Correcting Judge Gorsuch's Record on Students with Disabilities

Supreme Court Nominee Judge Neil Gorsuch's record on students with disabilities is troubling enough. But when Senators on the Judiciary Committee confronted Judge Gorsuch about it, his responses raised more serious questions.

JUDGE GORSUCH CLAIMED THAT ALL OF HIS DECISIONS ON STUDENTS WITH DISABILITIES WERE UNANIMOUS.

- Judge Gorsuch testified: "Now Senator, there are other cases, where again, **unanimously** my court had ruled *for* children with disabilities under this law."[i]
- When Senator Durbin noted, "Judge, in 8 of 10 cases that came before you, you ruled against the students with disabilities," Judge Gorsuch responded: "I am sure they were **unanimous** panels if you are looking."
- Again, Judge Gorsuch testified: "[We] followed our circuit precedent, and **these cases have been decided unanimously, I think all of them, if I had to guess**."
- Judge Gorsuch testified again, in response to Senator Klobuchar's question about *Luke P.*: "And, Senator, **all these opinions in the 10th circuit we're talking about have been unanimous**. **Every one of them**, including this one . . . ."

FACT CHECK: **FALSE**. Not all of Judge Gorsuch's IDEA cases have been unanimous. In fact, ***A.F. v. Espanola Public Schools***, 801 F.3d 1245 (10th Cir. 2015), written by Judge Gorsuch, contained a compelling dissent from Chief Judge Mary Beck Briscoe. Judge Gorsuch's contention that "all" of his rulings against student with disabilities were unanimous is especially disingenuous given that (a) *A.F.* was the most recent case he had authored regarding students with disabilities, and (b) the dissent was written by the Chief Judge of the Tenth Circuit at the time. In *A.F.*, Judge Gorsuch held that a student who had mediated her IDEA claim could not pursue other civil rights disability claims in court. Chief Judge Briscoe called this ruling "inconsistent with the very purpose of the IDEA." 801 F.3d at 1256-57 (Briscoe, C.J., dissenting).

JUDGE GORSUCH CLAIMED THAT HE HAS *WRITTEN* CASES RULING IN FAVOR OF STUDENTS WITH DISABILITIES.

- Judge Gorsuch testified: "**Senator, I've written cases for families in IDEA cases.**"[ii]

FACT CHECK: **FALSE.** Judge Gorsuch has never written a case in favor of a student with disabilities—let alone one in favor of a student with disabilities under the IDEA. In every opinion Judge Gorsuch has written involving students with disabilities, he has ruled *against* the student. *See A.F. v. Espanola Pub. Sch.*, 801 F.3d 1245 (10th Cir. 2015) (Gorsuch, J.); *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008) (Gorsuch, J.); *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116 (10th Cir. 2008) (Gorsuch, J.)**.**

JUDGE GORSUCH CLAIMED THAT HE HAS RULED IN NUMEROUS CASES FOR STUDENTS WITH DISABILITIES.

- Judge Gorsuch testified: "**And you'll see other opinions where I've joined Republicans and Democratic appointed Judges ruling for the family.**"[iii]

FACT CHECK: **MISLEADING**. Judge Gorsuch's assertion that he's had "cases," "examples", and "opinions,"—plural—in which he has ruled for families of students with disabilities is similarly misleading. Judge Gorsuch is correct that *M.S v. Utah School for the Deaf and Blind*, 822 F.3d 1128 (10th Cir. 2016) (Murphy, J.) was one case in which he ruled for a student with disabilities. Judge Gorsuch can only contend that he sided with a student with disabilities in one other case: *Jefferson County School District R-1 v. Elizabeth E.*, 702 F.3d 1227 (10th Cir. 2012). But it would be galling for him to assert that *Elizabeth E.* is a testament to his fairness in ruling both for and against students with disabilities. In *Elizabeth E.*, he wrote a pointed concurrence to express his view that the IDEA is purely educational, and does not help students with disabilities in their "life challenges"—effectively narrowing the scope of students' IDEA rights. 702 F.3d at 1243-44 (Gorsuch, J., concurring).

JUDGE GORSUCH CLAIMED THAT HE HAS RULED ON CASES IN FAVOR OF STUDENTS WITH DISABILITIES UNDER THE *DE MINIMIS* STANDARD.

