COMMENTARY

THE 2006–2007 TERM OF THE UNITED STATES SUPREME COURT AND ITS IMPACT ON PUBLIC SCHOOLS*

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* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 223 Ed.Law Rep. [481] (Nov. 15, 2007).

1. Hogan & Hartson LLP has published an annual review of the Supreme Court decisions affecting public education since 1987. This article is intended for general informational purposes only, and does not constitute legal advice. An attorney should be consulted regarding the specific facts and circumstances associated with any legal matter or case.

INTRODUCTION

The 2006–2007 Term of the United States Supreme Court included an unusually large number of high-profile rulings directly involving public school districts. These decisions included a number of bitterly divided 5–4 decisions addressing issues ranging from race-conscious student assignment measures to the appropriate limits on student speech at school-sponsored events. In these cases and others with more indirect implications for school districts, a new, more conservative majority emerged on the Court, but this majority produced varying results for school districts, sometimes upholding school authority and other times limiting the discretion of professional educators and elected school boards.

In addition to reviewing the Court's most significant decisions this Term, this annual summary will look forward to some important cases on the Court's docket for the 2006–2007 Term. The Court has already granted *certiorari* in several important education cases that will be decided next Term.

During the 2006–2007 Term, the Supreme Court decided 68 cases by signed opinions and denied review of thousands of others. Overall, the Term was one in which a more conservative majority began to assert itself. On the other hand, the Court's five most conservative justices also revealed significant divisions among themselves, often disagreeing on the rationale for or a scope of a decision even when they agreed upon the outcome. Generally, Justices Thomas and Scalia seemed to favor more bold moves to overturn precedents with which they disagreed, while Chief Justice Roberts and Justice Alito appeared to follow a more incremental approach. Justice Kennedy, while often voting with these four, took an even more cautious approach to jurisprudential shifts.

While Chief Justice Roberts has often spoken of his desire to build consensus on the Court, many of this Term's most important cases were decided by narrow margins and over bitter dissents. Indeed, 35% of the Court's cases were decided by 5–4 votes, up from only 14% during the 2005–2006 Term. Many of these votes were split along ideological lines. The newest justices, Chief Justice Roberts and Justice Alito, more often than not were in the majority in these contested cases. As a result of its two new members, the Court's center of gravity has shifted to the right.

The fulcrum of the Court this Term, however, appeared to be neither of its newest members, but rather Justice Kennedy. With the retirement of

Justice Sandra Day O'Connor, it was Justice Kennedy this Term who most often cast the swing vote in narrowly decided decisions. For example, he wrote a key concurrence in the Court's 5–4 decision limiting school districts' ability to use race to promote integration. He was in the majority in every education law case and dissented in only two cases the entire Term. Justice Kennedy also was in the majority in every one of the Court's 24 decisions decided by a 5–4 margin during the 2006–2007 Term and was in the majority in nine of 12 such decisions during the previous Term, which was the first for the two new justices.

In the marquee case this Term, the Supreme Court revisited the implications of its decision more than half a century ago in *Brown v. Board of Education*, with four Justices providing a remarkable reinterpretation of it, four passionately defending its legacy, and Justice Kennedy attempting to find a middle ground that ultimately determined the outcome of the case. In *Parents Involved in Community Schools v. Seattle School District No. 1*,[2] the Court found student assignment plans in Seattle, Washington and Jefferson County, Kentucky considered race unconstitutionally in a manner that was not narrowly tailored to a compelling governmental interest. Four justices, including Chief Justice Roberts and Justice Alito, also suggested that the goal of promoting racially integrated schools might itself be constitutionally suspect under their revisionist view of *Brown* as a decision solely about racial classification rather than segregated schools and unequal educational opportunities. Although this was not widely reported in the media, Justice Kennedy firmly rejected this reinterpretation of the Court's precedents, but nevertheless joined those four justices in finding the plans unconstitutional because, in his view, although their goals were laudable, the means that the plans employed to promote integrated schools violated the Equal Protection Clause. Four other justices vehemently dissented, with Justice Breyer, in particular, reading a passionate statement about the case from the bench when the decision was announced on the last day of the Term.

