



Judge Neil Gorsuch's Record on Students with Disabilities

Introduction

The National Education Association supports the rights of students with disabilities to receive a high quality education, to live free from discrimination, and to be vindicated by the courts when those rights are violated. Providing students with disabilities the opportunity to succeed academically is a moral and professional responsibility of the educator community and the nation as a whole. The Trump Administration, and its nominee to the Supreme Court, Judge Neil Gorsuch, appear not to share that sense of responsibility. He has ruled against students with disabilities in numerous cases and his record, when considered as a whole, shows a lack of regard for the struggles and rights of students with disabilities. Based on our review, Judge Gorsuch has sided with a disabled student without expressing his personal reservations in only one case.¹

Specifically, his decisions raise at least four concerns:

- First, Judge Gorsuch has erected technical legal barriers against the legal claims of students with disabilities — barriers of the type that the Supreme Court has subsequently rejected unanimously.
- Second, Judge Gorsuch believes that students with disabilities are only owed an education that is barely more than *de minimis*, a view that has been rejected by other courts, and that the Supreme Court appears poised to reject as well.
- Third, Judge Gorsuch believes that the constitutional rights of students with disabilities are not violated even when such students are segregated and subjected to abusive confinement.
- Fourth, Judge Gorsuch believes in dismantling the power of administrative agencies to enforce regulatory protections, including those for students with disabilities.

Given this record, the hard-won protections for students with disabilities could be in peril should Judge Gorsuch be confirmed to the Supreme Court.

Background

For much of our history, disabled students' access to education — let alone a quality education — was nonexistent. Just four decades ago, state laws prohibited children with disabilities from attending public schools altogether.² Those laws prevented four out of every five students with a disability from receiving *any* public education.³ Instead, students with disabilities were warehoused in “restrictive settings [that] provided only minimal food, clothing, and shelter.”⁴

But two landmark cases, *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), struck down laws like these as a violation of equal protection and due process under the U.S. Constitution.

Congress responded to these rulings and passed § 504 of the Rehabilitation Act in 1973, which prohibits public entities from discriminating against persons with disabilities.⁵ And relying on *Mills*' holding that the Constitution guarantees students with disabilities an appropriate education, Congress passed the Education for All Handicapped Children Act (now the Individuals with Disabilities Education Act (IDEA)) in 1975.⁶ In 1990, Congress passed the Americans with Disabilities Act (ADA), which extended the antidiscrimination protections of § 504 to many private institutions.⁷ These three laws — the IDEA, § 504, and the ADA — provide the bulwark of civil rights protections for students with disabilities.

The Constitution also offers some protections for students with disabilities, largely in the context of school discipline. Most courts recognize a right under the Fourth Amendment for students to be free from unreasonable seizures in school,⁸ and even more have recognized the substantive due process right to be free from discipline that “shocks the conscience.”⁹ The Equal Protection clause also includes the right of equal access to education for students with disabilities.¹⁰

Of these protections, the IDEA is the most robust. It proclaims that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”¹¹ To that end, it requires all schools receiving federal funds to provide a “free appropriate public education”¹² to students with disabilities, as well as to comply with various procedural protections, such as preparing an annual, goal-driven Individual Education Program (IEP).¹³

Although Congress has never fully funded IDEA,¹⁴ the Act nonetheless has produced impressive results for students both with and without disabilities, results largely caused by the law's emphasis on inclusive education.¹⁵ When students with disabilities are educated alongside their non-disabled peers, they score higher on literacy measures, perform better on standardized tests, get better grades, and are more likely to master their IEP goals.¹⁶ Even students without disabilities experience similar, improved academic growth when they are taught in integrated classrooms.¹⁷ This remarkable progress, however, was not won without key decisions from the federal courts vindicating the rights of students with disabilities to achieve dignity and parity from our public education system.¹⁸

But if the Supreme Court were to adopt Judge Gorsuch's views on disability and education, the IDEA and its complementary civil rights laws and protections could be hollowed out.

