School Law and the Supreme Court

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Overview of the Presentation

- Justice Gorsuch
- Supreme Court and education law
  - Past
  - Present
  - Future
Justice Gorsuch
Justice Gorsuch and School Law

- Participated in too few school cases on the 10th Circuit to draw any hard and fast conclusions
- Quickly joined forces with most conservative Justices on the Supreme Court (Thomas and Alito v. Roberts and Kennedy)
- Generally expect him to be…
  - Pro-religion in public spaces
  - Pro-public employers (versus public employees)
  - Pro-qualified immunity
Tenth Circuit Decisions

• Dissented from 10th Circuit panel ruling that upheld a school resource officer's arrest and handcuffing of a New Mexico 7th grader for disrupting his class with “fake burps”

• Joined a unanimous panel holding that a school district's use of a "timeout room" to briefly restrain an elementary school student with developmental disabilities did not "shock the conscience" and thus did not violate the student's constitutional rights

• Joined a panel decision that a group of parents could proceed with a lawsuit seeking to declare a federal constitutional right to spend more on education than the state's school-finance plan permitted
Supreme Court Past
Endrew F. v. Douglas County School District

- Most important special education case in a long time
- Challenging case to understand
  - Lots of steps to understand what is going on
  - Lots of buzz words and abbreviations
- Huge change in the law (in many states)
- Likely to cost school districts and states a lot of money
- Supreme Court doesn’t pretend its opinion provides all the answers
Endrew F. v. Douglas County School District

• Unanimous holding: public school districts must offer students with disabilities an individual education plan (IEP) “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”

• Court rejects Tenth Circuit’s holding that an IEP must merely confer “some educational benefit” that is “more than de minimis”
Endrew F. v. Douglas County School District

• Per the federal Individuals with Disabilities Education Act (IDEA), a student with a disability receives an IEP, developed with parents and educators, which is intended to provide that student with a “free and appropriate public education” (FAPE)
Endrew F. v. Douglas County School District

- Board of Education v. Rowley (1982): first stab at defining FAPE
- Court failed to articulate an “overarching standard” to evaluate the adequacy of an IEP because Amy Rowley was doing well in school
- But the Court did say in Rowley that an IEP must be “reasonably calculated to enable a child to receive educational benefits”
  - For a child receiving instruction in the regular classroom an IEP must be “reasonably calculated to enable the child” to advance from grade to grade
Endrew F. v. Douglas County School District

- What if a child with a disability isn’t able to advance from grade to grade?
- In *Endrew F.* the Court stated that if “progressing smoothly through the regular curriculum” isn’t “a reasonable prospect for a child, his IEP need not aim for grade level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance.”
Endrew F. v. Douglas County School District

• The Court admitted its new standard is “general” but was also clear that it is “markedly more demanding than the Tenth Circuit’s standard”
Endrew F. v. Douglas County School District

- This ruling will cost states and school districts money
  - Some school districts will have to offer a more rigorous education to some special education students
  - Courts may be more willing to find a denial of FAPE than before
  - Parents have more bargaining power in the IEP development process
  - District may agree feel they have to agree to more private placements
Practice in Some States will have to Change

Biggest change in law

- Tenth Circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming)
- First (Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island)
- Fourth (Maryland, North Carolina, South Carolina, Virginia, West Virginia)
- Seventh (Illinois, Indiana, Wisconsin)
- Eighth (Arkansas, Iowa, Minnesota, Missouri, and Nebraska)

Smallest change in

- Third (Delaware, New Jersey, Pennsylvania,
- Sixth (Michigan, Ohio, Tennessee, Kentucky)
How Have the Circuit Courts Responded?

• They haven’t had much of a chance yet
• No federal appellate court has really taken on the new standard
• Here are the closest
  • The 5th Circuit which before “appear[ed] to apply the just-above-trivial standard but without expressly rejecting a higher standard”
C.G. v. Walker Independent School District—Fifth Circuit

• Student was autistic; parents wanted a private placement
  
  • Here, the district court explicitly stated that “[t]he educational benefit ... ‘cannot be a mere modicum or de minimis; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement.’” The court focused on the four factors from Michael F. listed above to evaluate C.G.’s IEP which, it stated, “guide a district court in the fact-intensive inquiry of evaluating whether an IEP provided an educational benefit.” The court extensively evaluated C.G.’s IEP then held that all four factors weighed in favor of concluding that her IEP was reasonable based on her specific needs and progress.18 Although the district court did not articulate the standard set forth in Endrew F. verbatim, its analysis of C.G.’s IEP is fully consistent with that standard and leaves no doubt that the court was convinced that C.G.’s IEP was “appropriately ambitious in light of [her] circumstances.”19
M.L. v. Smith—Fourth Circuit

