COMMENTARY

THE 2005–2006 TERM OF THE UNITED STATES SUPREME COURT AND ITS IMPACT ON PUBLIC SCHOOLS*

by

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* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 213 Ed.Law Rep. [1] (Nov. 16, 2006).

1. Hogan & Hartson L.L.P. has published an annual review of the Supreme Court decisions affecting public education since 1987.

INTRODUCTION

The 2005–2006 Term of the United States Supreme Court included several rulings of direct significance to school districts and several others with more indirect implications. Moreover, the Court granted *certiorari* in several important education cases that will be decided next Term. Thus, in addition to reviewing the Court's most significant decisions this Term,*1*/ this annual summary will look forward to some important cases on the Court's docket for the 2006–2007 Term.

During the 2005–2006 Term, the Supreme Court decided 71 cases after argument, resolved 11 more in summary dispositions without argument, and denied review of thousands of others. Overall, the Term was one of dramatic change in the composition of the Court, but only moderate changes in its decisions affecting education. The remarkable stability in the Court's composition for more than a decade ended last year with the passing of Chief Justice William Rehnquist and the retirement early this year of the Court's first female Justice, Sandra Day O'Connor.

The new Chief Justice, John Roberts, began his legal career, first as a clerk to Judge Friendly of the U.S. Court of Appeals for the Second Circuit, and then as a law clerk to his predecessor. He subsequently had a distinguished career, including several years as the Principal Deputy Solicitor General, private practice at Hogan & Hartson, and an appointment to the United States Court of Appeals for the District of Columbia Circuit. He became our Nation's 17th Chief Justice and the first new Justice since the appointment of Justice Stephen Breyer in 1994.

Justice O'Connor announced her intention to retire before the Term began in October 2005, but ended up serving until late January 2006, as President Bush's initial nominee to replace her, Harriet Meiers, withdrew under pressure from members of the President's own party. Chief Justice Roberts, ultimately, was joined on the Court by another former federal court of appeals judge, Justice Samuel Alito. Justice Alito, viewed by some pundits as a more reliable conservative than Ms. Meiers, took the seat vacated by Justice O'Connor, becoming the Court's most junior Associate Justice. He had previously served as judge on the United States Court of Appeals for the Third Circuit for 16 years, after spending his early career as a lawyer in a variety of capacities for the federal government.

It has been widely speculated that the appointment of the two new justices, particularly Justice Alito, would push the Court to the right. However, their first Term showed only limited evidence of such a trend. Indeed, a remarkably high percentage of the Court's cases, 45%, were decided by unanimous opinions. Likewise, the number of 5–4 decisions was relatively small, about 14% (compared to more than 20% in most recent Terms), and the Court's conservative majority held sway in half of those 5–4 cases. Moreover, the Court surprised many observers with its biggest decision of the year issued on the last day of the Term: In *Hamdan v. Rumsfeld,* the Court held 5–3 that President Bush lacked the authority to constitute military commissions to conduct criminal trials for alleged alien terrorist detainees.

Ultimately, the Court's center of gravity, however, does appear likely to shift at least one seat to the right. For several years, retired Justice O'Connor had most frequently been the swing vote in hotly contested cases. For example, in recent years, the Court has decided by narrow margins significant cases involving the Establishment Clause of the First Amendment, the limits on the acceptable consideration of race and ethnicity in governmental decision-making, and the respective powers of our state and federal governments. Justice O'Connor played a central role in the outcome of many of these cases.

After Justice O'Connor left the Court, during the latter half of the 2005–2006 Term, Justice Anthony Kennedy stepped into this pivotal role and cast the fifth and deciding vote in more closely divided cases than any of his colleagues. Justice Kennedy was in the majority in nine of the twelve 5–4 decisions this Term. In addition, four Justices, including the two new Justices, are seen as generally more conservative than Justice Kennedy and four as generally more liberal. This pattern can be seen in a few of the cases affecting education last Term, but not in the two most prominent of these.

After two decades without a major special education case, the Court decided two last Term. In both, moreover, solid majorities supported favorable outcomes for school districts. First, in *Schaffer v. Weast*, in an opinion by Justice O'Connor, the Court ruled 6–2 in favor of the Montgomery County, Maryland Public Schools.[2] The Court held that the party requesting a due process hearing under the Individuals with Disabilities Education Act ("IDEA") bears the burden of proof. Likewise, later in the Term, in *Arlington Central School District v. Murphy,* both new Justices joined a 6–3 majority in finding that IDEA does not require school districts to reimburse parents who prevail in special education disputes for the costs of experts.

The Court also decided a number of cases this Term that will affect school districts in their capacity as employers. Two of the most significant of these cases are *Burlington Northern and Santa Fe Railway Co. v. White* and *Garcetti v. Ceballos*. In *Burlington Northern*, a unanimous Court strengthened protection from retaliation for employees claiming to have been subjected to sexual harassment. In *Garcetti*, Justice Kennedy joined the Court's more conservative Justices in a 5–4 ruling holding that the First Amendment does not protect statements made by a public employee in the course of his or her job.

2. Hogan & Hartson was lead counsel for the school district in this case.

Similarly, Justice Kennedy was the swing vote in the Term's major voting rights case. He joined a 5–4 majority rejecting a claim of partisan gerrymandering challenging a mid-term Congressional redistricting by the Republican-controlled Texas Legislature. On the other hand, in the same case, Justice Kennedy joined the Court's four most liberal Justices in finding that Texas violated the Voting Rights Act by dismantling an electoral district with a Latino majority.

In two other cases with indirect implications for school districts, the Court was unanimous. In *Rumsfeld v. Forum for Academic and Institutional Rights,* the Court held 8–0 that a federal law requiring universities to give the same access to military recruiters as to other potential employers does not violate the First Amendment. Similarly, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court ruled 8–0 that the Religious Freedom Restoration Act gives a small sect based in Brazil the right to import into the U.S. a hallucinogenic tea because its use forms a central part of the group's religious rituals.

This Term, the Court also declined to review several lower court decisions of interest to school districts in a number of important areas. For example, the Court declined to review the decision of the Indiana Supreme Court in *Myers v. Indiana*, which upheld, against a Fourth Amendment challenge, a police "drug sweep" of all vehicles in a school parking lot.

When the Supreme Court decides not to review a case, known as a denial of *certiorari*, it means only that the lower court's ruling will stand and does not necessarily signify that the Supreme Court agrees with the lower court's reasoning or conclusion. The Supreme Court has virtually unlimited discretion to decide which cases it will consider and rarely explains its reasons for declining to review a case.

In addition to summarizing cases decided by the Court and cases in which *certiorari* was denied, this article also briefly addresses several important cases that the Supreme Court is expected to decide during the 2006–2007 Term, which begins in October 2006. Two of these cases will be heard in tandem and involve challenges brought to race-conscious student assignment measures designed to promote integrated public schools. In *McFarland v. Jefferson County Board of Education*, which will be heard in the Supreme Court by the name *Meredith v. Jefferson County Board of Education*, the Sixth Circuit upheld the voluntary race-conscious plan adopted by the school district, located in Louisville, Kentucky. The school district adopted the plan after it was released from court supervision following decades of court-ordered desegregation. The Ninth Circuit also upheld a similar voluntary desegregation plan in *Parents Involved in Community Schools v. Seattle School District No. 1*.[3] In Seattle, a series of voluntary desegregation plans beginning in the 1970s had allowed the school district to avoid federal court intervention. Both cases are expected to be argued in December.

