10 people who want to eat in the State cafeteria who are in
11 wheelchairs have to sit. Is that discrimination?

12 MS. DOWNING: That would -- that would
13 discriminate, yes.

14 QUESTION: All right. Now, if that's so, then
15 suppose you said all the people who have broken legs or
16 whatever, if they want library books, they have to go to a
17 special room where we lock them up overnight. I mean,
18 that's clearly wrong.

19 MS. DOWNING: Certainly.

20 QUESTION: All right. Now, what's -- what
21 they're saying I think is that a person who clearly
22 shouldn't receive treatment for a mental disability in
23 that special room, it's just as much discrimination to
24 lock them up in the special room as if they went there to
25 get library books because, after all, there's no relation

1 to being in that special room and their mental disability.

2 MS. DOWNING: Well --

3 QUESTION: It's -- there's no medical reason for
4 putting them there. There's no more medical reason for
5 putting them there than there is a medical reason for
6 putting a person with a broken leg there. And if there's
7 no medical reason for putting them there, why is it any
8 different to say you get mental treatment in that room
9 than to say you get library books in that room? There's
10 no relationship between the nature of the room and the
11 treatment that's being handed out.

12 At least, that's how I understood it. I may not
13 understand it fully, but that was my understanding. Where
14 there's no relation between the treatment and being in the
15 special room, you can no more keep the mentally ill person
16 there than you could a person who wanted any other kind of
17 service.

18 MS. DOWNING: Your Honor, in response to an
19 earlier point that you made in your -- in what -- in your
20 hypothetical, again you referred to locked, that they're
21 locked in the room. In this case --

22 QUESTION: I'll assume they're not.

23 MS. DOWNING: That they're not locked.

24 QUESTION: Let's just call -- just call it a
25 special room, and by that we'll mean an institutionalized

1 room.

2 MS. DOWNING: I believe where the State would
3 disagree and the State's position is different than that
4 is that it cannot be assumed that because one option is
5 appropriate -- and that's community care -- that another
6 option, which is hospital care is not appropriate.

7 Now, Congress has spoken quite clearly on this
8 in the Medicaid Act. Congress has highly regulated and
9 pumped billions of dollars into the institutional care of
10 individuals and has only allowed community care as a pilot
11 project, as a let's try it out and see how it works
12 project. The State has to get special permission under
13 the Medicaid Act in order to provide those waiver beds.

14 QUESTION: Ms. Downing, do you have a special
15 room for broken legged people? I mean, is -- is that the
16 proper analogy? I thought you had one room for everybody,
17 and that what's going on here is that this person is
18 saying, I don't really want this one room. I can be
19 treated better somewhere else. You haven't established
20 one room for broken legged people or for people with a
21 certain type of disability, have you? You've said, if you
22 want to get library books, this is where library books are
23 given out.

24 MS. DOWNING: That's -- that's correct.

25 QUESTION: And here you have plaintiffs who say,

1 I don't want to come into this one room. I can get
2 library books, given my -- the nature of my disability, in
3 a -- in a bigger room with more windows or something. And
4 you're just saying, I'm sorry, we -- we don't have a
5 bigger room with more windows. Everybody who needs
6 library books has to come to this room.

7 QUESTION: But I thought in this case you had
8 two rooms. You have the room without windows and the room
9 with windows. And the person is saying, I'm entitled to
10 go to the one with windows.

11 QUESTION: And you are saying there not only
12 because they have a mental illness. That's -- that's how
13 I understand your case.

14 MS. DOWNING: I --

15 QUESTION: Now, tell us if the case is --

16 MS. DOWNING: I would disagree with the last
17 point. The previous points from Justice Scalia and
18 Justice O'Connor I think fairly state the position, but
19 that we are excluding the person from going to the second
20 room because they have a mental disability is -- is not
21 the case. In fact, what Georgia does is once the person
22 is stabilized, is they do attempt to get them into a
23 community placement.

24 QUESTION: Well, are you putting some extra
25 barriers? Are you making it more difficult to get to

1 that --

2 MS. DOWNING: No. No, not in any way. Georgia
3 does not make it more difficult for them to get into the
4 -- the second room. In fact, Georgia is providing more
5 and more of these rooms.

6 QUESTION: What if there's no space? You're
7 saying they have to wait in line. Right?

8 MS. DOWNING: Yes, we do.

9 QUESTION: But you -- you assert you could
10 eliminate the second room entirely if you wanted to, if -
11 - if you decide that the way the State wants to provide
12 treatment is -- is institutionally, you're -- you're
13 authorized to do that.

14 MS. DOWNING: Your Honor, that --

15 QUESTION: I thought you said that. Is -- is
16 this a new question? I thought we answered that earlier.

17 MS. DOWNING: Your Honor, Georgia -- Georgia
18 thinks it would be inconsistent to say that Georgia must
19 provide as many beds in the community, once they have a
20 program, as -- as there's demand for, and yet at the same
21 time to say that Georgia is not required to provide those
22 beds in the first place.

23 QUESTION: Which is your position, that you're
24 not required to provide community service at all.

25 MS. DOWNING: Well, Georgia -- not under the

1 ADA. We don't believe that Georgia is required to under
2 the ADA.

3 QUESTION: May I ask you a question about the
4 meaning of the word discrimination? It seems to me that
5 the argument -- your position is discrimination means
6 disparate treatment, treated differently. It seems to me
7 your opponents say discrimination means unjustified
8 disparate treatment. Am I correct in describing the --
9 the positions of the parties?