The Supreme Court's conservative wing also constituted a 5–4 majority in *Morse v. Frederick*, but in this case the Court upheld school district authority against constitutional challenge. The Court recognized the authority of school districts to punish student speech at school-sponsored activities if that speech can be interpreted as celebrating or promoting illegal drug use. In so doing, the High Court also swept aside a troubling Ninth Circuit ruling that had found a school principal personally liable for disciplining a student who engaged in expressive activity promoting drug use.

After two decades without a major special education case, the Court decided two during its 2005–2006 Term and continued that new trend, deciding one more last Term. In *Winkelman v. Parma City School District*, the Court held that parents themselves have enforceable rights under the Individuals with Disabilities Education Act ("IDEA"). As a result, parents may represent themselves in federal court actions without needing to retain legal counsel.

2. Hogan & Hartson was co-counsel for the Seattle School District in the Supreme Court.

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 *Ledbetter v. Goodyear Tire & Rubber Co.,* and *Davenport et al. v. Washington Education Association.* In *Ledbetter,* the same 5–4 majority that decided *Morse* and *Seattle* required employees to file a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the time their pay is set in order to preserve their right to bring a discriminatory pay claim under Title VII. This case again provoked a passionate dissent, this one authored by Justice Ginsburg. She also read a statement from the bench urging Congress to overturn the Court's decision. In contrast to this sharply divided decision, a unanimous Court in *Davenport* upheld the authority of states to require labor unions to have non-members authorize any use of agency fees for political purposes.

This Term, the Supreme 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 two employment cases involving the questions of whether an employer, such as a school district, may be held liable for unlawful discrimination on the basis of a subordinate employee's discriminatory animus. Indeed, the Court decided not to review a couple of cases raising this issue, despite the fact that a settlement deprived it of the opportunity to decide the question in a case that it had previously set for argument.

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 2007–2008 Term, which begins in October 2007. One of these cases involves the question of whether IDEA requires a school district to reimburse parents of a child with disabilities for private school tuition when the child has not previously attended a public school. This case, *Board of Education of the City School District of New York v. Tom F*, has been fully briefed and will be argued the first day of the Term.[3] The Court also has agreed to decide *Mendelsohn v. Sprint/United Management Co.,* which involves a question of the type of evidence that may be considered relevant to prove discriminatory intent under the Age Discrimination in Employment Act ("ADEA"). In another employment case, *Holowecki v. Federal Express Corp.,* the Court will decide what is necessary to file effectively the charge with the Equal Employment Opportunity Commission ("EEOC") that is a statutory prerequisite to instituting an ADEA action in federal court.

3. Hogan & Hartson wrote an amicus brief in support of the school district on behalf of the National School Boards Association.

This review of the Supreme Court's 2006–2007 Term is divided by subject matter, as follows: (I) Voluntary Race Conscious Measures to Promote Integrated Schools; (II) Freedom of Speech; (III) Special Education; (IV) Labor and Employment and (V) School Finance. Full citations to the cases and statutes discussed appear in the appendix at the end of this summary.

I. VOLUNTARY RACE-CONSCIOUS MEASURES TO PROMOTE INTEGRATED SCHOOLS

In the two most highly watched cases of the Term, a sharply divided Supreme Court issued a single set of five clashing opinions that revealed strikingly different views of the meaning of the Fourteenth Amendment's Equal Protection Clause and the legacy of the Court's 1954 decision in *Brown v. Board of Education.* The immediate impact of the Court's 5–4 decision was to find unconstitutional two voluntary student assignment plans designed to promote racially integrated public schools. Nevertheless, five justices indicated their support for the importance of racially integrated public schools and for the principle that some race-conscious means may be used to achieve diverse school enrollments.

On June 28, 2007, the last day of the 2006–2007 Term, the Court announced its decision in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*. The majority opinion, written by Chief Justice Roberts, reversed decisions of the Ninth Circuit and the Sixth Circuit that had upheld both plans against challenges under the Fourteenth Amendment. The Court thereby limited to some degree the measures that school districts can employ to promote racially integrated schools.

While the particular plans at issue were found unconstitutional, however, five justices also expressed their belief that both preventing racial isolation and promoting the educational benefits of diverse student enrollments are compelling governmental interests that can justify the use of some race-conscious measures. Justice Kennedy, who joined the majority in finding the two plans before the Court to be unconstitutional, wrote a separate concurrence to emphasize his belief that these interests are compelling and also that there are some race-conscious measures to promote them that may not even be subject to strict scrutiny. Likewise, the dissenting opinion by Justice Breyer, which was joined by three other Justices, also makes clear that these four other Justices would endorse not only the measures supported by Justice Kennedy, but also the plans used by Seattle and Jefferson County themselves.