- Judge Gorsuch testified: "And of course, there had been other cases involving IDEA **where the parents and the child prevail** based on the existing law."[iv]
- Judge Gorsuch testified again: "*School of Deaf and Blind*, [and] another Jefferson County case **are examples where I joined, participated, or wrote, in IDEA cases *for* the family under our binding standard.**"[v]

FACT CHECK: **FALSE.** *M.S v. Utah School for the Deaf and Blind*, 822 F.3d 1128 (10th Cir. 2016), the case Judge Gorsuch specifically cited, did not actually involve "the binding standard" defining a "free appropriate public education" that he referred to in his testimony. In fact, the only issues before Judge Gorsuch were: (1) whether "the district court erred in delegating to M.S.'s IEP team the decision whether to place M.S. at Perkins[;]" and (2) whether the district court erred "in awarding [M.S.] only a limited amount of attorneys' fees." 822 F.3d at 1133. Furthermore, in the *Elizabeth E.* (Jefferson County) case cited above—the only other case the NEA could find in which he ruled for a student with disabilities—the opinion does not cite either the "*de minimis*" standard *or* the "merely more than *de minimis*" standard from *Luke P.* The only reference to any standard—since the primary concern was whether the student's placement was reimbursable—referred to a "meaningful benefit" under the IDEA. *See Elizabeth E.*, 702 F.3d at 1237-38 ("Assuredly, there are some cases in which courts must decide just how broadly the Act's definition of 'special education' extends in order to effectuate the Act's requirement that all children, no matter how disabled, receive some meaningful educational benefit.").

JUDGE GORSUCH CLAIMED THAT THE *LUKE P.* STANDARD WAS BASED ON TENTH CIRCUIT PRECEDENT.

- Judge Gorsuch testified: "Luke P. was a unanimous decision . . . . There was no dispute in my court about the applicable law, and **because we were bound by circuit precedent** in a case called 'Urban versus Jefferson' from 1996 that said that the appropriate standard was *de minimis* and the educational standard had to be more than *de minimis*, and that is the law of my circuit,

Senator . . . . But the fact of the matter is I was bound by circuit precedent and so was **the panel of my court, and they had been bound for 10 years by the standard in Urban versus Jefferson County**.'"

- Senator Durbin asked "Why would you add the word 'merely' to modify" the *de minimis* standard? Judge Gorsuch responded, "Senator, all I can say to you is what I've said to you before, it was a unanimous panel of the 10th Circuit **following ten-year-old circuit precedent** . . . . **We followed our circuit precedent** . . . ."
- Senator Klobuchar asked about the *Urban* case that Judge Gorsuch relied on for precedent: "So to me, you actually were the first in this case that you wrote to come up with this standard, and then you actually made it, which I'll get to in a second, you added the word 'merely.' Why don't we just start with, don't you see [*Urban*] as more *dicta* than a holding?" And Judge Gorsuch responded: "But, no, I wouldn't agree with that. **My recollection is that the 10th Circuit precedent was very clear, that 'some' meant 'more than de minimis.'** Some meaningful educational benefit in *Rowley* was the Supreme Court precedent and our court interpreted that to mean more than *de minimis*."

FACT CHECK: **FALSE.** Judge Gorsuch was the first judge in the Tenth Circuit to narrow the *de minimis* benefit standard to almost nothing. **He was the first in the Tenth Circuit to add the word "merely" to qualify the *de minimis* standard**: "we have concluded that the educational benefit mandated by IDEA must merely be 'more than *de minimis*.'" *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) (quoting *Urban v. Jefferson Cty. Sch. Dist. R–1*, 89 F.3d 720, 727 (10th Cir. 1996)). Judge Gorsuch left no question as to his intention in adding the word "merely," stating that **the standard "is not an onerous one."** *Luke P.*, 540 F.3d at 1149. As for *Urban v. Jefferson County School District*, 89 F.3d 720 (10th Cir. 1996), on which Judge Gorsuch relies for precedent, the phrase "*de minimis*" is mentioned only *once* in the entire case: "In the context of a severely disabled child such as Gregory, 'the "benefit" conferred by the [IDEA] and interpreted by Rowley must be more than *de minimis*.'" 89 F.3d at 726-27 (quoting *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988)).