10 MS. DOWNING: Well, Georgia -- Georgia believes
11 that unjustified disparate treatment based on
12 disability --

13 QUESTION: Do you think discrimination just
14 means unjustified disparate treatment, or do you say every
15 disparate treatment is discrimination? What is -- what is
16 your view of --

17 MS. DOWNING: Well, we don't believe that every
18 disparate treatment is discrimination. I think this was
19 -- this was --

20 QUESTION: Well, if it's unjustified disparate
21 treatment that constitute discrimination and if there's no
22 justification for keeping a person in the second room
23 instead of the first, why doesn't the statute apply?

24 MS. DOWNING: Well, we believe that there is
25 justification for -- for treating the person in the

1 hospital. There has been justification for centralized
2 treatment for policy reasons and for medical reasons.

3 QUESTION: But then --

4 QUESTION: And I thought financial reasons. I
5 thought you said you don't have enough money to have too
6 many community --

7 MS. DOWNING: And -- and financial reasons.
8 That's -- that's correct. There have been --

9 QUESTION: But -- but -- if -- if you factor in
10 the fact that it's medically reasonable and preferable to
11 -- which is what the implication of your suggestion is, to
12 treat in a hospital, then this whole case goes away. I -
13 - I think we have to take the case on the assumption that
14 the treatment can be just as effective in the integrated
15 setting as it in -- as it is in the hospital. If you say
16 it's more effective and -- and you can only provide the
17 most effective treatment there, then it's a different
18 case.

19 MS. DOWNING: Well --

20 QUESTION: What we're trying to do is to find
21 out what is the issue you're asking us to decide, and it
22 seems the parties are -- the briefs are not meeting the
23 way you're -- you're presenting the case.

24 MS. DOWNING: It's Georgia's position that what
25 the ADA is primarily focused on is evenhanded treatment

1 between the handicapped and -- and the non-handicapped,
2 that to -- it does have some application in disability
3 services, but it does not apply with equal force in the
4 provision of disability services. The primary purpose of
5 the ADA is to provide in an evenhanded way the services
6 that are available without discrimination according to
7 disability. The primary purpose is not to require the
8 Georgia to totally expand its community services to meet
9 all demand, which is what the plaintiffs are suggesting.

10 QUESTION: Yes. Ms. Downing, let me remind you
11 and my colleagues the -- the question presented in the
12 petition for certiorari, whether the public services
13 portion of the Federal ADA compels the State to provide
14 treatment and habilitation for mentally disabled persons
15 in a community placement when appropriate treatment and
16 habilitation can also be provided to them in a State
17 mental institution.

18 MS. DOWNING: That's -- that's correct. That's
19 correct.

20 QUESTION: Well, it's correct because that's the
21 question you presented.

22 (Laughter.)

23 MS. DOWNING: It's Georgia's position that it is
24 reasonable for the State to ask someone to wait until a
25 community placement is available, that that does not

1 constitute discrimination. It is a fundamental alteration
2 of the State's services to require the State to close down
3 institutions and to fully fund --

4 QUESTION: Well, that issue is open on remand I
5 assume.

6 MS. DOWNING: But we -- we think that goes to -
7 -

8 QUESTION: Whether it's a fundamental alteration
9 of the State's program.

10 MS. DOWNING: But we think that also goes to the
11 issue of whether there's been discrimination in the first
12 instance.

13 QUESTION: Can you make that wait longer for the
14 mentally ill than for other disabilities?

15 MS. DOWNING: No. No. If the person has --
16 meets the qualifications for the services, that they can
17 certainly access the services when they're available.

18 And I would like --

19 QUESTION: Ms. Downing, I thought this case had
20 gone back on remand to decide the financial, whatever it
21 was, question --

22 MS. DOWNING: Well, what the Eleventh Circuit
23 did, however, is limit the question on remand to a
24 comparison between the cost of serving two persons in the
25 community relative to the entire mental health budget of

1 the State. Now, this is -- this is not a fair comparison
2 when you have 2 persons on the numerator and 160,000 on
3 the denominator as to cost. And in fact, the district
4 court has already ruled on -- on that issue exactly the
5 way the Eleventh Circuit defined --

6 QUESTION: You say the Eleventh Circuit sent
7 back the wrong question.

8 MS. DOWNING: Absolutely. Absolutely. The
9 Eleventh Circuit sent back the question that was always -
10 - will always preclude the State from a meaningful
11 defense.

12 And I would --

13 QUESTION: Why -- I opened with this question
14 and -- and if I'm wrong about it, do tell me. I thought
15 the State's current position is, yes, we think there ought
16 to be two rooms. We have two rooms, but people have to
17 stand on line because we don't -- the second room isn't
18 large enough. I thought that was the position you were
19 taking now and that that's compatible with the act.

20 MS. DOWNING: The -- the act by its terms -- the
21 act by its terms -- there's more than one argument,
22 obviously, we have. The -- the act by its terms we
23 believe does preclude that interpretation. However, if
24 you believe that it does not preclude that interpretation,
25 then -- then we believe that the Justice Department's

1 interpretation is not entitled to deference because it's
2 been a total reversal.

3 And I would like to point out --

4 QUESTION: A total reversal of -- of what?

5 MS. DOWNING: The Justice Department -- I would
6 like to point out that the Justice Department's position
7 has -- has reversed in this case. In -- in the Bowen
8 case --

9 QUESTION: Reversed from what? Because I'm
10 looking at their brief and -- what was it? The Helen L.
11 case?

12 MS. DOWNING: Yes. The Helen L. --

13 QUESTION: And they say the unnecessary
14 segregation of individuals with disabilities is a form of
15 discrimination prohibited by the ADA and its implementing
16 regulations.