This review of the Supreme Court's 2005–2006 Term is divided by subject matter, as follows: (1) Students with Disabilities; (2) Freedom of

3. Hogan & Hartson is co-counsel for the school district in its case before the Supreme Court.

Speech; (3) Employment; (4) Freedom of Religion; (5) Voting Rights; (6) Federal Civil Procedure; (7) Fourth Amendment; (8) Race Conscious Decision–Making; and (9) Preview of the 2006–2007 Term. Full citations to the cases and statutes discussed appear in the appendix at the end of this summary.

I. STUDENTS WITH DISABILITIES

This Term, the Supreme Court decided two key special education cases, *Schaffer v. Weast* and *Arlington Central School District Board of Education v. Murphy*. Both of these decisions have significant positive implications for school districts across the country. In *Schaffer*, the Court ruled that the party challenging an individualized educational program ("IEP") under IDEA bears the burden of persuasion in a due process hearing. In *Murphy*, the Court held that school districts are not liable for the expert fees incurred by parents who successfully bring a claim under IDEA.

A. Burden of Proof Under IDEA

The plaintiff in *Schaffer* was diagnosed with learning disabilities and speech-language impairments. He attended a private school through seventh grade, when school officials informed his parents that he needed a school that could better accommodate his needs. Brian's parents contacted the Montgomery County Public Schools ("MCPS") and the school district convened an IEP team that evaluated Brian's eligibility to receive special education services. The team developed an IEP that offered Brian a placement in either of two MCPS middle schools, where the school district felt he would have received the necessary special education services. The Schaffers, however, rejected the IEP and enrolled Brian in another private school. They subsequently filed an administrative complaint against MCPS under IDEA, challenging the IEP and seeking reimbursement for the private school's tuition.

The procedural history of the case is complex. An administrative law judge ("ALJ") initially concluded that Brian's parents–the complainants–bore the burden of proving their claim that the school district's IEP was inadequate and, because they had not met this burden, ruled in favor of the school district. On appeal, a federal district court reversed and remanded, concluding that the school district bore the burden of persuasion. While the school district's appeal of the district court's decision to the Fourth Circuit was pending, the ALJ reconsidered the case in light of the district court's holding and ruled in favor of the parents, finding that since the evidence had been in equipoise, the burden of proof was dispositive. The Fourth Circuit, however, vacated the district court's ruling and remanded. When the district court subsequently reaffirmed its prior ruling on the burden of proof (concluding that it rested on the district), MCPS appealed again. Taking its second look at the case, the Fourth Circuit reversed again, holding that the burden of proof should have been on the parents.

The Supreme Court affirmed the Fourth Circuit in a 6–2 decision in which Chief Justice Roberts did not participate. The majority, in an opinion by Justice O'Connor, explained that because IDEA is silent on which party

bears the burden of persuasion, the traditional rule should apply: The burden of proof rests on the party bringing the challenge.

The Court found no reason to conclude that Congress intended to deviate from the normal allocation of the burden of proof. While acknowledging that school districts may have a "natural advantage" in information and expertise, the Court explained that Congress addressed this advantage in IDEA by providing procedural safeguards and requiring school districts to share information with parents. In addition, the majority was unwilling to assume that every IEP is invalid until the school district proves it to be valid, as the parents' position would have required. Justice Stevens wrote a short concurring opinion emphasizing this latter point.

The two dissenting Justices disagreed with the majority's conclusion but each for different reasons. Justice Ginsburg argued that, while the burden of proof ordinarily does fall on the plaintiff, under IDEA, the school district should bear the burden of showing the IEP's adequacy because it has an affirmative obligation to provide the program and is in a better position to show that it has satisfied its responsibilities. Justice Breyer, on the other hand, would have left the decision to individual states, arguing that IDEA's silence on the question indicated that Congress did not intend to establish a uniform federal standard at all.

The decision in *Schaffer* has important implications for school districts. First, in some IDEA cases the trier of fact may find that the two sides have presented essentially equal evidence–as was the situation in *Schaffer*–making the allocation of the burden of proof dispositive. The Court's ruling thus improves the likelihood that a school district defending an IEP will prevail in close cases. Second, it is likely that the Court's decision will deter some parents from filing non-meritorious claims in the first place.

On the other hand, school districts also should be aware that the Court declined to decide whether or not states may adopt a different burden of proof for IDEA administrative hearings. Consequently, the laws of several states, such as Minnesota and Delaware, which both require school districts to bear the burden of proof, apparently still remain valid.

B. Liability for Expert Fees under IDEA

In a second special education case, *Arlington Central School District Board of Education v. Murphy,* the Supreme Court resolved a disagreement among the lower federal courts of appeals regarding whether parents who successfully bring an IDEA claim against a school district are entitled to recover expert fees that they incur. The Court held that IDEA's attorneys' fee provision does not allow prevailing parents to recover expert fees from school districts.

The case arose when Pearl and Theodore Murphy filed an IDEA complaint in the Southern District of New York on behalf of their son. The Murphys ultimately prevailed, and the school district was ordered to pay their child's tuition at a private school. The Murphys then asked the court to order the school district to reimburse some of their litigation expenses, including $29,350 in fees for an educational consultant. The district court concluded that the Murphys were entitled to recover some of these fees from the school

district, but only for the time charged by the consultant for work completed between the request for a hearing and the final ruling. As a result, the court awarded the Murphys $8,650 for the expert's costs. While the Second Circuit affirmed the lower court's decision and held that expert fees are recoverable under IDEA, other federal courts of appeal had reached the opposite conclusion in prior cases. The Supreme Court accordingly granted *certiorari* to resolve this split among the circuits.

In a 6–3 decision, the Supreme Court reversed the Second Circuit, holding that IDEA's fee-shifting provision does not allow prevailing parents to recover expert fees. In an opinion by the Court's newest member, Justice Alito, the majority emphasized that IDEA was enacted pursuant to the Constitution's Spending Clause and that, as a result, Congress must give state officials clear notice of all obligations attached to their acceptance of federal funds. The Court found that the statutory language–which allows a court to "award reasonable attorneys' fees as part of the costs" to the parents of a disabled child who have prevailed in an IDEA action – does not clearly authorize a court to award expert fees. Therefore, Congress did not afford state officials adequate notice of any intent to hold school districts liable for expert fees.

The Second Circuit had relied heavily on IDEA's legislative history and specifically on the Conference Committee Report, which states that the conferees intended expert fees to be included in the term "attorneys' fees as part of costs." The Supreme Court determined, however, that, given the ambiguous text of the statute itself, the statement in the Conference Report did not provide state officials with adequate notice that they would be liable for expert fees if they accepted IDEA funds. The Court also rejected the argument that the overarching goal of IDEA suggested that school districts should be required to compensate prevailing parents for expert fees. The majority reasoned that IDEA's aim of ensuring disabled children access to a free and appropriate education must be balanced against Congress' legitimate fiscal considerations.

Justice Ginsburg concurred in the Court's judgment and in part of the majority opinion, but wrote separately to argue that the majority relied too heavily on the Spending Clause's "clear notice" requirement. Furthermore, noting her belief that holding school districts liable for the costs of educational consultants would be consistent with IDEA's overarching goal, Justice Ginsburg expressly invited Congress to consider amending the statute to allow prevailing parents to recover expert fees.

Justice Breyer wrote the primary dissenting opinion, which was joined by Justice Stevens and Justice Souter. Concluding that the statute should be interpreted as authorizing courts to award expert fees, the dissent argued that Congress made its intent explicit in the Conference Report and that this legislative history should guide the Court's interpretation. The dissent also argued that its interpretation of the fee-shifting provision would complement the statute's overall purposes. Justice Souter also filed a separate dissent.

In light of the Court's decision in *Murphy*, school districts cannot be held liable for the expert fees incurred by parents who have prevailed in an IDEA proceeding. As the approximately $30,000 requested by the parents for expert

fees in *Murphy* and the $8,650 granted by the lower court demonstrate, the costs of expert consultations can be quite high.