Individuals with Disabilities Education Act (IDEA)

Judge Gorsuch has written or participated in several cases about the IDEA that limited students' access to the courts, or otherwise limited their access to relief. In *A.F. v. Española Public Schools*,¹⁹ the mother of a student with disabilities filed a complaint for an impartial due process

hearing. Through mediation with the school district — an alternative administrative procedure under the IDEA²⁰ — she and the school district reached a settlement on the IDEA violation. Wishing to receive relief for violations of § 504 and the ADA as well, the mother filed suit in federal court. Judge Gorsuch ruled that reaching a settlement through mediation did not amount to proper “exhaustion” of administrative procedures under the IDEA to allow the mother to vindicate her rights under the ADA or § 504. Judge Gorsuch claimed that the IDEA’s “plain text” forced him to arrive at such an unfair result.²¹

There are numerous problems with that reasoning, the most significant of which is that it would effectively bar students from pursuing discrimination claims under § 504 and the ADA for a denial of educational services, even though Congress plainly intended those statutes to create educational rights separate from the IDEA. A vigorous dissent by then Chief Judge Mary Beck Briscoe in *A.F.* considered Judge Gorsuch’s “plain text” reasoning unsustainable, pointing out that Judge Gorsuch’s “interpretation is inconsistent with the very purpose of the IDEA. It forces a claimant to choose between mediating a resolution to her IDEA claim . . . and thereby obtaining some or all of the relief sought under IDEA, . . . or forgoing any relief at all and waiting . . . in hopes of later filing suit and obtaining relief under both IDEA and other statutes.”²²

A federal court later facing the same issue agreed with the dissent and characterized Judge Gorsuch’s reasoning as “nonsensical.”²³ The court concluded, contra to Judge Gorsuch’s view, that “it makes little sense to require parents and disabled students, who have been successful in mediation with regard to their IDEA claims for compensatory education, to pursue a due process hearing and appeal for related but non-IDEA claims seeking compensatory damages — damages that are not even allowed for under the IDEA.”²⁴

And on February 22, 2017, the Supreme Court, in an 8-0 decision, made clear, again contrary to Judge Gorsuch’s view, that students may assert their rights under the ADA and § 504 in federal court without exhausting the IDEA administrative process. In *Fry v. Napoleon Community Schools*, Justice Kagan wrote for a unanimous Court that “[a] complaint seeking redress for . . . other harms, independent of any [IDEA violation], is not subject to [the IDEA’s] exhaustion rule because, once again, the only ‘relief’ the IDEA makes ‘available’ is relief for denial of a FAPE [free appropriate public education].”²⁵ In dismissing A.F.’s claims in *A.F. v. Española Public Schools*, Judge Gorsuch summarily concluded that her earlier IDEA claim was “the same” as that in her ADA and § 504 claims.²⁶ The Supreme Court’s *Fry* decision makes clear that that approach is contrary to “the diverse means and ends of the statutes covering persons with disabilities.”²⁷ Rather, a court’s examination of a disabled student’s complaint “should consider substance, not surface.”²⁸

In another line of cases, Judge Gorsuch has dismissed the ability of students with disabilities to receive remedies from the court, even when the student’s IDEA rights had clearly been violated. In *Garcia v. Board of Education of Albuquerque Public Schools*,²⁹ the school district admittedly violated the IDEA by failing to revise the IEP of Myisha, a student with a learning disability who frequently skipped class. By the beginning of the following school year, the school district still had not completed an IEP for her, and Myisha dropped out. Judge Gorsuch held that Myisha was not entitled to any relief, holding that her behavior — not the school district’s violation — was

the primary cause of her lost educational opportunities. And in *Sytsema v. Academy School District No. 20*,³⁰ the school district likewise conceded that it had violated the procedures in the IDEA. Judge Gorsuch this time joined an opinion holding that the lower court improperly gave too much weight to that procedural violation in awarding judgment to the student.

In *Chavez v. New Mexico Public Education Department*,³¹ the panel, joined by Judge Gorsuch, agreed that there was no question that the plaintiff, a high-functioning autistic student, had been denied services under the IDEA. The student refused to go to school, but the school and the local education agency made no attempt to address the problems that led the student to that point, and eventually pretended that he was not even enrolled. Given the local education agency's delay in remedying its violation, the student sought redress from the State instead. The panel held that the State was not obligated to substitute services for the local education agency, even if that agency had "blocked [the plaintiff's] educational progress for perhaps an unconscionable time"³²

Even when Judge Gorsuch has allowed suits by students with disabilities to proceed, he has construed the meaning of an "appropriate education" so narrowly as to render this key IDEA right essentially meaningless. The Supreme Court is currently deliberating exactly what level of education the IDEA requires in *Andrew F. v. Douglas County School District*³³ — a case that came through the Tenth Circuit, and that is reviewing the very low standard that Judge Gorsuch has set out in many of his IDEA cases.

