3/13/03 docket #2002-214 Transcript of SM

5 Judges - Jeffrey L. Amestoy, Chief Justice; John A. Dooley, Associate Justice; Marilyn S. Skoglund, Associate Justice; Frederic W. Allen, Chief Justice (Ret.) Specially Assigned; Ernest W. Gibson III, Associate Justice (Ret.) Specially Assigned.

Lawyer - Barbara Crippen - DOE
Lawyer - Michael Farris - HSLDA

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(talk not on the microphone)
Good Morning, Your Honors, this is the matter before the court this morning: the case entitled (indistinct) SM, docket number 2002-214. Representing the appellant, SM, is Michael Farris, and sitting at counsel table with Michael Farris is James Mason. Representing the Appellies State of Vermont is Barbara Crippen.

Judge: Counsel

Farris: Mr. Chief Justice, may it please the court, this case is largely a matter of statutory interpretation, and whether or not the Vermont Department of Education has correctly interpreted the relevant provision of the Vermont Home Schooling Law consistent with the Legislature's direction and this court's interpretation of the Legislature in the ___?___ TM case. But before we proceed to battling about the consistency of the statutory interpretation, we'd like to establish what is the Vermont Department of Education actual statutory interpretation as opposed to the private act or the official act of Natalie Casco, the Home School Supervisor. I think it would be clear that we recognize that there is a difference between an act, and an individual employee of the Department and the Department's official interpretation of the Law. Now there are three possibilities for finding the official interpretation of what's required in these disability's screenings. One would be potentially the content of Form B, but the Department in it's brief readily concedes that Form B is not required. You can have an alternative to Form B. The Second possibility of finding the Statutory Interpretation by the Department would be by it's official checklist. But the Department says "No, that's just a working tool." And in any event, the checklist that was used in this particular case are where we find the interpretation at stake was not on any printed matter, it's stricken out and hand written, it's an interliniation by Natalie Casco that's where the disputed information is found. We would suggest that the official interpretation of the Department is found on page 18 of the Appellies supplemental case. Where they give instructions on how to go through the pre-assessment process. It's page 18, which is actually page 17 of the packet of information that's sent out to homeschoolers. Item one under that pre-assessment section says: 'This section of law specifies that a comprehensive evaluation is not required to establish eligibility for special education. However some type of screening is necessary." That's it. That's the entire official VDE interpretation of the statute. We clearly comply with that.
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Judge1: Is there a fourth alternative which is under this sort of unique statutory scheme that the hearing officer's decision becomes essentially the requirement because what's happened is that the Department makes a request of your client, your client chooses not to provide the information that the Department is requesting. The hearing officer decides whether the request is reasonable under the circumstances.

Farris: The hearing officer, Your Honor, is not an employee of the VDE, so he could not be possibly construed to be the agency that's most familiar with the language. The reason that the court gives deference to the statutory interpretation of a department is that they deal with it everyday. This is just lawyer who's an outsider who comes in, is on an approved list, and certainly there would be no deference given to that person. Certainly no more deference than would be given to a trail judge, certainly in this state, in this court construing the statute is a matter of law, it's (unknown word denogo?), and we would continue that the court would (unknown word again- denogo?) review over an independent hearing officer, and certainly is no statutory, excuse me, no administrative interpretation, in the traditional sense, that's found there.

Judge1: But it is a place that in writing, is contained, based on the evidence that was given by both sides, what the requirement is, and what the statute means, and what's the nature of the requirement in relation to the statute.

Farris: The difficulty with that approach, Your Honor, is this: That would take a hearing officer's private decision in a particularized case, and make it the binding law upon the entire homeschooling population of the state of Vermont. How are people supposed to know of the hearing officer's decision? How is that communicated to people? How are people put on proper notice? I think that that if we were to take that position, I would suggest that that process inherently violates the doctrine avoid for vagueness, because it's simply not a matter of record that could be established and could be ascertained

Judge1: I assume you'd argue that the reverse of that is true, that is, if the hearing officer had said "No, Department, you can't ask for this information, you have to accept what was provided to you under the statute." That that would have been binding on the Department in other cases.

