It's a School Law Year in the Supreme Court

Outline


3. It ain’t over til the High Court sings. *Gloucester County School Board v. G. G.* & other happenings

4. Bonus Round: To Be or Not to Be Justice Gorsuch.

- Question Presented:

May parents of a disabled child bypass IDEA procedures to bring directly a suit for damages under the Americans with Disabilities Act and the Rehabilitation Act, as damages are not available under the IDEA?

Facts…

- Parents of a child with cerebral palsy requested school district allow service dog to accompany the child to kindergarten to enhance her independence.
- School’s IEP team determined the human aide already assisting the child as part of her IEP sufficiently met her needs, and denied the request.
"Never work with animals or children."
-W.C. Fields

Exhibit A: The dog, Wonder.
Exhibit B: Wonder & Ehlena

Facts, continued…

• Instead of using IDEA dispute resolution procedures to resolve the disagreement, the parents home schooled Ehlena and filed a complaint with the U.S. Department of Education’s Office for Civil Rights (OCR).
• After two-year OCR investigation, district agreed to let the service dog accompany the child, but the parents instead enrolled her in another district.
The Lawsuit below: Courts rule Parents must exhaust IDEA procedures before filing suit.

- Parents brought a suit seeking monetary damages under Section 504 and the ADA for the first school district’s failure to accommodate the presence of the service dog.
- Both the trial court and the Sixth Circuit agreed that the case should be dismissed, because when the injuries alleged can be remedied through IDEA procedures or they relate to the specific educational purpose of the IDEA, parents must exhaust IDEA procedures before seeking relief in court.

NSBA’s amicus brief included:

- The Michigan Association of School Boards
- AASA (The School Superintendents Association)
- ASBO (Association for School Business Officials)
- NASDSE (National Association of State Directors of Special Education)
Fry v. Napoleon Comm. Sch., 137 S.Ct. 743 – cont’d

- NSBA amicus brief argued:
  - A direct route to litigation undermines the IDEA’s collaborative process for resolving special education disputes.
  - The collaboration and administrative hearing processes provide for best interest of the child through:
    - educational expertise, expeditious resolution, reduced financial and emotional costs of litigation.

The court reversed 8-0, in an opinion by Justice Kagan on February 22, 2017, holding:

- (1) Exhaustion unnecessary when “gravamen” of suit is something other than denial of FAPE;
- (2) Case remanded to determine whether the gravamen of complaint -- which alleges only disability-based discrimination without reference to adequacy of special-education services -- seeks relief for denial of a FAPE.
The court’s thinking…

- Plaintiff must first use the IDEA’s administrative proceedings only if she contends that she has been denied FAPE.
- A hearing officer is limited in relief awarded in an IDEA proceeding.
- If a plaintiff must begin with the IDEA proceedings only when she is alleging that she has been denied a FAPE, the court continued, how are courts supposed to decide when the plaintiff is seeking relief for the denial of a FAPE and when she is not? In other words to the exclusion of 504 or ADA?

Opinion provided some guidance.

- Courts should pose “a pair of hypothetical questions:
  - First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library?
  - And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?”
  - If YES then failure then “a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about [the IDEA].” Ergo, no exhaustion necessary.
**Takeaways for schools…**

- Be clear about nature of service.
- If service is substantive in nature, or related closely to a substantive academic service, articulate that clearly in the IEP. Parent concurrence about nature of service may be useful in subsequent hearing.
- If service is about access, and clearly not about the provision of a substantive educational service, think about noting the distinction.

---


Re-visitation of *Rowley* standard.

- FAPE is not currently defined in IDEA or its regulations re: level of educational benefit. Should it be?
- Members of COSA's IDEA Reauthorization Working Group have been considering this question.
- Potential Congressional action?

• The case was brought by the parents of Endrew F., a child with autism who attended kindergarten through fourth grade in Douglas County schools.
• During that time, he progressed academically and socially but continued to exhibit problem behaviors. Endrew's parents unilaterally placed him in a private school and requested tuition reimbursement, claiming the district had failed to provide FAPE.