In *Thompson R2-J School District v. Luke P.*,³⁴ Judge Gorsuch's opinion helped establish that low bar in the Tenth Circuit. Luke P. was an autistic student who claimed he had been denied an appropriate education under the IDEA. Although Luke was able to get by with assistance in school, the school did not prepare him for functioning at home, where he continued to struggle, manifesting in problems such as using the toilet. Based on this, his parents — and several other experts in autism, psychology, and occupational therapy³⁵ — believed that the most appropriate placement for him would be in a residential facility. Judge Gorsuch disagreed. He held that the IDEA only required educational progress that was "merely . . . more than *de minimis*."³⁶

The ability of a student to function intellectually and socially outside of the classroom (also known as "generalization") was not an IDEA requirement, Judge Gorsuch asserted, despite the fact that the IDEA itself says one of the law's core purposes is to foster "full participation, independent living, and economic self-sufficiency for individuals with disabilities."³⁷ Judge Gorsuch arrived at this result only after taking the extraordinary step of overturning the findings of an impartial hearing officer, an administrative law judge, and the district court, all of whom ruled for Luke P. The Supreme Court's decision in *Andrew F.*, on the underlying issue of the level of educational benefit that the IDEA requires, is not expected till later this spring but at argument the Justices expressed significant skepticism over the very low bar that Judge Gorsuch's opinion espouses.³⁸

In *Sytsema v. Academy School District*,³⁹ yet another ruling joined by Judge Gorsuch that rejected claims brought by a disabled student, the court held that a school's tenuous and unspecified generalization plans for the plaintiff, Nicholas, were sufficient for IDEA purposes.⁴⁰ What's more, even though it was uncontested that a teaching technique in Nicholas's IEP had

proven “ineffective” for him, Judge Gorsuch’s panel held that the IEP was still capable of providing Nicholas with “some” educational benefit, and thus did not violate the IDEA.⁴¹

Another case that lays bare Judge Gorsuch’s skepticism of the school’s role in promoting intellectual and social functioning outside the classroom is *Jefferson County School District R-1 v. Elizabeth E.*⁴² In that case, Judge Gorsuch joined a panel decision ruling in favor of the disabled student: he called the decision “undoubtedly right and easily arrived at.”⁴³ But he nonetheless wrote a lengthy concurrence to opine that the IDEA does not entitle students to *any* services that are not “educational.”⁴⁴ He wrote that “educational” needs and “social, emotional, or medical needs” are dichotomous for IDEA purposes, and the IDEA covers *only* the former.⁴⁵ This, despite the fact that the educator community has long known that segregating educational needs from socio-emotional ones in children is fruitless.⁴⁶

Judge Gorsuch asserted that “*all* of our sister circuits agree” with him on this point — a contention that is, at best, misleading.⁴⁷ For instance, the case Judge Gorsuch cites from the Third Circuit to support his concurrence, *Kruelle v. New Castle County School District*,⁴⁸ is actually skeptical of attempting to disaggregate a child’s socio-emotional and medical needs from her educational ones: “the unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning.”⁴⁹

§ 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA)

Judge Gorsuch is no more solicitous when it comes to other federal protections for disabled students. In *Miller v. Board of Education of Albuquerque Public Schools*,⁵⁰ he joined an opinion that created technical legal barriers to disabled students. In *Miller*, a student’s parents had presented evidence that their child’s school had not complied with promises to teach him in accordance with a proven reading program that would address some of his severe learning disabilities. An administrative appeal officer agreed with the parents that this failure had resulted in their son being denied an appropriate education, and Gorsuch’s panel did not reconsider this issue on appeal. However, the parents pressed that the failure amounted to discrimination under the ADA and the Rehabilitation Act as well. The court refused to consider those other claims, even though evidence that a school has violated the IDEA represents some evidence that it may have violated the ADA and § 504 too.⁵¹

Constitutional Rights of Students with Disabilities

Judge Gorsuch has joined several opinions that cast doubt on the ability of disabled students to assert settled constitutional claims as well. In *Muskrat v. Deer Creek Public Schools*,⁵² the school placed a student with developmental disabilities in a small timeout room at least 30 times over the course of two school years. The school continued to use the timeout room, despite understanding that the student did not have the mental maturity to understand the timeout room’s purpose, and that he was showing signs of increasing stress, including sleeplessness, vomiting, and a frequent urge to urinate. Judge Gorsuch joined a decision rejecting a Fourteenth Amendment “shocks the conscience” constitutional claim by the student, and upholding the district court’s decision. The decision reasoned that the treatment did not constitute a “brutal and inhumane abuse of official power.”⁵³

