Supreme Court Update: Education Law in the Courts
Agenda

- U.S. Supreme Court Update
- Supreme Court Cases – Last Term
  - First Amendment
  - Fourth Amendment
- Supreme Court Cases – Upcoming Term
  - Discrimination – Sexual Orientation
  - Discrimination – Transgender Status
  - Immigration – DACA
  - School Choice
- Select Recent Federal Circuit Court Decisions
U.S. Supreme Court Update
SCOTUS – A High-level Look

- Nine justices serve lifetime appointments following nomination by the President and confirmation by the Senate.

- The Court decides to hear cases when at least four of the nine justices vote to grant the Petition for Certiorari (this happens less than 90 times out of 7,000+ requests).

- The Court hears oral arguments on cases from October through April, where each side’s attorney is allocated a half hour for oral arguments.
Supreme Court Justices

John Roberts
Chief Justice
Appointed in 2005 (Bush)
Age 64

Clarence Thomas
Associate Justice
Appointed in 1991 (H.W. Bush)
Age 71

Samuel Alito
Associate Justice
Appointed 2006 (Bush)
Age 69

Neil Gorsuch
Associate Justice
Appointed in 2017 (Trump)
Age 51

Brett Kavanaugh
Associate Justice
Appointed in 2018 (Trump)
Age 54

Ruth Bader Ginsburg
Associate Justice
Appointed in 1993 (Clinton)
Age 86

Stephen Breyer
Associate Justice
Appointed in 1994 (Clinton)
Age 80

Sonia Sotomayor
Associate Justice
Appointed in 2009 (Obama)
Age 65

Elena Kagan
Associate Justice
Appointed in 2010 (Obama)
Age 59

Elena Kagan
Associate Justice
Appointed in 2018 (Trump)
Age 54

Samuel Alito
Associate Justice
Appointed 2006 (Bush)
Age 69
Justice Brett Kavanaugh

- Latest addition to the Court; replaced swing Justice Anthony Kennedy.
  - Former Justice Kennedy law clerk.

- Confirmed by the Senate in a 50-48 vote on October 6, 2018.

- Significant because Justice Kennedy was a key swing vote on the Court. For example:
  - *Fisher v. University of Texas at Austin* (2016) (Fisher II) (opinion by Justice Kennedy holding that the University’s use of race as a consideration in admissions did not violate the Equal Protection Clause of the 14th Amendment)
“With Justice Brett Kavanaugh joining the Supreme Court in October, much of the discussion this term has centered on how the new justice would fit in on the court and mesh with the other sitting justices. If finding agreement was his goal, Kavanaugh seems to have done an effective job. Kavanaugh had the highest frequency in the majority of the justices, at 91 percent. Roberts was second highest at 85 percent. Kavanaugh and Roberts also shared the highest agreement level for any justice pairing this term, at 94 percent. While Kavanaugh shared high agreement levels with several of the other more conservative justices on the Supreme Court, his agreement levels with some of the more liberal justices were on the high side as well. Kavanaugh’s votes aligned with Justice Samuel Alito’s 91 percent of the time and his agreement level with Thomas was at 80 percent. Below this, Kavanaugh agreed equally often with Justices Stephen Breyer, Elena Kagan and Neil Gorsuch, at 70 percent apiece”

SCOTUS Decisions from OT 2018
High-level look

- No cases involving school districts, colleges, or universities.

- However, a number of key cases in areas that affect school districts, including the First Amendment (speech and religion clauses), Administrative Law (whether and under what circumstances courts must defer to agency interpretations of their own regulations), and in relation to undocumented immigrants (Census case).
Court demonstrated a willingness to overrule precedent in a number of cases:

  - Court overruled precedent case *Nevada v. Hall*, 440 U.S. 410 (1979) to establish that states retain their sovereign immunity from private suits brought in courts of other states.

  - Court overruled *Williamson County v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) to establish that plaintiffs alleging that local governments have violated the takings clause may proceed in federal court without needing to exhaust state court remedies first.
First Amendment – Speech

- Supreme Court held that probable cause generally defeats First Amendment retaliation claim brought under Section 1983 (Exception where plaintiff can show arrest for a misdemeanor offense where officers typically exercise discretion not to arrest (e.g., jaywalking)).

- Bartlett was a festival goer at Alaska’s “Artic Man” concert series that was arrested during a second encounter with a police officer after an earlier verbal confrontation that did not lead to probable cause for arrest.

- This could be relevant for public schools that employ school resource officers.
First Amendment – Religion

• Supreme Court held that a publicly maintained and displayed war memorial with a cross on it did not violate the Establishment Clause. In this case, the Supreme Court made a distinction between the constitutionality of existing historical monuments and the construction of new monuments.

• This case could be relevant for historical monuments on public school grounds that contain religious symbolism.
Census – Citizenship Question
Supreme Court held that the Secretary of the Department of Commerce did not violate the enumeration clause or the Census Act in deciding to reinstate a citizenship question, but the district court properly remanded to the Agency where the reason given for the agency action did not match the evidence in the record (pretext).