17 MS. DOWNING: Yes, and that's the first time, as
18 conceded by the Attorney General, that they ever took that
19 position. Prior to the time the ADA was passed, the --
20 the Attorney General took the position that section 504
21 essentially is concerned only with discrimination in the
22 relative treatment of handicapped to non-handicapped
23 persons and does not confer any absolute right to receive
24 particular services or benefits under federally assisted
25 programs.

1 QUESTION: Where is that from?

2 MS. DOWNING: That is from the Bowen case. The
3 Court cited the Solicitor General's position, the exact
4 language of their brief in that case. That's the position
5 we take. That's the position that the Solicitor took in
6 that case.

7 And also, in their regulatory impact statement,
8 which was issued after the ADA was passed, they took the
9 exact position which we're taking today, which is that
10 title II-A essentially operates to extend the program
11 accessibility standards of the Rehabilitation Act of 1973
12 to the last small, remaining portion of the public sector
13 not covered by this standard. We agree with that. We
14 think that the program accessibility of the community
15 services is covered by the ADA and was covered by section
16 504.

17 The -- in the -- that analysis, the Department
18 also said that the litigation expenses attributed to title
19 II-A are likely to be minimal given that it imposes only
20 the now familiar standards of the Rehabilitation Act.
21 This is certainly not a now familiar standard to the
22 State. This -- this application to least restrictive
23 treatment never appeared until 1994 in an amicus brief.

24 And I'd like to reserve my remaining time for
25 rebuttal, if there are no further questions.

1 QUESTION: There's no time left and no further
2 questions.

3 (Laughter.)

4 QUESTION: Mr. Gottesman.

5 ORAL ARGUMENT OF MICHAEL GOTTESMAN

6 ON BEHALF OF THE RESPONDENTS

7 MR. GOTTESMAN: Mr. Chief Justice, and may it
8 please the Court:

9 In enacting the ADA, Congress declared that its
10 overriding goal was to remove barriers that were
11 preventing persons with disabilities from gaining access
12 to the economic and social mainstream of American life.
13 To that end, Congress catalogued on the face of the
14 statute a number of practices that it thought was impeding
15 that access, and it called these -- and this is a quote
16 from the statute -- forms of discrimination.

17 First on the list was the isolation and
18 segregation of persons with disability from the social
19 mainstream of American life. And the legislative history
20 is clear that what Congress had in mind in putting that
21 first on the list and referring to institutionalization as
22 one of the places where there are serious and pervasive
23 problems to be addressed was the unnecessary confinement
24 of persons with mental disabilities.

25 QUESTION: How dependent is your argument, Mr.

1 Gottesman, on what you describe as the legislative
2 history?

3 MR. GOTTESMAN: It's I think not dependent at
4 all. The legislative history confirms what appears in the
5 text of the statute, and to show that, Your Honor, I would
6 propose to look solely at the text first. The text
7 recites isolate and segregate as a pervasive form of
8 discrimination.

9 QUESTION: This isn't -- I mean, this doesn't -
10 - this isn't isolation or segregation. It is the State
11 offering certain treatment services. It says this is the
12 treatment service that we have. That's quite different
13 from saying, you know, people in wheelchairs have to be in
14 a separate part of the room. It just happens that this is
15 the only service we provide.

16 MR. GOTTESMAN: Well, Your Honor, the argument
17 that this is voluntary, we provide the service, we happen
18 to provide it in the locked ward of a mental
19 institution --

20 QUESTION: Right.

21 MR. GOTTESMAN: You don't have to take the
22 service, but if you would like the service, the only place
23 you can have it is here.

24 QUESTION: Well, now, in this case we do not
25 have a locked ward.

1 MR. GOTTESMAN: Yes, we do, Your Honor.

2 QUESTION: Well, according to counsel for the
3 petitioner, these particular individuals were permitted to
4 leave, or at least one of them, during the day and return
5 at night.

6 MR. GOTTESMAN: No, that's not accurate, Your
7 Honor, and let me be clear about what the record shows.
8 One of these petitioners did try from time to time to
9 leave, to go out into the community. She was taken by the
10 police and brought back. Under Georgia law, even if you
11 are a voluntary, that is, not a statutorily committed
12 person, but a voluntary entrant into this institution, you
13 are not free to leave at will to come and go. You can
14 apply for release and the State will be obliged to release
15 you after 72 hours, but you are --

16 QUESTION: So, you disagree with the description
17 given by counsel for the petitioner of the --

18 MR. GOTTESMAN: Totally, Your Honor.

19 QUESTION: -- conditions.

20 MR. GOTTESMAN: Totally. These were locked
21 wards. There's --

22 QUESTION: They were locked, but to say it's
23 locked is not to say that it's involuntary. She could get
24 out at any time that she wanted.