Farris: Certainly, because that's the principle of the restitute (mumbles) . . . because that binds a litigate, you can't bind non-litigants to a decision by an independent hearing officer. And so the rest of the homeschoolers in the state would not be bound, but the state would be bound by the decision of a hearing officer.

Judge2: Counselor, is your concern here that under the current statute as applied, the hearing officer will be in the circumstance of actually evaluating whether or not a student is sufficiently disabled or handicapped? Or is it that there won't be sufficient notice. The Department's position seems to be "We just need something more than a representation that's been done, when we have reasons to ask more questions and it's not for the purpose of evaluating the disability, but just need greater documentation."

Farris: Your Honor, we would suggest that we're not focused so much on what the hearing officer's power is, but really what the Department's power is. Because that's the issue, is when we turn in the

forms, is the form deemed sufficient by the Department, itself? And while our position and the Departments position may not be that far wide out on the particulars of the case, the legal theories are really like on opposite sides of the Continental Divide. We were both relatively close to the peak of the Continental Divide in what we say the statute permits, but the theories are radically different and lead to dramatically different consequences. The only possible reason that they could have to ask for the underlying data, and that's what hearing officer held, that they have the right to ask for underlying data. Didn't say just a little bit of underlying data, the holding is underlying data period. And if that's the case the only possible reason for that is so the Department or the hearing officer can second guess the professional. And there's simply not enough data, it's not a rational consequence of the statute. There's not enough data to make the rational determination, because the record reflects that as few as two extra letters on the form, I mean letters, NL on a form were sufficient. And the maximum that we've seen is nine words. 'This child was seen by me on such and such a date.' And nine words or two letters or anything that's close to that cannot possibly suffice for the kind of basic screening that's contemplated by the statutes, it's very important you understand, the statute clearly distinguishes between a comprehensive screening and this basic rudimentary screening that's required here.

Judge1: It is a trigger, if I understand the law right, maybe I don't, of responsibilities on the department, and the responsibilities on your client, if, in fact, this turns out to be disabled students.

Farris: Contrary, Your Honor, if you'll look at a few pages back at the state's statement of the case. They specifically say, 'If you're a homeschooled student, and you are disabled you're not entitled to any public services. So, it's not a triggering effect, what so ever, on the Department's side. There is a triggering effect upon the parent's side, if their professional finds there's a disability, to get further services, because the state has no responsibility to furnish the services, but the parent's do have a

Judge1: The state has a responsibility to ensure your client gets the further services, do they not? They can't allow a situation to go on in which the student is labeled disabled or handicapped or whatever is the exact word, and then that label is ignored thereafter.

Farris: Correct, Your Honor, we make no contentions that's contrary to that point. The power of the state in that case is the same as the power of the state of a more normal child, because the state has the responsibility to determine whether, for example, the mathematics curriculum is present, but the statute explicitly says that you cannot ask the methods of instruction in mathematics, nor can you can you demand to know what the materials are in Mathematics. So they can't judge the adequacy of a mathematics instruction, all they can see if mathematics is present. They're judging for the presence of the appropriate course of study. So to here in the area of disability instruction, they have the authority to demand to know that there is, for example if the child's dyslectic, there is appropriate instruction taking place to deal with that particular disability. Or if the child's blind or has ADD or has something else.

Judge1: You just used the word, appropriate. They determine appropriate or the parents in entirely determines appropriate?

Farris: The statute gives a definition for the term appropriate in education,

Judge1: No, I mean with respect to the education of, or services of the disabled.