The resolution of this issue will affect how populations are counted for purposes of school funding and other appropriations.

Supreme Court Rules Against Administration Regarding Citizenship Question On Census

FOR IMMEDIATE RELEASE

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Alexandria, Va. – June 27, 2019 – Daniel A. Domenech, executive director of AASA, The School Superintendents Association, issued a statement following the U.S. Supreme Court’s decision to block a citizenship question to the census.

“AASA is pleased to see the Supreme Court’s decision on the census citizenship question. With today’s decision, ruling that the citizenship question cannot be added to the 2020 Census, democracy won.

“Today’s decision is a critical step for supporting a robust, accurate count in the 2020 census. The success of our nation’s public schools to best educate the students they serve and the broader communities they support relies on a truthful reflection of the people in that community. Today’s decision supports a census instrument with broad participation, that reflects updates and revisions through normal order, and that is free of items that would suppress participation, particularly among historically underrepresented populations.

“The data and detail of the 2020 census will shape and impact the allocation of critical federal, state and local resources for the next 10 years, and the ability of public schools to serve all students will be bolstered by the accuracy of the 2020 census count. More specifically, the population counts from the decennial census are used to determine the allocation of federal funds for many programs, including Critical federal education programs like Title I and IDEA, whose funding allocations depend on school district counts of the school-aged population.

“For these reasons, AASA applauds today’s decision, will work to ensure the federal government respects the Supreme Court decision and proceeds with efforts to prepare a 2020 Census that does not include the citizenship question. AASA will be working with school system leaders across the nation to get out the count.”

• What next?

Donald J. Trump
@realDonaldTrump

The News Reports about the Department of Commerce dropping its quest to put the Citizenship Question on the Census is incorrect or, to state it differently, FAKE! We are absolutely moving forward, as we must, because of the importance of the answer to this question.

8:06 AM - 3 Jul 2019

26,148 Retweets 91,902 Likes
• What next?

– After initially agreeing to remove the citizenship question from the 2020 Census forms, the Department of Justice informed a federal court on Friday July 5, 2019 that the administration will move forward to find further support for the inclusion of the question. Department of Justice lawyers indicated that if the Department of Commerce adopts a new rationale for including the citizenship question on the Census, the government will “immediately notify” the district court.
Administrative Law – Auer Deference

- The Supreme Court in a 5-4 opinion refused to overrule cases which held that courts must defer to an agency’s reasonable interpretation of its own genuinely ambiguous regulations (Auer deference).
  - The Court (Justice Kagan, joined by Justices Roberts, Ginsburg, Breyer and Sotomayor) refused to overrule Auer, but “reinforced its limits.”
  - Deference to an agency interpretation is appropriate only where: (1) regulation is genuinely ambiguous; (2) the agency’s interpretation is reasonable; and (3) the Court makes an independent inquiry into the character and context of the agency interpretation to confirm that it is entitled to controlling weight (e.g., must be authoritative/official position, involve the agency’s substantive expertise, and involve the agency’s fair and considered judgment).

- Four Justices would have overruled Auer (Justices Thomas, Gorsuch, Alito, and Kavanaugh).

- Recent examples of U.S. Department of Education interpretations of its regulations:
  - The 2016 Office for Civil Rights (“OCR”) Dear Colleague Letter interpreting the Title IX regulations to require that public schools provide students access to the bathroom that matched the student’s gender identity rather than their biological sex, which was the subject of litigation and withdrawn in 2017.
  - The 2014 OCR DCL asserting that OCR would investigate reports of racial disparities in student discipline that would violate Title VI, which was withdrawn in 2018.

- From the National School Boards Association friend-of-the-court brief:

  5

  leveraged to achieve national objectives while remaining cognizant of state and local prerogatives—and safeguarding individual liberty all the while.

  The *Auer* regime, however, turns collaborative federalism on its head. By demanding deference to an agency's interpretation of its own regulations, *Auer* provides a powerful incentive for agencies to abandon the notice-and-comment process that facilitates dialogue among federal, state, and local governments. This, in turn, invites dramatic shifts in federal policy with each new administration—and tends to result in policies that lack the clarity and wisdom that public participation can engender. Worse still, when agencies *do* engage in notice-and-comment rulemaking under the *Auer* regime, they do so knowing that by crafting ambiguous regulations they can expand their own power to unilaterally dictate federal policy through subsequent interpretation. In this way, *Auer* threatens not only separation of powers but also federalism—and, ultimately, individual liberty. *Auer* should be overruled.
SCOTUS Cases for OT 2019
These cases are scheduled for the next term, with arguments starting in October.
Discrimination – Sexual Orientation and Transgender Identity
**Bostock v. Clayton County**, 894 F.3d 1335 (11th Cir. 2018)

- The Eleventh Circuit held that an employee that was allegedly terminated because of his sexual orientation and participation in an LGBT recreational softball league **was not allowed** to bring Title VII claims based on sexual orientation.

