

**NCOSEA
Louisville, Kentucky
October 12, 2006
Mark Oettinger, Vermont DOE**

Overview of the USSC's 2005-06 Term

During the 2005-06 term, the USSC decided 72 cases after full argument, the fewest number in recent history.

Of those 72 cases, 37 (just over half) were unanimous. 17 of the 72 cases (about a quarter) were decided 5-4.

Once the USSC takes a case, it is likely to reverse. Of the 72 cases during the 2005-06 term, 70% were reversed and 30% were affirmed.

Of the 72 cases during the 2005-06 term, 80% were appeals from the federal circuit courts of appeal, and only 20% were appeals from state supreme courts. Of the 57 appeals from federal circuit courts of appeal, 14 (25%) were from the 9th Circuit (i.e., Far West). Of the 14 9th Circuit cases, 11 (79%) were reversed.

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2005-06 USSC Education Law Cases

The IDEA Battlefield

Schaffer v. Weast (Case No. 04-698). 546 U.S. ___, 44 IDELR 150 (2005). The burden of persuasion in an administrative due process hearing rests on the party requesting the hearing. 6-2 decision (Roberts did not participate). Ginsburg dissents, opining (for policy reasons) that burden should be on school district. Breyer dissents, and would remand, opining that burden should be determined through reference to state IDEA regulations and/or by state statutes or rules governing administrative proceedings. 10/5/06. District victory.

Arlington Central School District v. Murphy (Case No. 05-18). No recovery of expert fees by successful IDEA plaintiff. Statute permits recovery for attorney's fees and "costs." Case construes "costs" in a traditional and limited manner, so as to exclude recovery of expert fees. 6-3 decision. Breyer, Stevens and Souter dissent, citing clear congressional intent to the contrary. Majority cites fact that IDEA was enacted pursuant to the Spending Clause which requires unambiguous *statutory* language disclosing any conditions attached to the states' receipt of federal funds. 6/26/06. Another district victory.

1st Amendment - Speech

Garcetti v. Ceballos (Case No. 04-473). Government employee's 1st Amendment rights do not outweigh the government employer's right to discipline the employee for comments made by the government employee in the course of his or her employment. In this particular case, a prosecutor opined that the contents of an affidavit supporting probable cause were false, and that the government's case was therefore unsupported. 5-4 decision, reversing 9th Circuit. "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Souter/Stevens/Ginsburg dissent would afford greater protection to speech regarding "official wrongdoing and threats to health and safety," and would balance those interests against the government's need for administrative efficiency. Stevens dissent points out that speech *was* protected in prior USSC case where a teacher expressed the opinion to her principal that the school's employment practices were racist. Interestingly, in this case, since the speaker was a lawyer/prosecutor, he had obligations under Jencks v. U.S. (prosecution's affirmative duty to provide discovery, including

exculpatory evidence), and Rules of Professional Conduct 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel) and 3.8 (Special Responsibilities of a Prosecutor). Choose between your job and your license to practice law. 5/30/06. A troubling decision.

Rumsfeld v. Forum for Academic and Institutional Rights (Case No. 04-1152). 3/6/06. Solomon Amendment requires that military recruiters be given the same access to campuses as other recruiters, lest the academic institution lose certain federal funds. This does not abrogate the free speech rights of the academic institution. Speech is not implicated. Academic institutions and their faculty and students are free to speak against the military recruiters. Solomon act regulates *conduct* not *speech*, and having military recruiters on campus is not “expressive conduct,” such as flag burning, which *would* enjoy constitutional protection. 8-0 decision by Chief Justice Roberts. Justice Alito did not take part.

Sovereign Immunity

United States v. Georgia (Case No. 04-1203). Plaintiff/prisoner, a pro se paraplegic, alleges inability to turn his wheelchair around in his 3-foot-wide cell, and alleges that correctional officers ignored his needs for assistance with bodily functions, allowing him to sit in his own feces and urine for long periods of time. He claims that violations of Title II of the ADA (denying him, inter alia, education services), amount to 8th Amendment violations, and therefore 14th Amendment violations, through §5 of which state sovereign immunity is abrogated. Justice Scalia writes for a unanimous USSC reversing 11th Circuit finding of state sovereignty. Held: ADA validly abrogates state sovereign immunity for conduct which violates *both* ADA and 14th Amendment. 1/10/06. Judgment withheld on question of whether state sovereignty would be abrogated in case of an ADA violation which does *not* rise to the level of a 14th Amendment violation.

Antitrust

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. (Case No. 04-905). Finding of no “secondary-line price discrimination” in case of motor vehicle manufacturer which offered bulk lots of vehicles to different dealers at different prices. Violation *would* occur if the differential pricing were to be invoked when the two dealers were proposing to sell the same vehicles to the *same* end user/purchaser. National school bus organization filed amicus brief for fear that different ruling would have driven up the cost of school buses. In light of the USCC’s ruling, that concern appears to have been unwarranted. 7-2 decision, Stevens and Thomas dissenting.