The Court's decision also allayed concerns that the role of educational consultants would increase if school districts were universally required to pay prevailing parents' expert fees. Greater use of independent educational consultants by parents likely would have made the dispute resolution process under IDEA more adversarial. The Court's decision thus helps maintain the more collaborative approach between parents and school officials that Congress envisioned.

II. FREEDOM OF SPEECH

The Court decided two major First Amendment free speech cases this Term that are of significance to public school districts and declined to review several others. In the first, the Court found constitutional statutory provisions requiring that law schools receive federal funds to provide military recruiters with access to their students. In the second, the Court held that the First Amendment does not protect official statements by public employees when employees are performing their job duties.

A. Access to Campuses for Military Recruiters

The Solomon Amendment requires all institutions of higher education that receive federal funds to provide military recruiters at least as much access to students as the schools provide to other recruiters. In *Rumsfeld v. Forum for Academic and Institutional Rights Inc.*, several law schools and their faculties organized as the Forum for Academic and Institutional Rights, Inc. ("FAIR") and challenged the Solomon Amendment. Because of policies against discrimination based on sexual orientation, many law schools had restricted military recruitment based on the military's policies with respect to homosexuals. FAIR thus claimed that the Solomon Amendment violated its members' First Amendment rights to freedom of speech and association as those rights are exercised in such nondiscrimination policies. According to FAIR, the Solomon Amendment forced schools to chose between disseminating a message they found objectionable or losing federal funding.

The plaintiffs initially sought a preliminary injunction against enforcement of the Solomon Amendment. The district court denied the injunction, holding that because recruiting is conduct and not speech, Congress is able to regulate it. Therefore, the district court concluded that FAIR had failed to establish a likelihood of success on the merits. The Third Circuit, however, reversed and held that the Solomon Amendment was unconstitutional because it forced law schools to chose between surrendering First Amendment rights and losing funding.

A unanimous Supreme Court reversed. Chief Justice Roberts, writing for the Court, first clarified the correct interpretation of the Solomon Amendment, confirming that schools cannot comply with it simply by applying a general nondiscrimination policy to all recruiters, thereby excluding both the military and any other recruiters that also discriminate against homosexuals. According to the Court, it is insufficient under the Solomon Amendment for a school merely to treat the military in the same manner as other employers

who may violate its nondiscrimination policy. Rather, under the proper interpretation of the statute, military recruiters must have access at least equal to that provided to *any* other employer.

The Court then took up the constitutional questions and emphasized that if Congress can regulate military recruiting directly through its enumerated Article I powers, then it also may accomplish the same purpose indirectly through its Spending Clause powers by attaching conditions to federal funding that educational institutions are not obligated to accept. The Court reasoned that conditioning funding upon the acceptance of a certain requirement cannot be unconstitutional if that same requirement constitutionally could be imposed directly.

In analyzing the Solomon Amendment, the Court first found that it does not dictate the content of speech. According to the Court, law schools remain free to express whatever views they may have on the military's employment policies while still retaining eligibility for federal funding. Therefore, the Court concluded that the Solomon Amendment regulates conduct–not speech.

The Court also rejected the argument that the type of conduct being regulated is inherently expressive and thus protected by the First Amendment. The conduct addressed by the Solomon Amendment–allowing access to recruiters–is not inherently expressive. Providing such access therefore did not constitute "symbolic speech" in the way that an activity such as flag-burning does.

Finally, the Court rejected FAIR's argument that the Solomon Amendment violates law schools' right to freedom of association because it mandates the presence of military recruiters on campus. Recruiters, the Court noted, do not become part of the law school community: They are effectively outsiders and, therefore, do not seek to become members of the school's expressive association.

While the Solomon Amendment does not apply directly to public school districts, as it does to institutions of higher education, the No Child Left Behind Act of 2001 ("NCLB") contains similar provisions requiring equal access for military recruiters. *Rumsfeld* likely means that these NCLB provisions also would withstand a First Amendment challenge. Therefore, school districts should carefully examine their policies with respect to military recruiters' access to students.

B. Official Speech by Government Employees

In *Garcetti v. Ceballos*, the Court, in a 5–4 decision, held that when public employees make statements in the course of their official duties, they are not speaking as citizens for First Amendment purposes and their communication, therefore, is not shielded from employer discipline.

The plaintiff, Richard Ceballos, distributed a memorandum to his supervisors questioning whether a deputy had lied in a previously issued search warrant affidavit. Ceballos alleged that he was subject to retaliatory employment actions when the agency subsequently demoted and refused to promote him. The district court held that because Ceballos' memo was written pursuant to his official duties, it was not protected speech under the First

Amendment. The Ninth Circuit reversed and concluded that the memorandum did constitute protected speech because the issue of government misconduct was a matter of public concern entitled to First Amendment protection. The Supreme Court, in a 5–4 decision, reversed the Ninth Circuit.

The majority opinion, authored by Justice Kennedy, began by discussing some threshold questions in determining whether a public employee's speech is constitutionally protected. The first determination is whether the employee spoke as a citizen on a matter of public concern. If not, the public employee has no free speech claim. On the other hand, if the employee spoke as a citizen regarding a matter of public concern, in some cases, he may have a free speech claim. The majority stressed that citizens working for the government necessarily accept certain limitations on their freedom because government agencies must have control over employees in order to provide public services efficiently. The Court specifically stated that, "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."

According to the majority, the determinative factor in this case was that Ceballos' speech was made pursuant to his employment duties. He did not act as a citizen when he wrote the memo, but rather as a government employee. The Court concluded that "when public employees make statements pursuant to their official employment duties, they are not speaking as citizens for First Amendment purposes and they are not protected from employer discipline." While recognizing that public employees enjoy other safeguards through whistle-blower protection laws and labor codes, for example, the Court refused to grant constitutional protection to every statement made by a public employee pursuant to his or her professional duties.

The majority also noted that other factors, such as academic freedom, might argue for greater constitutional protections for expression related to scholarship and classroom instruction. However, the Court declined to decide at this time the extent to which the *Ceballos* analysis would apply to such cases.

Justices Stevens and Breyer filed dissenting opinions, as did Justice Souter, who was joined by Justices Stevens and Ginsburg. All argued that the First Amendment may sometimes protect a public employee's official speech. Both Justice Stevens and Justice Souter also noted that public employees are still citizens while they work for the government and argued that speaking as a citizen and speaking as a public employee are not very different. Both Justices disagreed with the majority's conclusion that the Constitution never protects such employee communications from discipline, arguing that the extent of protection should be based on the facts surrounding each case. Likewise, Justice Stevens argued that it is illogical to allow constitutional protection for the same words depending on whether the words are within a job description or not.

Ceballos is an important decision for school districts in their role as employers. It makes clear that at least some speech in the context of a public

employee's official job duties may not be protected by the First Amendment. Moreover, this decision suggests that the further away from a classroom setting such official speech occurs, the less likely it is to be protected. For example, under *Ceballos,* it seems less likely that a human resources director's criticism of school board hiring policies would be protected than similar or even identical comments in the classroom by a high school civics teacher. Thus, while *Ceballos* gives school districts more authority to control the official speech of employees in the conduct of their duties, school officials need to remain vigilant about First Amendment issues.