- The case has been consolidated with **Altitude Express Inc. v. Zarda** in a petition for cert which the Supreme Court has granted. The case is set for argument in October Term 2019.

**Altitude Express Inc. v. Zarda**, 883 F.3d 100 (2d Cir. 2018)

- The Second Circuit held that a sky diving instructor who was allegedly fired due to his sexual orientation **was allowed** to bring a Title VII claim. The court in this case characterized discrimination against employees on the basis of sexual orientation as a form of prohibited sex stereotyping.

- The case has been consolidated with **Bostock v. Clayton County** in a petition for cert which the Supreme Court has granted. The case is set for argument in October Term 2019.
R.G. & G.R. Harris Funeral Homes Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018)

- The Sixth Circuit held that discrimination against an employee on the basis of their gender identity being transgender is a violation of Title VII’s protections against sex discrimination.

- This case involved a funeral home worker who was not able to receive gender-conforming work uniforms from their employer.

- The Supreme Court has granted cert in this case. The case is set for argument in October Term 2019. Question presented: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under Price Waterhouse v. Hopkins, 490 U. S. 228 (1989).
Immigration– DACA
• The Deferred Action for Childhood Arrivals (DACA) program allows undocumented individuals that were brought to the United States as young children to petition for temporary deferral of deportation. The Trump Administration has announced its decision to rescind DACA.

• These three cases all challenge the Trump Administration’s decision to rescind DACA. Lower courts in these cases have issued nationwide injunctions to temporarily prevent the termination of the DACA program during the pendency of this litigation. DHS has been ordered to continue to renew DACA registrations for individuals who were already registered.

• The cases have been consolidated and the Supreme Court has granted cert. The case is set for argument in October Term 2019.

• Question Presented: (1) Whether the Department of Homeland Security’s decision to wind down the Deferred Action for Childhood Arrivals policy is judicially reviewable; and (2) whether DHS’s decision to wind down the DACA policy is lawful.
School Choice – Vouchers
The Montana Tax Credit scholarship program allows Montana residents to receive a tax credit of $150 for contributions to a privately run scholarship program. The Montana Department of Revenue limited this program to the use of scholarship funds for students to attend non-religious private schools. Parents of students attending religious private schools challenged this decision. The Montana Supreme Court ruled in favor of the Department of Revenue in forbidding the use of public monies for private religious institutions.

The Supreme Court granted cert and the case is set for argument in October Term 2019.

Question President: Does it violate the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools?
Select Recent Federal Court Decisions
Select Recent Circuit Court Cases

- **First Amendment – Religion**
  - *Wood v. Arnold*, 915 F.3d 308 (4th Cir. 2019)
    - The Fourth Circuit found that a school district’s history unit on Islam did not violate the First Amendment’s Establishment Clause. This case is one of several recent instances in which students and their families are suing public schools for incorporating lessons on Islam into curricula.
    - The Ninth Circuit found that a high school football coach was a public employee when he would pray on the field before football games. He therefore was not able to bring a First Amendment claim when fired for disobeying school district officials who required him to stop this pre-game prayer.
    - The Ninth Circuit did not separately rule on whether this prayer by a school official violated the Establishment Clause. One judge on the panel wrote a concurrence that also found that the coach’s actions violated the Establishment Clause in that it was state-sponsored advancement of religion. The Supreme Court denied cert in the case.

- **Fourth Amendment – School Discipline**
  - *I.B. v. Woodard*, 912 F.3d 1278 (10th Cir. 2019)
    - The Tenth Circuit denied a mother’s Fourth Amendment claim that her daughter was unreasonable seized and searched when a caseworker at a school strip searched her for signs of abuse. The court applied the qualified immunity doctrine as there was not clearly established law that the special circumstances exception did not apply here. The Supreme Court denied petition for cert in this case.

- **Discrimination – Transgender Students**
    - The Third Circuit denied students’ Title IX and privacy claims that attempted to bar a school district from enforcing a policy in which transgender students were allowed to use the restrooms that correlate with their perceived gender identity. The Supreme Court denied the petition for cert in this case.
In 2016, the Obama Department of Education promulgated the regulation “Equity in IDEA” which required SEAs to use a standard methodology to identify districts that had a “significant disproportionality” of students of racial minority groups in the districts’ special education programs.

In February of 2018, the Trump Department of Education delayed the implementation of the Equity in IDEA rule from July 1, 2018 to July 1, 2020.

In this case, the federal district court held that the Department of Education had failed to provide reasoned explanation for implementing the delay regulation and that it had failed to consider costs in implementing the delay. The district court therefore vacated the delay regulation. The 2016 significant disproportionality rule is therefore in effect.

The Department of Justice filed a Notice of Appeal for this case on May 6, 2019. The D.C. Circuit will hear the case.
Wrap Up/Questions
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