A. Background

At issue in these cases were two student assignment plans designed to promote racial diversity. Under Seattle's plan, which was the most recent of a long series of voluntary integration measures adopted by the district since the 1970s, entering ninth grade students were asked to rank their top three choices among the ten public high schools. When a school was oversubscribed, the district applied a series of what it called "tiebreakers" to determine assignments. The first such tiebreaker gave preference to students whose siblings were currently enrolled at that school. The second tiebreaker

looked at proximity of the student's residence to the chosen school, unless the school's racial composition in terms of white and non-white students differed from the district average by more than 15 percentage points. In that case, a racial tiebreaker was used to promote diversity by assigning students of the under-represented group before students from the other racial group.

The Jefferson County plan was put in place after that district was found unitary and released from federal court jurisdiction. The plan sought to maintain the racially integrated schools that the district had achieved through three decades of court supervision. The Jefferson County plan affected assignments at all levels. Each middle and high school student in the district was assigned to a "resides" school based on the student's residence. Elementary schools were grouped into clusters, and elementary school students were assigned to either their "resides" school or another cluster school. Attendance boundaries for "resides" schools were drawn, so far as practicable, to promote diverse enrollments. Students could request a transfer to any Jefferson County school. Transfer requests were considered based on available space, school or program requirements and the district's student assignment guidelines, which sought black student enrollments between 15% and 50% at all district schools.

Lower courts concluded both programs met constitutional requirements. In 2005, the Ninth Circuit *en banc*, applying strict scrutiny, upheld the constitutionality of Seattle's plan against a challenge by a Seattle parents organization. The Ninth Circuit, relying on the Supreme Court's 2003 decision in *Grutter v. Bollinger,* upholding a race-conscious admissions policy at the University of Michigan, found that seeking the social and educational benefits of racial and ethnic diversity and combating racial isolation were compelling interests in the K–12 setting as well and further concluded that the method used by Seattle was narrowly tailored to serve those compelling interests.

The Sixth Circuit also upheld the Jefferson County plan against a similar challenge by a white elementary school student who was denied a transfer request. The Sixth Circuit endorsed the district court's holding that promoting diversity and preventing racial isolation were compelling interests and that, in most respects, the Jefferson County plan was narrowly tailored. The district court also had found that one aspect of the plan that allocated seats in a unique magnet program according to the racial guidelines was not.

The plaintiffs in both cases petitioned the Supreme Court for *certiorari*. While the Court had denied *certiorari* in a case from the First Circuit raising somewhat similar issues at the beginning of its 2005–2006 Term, later in the same Term, after Justice Alito was confirmed and replaced retired Justice Sandra Day O'Connor, the Court agreed to hear these two cases.

After extensive briefing, including the submission of literally dozens of amicus briefs, oral argument on December 4, 2006, and seven months of deliberations, the Court reversed the decisions of the Sixth and Ninth Circuits and remanded both cases for further proceedings. The Chief Justice wrote the majority opinion, which was joined in full by Justices Scalia, Thomas, and Alito. Justice Kennedy joined in the result, but did not join in key parts of the majority opinion and wrote a concurring opinion stating that

the school districts had demonstrated compelling interests, although the particular plans at issue in his view had not been shown to be narrowly tailored. Justice Thomas wrote a separate concurrence. Justice Breyer also wrote an impassioned dissent that was joined by Justices Stevens, Souter, and Ginsburg. Justice Stevens also dissented separately.

B. Majority Opinion

The Chief Justice identified the legal question presented by these cases as "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments."

Before reaching that question, however, the Court first considered whether it even had jurisdiction to hear the case. The majority rejected Seattle's arguments that the plaintiff organization lacked standing because none of its current members could claim an imminent injury (since Seattle had ceased using the plan and those students previously affected by it had graduated). The Court held that the mere possibility the plaintiffs' elementary and middle school children might be denied admission to high schools of their choice based on race in the future and the possibility they might be forced to compete in a system that used race as deciding factor constituted cognizable injuries. The Court also found that Seattle's voluntary cessation of using the plan did not moot the case. Even though jurisdiction had not been challenged in *Jefferson County*, the Court also found that the plaintiff there had standing because her son might again be subject to racial guidelines upon enrollment in middle school and because the plaintiff sought damages.