- Parents of Orthodox Jewish student with Down Syndrome wanted a private placement at an Orthodox Jewish school

- Our prior FAPE standard is similar to that of the Tenth Circuit, which was overturned by Endrew F. We have cited to the Tenth Circuit’s standard in the past, including that court’s decision in Endrew F. itself. See O.S., 804 F.3d at 360 (citing Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE–1, 798 F.3d 1329, 1338–41 (10th Cir. 2015)). For purposes of the case at bar, though, we need not delve into how Endrew F. affects our precedent because the IDEA does not provide the remedy the Plaintiffs want, regardless of the standard applied. Moreover, the Plaintiffs never raised any issue about the standard before the ALJ or district court, and it was never at issue on appeal. The Plaintiffs have not identified in post-argument briefing any way in which Endrew F. affects the resolution of this case.
Endrew F. v. Douglas County School District

• Fun facts
  • Justice Gorsuch was the author of a 2008 opinion which was the basis for the Tenth Circuit’s opinion in Endrew F.
  • The Court’s opinion in Endrew F. was handed down during Justice Gorsuch’s confirmation process
  • Tenth Circuit position in 2008 wasn’t radical
Endrew F. v. Douglas County School District

- Bottom line
  - This case will probably result in more private placements because courts order them or districts feel they have to agree to them
  - How big the change will be will depend on how lower courts interpret *Endrew F.*
Trinity Lutheran v. Comer

- Supposed to be the biggest case of last term
- Accepted before Justice Scalia died
- Justice Gorsuch participated
- 7-2 not 5-4
- Fizzled out in part because of a footnote
Trinity Lutheran v. Comer

- Establishment Clause in the U.S. Constitution
  - Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

- Blaine Amendments—super Establishment Clauses in state constitutions
  - Missouri’s constitution prohibits public funds from being used “directly or indirectly, in aid of any church, sect, or denomination of religion”
Blaine Amendments—Institute For Justice
Trinity Lutheran v. Comer

- Missouri violated Trinity Lutheran Church’s free exercise of religion rights when it refused, on the basis of religion, to award the Church a grant to resurface its playground with recycled tires.
- Trinity’s preschool ranked fifth among 44 applicants to receive a grant from Missouri’s Scrap Tire Program.
- Missouri’s Department of Natural Resources (DNR) informed the preschool it didn’t receive a grant because Missouri’s constitution prohibits public funds from being used “directly or indirectly, in aid of any church, sect, or denomination of religion.”
- Trinity sued the DNR claiming it violated the Church’s First Amendment free exercise of religion rights.
Trinity Lutheran v. Comer

• As the policy expressly discriminated against otherwise eligible recipients on the basis of religion, the Court reached the “unremarkable” conclusion that it must be able to withstand “the most exacting scrutiny”

• It did not because the DNR “offers nothing more than Missouri’s policy preference for skating as far as possible from religious establishment concerns”
Trinity Lutheran v. Comer

- The Court notably distinguished this case from *Locke v. Davey* (2004) where it upheld the constitutionality of a State of Washington scholarship program that excluded students pursuing degrees in devotional theology.
  - Davey was not denied a scholarship because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.
Trinity Lutheran v. Comer

• The breadth of the Court’s ruling and its applicability to other government aid programs is unclear
  • In the third footnote of the opinion, Chief Justice Roberts joined by Justices Kennedy, Alito, and Kagan agreed that “[t]his case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”
  • Justice Breyer, concurring, and Justices Sotomayor and Ginsburg, dissenting, presumably agree with this footnote as well
  • Thomas and Gorsuch didn’t join this footnote
Trinity Lutheran v. Comer

• Sotomayor and Ginsburg wrote that the court’s opinion in its entirety “profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church”
Trinity Lutheran v. Comer

- Big question for states with voucher programs and Blaine Amendments
  - Is a voucher program more like giving a student public money to study theology or giving public money to a church preschool playground?
- No federal court of appeals decisions applying this case in the K-12 school choice context yet
- But Supreme Court sent two case back to the lower court to be decided again after Trinity Lutheran; neither have been decided again yet
Colorado State Board of Education v. Taxpayers for Public Education