C. Free Speech Cases the Court Declined to Review

This Term, the Court also declined to review several cases regarding free speech issues in the education context. As a result, the rulings of the various lower courts in the following cases remain intact and are binding precedents for each respective jurisdiction:

- In *Stavropoulos v. Firestone*, the Eleventh Circuit held that a public employer retaliates when he or she takes adverse action that is likely to chill an employee's speech.
- In *Peck v. Baldwinsville Central School District*, the Second Circuit remanded a case involving religious images in a kindergarten student's school assignment. The court of appeals found that summary judgment was inappropriate because factual questions remained, such as whether the teachers had engaged in viewpoint discrimination based solely on the religious content of the poster, whether the poster offered a religious viewpoint that was outside the scope of the assignment, and whether a secular image that was similarly outside the scope of the assignment would have received the same criticism.
- In *Johnson-Kurek v. Abu Absi*, the Sixth Circuit held that a university does not violate a non-tenured faculty member's right to free speech and academic freedom by requiring her to communicate more clearly to her students about administrative aspects of a course, such as what work is required.
- In *Pony Lake School District v. State Committee for the Reorganization of School Districts*, several small school districts in Nebraska filed a class action seeking an injunction preventing school district consolidation before a referendum was held. Claimants argued that dissolving small school districts before the referendum violated their right to free speech, but the Supreme Court of Nebraska disagreed.
- In *Haiying Xi v. Littell*, the Superior Court of Pennsylvania, in an unpublished opinion, held that a college student does not have the right to know the reason for a grade after it is assigned or the right to receive the correct answer.

III. EMPLOYMENT

In addition to *Ceballos*, which discussed both First Amendment and employment issues, the Court also decided several other employment cases and denied *certiorari* in other cases that are all relevant to public schools in their role as employers.

A. Title VII

During its 2005–2006 Term, the Supreme Court decided three Title VII cases that may affect school districts: *Burlington Northern and Santa Fe Railway Co. v. White, Arbaugh v. Y & H Corporation* and *Ash v. Tyson Foods, Inc*.

1. Retaliation under Title VII

In *Burlington Northern and Santa Fe Railway Co. v. White*, the Court considered the standard for unlawful retaliation under Title VII. The plaintiff in *Burlington Northern* brought a Title VII suit alleging sexual harassment and retaliation and claimed that her employer had reassigned her to a more physically demanding job after she had complained of sexual harassment. She also alleged that her employer had suspended her without pay for 37 days after she had filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). A jury found in favor of the plaintiff with respect to these retaliation claims, and the Sixth Circuit affirmed.

Justice Breyer, writing for eight Justices, agreed. The Court resolved a split among the circuits and rejected the position of the United States that the Title VII ban on retaliation was limited to actions affecting the terms and conditions of employment. Regarding the scope of the anti-retaliation provision, the Court adopted the view that the plaintiff need show only that the "employer's challenged action would have been material to a reasonable employee," meaning that the action likely would have "dissuaded a reasonable worker from making or supporting a charge of discrimination."

In reaching this conclusion, the Court first dismissed the argument that the retaliation ban should be given the same scope as the substantive anti-discrimination provisions of Title VII, which are expressly limited to the "terms and conditions of employment." Justice Breyer noted the textual differences between the two portions of the statute. He also observed that such a narrow definition of retaliation might not be effective in deterring employers from retaliating. Moreover, he pointed out that the EEOC, the primary agency charged with Title VII enforcement, had adopted the broader interpretation of the retaliation provisions. It is interesting to note that despite the EEOC's long-standing interpretation, the Solicitor General argued for a different, narrower construction on behalf of the United States.

The Court determined that the proper standard for determining injury under the retaliation provision is an objective, "reasonable person" standard. This standard requires that a plaintiff demonstrate the employer's conduct would have prohibited a reasonable person from pursuing or participating in a Title VII action. Applying this standard to the facts of the case, the Court found that both reassignment to a more physically demanding job and suspension without pay constituted prohibited retaliatory acts.

Ultimately, the Court suggested that the "scope of the retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." Thus, even an action occurring outside the workplace could constitute improper retaliation if the effect of such an action would be to dissuade a reasonable employee from pursuing a Title VII claim.

Justice Alito, concurring, agreed with the result, but disagreed as to the standard announced by the Court. He was persuaded that the proper standard under which to judge a retaliation claim is the standard applied to a discrimination claim under Title VII. He thought the facts of this case satisfied that narrow standard. Justice Alito, however, questioned the effect the Court's decision may have upon the conduct of both employers and employees and argued that the decision could lead to "logically . . . perverse results."

School districts as employers should remain cautious about the potential for retaliation claims under Title VII. The Court's decision in *Burlington Northern* has expanded the retaliation provisions of federal employment discrimination law to the widest scope previously adopted by any court. Retaliation claims are already frequently a part of employment discrimination claims. In the early 1990's, about 15% of all discrimination charges filed with the EEOC alleged retaliation. By 2005, that percentage had almost doubled to nearly 30%. Approximately one in three EEOC complaints now alleges retaliation, either in addition to some underlying discrimination or independent of it. School district policies, procedures and training, therefore, should specifically address how to avoid conduct that may be perceived as retaliatory.

2. Contextual Evidence of Discrimination

In *Ash v. Tyson Foods, Inc.*, the Supreme Court, in a *per curiam* opinion, reemphasized that lower courts need to allow juries to evaluate carefully possible evidence of discrimination. The Court held, for example, that evidence that a plant manager sometimes referred to certain employees as "boy" was potentially probative of discriminatory animus. Further, the Court held that an employee's allegedly superior qualifications for a position could show that an employer's proffered reasons for denying a promotion were pretextual.

Ash involved two African–American employees who brought suit under 42 U.S.C. § 1981 and Title VII after their employer allegedly chose two less-qualified white males for promotion over them. At the conclusion of the trial, the jury found for the two petitioners and awarded compensatory and punitive damages. However, the court subsequently ordered a new trial in light of requests from the defendant employer. In affirming the lower court's decision to order a new trial, the Eleventh Circuit found that while the evidence presented by one of the employees was "insufficient to show pretext," and thus inadequate to show unlawful discrimination, the other employee had presented enough proof to submit the case to the jury.

The Supreme Court vacated the Eleventh Circuit's decision, finding two critical errors. First, the court of appeals had ruled that the defendant's plant manager's occasional use of the word "boy" to refer to the African–American petitioners was not enough alone–in any circumstance–to establish discrimination. The court had reasoned that "modifiers or qualifications" were necessary to constitute discrimination. The Supreme Court disagreed, however, recognizing that "the term [boy], standing alone, is [not] always benign." Additionally, the Court ruled that determination of the speaker's meaning is a factual question necessarily involved in this type of Title VII inquiry and

accordingly, evaluating the probative value of such evidence is an appropriate question for a jury.

Second, the Court held that the Eleventh Circuit had articulated the wrong "standard for determining whether the asserted non-discriminatory reasons for [defendant's] hiring decisions were pretextual." The Eleventh Circuit had ruled that evidence of superior qualifications establishes pretext in hiring decisions "only when the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." The Supreme Court considered this standard "unhelpful" and "imprecise" and again found the issue of pretext to be a factual one for the jury.

The Court also granted *certiorari* and vacated the Eleventh Circuit's judgment in *Higgins v. Tyson Foods, Inc.*, in light of the decision in *Ash*. Because *Higgins* involved some of the same issues as *Ash*, the Eleventh Circuit must apply the Supreme Court's analysis in *Ash* and more carefully consider words that could convey racial animus and pretext in hiring and promotion decisions.

Ash provides a reminder that employee speech, particularly that of supervisory personnel, can be considered evidence of unlawful discriminatory purpose. School districts should have clear policies prohibiting discriminatory conduct and train employees on avoiding inappropriate remarks. Furthermore, educators should pay special attention when making hiring and promotion decisions to ensure that qualifications are carefully considered. In addition, when a school district passes over a candidate who could be perceived to have better qualifications than a person of a different race, ethnicity or gender who is hired and/or promoted, educators must base the decision on clearly non-racial grounds and should document the legitimate non-racial and non-gender related reasons for the decision.