The majority applied strict scrutiny in considering the central issue of whether the student assignment plans in Seattle and Jefferson County violated the Equal Protection Clause. Strict scrutiny requires a court to determine whether the government has a compelling interest and whether any race-conscious means chosen to achieve that interest are narrowly tailored to that end.

The Chief Justice began by stating that the Supreme Court has previously recognized only two interests sufficiently compelling to warrant the use of racial classifications in the education context, and he concluded that neither of these interests applied in these cases. First, the compelling interest in remedying the effects of past intentional discrimination was not at stake in either case, because Seattle public schools were never *de jure* segregated and Jefferson County public schools were declared unitary in 2000. Second, the majority also found that neither school district had showed that it shared precisely the same compelling interest in diversity recognized in the higher education context in the Court's 2003 decision in *Grutter v. Bollinger*. Finally, the majority also noted that it did not have to decide whether the school districts had some other compelling educational interest, because neither plan was narrowly tailored to any such interest.

The majority thus concluded "the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from diversity." Chief Justice Roberts's majority opinion first cited the limited impact that these plans had on student

assignment in both districts as evidence that racial classifications were unnecessary. He also criticized the districts' failure to demonstrate that they had seriously considered race-neutral alternatives. Specifically, the majority found that Seattle had rejected alternative assignments after only cursory consideration, and that Jefferson County presented no evidence that it had considered race-neutral plans at all.

C. Plurality Opinion

In a part of his opinion not joined by Justice Kennedy, Chief Justice Roberts went further and suggested that in his view (and that of three other Justices as well) the school districts had not advanced a compelling interest. This part of the Chief Justice's opinion, which has the support of only four justices, does not establish the law on this point. This four-justice plurality suggested that concerns about racial imbalance or racial isolation in schools would not be an acceptable justification even for narrowly-tailored race-conscious student assignment policies: "We have many times over reaffirmed that '[r]acial balance is not to be achieved for its own sake.' "

The Chief Justice also addressed several of the arguments advanced by Justice Breyer in dissent. The plurality dismissed the precedential value of several cases cited by Justice Breyer, including the Court's landmark 1971 decision on court-ordered desegregation remedies, *Swann v. Charlotte–Mecklenburg Board of Education*. In upholding the federal court's authority to order the desegregation remedies at issue in *Swann*, the Court had relied on the assumption that school districts themselves had the power to promote racially integrated schools as a matter of educational policy. The Chief Justice also rejected Justice Breyer's reliance on the Court's more recent decision in *Grutter*, arguing that *Grutter* cannot support a finding of compelling interest in these cases because that opinion recognized racial balancing as unconstitutional and required a broader conception of diversity.

D. Justice Kennedy's Concurring Opinion

In a concurring opinion that may ultimately prove the most significant of the five opinions issued in these cases, Justice Kennedy staked out a middle ground between the Chief Justice and Justice Breyer. Justice Kennedy noted that the school district's laudable goals "should remind us that our highest aspirations are yet unfulfilled," but he nevertheless rejected the way in which these school districts had pursued their laudable goals by making decisions about individual students based on their race.

Justice Kennedy sharply disagreed with the Chief Justice on the question of compelling interest, finding that "[a] compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue." He thus called the plurality opinion "profoundly mistaken" to the extent that it "suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools." Justice Kennedy also recognized a separate compelling interest in promoting the educational benefits of diversity at the K–12 level, an interest analogous, but not identical, to the educational interest in diversity recognized at the higher education level in *Grutter.* While recognizing a color-blind Constitution as a worthy aspiration, he cautioned

"[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle." The four dissenting justices also agreed that such compelling interests exist in the elementary and secondary education, making it a view shared by a majority of the current members of the Court.

Justice Kennedy's concurring opinion also offered further insights into what particular kinds of programs he might find permissible under the Fourteenth Amendment. In fact, Justice Kennedy specifically identified five categories of race-conscious activity that he believes are not constitutionally problematic: (1) selecting school sites; (2) drawing attendance boundaries; (3) allocating programs and resources; (4) recruiting students and faculty in a targeted manner; and (5) tracking and reporting data. According to Justice Kennedy, undertaking these types of measures in a race-conscious manner likely would not even trigger strict scrutiny under the Equal Protection Clause because they do not entail decisions about individual students based upon their racial classification. In addition, he suggested that other policies that make such decisions about the assignments of individual students might themselves survive strict scrutiny if they satisfied the type of analysis outlined by the Court in *Grutter*, albeit adapted to the K–12 context.