- Students enrolled but don’t attend a public charter school; district sends 75% of per-pupil revenue to the student’s private school of choice, including religious schools
- A plurality of the Colorado Supreme Court struck the program down relying on *Locke*:
  - By its terms, section 7 is far more restrictive than the Establishment Clause regarding governmental aid to religion, and the Supreme Court has recognized that state constitutions may draw a tighter net around the conferral of such aid. See *Locke v. Davey*
New Mexico Association of Nonpublic Schools v. Moses

- New Mexico constitution: “no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university”

- New Mexico Department of Public Education loans non-religious instructional materials to students who attend private school

- “We conclude that the New Mexico Constitutional Convention was not willing to navigate the unclear line between secular and sectarian education, or the unclear line between direct and indirect support to other than public schools”
Janus v. American Federation of State, County & Municipal Employees (AFSCME)

- The law
- The politics
Janus v. AFSCME

- About half the states are “right to work” for public sector employees
  - If employees don’t want to join the union they don’t have to and they don’t have to pay a dime to the union
Janus v. AFSCME

- About half states have adopted “agency fee”/”fair share” laws for public sector employees
  - State legislatures allow unions and management to agree that if employees don’t join the union, they still have to pay their “fair share” of collective bargaining costs
Janus v. AFSCME

- Union dues
  - Political costs
  - Agency fee--collective bargaining, contract administration, and grievance adjustment
Source: National Right to Work Legal Defense Foundation
Janus v. AFSCME

- Janus could make all states right to work for public sector employees
- Janus works for a public employer in Illinois which is an agency fee state
- He doesn’t want to pay the agency fee
Janus v. AFSCME

• Think about his challenge intuitively
  • Why should someone have to pay any money to an organization they don’t want to join (First Amendment)?
Janus v. AFSCME

• Constitutionality of “fair share” established in 1977 in *Abood v. Detroit Board of Education*
  • Union helps you whether you want (by negotiating an agreement on your behalf, by processing your grievances if you have one, by making sure contract is administered fairly, etc.)
  • No free riders are allowed!
• Compromise
  • No one ever has to pay political costs
• Janus’s argument
  • Isn’t everything a union does political?
Janus v. AFSCME

- In 2012 and 2014 Justices Kennedy and Scalia joined two 5-4 decisions critical of Abood.
- In 2015 the Supreme Court decides whether to overturn Abood in Friedrichs v. California Teachers Association.
- Right before Justice Scalia died in 2016, it seemed very likely that the Court would have overturned Abood.
- Court issued a 4-4 opinion affirming the lower court’s refusal to overrule Abood.
Janus v. AFSCME

• Where is Justice Gorsuch?
  • Never ruled on this issue
  • Pretty easy to guess based on his decisions so far
  • How does he feel about overruling precedent?
Janus v. AFSCME

- The politics
  - Easy to find out: how much unions (particularly teachers unions) give to political causes (2016: $33 million)
  - Harder to find out: what percent of union dues are political costs v. agency fee (10% political costs/90% agency fee might be typical)
  - He said/she said: does almost of the money go to liberal causes?
Janus v. AFSCME

- Public sectors unions can (and do) exist without fair share
- Symbolic and practical importance of fair share
  - Will be the *Citizens United* of collective bargaining
  - Cornerstone of public sector collective bargaining
  - Guarantees significant funding
Janus v. AFSCME

- Union membership will likely take a hit
  - If you don’t have to pay agency fee will most people continue to pay?
    - Milwaukee Teachers Education Association membership is down 30 percent
    - Teacher union dues in WI are down 50 percent
  - If most people won’t pay their agency fee will they pay for political costs?
Bottom Line Question

• If you are in an agency fee/fair share state
  • What do poorer, weaker unions look like?
  • How do teachers unions spend money in your state now?
Supreme Court Future—Ready for Review
Will *Quill* be Overturned?