3. The Definition of "Employer" under Title VII

Title VII applies to employers having "fifteen or more employees." Questions have consistently arisen about this numerical qualification in the statutory definition of employer and whether it "affect[s] federal-court subject-matter jurisdiction or, instead, delineate[s] a substantive ingredient of a Title VII claim for relief." The Supreme Court's 8–0 decision in *Arbaugh v. Y & H Corporation* resolves this issue.

In *Arbaugh,* a female employee brought a Title VII action alleging sexual harassment by her employer. A jury found for the employee and awarded her damages of $40,000. Two weeks after the conclusion of the trial, the defendant employer moved to dismiss the action for lack of federal subject-matter jurisdiction, asserting for the first time that because the employer had fewer than 15 employees, Title VII did not confer jurisdiction on federal courts. Registering concern that granting the motion to dismiss was "unfair and a waste of judicial resources," the trial court nonetheless held that the 15–employee requirement was jurisdictional and belatedly dismissed the Title VII claims.

On appeal, the Fifth Circuit upheld the trial court's dismissal, relying on its prior decisions holding that the 15–employee requirement was jurisdictional. The decision highlighted an already existing split among the circuit courts

on this matter, with some courts of appeals, such as the Fifth and Sixth Circuits, holding that the employee-numerosity requirement is jurisdictional, and other circuits, such as the Second and Third Circuits, finding that the requirement is an element of a Title VII claim. The Supreme Court granted *certiorari* to resolve this disagreement among the lower courts.

The Court, in an opinion written by Justice Ginsburg, categorically rejected the characterization of the 15–employee requirement as jurisdictional. According to the Court, subject-matter jurisdiction can never be waived, and federal courts are required to ensure that jurisdiction exists, *sua sponte*, if necessary. Therefore, because Title VII contains no direction for courts to determine the number of employees of a defendant employer prior to hearing a Title VII case, the requirement should not be considered jurisdictional. Rather, numerosity was one of the several substantive elements in the statute.

Trial judges may be authorized to review the evidence surrounding contested facts when subject-matter jurisdiction is at issue, but when an element of a claim for relief is in dispute, "the jury is the proper trier of contested facts." Defendants, therefore, were not entitled to raise such a claim after the close of the trial on the merits.

The Court concluded by explaining that, although Congress could make the 15–employee requirement jurisdictional, such a change would require a plain legislative statement. "But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character."

The impact of this ruling is most direct with respect to school district employers with fewer than 15 employees. Such employers need to raise this issue at the earliest opportunity as a substantive defense to any Title VII claim. Although Congress could change the statutory requirement of 15 employees to a jurisdictional requirement–and although state anti-discrimination laws may have different, or no, numerosity prerequisites–at the present time, employing 15 people is clearly a substantive requirement for Title VII.

B. Americans with Disabilities Act

The Court also decided a case involving the Americans with Disabilities Act ("ADA") that has implications for educators. The plaintiff in *United States v. Georgia,* a paraplegic inmate in the State of Georgia, brought suit against the government alleging multiple violations of Title II of the ADA. He claimed that he was confined to a cell that prevented him from turning around in his wheelchair, was unable to use the restroom facilities, was injured trying to use the non-accessible facilities, and also was denied any assistance from the prison staff in cleaning up waste that he had created as a result.

A unanimous Court, in an opinion by Justice Scalia, determined that the ADA abrogates state sovereign immunity when the conduct alleged would also violate the Fourteenth Amendment. Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by

any such entity," and defines "public entity" as "any state or local government and any department, agency, . . . or other instrumentality of a state."

Both the district court and then the Eleventh Circuit had held that sovereign immunity barred claims for money damages against the State under Title II of the ADA. The Supreme Court, on the other hand, pointed to Section 5 of the Fourteenth Amendment, which gives Congress authority to abrogate state sovereign immunity in private suits for money damages when the alleged conduct would violate the Fourteenth Amendment. The Court found that Congress acted within its Section 5 power when it established private enforcement provisions under Title II. The Court, however, reserved for the future a determination of what type of conduct could be sufficient to give rise to a suit under Title II against the State because the court below had not yet developed a sufficient factual record for the Court to review.

Because the ADA applies to all public entities, this decision is important in the educational arena. Although the conduct alleged by the plaintiff in *Georgia* was particularly offensive (he also made an Eighth Amendment cruel and unusual punishment claim), the Court did not determine the precise limits of actionable conduct under Title II. It is possible that claims could be made against a school district for conduct that is far less extreme. However, that question was left for another day. School districts should be aware of this possibility when managing their ADA compliance programs.

C. Employment Cases the Court Declined to Review

1. Title VII

The Supreme Court also denied review in numerous other cases involving Title VII. In such cases, the lower courts' rulings remain intact and constitute the governing law in each respective jurisdiction. Several of these cases are particularly significant to school districts:

- In *Cardenas-Garcia v. Texas Tech University*, the Fifth Circuit held that poor performance reviews and disciplinary investigations do not constitute adverse employment actions under Title VII.
- In *Lapides v. Board of Regents of University System of Georgia*, the Eleventh Circuit, in an unpublished decision, reviewed whether the doctrine of claim preclusion barred the plaintiff's case and held that a plaintiff may not split his causes of action to bring state law claims in one suit and federal law claims in another after receiving a right-to-sue letter from the EEOC.
- In *Ypsilanti Board of Education v. Mulbah*, the Sixth Circuit held that a local school board can sue or be sued for violations of Title VII. The court held that while a Michigan board of education may not be a legal entity with the capacity to be sued for state law violations, it still possessed the capacity to be sued under Title VII.
- In *Wilson v. Delta State University*, the Fifth Circuit held that because it disadvantages both sexes alike, paramour favoritism is not sex-based discrimination and, therefore, is not prohibited by Title VII.

2. Age Discrimination in Employment Act

While the Supreme Court decided no age discrimination cases this Term, the Court declined to review several that relate to public schools:

- In *Fiona Feng Chen v. Northwestern*, the Seventh Circuit held that a plaintiff has 300 days from the date of a challenged employment practice to bring an ADEA claim before the EEOC and is precluded from presenting evidence that occurred outside that 300 day period.
- In *Affrunti v. Long Island University*, the Second Circuit held that the ADEA's 300–day statutory time limitation to file an EEOC charge starts to run when the employee "has definite notice of the termination, not the date of actual discharge."
- In *Vines v. University of Louisiana at Monroe*, the Fifth Circuit found that a university's appeal was barred by collateral estoppel because the issues in the complaint fell within the relitigation exception of the Anti–Injunction Act, which permits a federal court to prevent state litigation of an issue already decided by the federal court.

IV. FREEDOM OF RELIGION

The Supreme Court decided one case this Term that involved the religion clauses of the First Amendment that has indirect implications for public education. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Court interpreted the Religious Freedom Restoration Act of 1993 ("RFRA"), which applies to school districts. The Court also denied *certiorari* in a number of other freedom of religion cases.

A. Religious Freedom Restoration Act

In *Gonzales,* the Court affirmed a district court's preliminary injunction preventing the government from enforcing the Controlled Substances Act ("CSA") where such enforcement violated the RFRA. This statute forbids the government from substantially burdening a person's or group's free exercise of religion unless it has a compelling governmental interest that it pursues through the least restrictive means.