The panel, however, did not stop there. It further speculated that the Tenth Circuit would never entertain a Fourth Amendment “unreasonable seizure” claim — an easier constitutional standard to meet — in the context of discipline used against students with disabilities.⁵⁴ If the Tenth Circuit actually adopted such a sweeping foreclosure of constitutional claims, it would be in the minority.⁵⁵ Indeed, even the conservative-leaning Eleventh Circuit has accepted the usefulness of a Fourth Amendment analysis in this context.⁵⁶

Judge Gorsuch joined a similar decision in *Couture v. Board of Education*,⁵⁷ which reversed a district court ruling that concluded that a school’s use of a virtually windowless timeout room had violated a disabled student’s Fourth Amendment, Due Process, and Equal Protection rights. In that case, the plaintiff was a student with disabilities who had exhibited aggression, threats, and oppositional defiance, leading teachers and administrators to conclude that he required extensive behavior modifications. For a two-month period, the school decided to place the student in a “‘closet’-like time-out room, with nothing in it, no exterior window, dim light, and black construction paper over the window” in response to his concerning behaviors.⁵⁸ Despite evidence that the timeout room actually exacerbated the student’s problematic behaviors, the court did not find the use of the room “unreasonable.” And even though the student was at times locked in the room, alone, for nearly two hours, the court refused to hold that the use of the room deprived him of his right to an education.

Administrative Law and Regulations that Protect Students with Disabilities

Beyond Judge Gorsuch’s rulings dealing directly with students with disabilities, he also expresses a view of administrative law that would compromise federal agencies’ abilities to enforce the rights of disabled students. The Supreme Court gives deference to an agency’s interpretation of a statute when Congress has delegated rule making authority to the agency and the statute’s language is ambiguous; this is known as the *Chevron* doctrine. But in *Gutierrez-Brizuela v. Lynch*,⁵⁹ Judge Gorsuch wrote a lengthy concurrence criticizing the *Chevron* doctrine, calling it a “behemoth” that “swallow[s] huge amounts of core judicial and legislative power”⁶⁰ And in *Caring Hearts Personal Home Services, Inc. v. Burwell*,⁶¹ Judge Gorsuch criticized the very existence of agency regulations, mocking federal agencies as so-called “experts” of the laws they must promulgate.⁶²

Administrative agencies carry out the bulk of the work protecting students with disabilities: they enforce civil rights laws for disabled students, but they also enforce social programs that provide enormous assistance to students and adults with disabilities alike, including, for example, Social Security Disability Insurance. If the Supreme Court adopted Judge Gorsuch’s inimical views towards agencies and their work, students with disabilities stand to lose civil rights protections, healthcare coverage, and basic economic securities.

Conclusion

Judge Gorsuch’s record on students with disabilities raises serious questions about whether he, as a Supreme Court justice, would understand and stand up for the rights of disabled students. It is critical that the Senate review this record and demand that Judge Gorsuch explain how he would respect the rights of students with disabilities on the Supreme Court — in the face of an

overwhelming body of cases demonstrating his hostility towards this already vulnerable population.

¹ See *M.S. v. Utah Sch. for the Deaf & Blind*, 822 F.3d 1128 (10th Cir. 2016) (Murphy, J.) (holding that the lower court improperly delegated to the student’s IEP team the decision of where to place blind, hearing impaired, autistic student after finding that same team had failed to provide student with FAPE under IDEA).

² U.S. DEP’T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, at 3 (Nov. 2010), <https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf>.

³ U.S. DEP’T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, at 3 (Nov. 2010), <https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf>.

⁴ U.S. DEP’T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, at 3 (Nov. 2010), <https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf>.

⁵ 29 U.S.C. § 794 *et seq.*; see also Derek W. Black, *Education Law: Equality, Fairness, and Reform* ch. 6, at 468 (2013).

⁶ 20 U.S.C. § 1400 *et seq.*; see also Derek W. Black, *Education Law: Equality, Fairness, and Reform* ch. 6, at 468 (2013) (citing S. Rep. No. 94-168, at 6, 8 (1975)).

⁷ 42 U.S.C. § 12101 *et seq.*; see also Derek W. Black, *Education Law: Equality, Fairness, and Reform* ch. 6, at 468 (2013).

⁸ See *Preschooler II v. Clark Cty. Sch. Bd. of Trustees*, 479 F.3d 1175 (9th Cir. 2007) (holding that beating, slapping, and head-slammng a four-year-old preschooler with disabilities violated the Fourth Amendment’s prohibition against the use of excessive force); see also *Campbell v. McCalister*, 162 F.3d 94, No. 97-20675 (5th Cir. Oct. 20, 1998) (unpublished); *Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995).

⁹ See *Hatfield v. O’Neil*, 534 Fed. Appx. 838 (11th Cir. 2013) (unpublished) (holding that striking an intellectually disabled student in exact spot on the head where student had undergone brain surgery shocked the conscience); see also *Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). See generally *Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (holding that liberty interests are implicated within meaning of Fourteenth Amendment where a school “decide[s] to punish a child for misconduct by restraining the child and inflicting appreciable physical pain”).

¹⁰ See, e.g., *James S. v. Sch. Dist. of Philadelphia*, 559 F. Supp. 2d 600, 626 (E.D. Pa. 2008) (holding that complaint properly “allege[d] that the District’s treatment of [the plaintiff] deprived him of equal access to the education granted to children without disabilities”).

¹¹ 20 U.S.C. § 1400(c)(1).

¹² 20 U.S.C. § 1412(a)(1).

¹³ 20 U.S.C. § 1414(d).

¹⁴ Christina Samuels, *Supporters of IDEA ‘Full Funding’ Try Again with New Bill*, EDUC. WEEK (Jan. 27, 2015), http://blogs.edweek.org/edweek/speced/2015/01/supporters_of_idea_full-fundin.html.

¹⁵ See 20 U.S.C. § 1412(a)(5) (defining inclusion as the “least restrictive environment” for students with disabilities).

¹⁶ See Kathleen Whitbread, *What Does the Research Say About Inclusive Education?*, WRIGHTSLAW (1998-2016), <http://www.wrightslaw.com/info/lre.incls.rsrch.whitbread.htm>.

¹⁷ Anne M. Hocutt, *Effectiveness of Special Education: Is Placement the Critical Factor?*, 6 FUTURE OF CHILDREN 77, 91 (1996), https://princeton.edu/futureofchildren/publications/docs/06_01_04.pdf; U.S. DEP’T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA, at 8–9 (Nov. 2010), <https://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf> (“Mrs. Blake was pleased to see not only that Katie’s reading ability improved but also that many of [her non-disabled] students were benefiting from the techniques.”).

¹⁸ See, e.g., *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (holding that parents have the right to pursue claims on their own behalf under the IDEA); *Cedar Rapids Cmty. Sch. Dist. v. Garrett F.*, 526 U.S. 66 (1999) (holding that a continuous nursing service is a “related service” under IDEA, and therefore mandatory if student needs it to receive “meaningful access” to education); *Honig v. Doe*, 484 U.S. 305 (1988) (holding that IDEA’s “stay put” provision — where students remain in their educational placement during due process proceedings — was required).

¹⁹ 801 F.3d 1245 (10th Cir. 2015).

²⁰ See 20 U.S.C. § 1415(e) (outlining the mediation process for disputes); 20 U.S.C. § 1415(f)(1)(B)(i) (discussing mediation as an administrative alternative to an impartial due process hearing).

²¹ *A.F.*, 801 F.3d at 1248.

²² *A.F.*, 801 F.3d at 1256-57 (Briscoe, C.J., dissenting).

²³ *R.M. v. City of St. Charles Pub. Sch. Dist.*, No. 4:15-CV-706 CAS, 2016 WL 2910265, at *6 (E.D. Mo. May 19, 2016).

²⁴ *R.M. v. City of St. Charles Pub. Sch. Dist.*, No. 4:15-CV-706 CAS, 2016 WL 2910265, at *6 (E.D. Mo. May 19, 2016).

²⁵ *Fry v. Napoleon Cmty. Sch.*, 580 U.S. ___, slip op. No. 15-497, at 13 (2017).

²⁶ *A.F.*, 801 F.3d at 1246, 1248.

²⁷ *Fry v. Napoleon Cmty. Sch.*, 580 U.S. ___, slip op. No. 15-497, at 14 (2017).

²⁸ *Fry v. Napoleon Cmty. Sch.*, 580 U.S. ___, slip op. No. 15-497, at 14 (2017).

²⁹ 520 F.3d 1116 (10th Cir. 2008).

³⁰ 538 F.3d 1306 (10th Cir. 2008).

³¹ 621 F.3d 1275 (10th Cir. 2010).

³² *Chavez*, 621 F.3d at 1288.

³³ 798 F.3d 1329 (10th Cir. 2015), *cert. granted*, 137 S. Ct. 29 (Sept. 29, 2016) (Memorandum).