Seattle and Jefferson County had argued that their plans met such criteria, but Justice Kennedy joined the majority in rejecting this argument. He identified some features of both plans that he found particularly problematic. For example, he was troubled by what he saw as a lack of transparency in the Jefferson County plan. He explained that to meet its burden of justifying its use of racial classifications, the school district "must establish, in detail, how decisions based on an individual student's race are made in a challenged government program. The Jefferson County Board of Education failed to meet this threshold mandate." Justice Kennedy also faulted the district for offering only "broad and imprecise" explanations that failed to offer insight into questions such as who makes decision, what oversight is provided, and how choices are made between similarly situated students. Justice Kennedy found that without this information the Court could not determine whether the district's use of racial classifications was narrowly tailored or "far-reaching, inconsistent, and *ad hoc*."

In Justice Kennedy's view, the fatal flaw in the Seattle plan was that the district failed to explain why the binary "white"/"non-white" classification employed by the plan was appropriate, given the district's racial demographics and the fact that less than half of Seattle's students are white. Justice Kennedy considered that classification a poor fit. He stated that "[f]ar from being narrowly tailored, this system threatens to defeat its own ends, and the school district has provided no convincing explanation for its design." Justice Kennedy's narrow tailoring analysis also seemed to leave open the possibility that either plan might have been found permissible had the district satisfied its burden to demonstrate that its chosen method was necessary as a last resort.

Like the plurality, Justice Kennedy rejected several aspects of Justice Breyer's argument in ways that highlight the searching type of narrow tailoring analysis that he favors. Claiming that the dissent's version of strict scrutiny looked more like rational-basis review, he argued that there would be no principled rule to limit the use of race under the rationale provided by

Justice Breyer. He also rejected the dissent's heavy reliance on *Grutter* and its companion case, *Gratz v. Bollinger*. Given that the Court in *Gratz* found the use of race by the University of Michigan unconstitutional, despite the inclusion of other factors, Justice Kennedy wrote "[u]nder no fair reading . . . can the majority opinion in *Gratz* be cited as authority to sustain the racial classifications under consideration here." Similarly, he argued that *Grutter* was largely inapposite because it upheld the validity of a flexible plan where race was one of many factors, as compared with the "mechanical formulas" at issue in these cases.

Justice Kennedy suggested that the dissent asks the Court to brush aside two important principles: 1) the distinction between *de jure* and *de facto* segregation, and 2) the presumptive invalidity of racial classifications. He stated that individual decisions made solely on the basis of racial classifications may be permissible as a remedy for *de jure* wrongs, but they generally are not appropriate in cases of *de facto* segregation. In sum, Justice Kennedy sought a middle ground, recognizing the legitimacy of race-conscious goals and of some methods that consider race in a broader context, while remaining highly skeptical of decisions about individuals made only on the basis of their race.

Thus, while Justice Kennedy stated that "government is not permitted to . . . classify every student on the basis of race and to assign them to schools based on that classification," in concluding, he also emphasized our "moral and ethical obligation to fulfill [our Nation's] historic commitment to creating an integrated society that ensures equal opportunity for all its children."

E. Justice Thomas's Concurring Opinion

While concurring in the Chief Justice's opinion in its entirety, Justice Thomas also wrote his own opinion to explain in more detail his disagreement with Justice Breyer's dissent._ First, he argued that the school boards had no compelling interest in implementing race-conscious student assignment programs._ Moreover, he contended, the Seattle and Louisville school districts were not "resegregating," as Justice Breyer claimed, but were merely "racially imbalanced." According to Justice Thomas, because this imbalance was not a constitutional violation the school districts had no interest in remedying it. Justice Thomas also criticized the dissent's reliance upon social science research describing the benefits of diversity in K–12 education, claiming that because the results of this research were hotly disputed among social scientists, they could not be the basis of a compelling state interest._ Finally, Justice Thomas argued that Justice Breyer's reliance on social norms, emphasis on practical consequences of striking down the schools' plans, and deference to school boards were reminiscent of the arguments made by segregationists during the *Plessy* and *Brown* eras.