- *Quill v. North Dakota* prevents state and local governments from requiring remote/on-line retailers to collect sales tax
- $23 billion in revenue lost a year
- In 2015 Justice Kennedy, prompted by an SLLC brief, stated he may be interested in overturning *Quill*
- South Dakota passed a law defying *Quill* with the hopes the Supreme Court will hold their law constitutional and overturn *Quill*
- *South Dakota v. Wayfair* is on its way to the Supreme Court
Three Big Questions

• Will the Court take the case?
• Will the Court decide it this term?
• How will the Court rule?
Transgender Bathroom

• Basic issue: do transgender students have a right under Title IX to use the bathroom consistent with their gender identity?
Transgender Bathroom

• Title IX prohibits school districts that receive federal funds from discriminating “on the basis of sex”
• A Title IX regulation states if school districts maintain separate bathrooms “on the basis of sex” they must provide comparable facilities for the other sex
• In a 2015 letter the Department of Education (DOE) interpreted the Title IX regulation to mean that if schools provide for separate boys’ and girls’ bathrooms, transgender students must be allowed to use the bathroom consistent with their gender identity
• In February 2017 DOE pulled that letter offering no further guidance on the issue
Gloucester County School Board v. G.G.

- G.G. is a transgender male
- Gloucester County School Board prevented him from using the boy’s bathroom
- He sued the district arguing discrimination in violation of Title IX
**Gloucester County School Board v. G.G.**

- The Fourth Circuit ruled in favor of G.G. giving *Auer* deference to DOE’s letter
- Per *Auer v. Robbins* (1997) a court generally must defer to an agency’s interpretation of its ambiguous regulations
- The Title IX regulation is ambiguous because it is “susceptible to more than one plausible reading because it permits both the Board’s reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department’s interpretation—determining maleness or femaleness with reference to gender identity.”
Gloucester County School Board v. G.G.

• Supreme Court agreed to review this case in 2016
  • Should courts defer to DOE’s letter interpreting the regulation?
  • Putting the letter aside, should the Title IX regulation be interpreted as DOE suggests?
• Was the Court really interested in the transgender issue or the deference issue?
Gloucester County School Board v. G.G.

- Court sends the case back to the 4th Circuit to decide the case again after DOE pulls the letter
- G.G. has graduated—is the case moot?
Kenosha Unified School District No. 1 Board of Education v. Whitaker

• Seventh Circuit held that a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is sex stereotyping that constitutes discrimination “based on sex” in violation of Title IX

• Lower court interprets Title IX without considering DOE’s interpretation (or lack thereof) in letters

• Cert petition filed; earliest case could be heard is next term
Title VII—Sexual Orientation Discrimination

- Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.
Title VII—Sexual Orientation Discrimination

• All federal circuit courts agreed Title VII protection does not include sexual orientation
• Until…
Title VII—Sexual Orientation Discrimination

- *Hively v. Ivy Tech Community College* (7th Circuit) (employees may bring sexual orientation discrimination claims under Title VII)
- Ivy Tech didn’t appeal to SCOTUS—law of the land in Illinois, Indiana, and Wisconsin
- En banc Eleventh Circuit recent refused to reconsider its ruling to the contrary in *Evans v. Georgia Regional Hospital*
- Cert petition for *Evans v. Georgia Regional Hospital* was considered on December 8
Title VII—Sexual Orientation Discrimination

• Get this issue to Justice Kennedy as quickly as possible?
Supreme Court Future—Further in the Future
Free Speech at School

- Court takes one of these cases about every decade
- *Morse v. Frederick* (2007) school could discipline student for unfurling a “BONG HiTS 4 JESUS” banner at a school event because drug are bad!
- Case remains somewhat an anomaly for the Roberts Court
- Maybe the Court will take a case involving disciplining a student for off-campus, online speech?
Prayer at Board Meetings

- *Town of Greece v. Galloway* (2014) (opening town board meetings with a prayer offered by members of the clergy does not violate the Establishment Clause when the practice is consistent with the tradition long followed by Congress and state legislatures, the town does not discriminate against minority faiths in determining who may offer a prayer, and the prayer does not coerce participation with non-adherents)
Prayer At Board Meetings

• Some of the issues
  • What if lead by students?
  • What if lead by board members?
    • What if they are all Christians?
  • Different rules for schools v. cities
DACA Litigation

- DACA allowed some undocumented immigrants who came to the United States as children to obtain temporary work permits and other benefits.
- Trump administration is “unwinding” the program down.
- 15 states and DC have sued about the ending of DACA.
- No ruling yet.
- Hard lawsuit to win—Obama adopted the program by executive action.
- Racial animus argument--78 percent of DACA grantees are of Mexican origin.
Davison v. Loudoun County Board of Supervisors

• Issue: may government officials ban comments (or commenters) from social networking sites and websites?
• Loudon County Board Chair banned someone from her Facebook page for 12 hours
• District court ruled she page violated the First Amendment in her individual capacity
• Very rare for a federal district court decision (not involving a federal law) to get national attention
Questions??

Thanks for attending