25 MR. GOTTESMAN: She could --

1 QUESTION: It took 72 hours.
2 MR. GOTTESMAN: Yes.
3 QUESTION: She had to give them 72 hours' notice
4 that I no longer want to be here --
5 MR. GOTTESMAN: That's right.
6 QUESTION: -- whereupon she was free to leave.
7 MR. GOTTESMAN: She was free to leave and would
8 not receive any of the services that she needed.
9 QUESTION: And one -- one of these -- one of
10 these -- respondents was -- was in -- in a community
11 location for some time, wasn't she?
12 MR. GOTTESMAN: Immediately before suit was
13 filed, for a period of a few weeks. That's correct.
14 QUESTION: Paid for by the State.
15 MR. GOTTESMAN: That's correct.
16 QUESTION: And -- and it took -- it took a full-
17 time person living with her to make that treatment
18 effective. Wasn't one of them living with a full-time
19 attendant?
20 MR. GOTTESMAN: One of them was living in a
21 place with several full-time attendants for a very brief
22 time, but then that was withdrawn.
23 But let me talk --
24 QUESTION: I mean, that's pretty expensive.
25 I ---

1 MR. GOTTESMAN: No. It's actually cheaper.

2 QUESTION: I guess that's community treatment,
3 but it's pretty expensive.

4 MR. GOTTESMAN: Well, it's cheaper, Your Honor,
5 and I -- I do want to spend a minute on why it's cheaper.

6 Actually it may be important to define what the
7 service here. The service is not housing, and the -- the
8 housing, whether in the institution or in a community
9 facility is paid for by the patient out of Social Security
10 disability checks. That's not the service.

11 The service that's being provided here is what
12 is generally called habilitation. It is a form of
13 training and supervision. People with developmental
14 disabilities need to learn how to do a variety of things
15 in order to function independently in society. That's an
16 educational function. While they are learning that and
17 until they have achieved the capacity to perform on their
18 own in society, they need a certain modicum of supervision
19 as well. And so, the service is a people-provided
20 service.

21 There is no dispute -- and Georgia concedes that
22 it is cheaper to provide that service to people in
23 community --

24 QUESTION: In a way that's what's bothering
25 me --

1 MR. GOTTESMAN: Pardon?

2 QUESTION: -- is if I say what is -- maybe you
3 can say something to reassure me. What bothers me is
4 this, that in the APA brief, they say without de-
5 institutionalization there would be 800,000 people in
6 institutions, but there are only about 76,000. Well, many
7 of those 76,000 must really need to be in institutions.

8 MR. GOTTESMAN: Yes.

9 QUESTION: And so, what worries me about your
10 position is writing something that, as it really works out
11 in the world, leads a lot of the people who need to be in
12 institutions to be out, abandoned in the streets. Now,
13 the reason that that is possible in my mind is because
14 once you say the law requires you to put people in halfway
15 houses, if you say that's appropriate, but appropriate is
16 a term that we want medical people to decide, not judges.

17 MR. GOTTESMAN: Correct.

18 QUESTION: And so, I'm suddenly worried in areas
19 of uncertainty, like your clients here who have been in
20 and out because they had threats to kill themselves or
21 others from time to time, and then sometimes -- that's the
22 real world. Sometimes they're in, sometimes they're out.
23 It's serious, complicated, technical and fluctuates.

24 And on your side, can you say something to
25 assure me that -- that if you won, that wouldn't suddenly

1 lead to a lot of people being thrown out of institutions
2 who ought to be there?

3 MR. GOTTESMAN: Well, the first reassurance is
4 that in this case the State's own professionals said that
5 these people could appropriately be served in the
6 community.

7 QUESTION: It's the rule of law that I fear --

8 MR. GOTTESMAN: And the question is, to what
9 extent would deference be owed to the State medical
10 professionals in cases where, unlike this one, they said,
11 we don't think this person can be appropriately served in
12 the community?

13 QUESTION: Can we go back one step to have this
14 clear, this basic question clear?

15 In your view, under the statute, is the State
16 required to have any community-based facilities? Suppose
17 the State says, some people we know are going to need
18 institutionalization. We're going to provide just the one
19 room. Is there any obligation under the ADA for the State
20 to do more than have institutional care?

21 MR. GOTTESMAN: We would say yes, Your Honor.
22 We're not clear whether the Solicitor General would say
23 yes. And let me explain why.

24 The applicable regulation, which Congress
25 virtually dictated that the Attorney General adopt says, a

1 public entity shall administer services in the most
2 integrated setting appropriate to the needs of qualified
3 individuals.

4 Now, we would concede the State doesn't have to
5 provide services at all. Nothing in the ADA says you have
6 to provide mental disability services. But what the
7 statute and what this regulation that Congress dictates
8 says is if you choose to provide the services, you must
9 provide them to individuals in the most integrated setting
10 appropriate to their needs.

11 QUESTION: May I --

12 QUESTION: But --

13 QUESTION: -- services are. I think if the
14 State would say, here are the services -- is -- is an
15 institution for people who want -- and -- and that
16 institution has to be as integrated as possible. You
17 can't make people in wheelchairs sit at one -- at one end
18 of the room. But the service is an institution for
19 treatment of these people.

20 MR. GOTTESMAN: Well, Your Honor, if one -- one
21 can definitionally negate entirely this provision. If one
22 does that --

23 QUESTION: I don't think that negates it
24 entirely. You cannot segregate people in wheelchairs.

25 MR. GOTTESMAN: It is not, and the State has not

1 argued that the service in this case is
2 institutionalization. The service is the habilitation
3 that the people need.

4 QUESTION: Mr. Gottesman --

5 MR. GOTTESMAN: The question is where it's going
6 to be provided and that's what --

7 QUESTION: May I ask, if you've finished your
8 answer to Justice Breyer's question, because I'm also
9 concerned about the possibility that if we adopt the rule
10 in its strongest form that you advocate, that the States,
11 in order to avoid the risk of liability, would have a
12 motive and an incentive to push people out into the
13 community that should not go in that direction. So, would
14 you finish your answer to that?