JUDGE GORSUCH CLAIMED THAT THE "MERELY MORE THAN *DE MINIMIS*" STANDARD WAS USED BY OTHER CIRCUIT COURTS.

- Judge Gorsuch testified: "**To suggest that we were in any way out of the mainstream or I was doing anything unusual would be mistaken because it is the standard used by many circuits up until I guess today.**"

FACT CHECK: **FALSE**. No other Circuit court that employed the "merely more than *de minimis*" standard, aside from the Tenth Circuit, relying on Judge Gorsuch's opinion in *Luke P. See Endrew F. v. Douglas Cty. Sch. Dist.*, 798 F.3d 1329 (10th Cir. 2015) (quoting *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)), *vacated and remanded by* No. 15-827 (U.S. Mar. 22, 2017). While other Circuit courts have used "*de minimis*" language, they have not qualified it with "merely." *See, e.g.*, *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182 (3d Cir. 1988).

JUDGE GORSUCH CLAIMED THAT THE *LUKE P.* CASE WAS BASED ON SUPREME COURT PRECEDENT.

- Senator Cruz asked: "the Supreme Court's own opinion in ***Board of Education v. Rowley* in 1982 held that a school district is compliant with IDEA so long as the student is 'making more than *de minimis* progress in school.'** My democratic colleagues have repeatedly

demanded over the last three days that Judge Gorsuch follow precedent. And indeed I will commend them for highlighting this case as yet another example of Judge Gorsuch doing exactly that, following precedent—following precedent in the Tenth Circuit, that itself was following precedent from the United States Supreme Court. Judge Gorsuch, as a judge of the Tenth Circuit, were you bound to follow Tenth Circuit precedent?" Judge Gorsuch replied, "Yes, Senator."

FACT CHECK: **FALSE. The words "de minimis" or "minimum" or "trivial" are found nowhere in *Board of Education v. Rowley*.** *See* 458 U.S. 176 (1982).

JUDGE GORSUCH CLAIMED THAT HE "STUCK TO THE TEXT" IN THE *LUKE P.* CASE.

- Senator Klobuchar asked: "So I'm trying to figure out why you picked certain cases to write concurring opinions on and to be more broad and then other cases where you really stick to the text." And Judge Gorsuch responded: "**I always try to stick to the text**, with respect."

FACT CHECK: **MISLEADING.** Judge Gorsuch has never properly addressed why the text of the IDEA is not entitled to the same weight as that of other laws. In *Luke P.*, he ruled that "[t]hough one can well argue that generalization is a critical skill for self-sufficiency and independence, we cannot agree with [Luke P. and his parents] that IDEA always attaches essential importance to it." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1150 (10th Cir. 2008). However, the IDEA's text is replete with the mandate to teach generalization skills to students with disabilities. For example, "[t]he purposes of [the IDEA] are . . . to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and **related services designed to meet their unique needs and prepare them for further education, employment, and independent living** . . . ." 20 U.S.C. § 1400(d)(1)(A). And further, "The term 'individualized education program' or 'IEP' means a written statement for each child with a disability . . . that includes . . . beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter . . . **appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills** . . . ." 20 U.S.C. § 1414(1)(A)(i)(VIII)(aa).

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[i] Senator Durbin had asked: "You asserted that, quote, 'the assistance that IDEA mandates is limited in scope,' end of quote. And that it only requires, quote, 'the creation of an individualized program reasonably calculated to enable the student to make some progress toward the goals within that program.' You also said and I quote directly from your opinion, 'From this direction, we have concluded, that the educational benefit mandated by IDEA must merely be more than *de minimis*,' end of quote. . . ."

[ii] Senator Klobuchar had asked Judge Gorsuch about why he chose to write concurring opinions in certain cases (like gun rights), but not for students with disabilities: "So why pick *Gutierrez* case or *Hickenlooper* to do a concurring opinion and not a case like this one, that is really about the kind of services that a child with autism are going to get?"

[iii] Judge Gorsuch testified to this in response to Senator Klobuchar's question about writing concurring opinions, cited in endnote (ii), above.

[iv] In response to a question from Sen. Grassley: "Congress could, of course, as you said, amend IDEA and states could create standards of their own."

[v] Emphasis from Judge Gorsuch's testimony.