F. Justice Breyer's Dissent

In a passionate dissent, Justice Breyer, joined by Justices Stevens, Souter and Ginsberg, focused on the Court's long-standing precedents in the area of school desegregation and noted that, in the past, the Court had "required, permitted, and encouraged" districts to undertake plans strikingly similar to those implemented in Seattle and Jefferson County. He rested his conclusion

that these plans were constitutional on four grounds: 1) both districts have a complex history of segregation and integration efforts; 2) precedent has always allowed for voluntary integration plans; 3) the plans here meet strict scrutiny by serving a compelling interest in a narrowly tailored way; and 4) to decide otherwise "risks serious harm to the law and for the Nation."

Justice Breyer recounted in great detail the history of government and social segregation in both Jefferson County and Seattle and provided substantial evidence of both school districts' efforts over the last quarter century to promote integration through a careful, increasingly measured use of race. Based on evidence of discriminatory practices by the Seattle school district, he argued that remedial justifications existed in both cases and that the distinction between *de jure* and *de facto* segregation was a hollow one. He emphasized that the districts' reliance on race had diminished over time as it pursued plans that were "less burdensome, more egalitarian, and more effective than prior plans." Specifically addressing Jefferson County's plan, which continued its court-ordered desegregation plan, Justice Breyer found it logically implausible that the plan could be "lawful the day before dissolution [of the court order] but then become unlawful the very next day."

The dissent also provides an extensive discussion of the Court's precedents in this area, noting the ways that the majority side-stepped the logical implications of those precedents in order to find these plans unconstitutional. Justice Breyer, for example, relied heavily on the Court's 1971 decisions in *Swann v. Charlotte–Mecklenburg Board of Education* (upholding the federal courts' power to order race-conscious school desegregation measures in part on the ground that school districts themselves possessed the authority to take such actions) and *McDaniel v. Barresi* (upholding a district's voluntary integration plan). Justice Breyer noted the Court's language in the *Swann,* recognizing the "broad discretionary powers of school authorities" to promote integration as a matter of "educational policy." He argued that far from being irrelevant dicta, as the Chief Justice's opinion for the plurality suggests, the language endorsed by a unanimous Court in *Swann* "reflected a consensus that had already emerged among state and lower federal courts." Justice Breyer relied on *McDaniel* for the related propositions that a district could have suffered *de jure* segregation without incurring a court-order to desegregate, that school boards are permitted to go beyond the Constitution's minimal requirements with regard to integration, and that *de jur*e segregation is not required before a school board can integrate its schools more fully.

In light of these precedents, Justice Breyer questioned whether strict scrutiny was the appropriate standard in this case, but ultimately agreed to apply strict scrutiny, in keeping with the Court's more recent decisions in other areas involving race-conscious decision-making. He found that both the Seattle and Jefferson County plans satisfy the strict scrutiny test. According to Justice Breyer, both school districts had a compelling interest in promoting racial integration in public schools. He identified three essential elements of this compelling interest: 1) a historical and remedial element aimed at eradicating the consequences of prior segregation and "maintaining hard-won gains;" 2) an educational element focused on eliminating the harms associated with racially isolated classrooms; and 3) a democratic element aimed at the desire to make America an inclusive society. He argued that when all

three elements are combined, they provide a compelling interest supported by precedent and logic.

Justice Breyer also found the plans to be narrowly tailored. First, the plans employed race in a limited manner. Second, non-racial factors determined most student placement decisions, and race played a role for only a fraction of students. Third, the plans were implemented in a manner that included constant reevaluation, lessening of burdens, and diminished use of race. Fourth, these plans were more narrowly tailored than other plans previously upheld by the Court. Finally, there were no reasonably evident alternatives, and the majority failed to provide any examples of how the plans could have been more narrowly tailored.

Finally, Justice Breyer lamented the possible negative consequences of the Court's decision; in particular, he feared that, despite Justice Kennedy's separate concurrence, school districts might be effectively forced to adopt ineffective race-neutral plans. He also cautioned that the Court's decision would likely increase litigation and make it harder for school districts to provide the integrated schools many parents and students want. He recalled the promise of *Brown* that America might one day be "one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live." In conclusion, he noted that the majority's decision "[t]o invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position . . . would break that promise." Justice Breyer felt so strongly about this case that he read a lengthy and impassioned statement from the bench explaining his dissent.

