

**THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE**

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

CEPI Education Law Newsletter

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SEPTEMBER 2009: Vol. 8-1

THE UNITED STATES SUPREME COURT 2009-2010: IS CHANGE COMING**Overview**

The United States Supreme Court's term officially begins on the first Monday in October and typically lasts until the end of June, or until the justices have handed down all opinions on cases they have heard. Vacca and Hudgins (1991) This coming term we will see a change in membership as the result of one justice retiring and a new justice taking her seat on our nation's highest court.

The Court's Changing Membership. Prior to its new term the membership of the United States Supreme Court included Chief Justice John Roberts, and Associate Justices John Paul Stevens; Antonin Scalia; Anthony Kennedy; Clarence Thomas; Ruth Bader Ginsburg; Stephen Breyer; and Samuel Alito, Jr. David Souter served as an Associate Justice until his recent retirement.

This coming term a new justice will join Chief Justice John Roberts and his seven colleagues. Appointed by President Barak Obama to replace Justice David Souter, Sonia Sotomayor will take a seat as an Associate Justice (and ninth member) of the United States Supreme Court. Formerly a judge on the United States Court of Appeals for the Second Circuit (1998 to the present), and before that a judge on the United States District Court for the Southern District of New York (1992-1998), Justice Sotomayor is an honors graduate of Princeton University. She completed her law degree at Yale University.

The Work Schedule. The justices maintain a very busy work schedule. The Court's official term is divided into two-week periods; more specifically, two weeks of open sessions (devoted to hearing cases that have been accepted for review) alternated with two weeks of recess. During the open sessions the Court hears cases on Mondays, Tuesdays, and Wednesdays and, as a general rule, four cases are heard per day—with one hour allotted to each case. Four justices must have agreed to accept a case for review. Agreeing or not to hear a case should not be interpreted as revealing the thinking of the justices or how they will rule in the case. Vacca and Hudgins (1991)

The Case Load. As a general rule, more than 10,000 cases (civil and criminal) are filed with the Supreme Court each year. Fewer than 100 cases per term are granted plenary (full) review, with oral arguments made by

attorneys. Of the 100 cases granted review by the Court, formal written opinions are delivered by the justices in 80 or 90. (LexisNexis 2008) These figures illustrate the importance of each of the Court's written opinions. Moreover, the importance of each section of the opinion must be underscored. As my former mentor Professor E.C. Bolmeier emphasized to his fledging students of education law, always pay strict attention to the majority opinion but never neglect reading the concurring and dissenting opinions when they appear. Few Supreme Court decisions involving issues of public education culminate in a vote of 9-to-0. We have much to learn from the diverse reasoning of each justice.

The Roberts Court

Prior to the retirement of David Souter, and based upon my analysis of the voting pattern in education-related cases prior to 2009 (as illustrated in several of my past commentaries), the Roberts Court was divided into the following three distinct groups of justices: *Group 1*: Chief Justice Roberts, and Associate Justices Scalia, Thomas, and Alito; *Group 2*: Associate Justices Stevens, Ginsburg, and Breyer; *Group 3*: Associate Justices Kennedy, and Souter. It should be pointed out that Justice Sandra Day O'Connor could be found in this last group prior to her retirement. In my view Justices Kennedy and Souter (and earlier Justice O'Connor) functioned as "swing votes" in most cases resulting in 6-to-3 and 5-to-4 decisions. Surprisingly, when the vote was 7-to-2, Justice Stevens joined the 6, leaving Justices Ginsburg and Breyer as the lone dissenters.

Recent Decisions. Analysis of more recent Supreme Court decisions reveals the emergence of a changing voting pattern. The following four decisions illustrate a possible new alignment of the justices, prior to Justice Sotomayor taking her seat on the Court.

Fitzgerald, et vir. v. Barnstable School Committee, et al. (2009). Decided on January 21, 2009, Fitzgerald involves the parents of a female student who claimed that the responses of a local board of education and school superintendent to their daughter's sexual harassment by an older male student were inadequate. In their initial federal court action the parents raised claims under Title IX (Education Amendments of 1972) and 42 U.S.C. Section 1983 (for violation of the Equal Protection Clause of the Fourteenth Amendment). Subsequently, a United States District Court dismissed the Section 1983 claim and the United States Court of Appeals for the First Circuit affirmed. In the appellate court's view, the United States Supreme Court's past precedents established that Title IX's implied private remedy was sufficiently comprehensive to preclude use of Section 1983 to advance constitutional claims.