15 MR. GOTTESMAN: Yes, I would like to, Your
16 Honor. There really are two separate questions I think.

17 One, will the courts override the judgments of
18 the State's own professionals, which I understood to be
19 Justice Breyer's first question. There, this case doesn't
20 present the question, but there is a question of the
21 degree of deference that this Court will accord to the
22 judgment of the State's professionals. And this Court is
23 in control of that when such a case is presented where the
24 patient says, I can be appropriately served outside, but
25 the institution says, no, we don't agree. Here they did

1 agree.

2 QUESTION: Where do we get the deference to
3 professionals out of the statute?

4 MR. GOTTESMAN: The statute does not say how the
5 determination will be made. This Court has, in
6 interpreting other statutes, said that in deciding a
7 question like this, we accord such deference as we think
8 is appropriate to them.

9 QUESTION: But it won't be the patient against
10 the State's professionals. It will be the patient's
11 professionals against the State's professionals. I don't
12 know any other area where we say when there's a battle of
13 experts, the State always wins.

14 MR. GOTTESMAN: Well, this Court --

15 QUESTION: We certainly wouldn't do that if the
16 issue were involuntary confinement.

17 MR. GOTTESMAN: I hope not.

18 QUESTION: Somebody says -- I hope not too. And
19 the patient brings in his experts who says, you know, he's
20 perfectly able to function outside of an institution, and
21 the State's experts say, no, no, no, he must be locked up.
22 You want us to say, well, that's the State's experts.
23 They win.

24 MR. GOTTESMAN: Well, Your Honor, on this issue
25 I find it hard to be arguing. And in our case the State's

1 professionals say not only can these people appropriately
2 be served in the community, they can be better served in
3 the community for obvious reasons. If habilitation is
4 designed to train them to function in the community, it's
5 easier to give that training if they're in the community.

6 QUESTION: Yes, but we have to worry about other
7 cases, not your case.

8 MR. GOTTESMAN: Well --

9 QUESTION: This isn't even a class action.

10 MR. GOTTESMAN: That's correct.

11 QUESTION: So, the question is a very pressing
12 one, and you haven't answered it yet.

13 MR. GOTTESMAN: Well, this Court has in other
14 cases said, we will give very strong deference to the
15 judgment of the -- the institution's professionals, said
16 that in a different context, not the ADA, in Youngberg v.
17 Romeo. It said in --

18 QUESTION: But what we don't know is, Mr.
19 Gottesman -- is how many other people the experts in the
20 -- in the institution have -- Justice O'Connor just made
21 the point it's not a class action. We have two
22 individuals. How do we know that there aren't a dozen
23 individuals who would benefit at least as much --

24 MR. GOTTESMAN: True.

25 QUESTION: -- but they haven't come to court?

1 What you're doing is saying the people who come to court
2 go to the head of the line.

3 MR. GOTTESMAN: We are not saying that, Your
4 Honor. That is addressed in the -- in the brief for the
5 United States.

6 Georgia identified in 1992 that it had 532 such
7 persons, persons in institutions who didn't need to be
8 there, and Georgia was saying to them, you can have this
9 service but only if you'll agree to stay in this locked
10 institution. Now --

11 QUESTION: What if you get into a situation, Mr.
12 Gottesman, where you have what you call the professionals,
13 which I presume means M.D.'s and so forth in the hospital,
14 but there's a hospital administrator who's perhaps a
15 political appointee and he -- he may disagree with the
16 professionals or if he doesn't like what the professionals
17 are doing, maybe he'll hire professionals who say what he
18 wants them to say?

19 MR. GOTTESMAN: Well, on the first score, Your
20 Honor, this Court in both Youngberg and in an 8 -- 504
21 case Arline, which also talked about deference to the
22 State's professionals, said it has to be professional
23 judgment that we defer to, not administrative judgment.
24 If a hospital administrator says, hey, I like being the
25 administrator of a great, big hospital, so I'm going to

1 overrule the judgment of the professionals, I want to keep
2 these people in an institution, even though they don't
3 need to be here, that would not be something that would
4 warrant deference.

5 QUESTION: Of course not, but he would hire, as
6 the Chief Justice suggests -- you know, as sure as God
7 made little apples, he will hire professionals who agree
8 with him, people -- professionals who like to keep
9 everybody in institutions.

10 MR. GOTTESMAN: Well, Your Honor, I'd like to
11 think States do better than that, and I think they do.
12 That is, this State has identified lots of people who
13 don't need to be in institutions.

14 Now, this business about --

15 QUESTION: What it boils down to -- let's assume
16 -- I mean, just I -- I assume there's something in Justice
17 Scalia's suggestion. Isn't that simply a problem with
18 which the law cannot deal beyond this point? If it gets
19 in front of a judge, a judge is going to have to decide
20 which professional has the more deserving credibility.
21 There's nothing beyond that that you can do to -- to
22 respond to -- to that problem of sort of stacking the
23 deck, is there?

24 MR. GOTTESMAN: Well, this Court in Arline,
25 which was a 504 case, said that we give very strong

1 deference to the views of the State's professionals.

2 QUESTION: So, your answer to Justice Breyer's
3 question I think boils down to this. Number one, what is
4 -- I guess in terms of the regulation, what is appropriate
5 to the needs is number one, an -- an issue for medical and
6 mental health professionals.

7 MR. GOTTESMAN: Yes.

8 QUESTION: Number two, there is no presumption
9 in favor of release. In other words, one does not go into
10 court as a plaintiff with the benefit of a presumption
11 that one ought to get released rather than not released.