Plaintiff, a Brazil-based Christian Spiritist sect named O Centro Espirita Uniao do Vegetal ("UDV"), with a small branch in the United States, centered its worship around the receipt of communion through *hoasca*, a "sacramental tea made from two plants unique to the Amazon region," one of which contains dimethlytryptamine ("DMT"), a hallucinogen listed in Schedule I of the CSA. In 1999, U.S. Customs inspectors seized an intercepted shipment of *hoasca* and threatened prosecution under the CSA. In response, UDV filed suit against the Attorney General and other federal law enforcement officials, seeking declaratory and injunctive relief. UDV claimed that this application of the CSA violated RFRA. The district court issued a preliminary injunction. The Tenth Circuit, sitting *en banc*–meaning that the case is reviewed by all of the appeals court's judges, rather than the usual three-judge panel–affirmed.

The Supreme Court also unanimously affirmed the lower court decisions. Writing for the Court, Chief Justice Roberts noted that the government had conceded that the application of the CSA here would substantially burden a sincere religious exercise. The district court had found that evidence of whether a ban on the use of DMT served a compelling interest–either of protecting the health and safety of UDV members or preventing diversion of DMT to the general population–did not weigh clearly in favor of

either party. To the Court, the government had argued that in seeking a preliminary injunction, UDV should have the burden of proof that the asserted governmental interests were not sufficiently compelling. However, the Court disagreed and instead held that the government bears the burden of proof as to its compelling interest.

The Court held that the government failed to meet that burden. The government had argued that permitting the use of *hoasca* would signal to the public that DMT was not a harmful substance and would open the door to additional judicial exemptions. The Court explained that under RFRA, it is insufficient for the government to provide broadly formulated statements about the general risks associated with the exercise of a particular religious rite. Rather, the government must give a specific explanation of its compelling interest in restricting the free exercise of religion by a person or group. The government's desire to apply a statute uniformly is also insufficient to trigger an exception to RFRA.

The Court also pointed out that Congress provided for the possibility of non-uniform application of the CSA when it included a clause permitting exemptions for uses of controlled substances consistent with public health and safety. For example, the CSA included an exception for peyote use among Native Americans, and Congress, in passing the RFRA, "plainly contemplate[d] that courts would recognize exceptions." Because the government had not demonstrated a compelling interest to justify the substantial burdening of the religious practices in question, the Court upheld the lower court's grant of a preliminary injunction.

This case is notable because it clarifies the type of proof that the government must present when it seeks to take any action that might burden the free exercise of religion. The RFRA applies to school districts and consequently, districts should pay attention to how it is interpreted. Specifically, this decision underscores the government's obligation under RFRA to present specific evidence of its compelling interest in taking any action that restricts the free exercise of religion.

B. Religion Cases the Court Declined to Review

This Term, in addition to deciding this RFRA case that is relevant to school districts, the Court also declined to hear some potentially significant religion cases. In each of these cases, the lower Court's rulings remain in effect in the relevant jurisdiction:

- In *American Jewish Congress v. Corporation for National & Community Service,* the District of Columbia Circuit reversed a summary judgment ruling finding the AmeriCorps program unconstitutional.
- In *Scalise v. Boy Scouts of America*, the Court of Appeals of Michigan held that school districts do not violate the Establishment Clause by allowing the Boy Scouts to use school facilities. The plaintiff had objected to the Boy Scouts' declaration of religious principles, claiming it entangled the district in the Boy Scouts' religious mission, and requested that the school district place a disclaimer on Boy Scouts' flyers at the school.
- In *Lambeth v. Board of Commissioners of Davidson County*, the Fourth Circuit held no Establishment Clause violation existed where the county

board authorized the inscription of "In God We Trust" on the facade of the county government center.

- In *Simpson v. Chesterfield County Board of Supervisors,* the Fourth Circuit held that neither nonsectarian invocations themselves nor a "clergy selection" policy limiting invocations to "a divinity that is consistent with the Judeo–Christian tradition" violated the Establishment Clause. Further, the court of appeals noted that the federal courts do not scrutinize legislative invocations as probingly as other religious activities.
- In *Bannon v. School District of Palm Beach County*, the Eleventh Circuit held that a school district's request that a student paint over her religious depiction painted as a mural on the school wall was not a constitutional violation because the wall constituted a non-public forum. Because the school district maintained editorial control over such expression, the school district could remove the mural so long its actions were reasonably related to legitimate pedagogical concerns.

V. VOTING RIGHTS

In the area of voting rights, the Supreme Court decided a single case with multiple fractured decisions this Term. The case involved the ability of states and other government bodies to redraw electoral districts. In *League of United Latin American Citizens v. Perry,* the Court reviewed a unique twist on the common practice of reevaluating and redrawing congressional district lines. The unusual aspect of the case was the decision of the Texas Legislature to reapportion for partisan purposes rather than based on new Census data.

In 2000, the Texas Legislature attempted to redraw its congressional district boundaries after the Census demonstrated demographic changes in the State's population. These efforts ultimately required judicial intervention because the respective parties in the Legislature could not come to an agreement on appropriate district lines. In 2003, when Republicans gained control of the State Legislature, they sought to redraw district lines again. Opponents of the new plan sought to invalidate it, alleging that it was not done to accommodate population changes, but purely to maintain Republican majority control of the Texas congressional delegation for the 2004 election cycle.

No majority of the Court agreed to a single test for analyzing the validity of such a mid-decade redistricting. However, a 5–4 majority of the Court, in an opinion by Justice Kennedy, upheld Texas' redistricting plan. While conceding that allegations of partisan gerrymandering under the Court's precedents could create a justiciable controversy, Justice Kennedy explained that Texas' redrawn Congressional map did not constitute an unconstitutionally partisan gerrymander.

In addition to resolving the constitutional challenge to the entire Texas plan, the Court also examined a challenge under Section 2 of the Voting Rights Act, which prohibits practices which dilute minority voting strength. The Section 2 issue focused on one particular district. Specifically, the plan reduced the Latino voting majority in District 23. Justice Kennedy, writing

for a completely different 5–4 majority, held that this aspect of the plan constituted impermissible voter dilution.

In this case, each of the nine Justices seemed to see the issues differently. Justice Stevens, with Justice Breyer, for example, concurred in part and dissented in part, agreeing with the Court's decision that the Latino district was invalid, but disagreeing that the overall plan was constitutional. Justice Souter, joined by Justice Ginsburg, also concurred and dissented in part to similar effect but on different grounds. Justice Souter would have supported the principle that partisan gerrymandering violates the Equal Protection Clause, and he argued for the use of symmetry as a test for determining when redistricting is unconstitutional. Chief Justice Roberts, joined by Justice Alito, concurred in the judgment, concurred in part of the decision, but also dissented in part. The Chief Justice disagreed with the conclusion that the changes relating to Latino voters violated the Voting Rights Act and instead would have upheld the plan in its entirety. Justice Scalia, joined by Justice Thomas and partly by the Chief Justice and Justice Alito, wrote separately, claiming that claims of political gerrymandering do not even present a justiciable case or controversy.

The constitutional limits on redistricting as well as the provisions of the Voting Rights Act analyzed in *Perry* apply to school districts with elected boards. When school districts reapportion, therefore, they need to be aware that the Voting Rights Act restricts measures that would dilute minority voting strength. With respect to partisan gerrymandering, while some Justices would give elected officials carte blanche, a majority of the Court believes that the Equal Protection Clause limits the extent to which a government body can reapportion to secure or entrench partisan advantage. It is not yet clear, however, what those limits are.

VI. CIVIL PROCEDURE

This Term, the Court also examined several cases involving civil procedure issues that may affect school districts involved in federal court litigation. Three stand out as being particularly relevant: One discusses a court's ability to enter a judgment as a matter of law, and two address removal and remand procedures.