This past January (2009), the United States Supreme Court reversed and remanded the case back to the First Circuit. In a unanimous decision delivered by Justice Alito, the Court held that: (1) Title IX does not preclude a Section 1983 action; (2) Title IX was not intended: (a) to be the exclusive mechanism (i.e., sole means) for addressing gender discrimination in schools, and (b) as a substitute for Section 1983 suits; and (3) parallel and concurrent 1983 claims will neither circumvent required procedures nor allow a plaintiff access to new remedies.

Pleasant Grove City, Utah, et al v. Summun (2009). A non-school case with policy implications for local public school officials, the Pleasant Grove City case was decided on February 25, 2009. The facts in this case are as follows. A public park in a Utah city had at least eleven permanent, privately donated displays one of which was a Ten Commandments monument. A religious organization requested permission from the city to erect a religious monument among those already there. City officials explained to the group that the park was limited to displays related to the city's history or those donated by groups with longstanding community ties. The religious group reviewed the policy and criteria but did not describe the historical significance or the

community ties of their proposed monument. Subsequently, the request to erect a new monument display was denied.

Focusing on the city's acceptance of the Ten Commandments monument but not their monument, the religious group filed suit in a federal court. In their suit the group claimed that in rejecting the request to erect a new monument in the park, city officials violated the First Amendment's speech clause. The federal district court denied the claim but the United States Court of Appeals for the Tenth Circuit reversed.

In a plurality decision delivered by Justice Alito (joined by Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, Ginsburg, and Breyer), the Supreme Court reversed the Tenth Circuit. In doing so the Court held that (1) because this case actually involves a form of government speech (conveying a government message) and the placement of permanent displays in the park, the city's decision to accept certain privately donated monuments while rejecting the application made by the religious group is not subject to scrutiny under the First Amendment's Free Speech Clause; (2) as a general rule, the forum analysis simply does not apply to permanent monuments on government property; and (3) even though the monuments were financed by private donations they still represent government speech.

What is interesting about the Pleasant Grove City decision is the diversity of opinion among the justices. Justice Stevens filed a concurring opinion, in which Justice Ginsburg joined; Justice Scalia filed a concurring opinion, in which Justice Thomas joined; Justice Breyer filed a concurring opinion; and Justice Souter filed a separate opinion concurring in the judgment. Justice Ginsburg saw it more as an Establishment Clause case. Thus, the final decision should be limited. Justice Breyer saw the matter simply as city officials being able to pick and choose displays that meet a variety of interests. Justice Souter used a "reasonable observer" test. Using Arlington Cemetery as an example, he states that just because a park display may involve religious symbolism does not make it government endorsement of that display.

Forest Grove School District v. T.A. (2009). Decided on June 22, 2009, the Court's opinion was delivered by Justice Stevens who was joined by Chief Justice Roberts, and Justices Kennedy, Ginsburg, Breyer, and Alito. Justice Souter filed a dissenting opinion joined by Justices Scalia and Thomas.

The facts of the case are these. A private specialist had diagnosed the student in this case as being learning disabled (L.D). Parents unilaterally removed him from public school, placed him in a private academy, and requested an administrative hearing regarding their son's eligibility for special education services under IDEA 2004. The school system had found him ineligible for services. Subsequently, a hearing officer concluded that the school system had failed to provide FAPE and that the parent's placement of their son in the private academy was appropriate. The hearing officer ordered that the school system reimburse the parents for private school tuition.

The hearing officer's opinion and order were challenged in federal district court where the award was set aside. In the opinion of the federal district court judge, IDEA (2004) categorically bars reimbursement unless the child has previously received special education services and/or related services under the school system's authority. This decision was appealed to the United States Court of Appeals for the Ninth Circuit where it was reversed. The Ninth Circuit concluded that tuition reimbursement is an appropriate remedy in this case.