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2006-07 USSC Ed Law Cases Granted Cert (to date)

Diversity/Integration/Affirmative Action

USSC grants cert on 2 cases in which school placement was based, in part, on race-based criteria. In each case (Jefferson County, Kentucky(!) and Seattle), lower courts in principle approved systems which are “narrowly tailored to achieve diversity.” Analysis extremely fact-specific. Jefferson County school district has 97,304 students, the nation’s 28th largest school district. Louisville is the nation’s 16th largest city. Student population: 66% Caucasian; 34% African American. USDC applied strict scrutiny per Grutter and Gratz, *infra*, but found that the government has a compelling interest in diversity. 6th Circuit affirmed *without comment*. Consider Grutter v. Bollinger, 539 U.S. 306 (2003), and Gratz v. Bollinger, 539 U.S. 244 (2003), in principle approving the University of Michigan affirmative action admissions practices at the college and law school levels.

Question: Is it constitutional to offer cash signing bonuses as minority teacher hiring incentives?

School Funding

Zuni Public School District No. 89, et al. v. U. S. Department of Education, et al. (Case 05-1508). Whether the method by which the Secretary of Education determines whether a state’s education funding system is “equalized” is based upon a permissible interpretation of the Impact Aid statute.

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2006-07 USSC Ed Law Cases Denied Cert (to date)

FL Bannan v. School District of Palm Beach County (Case No. 04-1207). Principal can demand that religious symbols on student-created in-school mural be removed.

LA Veazey v. Ascension Parish School Board (Case No. 04-1683). Change in location not “change in placement.” Hence, no need to amend IEP, with all attendant due process.

OH Steubenville City Schools v. Barrett (Case No. 04-1409). Superintendent has no qualified immunity in suit by substitute teacher who was told that he would never get a permanent job because he had moved his child from public to private school.

School Governance

NE USSC denies cert where NE consolidates 200 small districts into neighboring districts. Did they close schools? 5/24/06.

Question: Does anyone have experience with district consolidation cases, where courts have involved themselves in objections to: (1) school closures; (2) loss of school board seats; and/or (3) loss of local control generally?

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Other (Non-USSC) Cases

Vouchers

FL John Ellis “Jeb” Bush v. Ruth D. Holmes. Vouchers, usable in religious schools, for students leaving low-performing schools. Program held to be unconstitutional. Florida Supreme Court. 1/5/06.

NJ Choice advocates seek vouchers as remedy for students in low-performing schools.

But see Zelman v. Simmons-Harris, 536 U.S. 639 (2002), which upheld (5-4, per Rehnquist, C.J.) a program which gave vouchers (but only to parents with financial need) to allow recipients to leave underperforming state-controlled Cleveland schools. 96% of recipients used their vouchers for religious private schools. Held *not* violative of Establishment Clause because “the program is...a program of true *private* choice.” (emphasis supplied).

1st Amendment – Speech

VT Guiles v. Marineau, et al., Docket Nos. 05-0327-cv and 05-0517-cv, decided 8/30/06. 2nd Circuit amends USDC/VT decision to protect ALL aspects of speech on 7th grader’s T shirt which was critical of President Bush AND depicted cocaine and alcohol. Trial court protected criticism but not depictions of cocaine and alcohol. Unanimous 3-judge 2nd Circuit panel overturns/augments trial court decision to protect all aspects, including substance abuse depictions.

CA District OK in barring wearing of T-shirts in school with slogans denigrating homosexual students. Example: “Homosexuality is shameful.” 2-1 9th Circuit panel holds schools need not tolerate verbal assaults that could interfere with the educational development of gay teenagers. 9th Circuit denies rehearing en banc over five sharp dissents.

Question: Is this an issue ripe for USSC grant of certiorari for 2007-08 term?

1st Amendment – Religion

PA Parents challenge statute mandating that 9th grade biology students be told about the theory of intelligent design when studying evolution.

FL See also Bannan (mural alteration case), under Cert Denied, above.

Graduation Requirements

CA Valenzuela v. O'Connell Intermediate appellate court refuses to expedite hearing in case brought by students who haven't passed the mandatory math and language arts graduation tests (9.6% of all seniors...41,700 in all). State schools chief thwarts would-be renegade district (which was going to hand out diplomas anyway) because he controls district through bankruptcy fiduciary.

Pledge of Allegiance

VA Voluntary Pledge of Allegiance OK (although students must be afforded option of not participating). Not a violation of the Establishment Clause. 4th Circuit. 8/10/05. Unanimous. USSC avoided deciding this issue in Elk Grove Unified School District, et al. v. Newdow, et al., 542 U.S. 1 (2004), ruling that non-custodial plaintiff/father lacked standing.

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Other Potential Areas of Discussion

- A. To what extent, if at all, should race be a factor in student body composition?
Anyone care to predict the outcome of the affirmative action cases?
- B. To what extent, if at all, should schools have control over student attire?
...or other forms of expression?
And are school violence and exercise or restraint of expression connected?
- C. What did the Founders think about the relationship between Church and State?
...and does the answer to that question matter?
- D. What effect will the retirement of Justice O'Connor and the appointment of Justice Alito and Chief Justice Roberts have on the USSC's decisions?
Consider that the moderate(?) Justice O'Connor authored several 5-4 decisions
Including the University of Michigan cases upholding affirmative action

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