A. Judgment as a Matter of Law

In *Unitherm Food Systems, Inc. v. Swift–Eckrich,* the Court interpreted the requirements of Rule 50 of the Federal Rules of Civil Procedure, governing judgments as a matter of law. Specifically, the Court held that a party must file a Rule 50(b) motion after the entry of judgment in order to challenge a jury verdict on this ground on appeal.

In *Unitherm*, the defendant had filed a motion for a judgment as a matter of law under Rule 50(a) before the jury handed down its verdict, but it failed to file a Rule 50(b) motion to renew that challenge after the jury's verdict and entry of judgment. The Federal Circuit nevertheless permitted the defendant to contest the sufficiency of the judgment on appeal because it had filed the Rule 50(a) motion.

The Supreme Court reversed. In a 7–2 decision, with a majority opinion written by Justice Thomas, the Court held that a party must file a Rule 50(b) motion after a judgment is entered in order to raise that issue on appeal.

Justice Stevens dissented, joined by Justice Kennedy, and argued that the Federal Rules of Civil Procedure favor preservation of a court's power to avoid unjust results. Therefore, the dissenters argued, a court of appeals should maintain the power to review the sufficiency of the evidence and order appropriate relief if necessary, regardless of whether the party challenging the decision followed the correct procedures in the court below.

This case stands as a stark reminder of the important consequences of procedural rules in litigation. In particular, if a school district is involved in a jury trial and argues that the plaintiffs have no legal basis for relief, even if the court denies a Rule 50(a) motion, the school district should file a Rule 50(b) motion after judgment to preserve the argument for appeal.

B. Removal and Remand

Another civil procedure case decided this Term addressed the issue of attorneys' fees in cases that have undergone removal (the process whereby a party may request that a case commenced in state court be heard by a federal court if the case could have been brought there originally) and remand (the process whereby a party may send a case from federal court back to state court if the federal court lacks jurisdiction). In *Martin v. Franklin Capital Corp.*, a unanimous Court upheld the Tenth Circuit and ruled, in an opinion authored by Chief Justice Roberts, that a court should not award attorneys' fees under § 1447(c) to a party successfully obtaining a remand when the removing party had an objectively reasonable basis for removal. However, the Court also noted that when the removing party fails to act based on grounds that are considered reasonable, it may be appropriate for the court to award attorneys' fees for the fees incurred by the party responding to the removal action. This case serves as a reminder that all decisions of legal strategy, including those that are purely procedural, must be made in good faith and must be based on reasonable grounds.

In *Lincoln Property Co. v. Roche*, another case dealing with removal and remand, a unanimous Court, in an opinion by Justice Ginsburg, reversed a Fourth Circuit decision and held that defendants may remove an action on the basis of diversity of citizenship (one of the ways of establishing federal court jurisdiction based on the states of residence of the various parties) if there is complete diversity between all named plaintiffs and all named defendants and no defendant is a citizen of the forum state. The Court also discussed the meaning of "real party to the controversy," which allows courts to disregard some parties for diversity purposes because they are improperly named in the complaint in an effort to create federal jurisdiction. The Court concluded that one of the defendants, Lincoln Property, was properly included in the case and therefore was a real party to the controversy.

Though these civil procedure cases do not immediately affect the substantive policies of school districts, they are significant to any district involved in litigation. When a case is brought against a school district, it should pay attention to these procedural guidelines when determining wheth-

er a case should be resolved in state or federal court. In keeping with the Court's holding in *Martin*, for example, a school district may remove a case brought against it in state court only if it has an objectively reasonable basis for removal. Additionally, the *Lincoln Property Co.* case highlights a possible jurisdictional defense to some lawsuits brought in federal court.

VII. FOURTH AMENDMENT

While the Supreme Court did not decide any Fourth Amendment cases that directly pertain to public schools, it did deny *certiorari* in two Fourth Amendment cases that may be relevant to educators and students. Both of these cases involved searches of cars on school grounds:

- In *Myers v. Indiana*, the Supreme Court of Indiana concluded that the use of drug detection dogs to sweep all of the vehicles in the high school parking lot without reasonable suspicion that any of the cars contained drugs was permissible under the Fourth Amendment and did not constitute an unreasonable search and seizure.
- In *Maine v. Patterson*, the Maine Supreme Court held that an unreasonable search and seizure under the Fourth Amendment occurred when a campus police officer "tapped on the window of a parked car on campus and requested that the driver roll down the window" because a reasonable person in the defendant's position would not have felt free to decline the request, but instead may have found such directions to constitute an order.

VIII. RACE–CONSCIOUS DECISION MAKING

Although the Supreme Court did not decide any cases this Term directly discussing race-conscious decision making, it did deny *certiorari* to two cases on this subject. One case involved a school district and is directly relevant to how school districts use race in assigning students to schools. The other case, though in the transportation context, is relevant to educators because it highlights the importance that courts place on direct statistical evidence of historical discrimination in some race-conscious decision making cases. Because the Court denied *certiorari* in both of these cases, the decisions of the circuit courts remain undisturbed as legal precedent in those jurisdictions:

- In December 2005, the Court denied *certiorari* (and, in July 2006, denied a motion for rehearing of the petition) in *Comfort v. Lynn School Committee*, in which the First Circuit *en banc* held that a voluntary race-conscious student assignment plan enacted by the school district was constitutional and did not violate the Equal Protection Clause. In so concluding, the court of appeals held that school district had a compelling interest in obtaining educational benefits of racially diverse student body and that the district's plan was narrowly tailored to meet those interests. Interestingly, the Supreme Court denied *certiorari* in *Comfort*, but later decided to review two other cases dealing with the similar issues. These cases are examined in the final section of this article.
- The Court also denied *certiorari* in *Western States Paving Co. v. Washington State Dep't of Transportation*, a Ninth Circuit case exploring the constitutionality of a federally-funded transportation contracting program administered by the State of Washington. The case was initi-

ated by a white-owned contracting firm that lost its subcontracting bid under the State's program in favor of a higher bid from a minority-owned company. The Ninth Circuit affirmed the facial validity of the program, but held that the statistical evidence relied upon by the State did not meet constitutional standards. The court held that discrimination must be evident in the State's transportation industry to survive a constitutional challenge and found that the State had not provided evidence that minorities within Washington's transportation industry suffered from discrimination.

IX. PREVIEW OF 2006–2007 TERM

The 2006–2007 Term, which begins on October 2, 2006, promises to hold many developments of interest to public schools. Two of the most watched cases will be heard in tandem and will examine the voluntary use of race as a factor in student assignment policies adopted by two different school districts. As usual, the Court will also hear cases on topics such as employment law, the First Amendment and school finance that may have significant outcomes for school districts as well.

A. Student Assignment

In the three years following the Court's decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*, which addressed race-conscious admissions policies at the University of Michigan, the lower federal courts have gradually come to a consensus about race-conscious decision making in the K–12 context. The First, Sixth, and Ninth Circuits upheld the constitutionality of three separate voluntary race-conscious student assignment plans, finding three different plans to be narrowly tailored to compelling interests, including providing the benefit of diverse school enrollments and alleviating the harms of racial isolation. As noted above, the Supreme Court declined *certiorari* in the First Circuit case. Subsequently, however, the Court did grant *certiorari* in the other two cases, *Parents Involved in Community Schools v. Seattle School District ("Seattle")* and *Meredith v. Jefferson County Board of Education ("Jefferson County"),* from the Ninth Circuit and the Sixth Circuit respectively.

In *Seattle*, the Ninth Circuit considered "whether the use of an integration tiebreaker in the open choice, noncompetitive, public high school assignment plan" crafted by the Seattle School District violated the Equal Protection Clause because it involved the consideration of race. On review *en banc*, the full Ninth Circuit affirmed the district court and found the district's plan constitutional.