By a vote of 6-to-3, the Supreme Court affirmed the Ninth Circuit. In the Court's view, it is clear that IDEA (2004) authorizes reimbursement for private special education services when public school systems do not provide FAPE; and, this applies regardless of whether the student had previously received these services. In the

view of the dissenters, parents should initially give public school systems a chance to provide special education services before parents take their child out of public school and place him in a private school.

Stafford Unified School District #1, et al. v. Redding (2009). Decided on June 25, 2009, this case involves a female middle school student who had been subjected to a strip search by two female school employees in search of prescription pills. No pills were found. Subsequently, the student's mother filed suit in a federal district court claiming that the search violated the Fourth Amendment. As their defense school officials claimed sovereign immunity and moved for summary judgment. The district court granted the motion finding that there was no Fourth Amendment violation. However, the United States Court of Appeals for the Ninth Circuit reversed the lower court. In the appellate court's view the strip search was unjustified.

Ultimately, the Supreme Court affirmed in part, reversed in part, and remanded the case. In holding that liability of school officials should be addressed on remand, the Court ruled that even though school officials had reasonable suspicion to believe that a banned substance might be present and in this student's possession, they nonetheless violated her Fourth Amendment rights because of the intrusiveness of the search. What is interesting about this decision is the voting pattern and diverse rationale of the Justices. Justice Souter delivered the opinion of the Court, joined by Chief Justice Roberts and Associate Justices Scalia, Kennedy, Breyer, and Alito. However, Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justice Ginsburg joined; Justice Ginsburg filed a separate opinion concurring in part and dissenting in part; and Justice Thomas filed an opinion concurring in part and dissenting in part.

Postscript

Because of the complicated nature of the Supreme Court's high profile civil rights decision of last term Ricci, et al. v. De Stefano (2009), involving the City of New Haven, Connecticut, and the Title VII disparate impact/firefighter promotion test issue, the voting pattern of the justices is important to include in this commentary. In a 5-4 ruling for the firefighters, the Court's decision was delivered on June 29, 2009, by Justice Kennedy. Justice Kennedy was joined by Chief Justice Roberts and Associate Justices Scalia, Thomas, and Alito. Justice Scalia filed a concurring opinion; Justice Alito filed a concurring opinion joined by Justices Scalia and Thomas; and Justice Ginsburg filed a dissenting opinion in which she was joined by Justices Stevens, Souter, and Breyer.

Policy Implications

Judges interpret the law; and, more specifically, judges do not make policy decisions or dictate daily administrative procedures for local public school systems. However, as past experience and advice from school system attorneys tell us, court decisions, especially decisions of the United States Supreme Court, do have a major impact on the drafting and implementation of school system policies, as well as on day-to-day administrative practice in school buildings. Thus, it behooves public school officials and administrators to keep up-to-date on what the courts have said and to seek legal advice on a regular basis.

As suggested early in this commentary, how a justice votes regarding whether or not to hear a case does not indicate how a justice might rule in the case. However, as I have attempted to demonstrate in this commentary, how a justice votes (in conjunction with that justice's rationale), does give us some indication of what he or she might do and say when confronted with a similar issue in a future case.

As the Court's new term approaches, and prior to Justice Sotomayor casting her first vote, the alignment of the justices is as follows: *Group I*: Chief Justice Roberts and Associate Justices Scalia, Thomas, and Alito; and *Group II*: Justices Stevens, Ginsburg, and Breyer. Justice Kennedy remains as a swing vote. Thus, a potential for 5-3 and 4-4 votes is in place. Even though one might look to Justice Sotomayor's past record as a judge to make a prediction, how she will actually function and her impact on school policy as a member of the Roberts Court is unknown. It is wise to keep in mind the following observation made by the late Associate Justice Lewis F. Powell, Jr.: "...it is clear from the history of the Court, and certainly that of both the Warren and Burger Courts, that Presidents frequently are disappointed in the performance of their appointees." (Powell 1987)

Is change coming? At this point my answer is no—at least not in this coming term. However, with a possibility in the near future that one or two justices will announce their retirement from the Court, change is inevitable.

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Note: The views expressed in this commentary are those of the author.