Farris: Yes. Well, it would have to be basically there would be a general correlation, just as there is a general correlation between the subjects required, you know, mathematics is required and it has to be age appropriate, if you have a seven year old child and you're disclosing that you're teaching, a better example would be if you have a 15 year old child and you disclose you're teaching how to add and subtract, you've go an age mismatch. If you disclose you have a blind child and you're giving him ADD instruction, there's a mismatch. And so, it's a generalized statement. It's a notice of enrollment, you're not controlling the details. If they're entitled to determine what's substantively appropriate, we're in an approval state, not a notice of enrollment state. And that's the essence of this case, is the (mumbled word) ATM case says that legislature intended, and I think it's quite clear, the legislature intended this to be a notice of enrollment state, whereas this is a vestige of the old approval style. When they got to make substantive determinations of whether they thought a particular path of education was indeed substantively appropriate. Here we have essentially a checklist

Judge1: Have we ever reached that point. Is there anything in the case that suggests that there has ever been a withholding of approval based upon the evaluation of the VDE as to whether the education, whether the diagnosis is appropriate and the services is appropriate thereafter.

Farris: Your Honor, this is case basically says, We don't have enough information so we can make exactly that type of decision, that's what the brief of the Appellies says. That they want to be able to determine the sufficiency of the evaluation, to determine the sufficiency of the curriculum. That's simply not permitted. And so, we haven't gotten there because we've drawn the line of course that they

Judge2: But in fact the Department's position is "No, that's not correct, that's not a substantive, we're not looking for substantive evaluation of whether or not the student is disabled, what we need is some more evidence that we can rely on this statement." What you have here is a department that has not tailored a form sufficiently to give notice to folks as to what they should submit. If for example they said: 'we need a certified statement, sworn affidavit of a physician' period.

Farris: Your Honor, if it was a sworn affidavit, I think that again the Legislature should say. What the Legislature has said is they want an independent professional evidence. From our perspective, the parent must provide evidence that they've had their child evaluated by an independent professional. And there's this basic screening element, not the comprehensive screening, but this basic screening, and the evidence is you bring in the letter from the professional, that's duly signed off, just like they would take a doctor's note on a sickness or something else, there is evidence that the child was sick, they don't say 'what evaluation did you do?' they're trusting. Because if you're going to gather the evidence, you've got to gather a lot more than nine words. If they're really going to review and say "Is this screening adequate." they've got to gather more than what they're demanding in this case. It's meaningless. In fact, frankly, it really appears to be nothing little more than a power play, when we say 'we want to demand something of you that gives rise, not to the [incomprehensible], we think the better analogy is: it goes over the Continental Divide, because this is such a shifting standard. One year they say you have to be from Vermont to do these forms, then there's political pressure, and they back off of that that. And then they say, 'Well, the

requirements that are issued in this case weren't on the printed form', and they put it on the printed form. That kind of arbitrary enforcement is the hallmark of a vague law. And we're asking the court to avoid that vagueness instruction, and just simply say 'The parents have got to produce evidence that they in fact had the child screened by a professional.' And they've done that in this case.

Judge1: Can I take it, we've only a few minutes, just one other direction. You've sited a couple of times in your argument, that in the TM case, the state sites it too, it may reflect how we write our decisions, that both of you would site it and rely on it. It seems to me in a quick look, and I've been trying to understand, that in part of your argument, that the real issue with TM was, and the real holding is, that you can't declare that the students unenrolled, or not enrolled, unless you conduct this hearing. And that in fact narrowly on TM, TM has fully complied with here, that is the hearing was conducted. The rest of its all kind of dicta. Do I read TM right?

Farris: Well, Your Honor, it depends on whether you say the rest is all dicta or not, and I think that it is very important the predicate of this Court's ruling in TM is that this isn't a notice, an enrollment statute, not an approval statute. And on that basis TM dictates the outcome of this case in our favor. If all it says, is what you say, Your Honor, then the case is a first impression that TM doesn't answer the question one way or another, and so it doesn't help them, it may just simply eliminate a good weapon on our side.

Judge1: Okay. Thank you.

Farris: Thank you, Your Honor.