G. Justice Stevens's Dissent

Justice Stevens joined in Justice Breyer's opinion and shared his passion: In his separate dissenting opinion, Justice Stevens noted the "cruel irony in the Chief Justice's reliance on our [1954] decision in *Brown v. Board of Education*." He accused the plurality opinion of "rewrite[ing] the history of one of this Court's most important decisions" by rejecting the important distinction between invidious racial classifications and those that do not a burden a single group or stigmatize any individual. Finally, Justice Stevens proclaimed his "firm conviction that no Member of the Court [he] joined in 1975 would have agreed with today's decision."

H. Implications

The opinions in this case reveal a Supreme Court deeply divided on the role race-conscious decision-making may play in public schools. There is, however, one important victory in these cases for public schools: Five justices on the Supreme Court explicitly recognize compelling interests in preventing racial isolation and promoting the educational benefits of a diverse student population in the K–12 context. Thus, this decision resolves some uncertainty that existed in the wake of *Grutter* and *Gratz*.

In addition, Justice Kennedy's opinion also provides important guidance as to the types of race-conscious measures that a majority of the current Court would likely find to be constitutional. For example, race-conscious actions that do not make individual decisions based upon a student's race,

such as drawing attendance boundaries and school site selection decisions, may not even be subject to strict scrutiny in the view of Justice Kennedy and the four dissenters. Justice Kennedy also suggests, that, where necessary, race may play a role in more carefully designed plans that consider several factors in making individualized student-assignment decisions.

At the same time, however, the majority's determination that the plans employed in Seattle and Louisville were not narrowly tailored and failed strict scrutiny likely will result in an increase in the number of legal challenges to voluntary race-conscious student assignment plans. Moreover, four justices appear to be skeptical of the inherently race-conscious goals of avoiding racial isolation and promoting racially diverse enrollments. As a result, school districts that currently use the race of students as a factor in student assignment decisions should carefully examine their plans in light of the Court's various opinions. While the majority opinion makes clear that the precise measures used by Seattle and Louisville are not permissible, Justice Kennedy and four other members of the Court leave the door open to some more narrowly tailored plans.

II. FREEDOM OF SPEECH

During its 2006–2007 Term, the Supreme Court decided two First Amendment free speech cases that are significant to public school districts. While both cases were decided on relatively narrow grounds, both also have direct application to many public school districts. In the first case, the Court held that a principal may, consistent with the First Amendment, restrict student speech at a school-sponsored event when the speech promotes the use of illegal drugs and cannot reasonably be interpreted as commenting on any political or social issue. In the second case, the Court held that an athletic organization's rule prohibiting high school coaches from using undue influence to recruit middle school athletes does not violate the First Amendment where the organization's members have voluntarily joined the association and agreed to abide by its rules. The Court also denied *certiorari* in several other free speech cases involving public school districts.

A. Student Speech Advocating Illegal Drug Use

Near the end of the Term, on June 25, 2007, the Court issued its opinion in *Morse v. Frederick*, a case widely known as the "Bong Hits 4 Jesus" case. A closely divided Court ruled that the First Amendment does not prevent school officials from restricting speech that can reasonably be viewed as advocating illegal drug use because schools have a right to protect students from such speech.

The case began in Juneau, Alaska, where public high school students were allowed to watch the Olympic Torch Relay pass by their school on its way to Salt Lake City for the 2002 Winter Games. The high school principal, Deborah Morse, permitted students to attend the event, which was held during school hours, as an approved social event or class trip. Teachers and staff were in charge of monitoring the students' actions.

Joseph Frederick, a student at the school who did not attend classes that morning prior to the relay, stood on a sidewalk across the street from the

school during the event. As the relay and accompanying television cameras approached, Frederick, along with several friends, displayed a 14–foot-long banner that read "Bong Hits 4 Jesus." The banner was clearly legible to other students standing across the street. Principal Morse asked Frederick to stop displaying the banner and confiscated it when Frederick refused to comply with her request. She later suspended him for ten days on multiple grounds, including the violation of a school policy prohibiting expression that advocates the use of illegal substances.