The Ninth Circuit relied upon *Grutter* to hold that the District's justifications for the plan, including seeking the educational and social benefits associated with racial diversity and preventing the harms of racially isolated schools, were compelling state interests. The Ninth Circuit further held that the plan was narrowly tailored to meet these compelling interests. Notably, conservative Ninth Circuit Judge Alex Kozinski concurred in the majority opinion, stating that "a plan that gives the American melting pot a healthy

stir without benefiting or burdening any particular group'' should be left to the discretion of local elected officials.

In *Jefferson County,* the school district had operated under a federal court-ordered desegregation decree from 1975 to 2000. After it was released from the decree, the school district enacted a managed choice program designed to maintain its racially integrated school system. In making school assignment determinations, the school district weighed, among other factors, the students' place of residence, the schools' capacity, and the popularity of the programs. In making assignments, the District also considered race as a factor and required each school to maintain black student enrollment between 15 percent and 50 percent. The complex student assignment program also included a transfer plan designed to keep school enrollments within this broad range.

The district court held that the District's use of race in this program was narrowly tailored to serve compelling interests. The court found that (1) the school district's racial guidelines did not constitute a quota; (2) the individualized, holistic review required by *Grutter* was not applicable in the K–12 context, and the plan paralleled the ''plus'' system approved by the Supreme Court; (3) students were not unduly harmed by the process; and (4) the use of race-neutral strategies throughout the plan reflected a good faith effort to consider and use race-neutral alternatives. The Sixth Circuit panel essentially adopted the district court opinion in its entirety and refused to rehear the case *en banc*.

These two cases likely will be the most closely watched cases decided next Term in the field of public education. Though the Supreme Court has previously analyzed the use of race in a variety of educational contexts and repeatedly indicated support for voluntary desegregation measures, the Court has never decided a case that directly addressed the constitutionality of a voluntarily adopted school assignment program designed to promote racial and ethnic diversity through race-conscious means.

The decisions in these cases are likely to determine the extent to which such race-conscious student assignment policies will continue to be available to school districts in attempting to address critical educational problems, including the achievement gap between certain demographic groups and growing *de facto* segregation throughout the Nation.

B. Title VII

The Supreme Court also granted *certiorari* in *Ledbetter v. Goodyear Tire and Rubber Co.* and will examine whether a plaintiff may bring a Title VII action alleging illegal pay discrimination when the employee received pay during a statutory limitations period but the allegedly discriminatory conduct occurred prior to the limitations period. Title VII requires timely filing of a complaint alleging unlawful employment practices. Because the relevant statutory filing requirement in this case is 180 days ''after the alleged unlawful employment practice occurred,'' only practices that occur at most 180 days before the filing can form the basis of liability. In *Ledbetter*, while one act of pay discrimination, an annual salary review, did occur within the

180–day statutory period, petitioner wishes to include in the claim evidence of earlier discrimination that occurred prior to the 180–day period.

Although this case presents a fairly technical issue of statutory construction, the effect of the decision could be significant to school districts. If the Supreme Court decides to allow pre-statutory period evidence in pay discrimination claims, potential liability could increase significantly in certain circumstances. On the other hand, if the Court decides to affirm the Eleventh Circuit's holding that pre-statutory period evidence does not constitute part of the Title VII claim, liability will be limited to the acts occurring within the 180 days.

C. First Amendment

The Court granted *certiorari* in two consolidated First Amendment cases that came from the Supreme Court of Washington–*Washington v. Washington Educational Association* and *Davenport v. Washington Educational Association*. These cases challenge a state law governing a labor union's ability to use agency shop fees, which are the fees paid by employees who are not union members. The Washington law creates an ''opt-in'' procedure whereby non-union members have to authorize the use of their dues for political purposes.

The labor unions brought suit claiming that the WEA violated the Washington law by not soliciting authorization from non-union members and that the law generally violates their First Amendment rights. Under the First Amendment, a union is allowed to use a members' dues for purposes other than collective bargaining provided that the money does not come from employees who may object to the causes being supported. Thus, ''opt-out'' rules, making it the employee's burden to voice his or her objection to using dues for political purposes, have been upheld by the Supreme Court. This line of cases seeks to balance the free speech interests of non-union members' with the free association rights of union members.

The trial court found that Washington's law requiring ''opt-in'' procedures was constitutional and that the WEA had violated the requirement by failing to solicit non-member consent prior to using union dues for political purposes. The court of appeals reversed and held that the statute was unconstitutional because the ''opt-in'' procedure unduly burdened labor unions and therefore violated the unions' First Amendment rights. The Washington Supreme Court affirmed.

The Supreme Court, in hearing this case next Term, will review the issue of whether an ''opt-in'' requirement, like the one established in Washington, is constitutional. The outcome of this case may have implications both for teachers who pay union dues but are not members of their designated union and for teachers' unions themselves.

D. School Finance

The Court also granted *certiorari* in *Zuni Public School District No. 89 v. Dept. of Education*, and will review the issue of whether a state secretary of education can factor in federal aid to school districts when it makes statewide distributions of education funds.

Generally, states are prohibited from reducing the state aid they provide to school districts if the school districts receive Impact Aid. Impact Aid is a federal program in which the United States gives money to school districts experiencing financial burdens resulting from a difficulty raising local revenues because local property is tax exempt because it is owned by or acquired by the federal government. According to the federal law, the Department of Education may certify that the state equalizes its public school expenditures among all of its school districts and, if it does so, the state may then factor in the receipt of federal Impact Aid when it makes payments to school districts.

In this case, two New Mexico school districts, Zuni Public School District No. 89 and Gallup–McKinley Public School District No. 1, brought a lawsuit against the Department of Education after it certified that the State's finance program equalized public education expenditures among all school districts and that, therefore, the State could permissibly offset its distribution of money to districts by factoring in a district's receipt of federal Impact Aid funds. The Tenth Circuit panel denied plaintiffs' petition to review the Department's decision, upholding both the Department's construction of the equalization statute and New Mexico's aid calculation. The court of appeals subsequently vacated its decision and issued an *en banc* decision, this time splitting six to six. The effect of this tie was again to leave the State's calculation intact. The Supreme Court will review the case to determine whether New Mexico's allocation of funding was consistent with the federal laws setting forth the requirements for equalization.

Though it may be a narrow decision that applies to a small percentage of school districts, the Supreme Court's decision in this case may have remarkable financial significance for the funding of school districts with significant amounts of federally-owned property or land that may be purchased by the federal government in the future. If states are permitted to offset their funding to districts already receiving Impact Aid so long as their statewide funding formulas are equalized, some school districts stand to lose large amounts of funding.

E. Students with Disabilities

While at this point the Court has not granted *certiorari* in any special education cases, a petition for *certiorari* in one such case is currently pending before the Court. The Court has not yet determined whether it will review *Winkelman v. Parma City School District*. In that case, the Sixth Circuit relied upon its recent decision in *Cavanaugh v. Cardinal Local School District*, holding that IDEA does not allow non-attorney parents to represent their disabled child in federal court. Diverging from the First Circuit, the court also held that parents cannot pursue their own substantive IDEA claim *pro se* because IDEA grants substantive rights to disabled children, not their parents. As the Sixth Circuit and the First Circuit have split on this question, it is possible that the Supreme Court will grant the parents' petition for *certiorari*. The Court has indicated that it is seriously considering whether to grant the *certiorari* petition by inviting the Solicitor General to file a brief expressing the views of the United States.

APPENDIX: CASES AND OTHER AUTHORITIES DISCUSSED IN THIS SUMMARY

Cases:

Other Authorities: