Great Public Schools for Every Student

Judge Gorsuch on "Precedent" and Students with Disabilities

Judge Gorsuch has a troubling record when it comes to cases involving students with disabilities. In 8 out of the 10 cases brought by students with disabilities, Judge Gorsuch ruled against the student. Yet when confronted by senators on the Judiciary Committee, Judge Gorsuch disavowed responsibility for that record, instead he repeatedly asserted that his hands were tied in those cases by precedent. That is not so.

1. **The Tenth Circuit had never concluded that a disabled student's IDEA right to a "free appropriate public education" meant that the student was entitled to "merely" more than a *de minimis* educational benefit.** Earlier precedent had stated that students were entitled to *more than* a *de minimis* educational benefit. But Judge Gorsuch was the first jurist in the nation to insert "merely" into the equation, and the first to say that that same standard was "not an onerous one." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) ("[T]he educational benefit mandated by IDEA must merely be 'more than *de minimis*.'") (internal citations omitted). The insertion of the word "merely" mattered, changing what had been a floor (students must receive more than a *de minimis* benefit) into a ceiling (students need receive merely slightly above a *de minimis* benefit). The Supreme Court just unanimously overruled Judge Gorsuch's "merely more than *de minimis*" standard, reasoning that "a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all." *Endrew F. v. Douglas Cty. Sch. Dist.*, No. 15-827**,** slip op. at 14 (U.S. Mar. 22, 2017).
2. **In a case of first impression—where he was not bound by precedent—Judge Gorsuch *still* ruled against students with disabilities.** Even though Judge Gorsuch was not constrained by precedent in *A.F. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015), he ruled that students who mediated their IDEA claims were barred from asserting other civil rights claims in court. The Chief Judge of the Tenth Circuit dissented, calling Judge Gorsuch's resolution "inconsistent with the very purpose of the IDEA." 801 F.3d at 1256 (Briscoe, C.J., dissenting). Another federal court faced with the same issue ruled for the student, deeming Judge Gorsuch's reasoning "nonsensical." *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).
3. **Judge Gorsuch has disagreed with binding precedent in several other cases and has done so even to question longstanding Supreme Court precedent.** He wrote a concurrence in a case to assert gun rights, *United States v. Games-Perez*, 667 F.3d 1136, 1142 (10th Cir. 2012) (Gorsuch, J., concurring); he wrote a concurrence questioning bedrock Supreme Court administrative law precedent that protects consumers, workers, health and safety, the environment, and students with disabilities, *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); and he even urged the entire Tenth Circuit to reconsider a case involving the de-funding of Planned Parenthood, *Planned Parenthood Association of Utah v. Herbert*, 839 F.3d 1301, 1307 (10th Cir. 2016) (Gorsuch, J., dissenting). But when it came to students with disabilities, Judge Gorsuch never voiced his disagreement with precedent.
4. **In fact, in one of the just two cases in which he sided with a student with disabilities, Judge Gorsuch *did* write a concurrence—but he did so to argue that students' rights were limited.** In *Jefferson County School District R-1 v. Elizabeth E.*, 702 F.3d 1227 (10th Cir. 2012), Judge Gorsuch wrote a concurrence that the majority's ruling in favor of the disabled student was "easily arrived at" based on precedent. 702 F.3d at 1243 (Gorsuch, J., concurring). That should have been the end of the matter. But Judge Gorsuch went on to scold the majority for implying that the IDEA might provide disabled students with "social, emotional, or medical" services. *Id.* at 1244. Judge Gorsuch wrote that the IDEA's guarantees are limited in scope to "educational" needs, and do not assist students with disabilities in their "life challenges." *Id.* The Judge's concurrence ignores the text of the IDEA, which states that the purpose of the statute is to foster "full participation, independent living, and economic self-sufficiency for individuals with disabilities." *See* 20 U.S.C. § 1400(c)(1).