• U.S. Court of Appeals for the 10th Circuit upheld HO and district court’s decisions that Endrew had been receiving a FAPE, as defined in its precedent.
• Parents petitioned SCOTUS to hear the case, noting a split in the circuits about whether the substantive prong of the FAPE test requires a showing of something more than trivial de minimis educational benefit.

- SCOTUS invited the Solicitor General to file a brief expressing the views of the U.S.
- SG filed an *amicus* brief August 18 telling the Court:
  - There is an entrenched and acknowledged circuit conflict on the question presented.
  - The Tenth Circuit’s “merely *** more than de minimis” standard is erroneous.
  - The question presented is important and recurring, and the court should resolve it in this case.

---

**NSBA filed an amicus brief on December 21, 2016:**

1. Reading a higher substantive educational benefit standard into IDEA in effect would be legislating from the bench. As it did in *Arlington Central Sch. Dist. v. Murphy*, 548 U.S. 291 (2006), another IDEA case, the Court should avoid expanding statutory definitions to meet policy goals that are within the authority of the legislative branch to set.
a. Congress initially promised to provide 40% of the additional cost of educating children with disabilities, but has never appropriated more than 14%.

b. A Court ruling imposing a greater standard of responsibility without a commensurate increase in the level of funding by Congress could place schools in an untenable position of using more and more general education dollars to meet the new higher standard.

2. A new higher substantive educational benefit standard is unnecessary to ensure that students with disabilities receive the special education and related services contemplated by the IDEA’s FAPE standard.

The current IEP process is a collaborative framework that has worked well for several decades to ensure that students receive educational plans uniquely tailored to their needs.
At Oral Argument… the justices reflected many of the points raised by NSBA:

- A one-size fits all standard is not workable:
  - Chief Justice Roberts questioned how a single new standard would “work with students whose disabilities generally wouldn’t allow them…with their own potential to follow the general educational curriculum?”
  - Justice Breyer asked if court “suddenly adopt[ed] a new standard, all over the country we’ll have judges and lawyers and -- and -- and people interpreting it differently[…]”

- A new standard will increase litigation:
  - Justice Breyer said, “I foresee taking the money that ought to go to the children and spending it on lawsuits and lawyers and all kinds of things that are extraneous. That is what’s actually bothering me.”

- Increases in cost will tax an already burdened school system with Congressional broken promise to fund IDEA
  - Justice Alito asked, “[W]hat percentage of the funds that are spent by school districts for this program are paid by the Federal government?
  - Solicitor General responded, “I think it’s like 15 percent or something like that.”
  - Justice Alito also wanted to know the role of cost in the court’s ruling. “No matter how expensive it would be and no matter what the impact in, let’s say, a poor school district would be on the general student population, cost can’t be considered? And do you think in the real world, school boards are disregarding costs entirely?”

- A new standard will be confusing and unworkable.
  - Parents and their amici offer 9 different new standards.
  - Justice Alito said, “What is frustrating about this case and about this statute is that we have a blizzard of words.”
One person’s some is another person’s some.

“It says "some benefit," but you're -- you're reading it as saying "some benefit," and the other side is reading it as saying "some benefit,"

- CHIEF JUSTICE ROBERTS

Substance v. Process

- JUSTICE KAGAN: An IEP must have the goal of advancing a child in the general education curriculum and, to the extent possible, enable her to be educated in the school's regular classes." And, to me, that sounds exactly like what the chief justice just said, that an IEP has to be reasonably calculated to do those things. And if it's not, then relief follows.

- MR. KATYAL: …it's just a procedural guarantee that they have to think about and consider grade-level progress. It does not mean sort of substantive standard –

- JUSTICE KAGAN: That's wrong. This is not just a procedural guarantee. Yes, the IDEA has lots of procedures in it, but they're all geared towards a particular substantive result. And it's that substantive result that's the focus of the -- both the administrative process and then judicial review of what comes out of the administrative process.
Where might the Court go?

- Likely, the Court will say some educational benefit is not *de minimis*.
- The Court could say the educational benefit must be meaningful.
- Meaningful will likely mean “progress” to some goal or standard.
- Court could decide this standard only applies to students who are capable of “progress” and limit application.

Three out of four ain’t bad.

A few details...

- 8-0 for student.
- Written by the Chief.
- No concurrences.
- Measured decision.
- Roberts’ school lawyer background at play?
The Court did:

• Find Rowley “… is markedly more demanding than the ‘merely more than de minimis’ test applied by the Tenth Circuit.”
• Reiterate that the [IDEA] guarantees a substantively adequate program of education to all eligible children.
• Require IEP to “be appropriately ambitious in light of his circumstances.”

The Court did not:

• Adopt a “bright-line rule.”
• Establish a new standard defining FAPE.
  • Court expressly rejected equality of opportunity standard requested by parents.
  • Declined to do what Congress has not done since passage of IDEA and Rowley.
Distinction from *Rowley*, further evidence of no new standard.

- "*Rowley* had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level."

Implementing the decision...

- Individualized treatment. “[F]ocus on the particular child is at the core of the IDEA…”
- Ensure that IEP contains an analysis of progress “in light of the child’s circumstances.”
- If progress is not attainable state why. What undergirds determination?
- Note: If it is not a reasonable prospect for a student, “IEP need not aim for grade level.”

Transgender boy seeking use of restrooms based on his gender identity.


- At issue:
  - Whether the Title IX regulations on separation of students by “sex” (34 C.F.R. 106.33) are ambiguous; and
  - If so, whether the Department of Education’s interpretation is entitled to deference under Auer v. Robbins (1997).
- U.S. Court of Appeals for the 4th Circuit’s decided in April:
  - Regulation is ambiguous as applied to transgender students;
  - ED’s interpretation was entitled to deference.

- In the May 31, 2016 order denying the school district’s petition for en banc review.
- The dissenting justice noted the “… the momentous nature of the issue deserves an open road to the Supreme Court….”


- SCOTUS granted (5-3) the district’s emergency petition seeking a stay of 4th mandate and district court’s preliminary injunction allowing use of boys’ restroom/
- The stay terminates upon SCOTUS’ ruling.
- Potential Impact of 8 member court & Kennedy, J.
NSBA Brief was filed on January 10, 2017.

- NSBA’s brief did not address the question of transgender student rights under Title IX or the Equal Protection Clause of the Fourteenth Amendment.
- Instead NSBA challenged urged the Court not to afford judicial deference to the U.S. Department of Education’s guidance by making two main arguments.

1. 4th Circuit improperly deferred to fed’s position on its interpretation of “sex” under Title IX and its regulations.
2. Deference shifted legislative authority to the executive at the expense of state/local authorities who are better placed to resolve difficult emerging issues when courts have failed to provide clarity.
3. Major regulatory changes should be subject to the procedures set forth in the Administrative Procedures Act requiring Notice & Comment.
4. Public and stakeholder comment:
   - Ensures federal agencies have benefit of implementation challenges
   - Minimizes potential litigation
   - Avoids delegitimizing underlying goals to protect students by ensuring open process.
Between Scylla and Charybdis: The untenable position of school boards…

- Deference to agency “guidance” potentially endows such pronouncements with the force of law.
- Potential for conflict between multiple jurisdictions (federal/state).
- Places schools in an untenable position, because any position they take may subject them to agency enforcement and litigation.

Gloucester in the last two months…

- Supreme Court vacated 4th Circuit Decision in response to federal government withdrawal and remanded case to appellate court.
What’s next in the world of gender identity and Title IX?

• Federal government unlikely to issue new guidance in addition to that issued Feb. 22. State interest in deferring matter to states.
• Without the federal interpretation of Title IX, plaintiffs lose major support for argument that Title IX covers gender identity.
• Equal Protection arguments remain and are likely to take on greater emphasis as a result.

NSBA Resource Reminder

Transgender Students in Schools:

*Frequently Asked Questions and Answers for Public School Boards and Staff*

Version 9 (March 9, 2017)

http://www.nsba.org/nsba-faqs-transgender-students-schools
### NSBA/COSA Resource: Transgender Litigation Chart

![Transgender Litigation Chart](http://www.nsba.org/transgender-litigation-chart)

### Bonus Round.