Crippen: Good Morning, Your Honors. I'd like to first address some of the arguments that were raised by the Appellant. Particularly the difference between the Home Study's Consultant's action and the official interpretation of the statute with respect to independent and professional evidence. The guidelines that he's referring to clearly referenced the Form B which indicates that we're looking for an identified method of screening. A dated screening, some opinion as to whether there are any red flags detected through this screening. And that has to be done on an, I guess I already said this, but on an identified date, but it's also important to realize that the Home Study statute requires the department to give the parent's notice as to what's missing. And that was done in the _?_ case, we notified the parents that we were looking for an identified method of screening that was done both in writing and over the phone. But they simply refused to provide it. We'd also like to point out that the Department's construction of the independent professional evidence requirement has been consistent with respect to it's interpretation that it's requiring an identified method of screening. And that's consistent with the common meaning of the term evidence, when it comes to an opinion.

Judge3: But Miss Crippen, according to some of the exhibits, that have been provided, approval has been granted to these statements as to whether or not there's a handicapping issue present. When it's simply signed by the treating physician, the family physician says 'I don't identify any problems for this child." Now, I would understand how a family physician or pediatrician who's been treating this family and child would have a pretty good basis for his understanding of the child's needs. But the form itself and the exhibits that were offered here, don't indicate number one, that any screening

that was utilized by the Physician or specific dates that they saw the child necessarily, it's a simple statement by a physician that this kid is A-OK, ready to go.

Crippen: Well, the testimony at the hearing was that Well Child checks over a period of time can constitute a screening, because the physician would be looking at the child's developmental level over a time.

Judge3: Well, I understand that, but I just heard you saying that you wanted a statement specifically indicating what type method of screening was implemented.

Crippen: Well, as I recall, the exhibits, there were only two that didn't identify a method of screening. The consultant testified that she the entire form to determine what this screening consisted of, but an important point there is that the Form from HSLDA is proposing as independent professional evidence is designed to be unverifiable. And so the home study consultant will call if there's some question about whether the method of screening was sufficient. And the Form is clearly designed, our Form B, is clearly designed to provide more information. The Form that was used in the SM case doesn't indicate any sort of method of screening for a disability what so ever, and it's designed to be unverifiable. It's designed to be a mere conclusory unsupported statement of an opinion. And although, they keep equating that with evidence of an evaluation or screening, it simply doesn't evidence that.

Judge3: Is this a test of the form?

Crippen: No, it's not about the Form, it's about the content of the Form. It's about whether there is information that would verify that a screening occurred sufficiently recently in time that was in a ballpark to detect a disability. And what's important about that is that it relates to that essential requirement for an adapted curriculum for home study students with disabilities, that's the basic guarantee that those students are going to receive a minimum course of study. And that was considered so important by the Legislature that they added this additional safe guard which allows the hearing officer to order a comprehensive special education evaluation necessary

Judge1: What is the background here, does a homeschooled child who is in fact disabled have a right to special education?

Crippen: They would have a right to special education if they were engaged in a particular enrollment in a public school, in Vermont you can do that under Act 119 and the services would follow. They would also be eligible under the IDEA for a service plan, there's no entitlement there but the school could

Judge1: The problem I think with this case, and I'm having the same problem with your answer is that there's a lot of jargon here, IDEA?

Crippen: Oh, Individuals with Disabilities Education Act allows homeschool students to compete with Private school students for funding through the public school, to fund a service plan for that student.

Judge1: This is a Vermont statute?

Crippen: That's the federal law.

Judge1: So, are you telling me that the federal requirements do or do not apply to a homeschooled child who has no interaction at all with the public school system?

Crippen: The federal requirements for special education?

Judge1: Well, the right to special education.

Crippen: Its free appropriate public education. That's why you could access the services if you enrolled under Act 119. But the department also has a home study consultant on staff who assists parents in adapting curriculums, because there are learning strategies, there are adapted curriculums available that you can purchase. There's a range of options for home study students with disabilities outside the arena of the public school.

Judge2: Miss Crippen, how does a homeschool family get any kind of indication from the Form B pre-assessment language that says, on page 18 of the printed case: 'this section of the laws specifies that comprehensive evaluation is not required to establish eligibility for special education. However some type of screening is necessary. Is that the extent to which

Crippen: That goes directly into Form B which is attached to the guidelines, so it's very clear from the Form itself what we're actually looking for. But again, we do

Judge2: Is this the form that was handwritten at some point, isn't there evidence that there were changes on that form?

Crippen: No. That's a checklist, Your Honor that's simply a tool that's utilized by the Department to notify parents as to what's missing in an enrollment notice. So it's not the same thing as a policy, although it reflects the requirements of the statute. We're just trying to be as clear as we can regarding what's missing in an enrollment notice.

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(Minute: 22:38)

Judge1: Let me try a hypothetical, just to put this in context. Lets say a parent responded as you would, or the professional responded as you'd like and said that my determination is based on having seen the child two years ago. What would you do then?

Crippen: Well, normally the department would call the physician to determine if there had been any more resent contact than that, and what had been done two years ago. The fact that we . . .

Judge1: If that's what you do why didn't you call this teacher and . . .
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Crippen: The parents refused to allow it. You see the problem is we don't know what that teacher did, we don't know if that person had that student in school, and those records are confidential, the same. We treat the Form B as a limited waver. But the parents expressly refused to allow us to contact the teacher. They said, "You don't have any authority to ask for that information." And therein lies the problem. We need to be able to verify that the screening occurred. That would be sufficient to detect a disability, if that essential requirement for an adapted curriculum is going to have any meaning whatsoever.

Judge1: So you would treat a statement by the physician, lets take a physician, I think that's what you used: "That I saw this child at some point" as a waver of a confidentiality, that would allow you to inquire more about information not on the form.

Crippen: Yes

Judge1: But when they, but an opinion alone is not a waver.

Crippen: Well, the fact that the Form B is submitted to the Department indicates that there is a waver of that confidentiality, with respect to simply that screening. We are not assuming that it waves the confidentiality for all other aspects of the student's medical care.

Judge2: I'm just a little curious

Crippen: The HSLDA's form, Your Honor, on the bottom says 'this is not a release for confidential information'. And that's why we're stating that it's designed to be unverifiable.

Judge2: Counselor, in response to Justice ?Duly's question, You said that further inquiry would be necessary if the screening was more than two years ago. To what extent then do you see the Department getting into an evaluation of the appropriateness and thoroughness of the screening?

Crippen: We believe we're trying to verify the appropriateness and adequacy of the screening. But if the Departments not satisfied that the information provided supports an opinion expressed, the commissioner calls a hearing. It's not the same as an (appurable??) statue where you simply reject the enrollment. And we also disagree that a notice statute doesn't have an enforceable standards, this statute clearly has many enforceable standards. So the Department's role here in enforcing those standards is not simply limited to the ministerial function of checking to make sure all the forms are there, that's inconsistent with the hearing requirements because the commissioner can call a hearing not simply to determine if the information in enrollment notices is present, or on that ground, but to determine if the student's going to receive a minimum course of study. And that's the baseline standard for all students in the state of Vermont with regard to an adequate education.

Judge2: As you get to the hearing, lets assume you called a hearing because you're dissatisfied with the representation as to when the screening took place or who did it, then what type of inquiry does the department see taking place in the hearing? Does it go to the appropriateness of whether or not the physician or whoever else has done the evaluation has made a medically appropriate determination?

Crippen: It goes to whether there is a basis for the opinion expressed.

Judge2: And what do you see as the evidence for that basis?

Crippen: Well in the SM case I think all they really needed to do was to bring the teacher in to describe what they did, and if it wasn't someone who just saw the child on the playground for a half an hour, or have the child in the same building but didn't have that child perform developmentally appropriate tasks, then there would not be a sufficient basis for the opinion rendered on the form. Given the range of disabilities that are out there, I mean we're not talking just simply obvious physical disabilities.

Judge4: Well, I'm wondering, the form that was used, on page 21 of the printed case, has that statement 'This is not an authorization to release confidential information', is the method used confidential?

Crippen: It would depend on the context, Your Honor.

Judge4: Why couldn't you call the teacher, he's certified, and ask what method was used.

Crippen: We have tried to do that. I mean, this is not the first time we've seen the HSDLA form. Generally, the answer is going to be that I need permission from the parents, you call the parents and they say 'you're not entitled to the information, because the Home School Legal Defense Association tells us that's not the law.' So it goes around in a circle.

Judge4: If that statement were deleted from the HSLDA form, you would have no problem with the form itself?

Crippen: No, it wouldn't take much to alter that form but it has to give an identified method of screening at a specific point in time that's in the ballpark to detect a disability.

Judge4: Is that requirement in Form B?

Crippen: Yes, it is. (a little confusion) The Form B is on page 30 of the Apellies printed case. Describe the screening method used. Please be specific. Date seen. Did it indicate a handicapping condition? Is any further evaluation required to make this determination? In other words were there any red flags? Because sometimes the physician or the teacher filling out the form can't quite call it, there's something present that raises a concern.

Judge4: That Form B is not the same as the form V of the VDE of page 25 is it? Because they're two different forms . .. page 25 of the printed case of the Appellants (confusion)

Crippen: Oh

Judge2: There's also Form B of Appellants case on 62 A, that's not same as the, it purports to be the Department of Education's Form B, and it's a different form.

Crippen: It may not be exactly the same but it consists of the same information. Describe the screening method, the date seen, the results, is the child in need of further evaluation, and if yes, what are the specific recommendations? So it might be a different format, but the information contained in the form is the same. That's what we're looking for.

Judge2: But they're different. You would concede, would you not, that the questions on Form B of your supplemental printed case are more exhaustive than the questions on Form B of the Appellants.

Crippen: I'm not sure they're more exhaustive, Your Honor. It's basically the same content in a different format. (papers flipping) I lost the other one. Could you be more specific about what is different?

Judge2: Well the questions . . .

Crippen: Here we go . . . child's name, parent's address, it does indicate the Supervisory Union of residence, that would be the school district.

Judge2: I'm looking at questions 1,2, and 3.

Crippen: 1,2, and 3.

Judge2: 2 is different from

Crippen: Oh, and in need of further evaluation to develop eligibility for special education. That has been deleted from the one in the printed case. It depends on the date that these were submitted. The Appellies printed case was from the guidelines that were operative at the time that the hearing was tried and the parents had submitted the information. We still think that the significant thing here is the description of the method of screening, the date, the results, and the opinion regarding any sort of risk that would indicate the child is in need of any further screening.

Judge: Thank you Counselor.

(Minute: 31:52)

(muffled- said out of reach of microphones: Farris: If it would please the Court, is there any time remaining? 30 seconds?)

Judge1: 30 seconds is the same on both sides of the Continental Divide, you understand.

Farris: Yes, Your Honor. The Appellies brief concedes that Form B is not required. And so we can't be into a battle about the Form if it's not required.

Judge1: I understand that the information is required, its doesn't have to be in Form B.

Farris: But does it say on the official interpretation? It doesn't say that the information in Form B is required. It just simply says that some type of screening is required. That's it. Now if you look at page 25 of the printed case, where they say describe the screening method, you look, you'll see there is no space given to describe the screening method. And there is nothing filled in, it says date seen 7/99. And that was deemed approved, and so if we just put in simply 7/99, we're in.

Judge1: As I understood it from the hearing examiner's decision, the department acknowledged that that was a mistake. That is, that they had at times inadequately had accepted inadequately filled out forms. And I take it that they're referring to the one that you're referring to. And the hearing examiners said so, isn't that the same as evidence?

Farris: Not completely, Your Honor. We demanded to see all the approved forms, adapted for personal information. We were refused. And to say the records every single form that's in the record and all that we could legitimately find were this kind of nothingness that was filled out. And that's been accepted time and time and time again. The method of screening is not required. It's just simply "Seen by me 7/99." It's plenty good for the Department of Education.

Judge1: Thank you Counselor.

(Time ended: 34:00)