³⁴ 540 F.3d 1143 (10th Cir. 2008).

³⁵ *Thompson R2-J Sch. Dist. v. Luke P.*, No. 05-cv-2248-WDM-CBS, 2007 WL 1879981, at *3 (D. Colo. June 28, 2007). Conveniently, Judge Gorsuch neglects to mention this testimony favoring a residential placement from a host of experts who testified on Luke P.’s behalf, all of whom the hearing officer found credible. See *id.*

³⁶ *Luke P.*, 540 F.3d at 1149 (10th Cir. 2008) (internal citations and quotation marks omitted).

³⁷ 20 U.S.C. § 1400(c)(1).

³⁸ Amy Howe, *Argument analysis: Justices grapple with proper standard for measuring educational benefits for children with disabilities*, SCOTUSBLOG (Jan. 11, 2017, 6:12 PM), <http://www.scotusblog.com/2017/01/argument-analysis-justices-grapple-proper-standard-measuring-educational-benefits-children-disabilities/> (The Court “seemed sufficiently unhappy with the ‘more than merely de minimis’ standard that they are likely to strike it down.”).

³⁹ 538 F.3d 1306 (10th Cir. 2008).

⁴⁰ *Sytsema*, 538 F.3d at 1318.

⁴¹ *Sytsema*, 538 F.3d at 1317.

⁴² 702 F.3d 1227 (10th Cir. 2012).

⁴³ *Elizabeth E.*, 702 F.3d at 1243 (Gorsuch, J., concurring).

⁴⁴ *Elizabeth E.*, 702 F.3d at 1244 (Gorsuch, J., concurring).

⁴⁵ *Elizabeth E.*, 702 F.3d at 1244 (Gorsuch, J., concurring).

⁴⁶ See Lisa Trei, *Academic Performance and Social Behavior in Elementary School Are Connected, New Study Shows*, STAN. NEWS SERV. (Feb. 15, 2006), <http://news.stanford.edu/pr/2006/pr-children-021506.html> (“Children's social behavior can promote or undermine their learning, and their academic performance may have implications for their social behavior.”); NAT’L ASS’N FOR THE EDUC. OF YOUNG CHILD., POSITION STATEMENT: DEVELOPMENTALLY APPROPRIATE PRACTICE IN EARLY CHILDHOOD PROGRAMS SERVING CHILDREN FROM BIRTH THROUGH AGE 8, at 7 (2009), <https://www.naeyc.org/files/naeyc/file/positions/position%20statement%20Web.pdf> (“Of course, children’s social, emotional, and behavioral adjustment is important in its own right, both in and out of the classroom. But it now appears that some variables in these domains also relate to and predict school success.”).

⁴⁷ *Elizabeth E.*, 702 F.3d at 1244 (Gorsuch, J. concurring) (emphasis in original).

⁴⁸ 642 F.2d 687 (3d Cir. 1981).

⁴⁹ *Kruelle*, 642 F.2d at 694.

⁵⁰ 565 F.3d 1232 (10th Cir. 2009).

⁵¹ See *Miller*, 565 F.3d at 1246.

⁵² 715 F.3d 775 (10th Cir. 2013).

⁵³ *Muskrat*, 715 F.3d at 788.

⁵⁴ *Muskrat*, 715 F.3d at 789-92.

⁵⁵ See, e.g., *Doe v. Hawaii Dep’t of Educ.*, 334 F.3d 906 (9th Cir. 2003); *Gottlieb v. Laurel Highlands Sch. Dist.*, 272 F.3d 168 (3d Cir. 2001); *Campbell v. McCalister*, 162 F.3d 94 (5th Cir. 1998); *Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995).

⁵⁶ See *T.W. v. Sch. Bd. of Seminole Cty., Fla.*, 610 F.3d 588, 613 n.14 (11th Cir. 2010).

⁵⁷ 535 F.3d 1243 (10th Cir. 2008).

⁵⁸ *Couture*, 535 F.3d at 1255 (quoting the District Court’s language).

⁵⁹ 834 F.3d 1142 (10th Cir. 2016).

⁶⁰ *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring).

⁶¹ 824 F.3d 968 (10th Cir. 2016).

⁶² *Caring Hearts Personal Home Servs.*, 824 F.3d at 978 (“This case has taken us to a strange world where the government itself — the very ‘expert’ agency responsible for promulgating the ‘law’ no less — seems unable to keep pace with its own frenetic lawmaking.”).