12 MR. GOTTESMAN: Unless -- there's no presumption
13 unless the State's own professionals say --

14 QUESTION: Right, but that's not a -- I'm -- I'm
15 talking about a presumption apart from the testimony of
16 professionals.

17 MR. GOTTESMAN: That's right. That's correct.

18 QUESTION: And -- and number two, the burden --
19 number three I guess, the burden is on the person seeking
20 release --

21 MR. GOTTESMAN: Correct.

22 QUESTION: -- to demonstrate entitlement to
23 release. So, that's the source of -- of what I think
24 you've described as the deference to the -- to the
25 professionals representing the institution.

1 MR. GOTTESMAN: Well --

2 QUESTION: Are those the three components
3 basically?

4 MR. GOTTESMAN: Well, certainly those three,
5 that is to say, that even if all professionals' judgments
6 are to be given equal deference by the court, the
7 plaintiff, by virtue of having the burden of proof -- I
8 can appropriately be served in the community -- would have
9 to be more persuasive than the State.

10 QUESTION: Well, Mr. Gottesman, what do we mean
11 by the most integrated setting?

12 MR. GOTTESMAN: Well, the -- in the -- in
13 adopting the regulations, the Attorney General gave us a
14 definition of what that means, and it's printed on page 21
15 of our brief. An integrated setting, within the meaning
16 of this provision, is a setting that enables individuals
17 with disabilities to interact with nondisabled persons to
18 the fullest extent possible.

19 QUESTION: Well, let me ask you this. Suppose
20 that the State had just a mental institution and no
21 community-based facilities, but the plaintiff comes in and
22 says, look, if the State had three attendants to be with
23 me day and night so that I wouldn't hurt myself or anybody
24 else, I could be outside this institution and still be
25 getting care. And that would be the most integrated

1 setting under your definition. Must the State do that?

2 MR. GOTTESMAN: Probably not. I think the
3 answer is almost surely not, Your Honor, because it would
4 be able to satisfy the fundamental alteration defense;
5 that is, it would not be a reasonable accommodation to
6 serve that person in the community. The cost would be too
7 great.

8 QUESTION: It certainly would -- would be the
9 most integrated setting, though --

10 MR. GOTTESMAN: It would, indeed, but --

11 QUESTION: -- under your definition of it.

12 MR. GOTTESMAN: That's correct, but there is a
13 limit in the statute on the --

14 QUESTION: Isn't there also a limit in the reg?
15 I had assumed -- maybe I'm wrong. I had assumed that the
16 question of appropriateness under the reg would take into
17 consideration cost.

18 MR. GOTTESMAN: Well, it could well because it
19 is -- before you get to whether it's a fundamental
20 alteration, you have to ask is this a reasonable
21 accommodation because b(7) of the reg says, a public
22 entity shall make reasonable modifications in policies and
23 practices to avoid --

24 QUESTION: Suppose --

25 MR. GOTTESMAN: -- discrimination.

1 QUESTION: Suppose the State said we have 500
2 spaces in the -- in the community-based facility. There
3 are 532 people who qualify. What -- is the State then
4 required to create another community-based facility to
5 take care of the 32 who don't fit into the space
6 available?

7 MR. GOTTESMAN: Well, the State's obligation
8 here is to -- if it is going to provide these services, is
9 to provide integrated settings. That is, what Georgia is
10 doing is it's treating this as though the availability of
11 community services is out of their control. We can't help
12 it. There are only this many community services, so
13 people will have to wait in line.

14 QUESTION: Well, they can help it, but it would
15 cost money. And that -- see, one of the arguments that
16 was made, you can't just say it's cheaper to maintain a
17 person on the outside. Here's this huge institution and
18 it costs the State money. The State is going to lose
19 money unless it can get everybody out of the institution.

20 MR. GOTTESMAN: Well, it doesn't have to get
21 everybody out, Your Honor. If it gets a few people out,
22 it can reduce the number of personnel. The fact is that
23 it is much, much cheaper to provide these services in the
24 community. Georgia repeatedly acknowledges that.

25 Now, it does say -- but it has not yet proved -

1 - and we don't believe that it can prove -- that, yes, it
2 is much cheaper to serve them in the community, but we
3 still have to bear the same costs of the institution even
4 if the bed is empty.

5 QUESTION: Do they have an opportunity to make
6 that proof?

7 MR. GOTTESMAN: Of course.

8 QUESTION: But, as I understood, Georgia to take
9 the position that what was sent back to Judge Shoob was a
10 much less -- much narrower question than that.

11 MR. GOTTESMAN: Well, they were allowed to
12 demonstrate that it would be a burden, an undue burden,
13 and therefore a fundamental alteration to serve these two
14 people in the community, and they said, we concede that we
15 cannot make that showing.

16 QUESTION: But in any case, we don't have any
17 question before us --

18 MR. GOTTESMAN: That is correct.

19 QUESTION: -- about how, in effects, the balance
20 should be struck on -- on what is reasonably -- what is
21 reasonable financially.

22 MR. GOTTESMAN: That's correct. The State --

23 QUESTION: And the -- the only question we've
24 got, I guess, is whether there is a -- kind of a -- just a
25 -- a stone wall against your position erected by a -- a

1 view of discrimination that says that as long as you treat
2 all handicapped persons, regardless of the handicapped --
3 their handicap, in the same way, as a matter of law,
4 there can't be discrimination under the statute. That's
5 the only question we've got.

6 MR. GOTTESMAN: That's right. It's even easier
7 than that, and even when we agree, when our professionals
8 agree that they can be appropriately served outside. So,
9 they're saying, even if it's true, that there would be no
10 burden whatsoever on us.

11 QUESTION: Thank you, Mr. Gottesman.

12 Mr. Gornstein, we'll hear from you.

13 ORAL ARGUMENT OF IRVING L. GORNSTEIN

14 ON BEHALF OF THE RESPONDENT

15 MR. GORNSTEIN: Mr. Chief Justice, and may it
16 please the Court:

17 Under the Attorney General's integration
18 regulation, a State that offers treatment to persons with
19 disabilities must offer treatment in an integrated
20 community setting rather than a segregated institution
21 when treatment in the community would be appropriate to
22 the individual's needs and when it would not require an
23 unreasonable change in State policy or a fundamental
24 alteration in the State's treatment program.

25 QUESTION: Suppose you have people who are

1 uncertain on that point, I mean, and they say, it's also
2 appropriate at the hospital. I'm still worried. I have
3 the same problem. 76,000 people left. Many of those
4 76,000 need the institutionalized care, and if you tell me
5 it's cheaper, that's part of -- you know, it's cheaper to
6 put them out in a halfway house, maybe they'll all be
7 pushed out there. That's what I'm worried about, and I
8 would just like to be reassured that the decision that
9 we'll make in this case will be balanced and not somehow
10 get it wrong.

11 MR. GORNSTEIN: The statutory obligation only is
12 triggered when it is appropriate to treat the person in
13 the community.

14 QUESTION: Now, what do you do when people
15 disagree, when psychiatrists are not certain when, as
16 here, one says I think it's appropriate to treat her in
17 the facility, not outside?

18 MR. GORNSTEIN: In -- in this Court's decision
19 in Arline I believe, which was under section 504 of the
20 Rehabilitation Act, provides the nearest analogy, and
21 there the Court said that courts should generally defer to
22 reasonable judgments made by the State's treatment
23 professionals.

24 QUESTION: Mr. Gornstein, can I ask, what
25 administration -- what -- what responsibilities for

1 administering this act does the Attorney General have?

2 MR. GORNSTEIN: The Attorney General has
3 authority or was compelled to issue regulations --

4 QUESTION: Anything else?

5 MR. GORNSTEIN: Yes.

6 QUESTION: Does he administer the act? What
7 does he --

8 MR. GORNSTEIN: He administers the act by
9 following -- filing lawsuits when there are violations of
10 the act.

11 QUESTION: That -- that's not in administration
12 of the act. The Attorney General sues in criminal law as
13 well.

14 MR. GORNSTEIN: Well --

15 QUESTION: And we don't give him deference as to
16 the meaning of criminal laws.

17 MR. GORNSTEIN: You're raising the question of
18 deference.

19 QUESTION: I'm raising the question of -- do you
20 know any other case in which we have given deference? I
21 know several where we have denied deference to regulations
22 issued by an agency that did not have responsibility for
23 administering the act. Do you know of any where we have
24 given deference?

25 MR. GORNSTEIN: In -- this Court's decision in

1 Bragdon said that the Attorney General was entitled to
2 deference in his interpretation of title III in the -- of
3 the ADA based on the very factors that are present here,
4 that the Attorney General was directed to issue
5 regulations to --

6 QUESTION: Suppose Congress tells the Attorney
7 General to issue regulations concerning the meaning of
8 section 1983. Would we be bound by his -- by his
9 interpretation of it?

10 MR. GORNSTEIN: Justice Scalia, I think you
11 would not be bound by it, but I think you would be
12 entitled --

13 QUESTION: Can Congress --

14 MR. GORNSTEIN: -- you would be -- you would be
15 required to give it Chevron deference. Now --

16 QUESTION: You see, I thought Chevron deference
17 was -- came about because when Congress passes a statute
18 that requires administration by an executive agency, the
19 executive is necessarily the first person to take a cut at
20 giving meaning to it, and we give deference to that
21 person's cut because it's part of his necessary function.

22 But you have here a statute in which Congress
23 simply said, we don't want the courts to interpret this
24 legislation, we want the Attorney General to, and gave --
25 gave power to the Attorney General to simply make rules,

1 not because he's responsible for administering the act,
2 but because Congress just likes the Attorney General's
3 view of the statute better than it likes ours. I don't
4 know of any other instance where we've done that.

5 MR. GORNSTEIN: Justice Scalia, I think Bragdon
6 does settle that issue, but I also -- it's also the case
7 that Chevron itself --

8 QUESTION: Right and what's the cite for
9 Bragdon?

10 MR. GORNSTEIN: That is -- that is in our brief.
11 118 S.Ct. 2196, and -- and let me just refer you to the
12 pages in our --

13 QUESTION: Well, it's pretty scary if we decided
14 that way.

15 MR. GORNSTEIN: 11 -- I just want to give you
16 the --

17 QUESTION: It was the dentist case.

18 MR. GORNSTEIN: -- the jump cite if I can.

19 QUESTION: Tell me -- tell me I didn't join that
20 opinion.

21 QUESTION: It's 118 --

22 MR. GORNSTEIN: No. I -- I don't --

23 (Laughter.)

24 MR. GORNSTEIN: Justice Scalia, I -- you did not
25 join that -- that --

1 (Laughter.)

2 QUESTION: I feel much better.

3 (Laughter.)

4 MR. GORNSTEIN: But -- but it -- just to --

5 QUESTION: But that -- that --

6 MR. GORNSTEIN: -- to respond to your -- to your
7 question, Chevron really has two sources for deference.
8 One is when you delegate authority to administer the act,
9 and the other is when you delegate authority specifically
10 to issue regulations. And that's what we have here.

11 QUESTION: Well, what if Congress delegated to
12 the criminal division the authority to construe criminal
13 statutes?

14 MR. GORNSTEIN: Well, actually the -- the
15 Justice Department has authority, for example, to decide
16 what drugs are classified and what are not -- not
17 classified.

18 QUESTION: Well, but no --

19 MR. GORNSTEIN: Which seems -- I'm sorry.

20 QUESTION: A statute that defines, say, the Dyer
21 Act, transportation and interstate commerce. Justice
22 Department, you construe this. You know, what does
23 interstate commerce mean? What's an automobile?

24 MR. GORNSTEIN: If Congress specifically
25 delegated authority to the Attorney General to do that,

1 you would -- you would resolve that under Chevron
2 deference.

3 Let me just -- I don't want to --

4 QUESTION: Mr. -- I know you're anxious to do
5 something. We did not reach the Chevron point in
6 deference -- Chevron deference point in Bragdon. We did
7 not decide that you were entitled to the Chevron
8 deference. We say you're entitled to deference because
9 it's a well reasoned view of --

10 MR. GORNSTEIN: Well, there were actually two
11 different parts of --

12 QUESTION: -- much like many sources.

13 MR. GORNSTEIN: There are two different parts to
14 that decision, Justice Kennedy. In the first part, you
15 talked about Skidmore deference, but in the latter part of
16 the opinion, you talked about Chevron deference. So, I -
17 - I would respectfully disagree. I think you did resolve
18 it.

19 But in this case, you do not have to get into
20 the issue of deference because in the text of the act,
21 Congress made specific findings that segregation and
22 isolation are forms of discrimination, and that
23 discrimination persists in such areas as
24 institutionalization. Those findings demonstrate that
25 Congress understood that unjustified segregation of

1 persons with disabilities to be a form of discrimination
2 prohibited by the ADA.

3 Congress also specifically directed the Attorney
4 General to issue regulations that are consistent with
5 section 504 of the Rehabilitation Act, the coordination
6 regulations, and one of those regulations specifically
7 requires all services to be provided in the most
8 integrated --

9 QUESTION: Yes, but at that time, of course,
10 courts were divided on the meaning of those regulations,
11 and that brings us back to how do we interpret those
12 regulations of the AG. And it certainly wasn't clear at
13 the time that the regs under 504 demanded the least
14 restrictive care.

15 MR. GORNSTEIN: The principle that is at issue
16 here is that you must afford treatment in the most
17 integrated setting, but that is qualified by the treatment
18 has to be appropriate and it does not have to -- it cannot
19 require an unreasonable change in State policy or a
20 fundamental --

21 QUESTION: Well, the regulation doesn't really
22 say that, does it?

23 MR. GORNSTEIN: The regulation has --

24 QUESTION: The fundamental change business?

25 MR. GORNSTEIN: In -- in -- at -- it does in --

1 in 10a of our appendix. You have to read two regulations
2 together. D is the basic integration obligation which
3 says that a public entity shall administer services,
4 programs, and activities in the most integrated setting
5 appropriate to the needs of qualified individuals. But
6 then look above on number 7. It is subject to that
7 regulation, which says that a public entity shall make
8 reasonable modifications in policies and so on unless it's
9 a fundamental alteration.

10 And what that regulation reflects is that it has
11 never been the case under section 504 or the ADA that in
12 order to comply with them, a State would have to make
13 fundamental alterations or unreasonable changes in policy.
14 That was clear under this Court's decision in Southeastern
15 Community College v. Davis and in Alexander v. Choate, and
16 this regulation carries that principle over.

17 QUESTION: So, is it your position that if the
18 State had no community-based facilities, it would not have
19 to create them, although many people would be better
20 served --

21 MR. GORNSTEIN: We regard that as a fundamental
22 change in the way services would be delivered, and
23 therefore a State would not have an obligation to do
24 that --

25 QUESTION: How about release under the -- under

1 the circumstances that one-on-one care with round-the-
2 clock aides would be less restrictive?

3 MR. GORNSTEIN: That would depend on whether
4 that imposed unreasonable costs on the States or whether
5 it reflected a fundamental change in the way that the
6 State was providing services.

7 QUESTION: Well, how would you answer the
8 question if the State hadn't been doing that? They don't
9 have one-on-one care. They may have community-based
10 housing, but with limited staff to serve a number of
11 residents.

12 MR. GORNSTEIN: One-on-one care strikes us as an
13 issue that ought to be resolved in light of whether it is
14 an unreasonable additional expense. And the benchmark for
15 looking at that is in the -- title I on page 2a of our
16 brief says in general, undue hardship means requiring
17 significant expense. And then it goes on to give a number
18 of factors that a court should consider in deciding
19 whether it is a significant expense. Now, you cannot
20 develop a bright line rule, but that shows the guidance
21 that should be followed in deciding whether one-on-one
22 care reflects an unreasonable expense. You look at the
23 nature of the cost, the overall financial resources of the
24 facilities involved, the --

25 QUESTION: Is this statute or the regulation?

1 MR. GORNSTEIN: This is the statute, Mr. Chief
2 Justice.

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

5 The case is submitted.

6 (Whereupon, at 11:07 a.m., the case in the
7 above-entitled matter was submitted.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

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

TOMMY OLMSTEAD, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES, ET AL., Petitioners v. L.C., BY JONATHAN ZIMRING, GUARDIAN AD LITEM AND NEXT FRIEND, ET AL.

CASE NO: 98-536

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

BY: Jonathan M. May
(REPORTER)