Frederick appealed the suspension. When the school board upheld the suspension, Frederick sued both the school district and the his high school principal, alleging a violation of his First Amendment right to free speech. The trial court held that the principal possessed the authority to interdict a student message advocating drug use at a school-sanctioned event. The Ninth Circuit, however, reversed. The court of appeals held that school district did not have the authority to punish Frederick without showing that his speech had given rise to a risk of substantial disruption. Moreover, the Ninth Circuit also concluded that, because Principal Morse knowingly had violated Frederick's clearly established constitutional rights, she was not protected by the qualified immunity usually afforded to such public officials carrying out their official duties and could therefore be held personally liable for money damages.

The Supreme Court disagreed. Chief Justice Roberts wrote the majority opinion, holding that a school official does not violate the First Amendment by restricting student speech at a school-sponsored event if that speech is reasonably viewed as promoting illegal drug use. In this narrow ruling, the Chief Justice explained that a school may take reasonable steps to protect students entrusted to its care from such speech.

The majority opinion rests principally on its characterizations of the facts in this particular case. First, the majority rejected Frederick's argument that the event was not a school event. The Court concluded that the event was a school activity because it occurred during normal school hours; the school recognized it as "an approved social event or class trip;" teachers and administrators were in charge of supervising students during it; and the school's cheerleaders and band performed at it as well.

Second, the Court also found the principal's interpretation of the banner as advocating drug use was "plainly a reasonable one." The Court stated that, although the banner could be seen as either celebrating or advocating drug use, there was no meaningful distinction between the two messages when they were conveyed by students to their peers. The majority found that, because this was a school event, the applicable First Amendment rights were those applied in the school context.

The Court, however, rejected the Ninth Circuit's view that the proper test for school speech must always be whether school authorities reasonably believe that the restricted speech would create a significant disruption in the school. Instead, the Court characterized the general standard for student speech rights as "what is appropriate for children in school" and emphasized that students' constitutional rights in the school context may be more limited than their rights outside of that context.

The Court found that the restriction in this case was supported by the school's strong, "perhaps compelling" interest in deterring the dangers of illegal drug use. The majority reasoned that, unlike the mere possibility of school disruption, which normally is not sufficient to support speech restrictions, the dangers of illegal drug use by high school students were "strong and palpable." The Court pointed to evidence of the high incidence of drug use by school-aged children and emphasized that Congress has declared that schools have a responsibility to educate students about the dangers of illegal drug use. It further noted that speech advocating illegal drug use posed a challenge for schools trying to fulfill that important educational responsibility. The majority added that a school's failure to restrict such speech would send students the message that the school was not serious about deterring drug use.

The majority, however, expressly limited the scope of this rationale by explaining that school officials could not have limited the student speech in this case simply because it was offensive. Frederick's speech could be limited not because it was offensive but because it promoted illegal drug use.

Several justices separately concurred. Justice Alito, with whom Justice Kennedy joined, focused on what he understood to be the limits of the majority's decision. He emphasized that the Court's opinion extended only to allowing schools to restrict speech advocating illegal drug use and not to speech commenting on political or social issues. Indeed, he indicated that the restrictions on student speech upheld in this case were at the "far reaches" of what the First Amendment permits. In contrast, Justice Thomas wrote a separate concurring opinion, arguing that student speech in the school context should not be protected by the First Amendment at all. No other Justice, however, shared this extreme view.

Justice Breyer also concurred in the judgment, but dissented in part. He argued that the Court should not even have addressed the merits of the First Amendment claim. Instead, he argued that the Ninth Circuit's most glaring error was in stripping Principal Morse of qualified immunity. He argued that the Court should have addressed only this narrower issue and concluded that the principal had not clearly violated the students constitutional rights. He argued that, by declining to address the constitutional question, the Court could have avoided having to chose between the majority's view, which he feared might be interpreted to permit more viewpoint discrimination by school authorities, or the dissenters' position, which he believed could well interfere with a school's ability to maintain discipline.

Justice Stevens, with whom Justice Souter and Justice Ginsburg joined, dissented on the merits of the First Amendment issue. The dissent characterized the majority opinion as doing "serious violence to the First Amendment." In the dissenters' view, the majority opinion invites viewpoint discrimination by school authorities. Justice Stevens argued that under the Court's precedents student speech should not be restricted unless that speech is likely to provoke the alleged harm that school authorities seek to prevent. In this case, he reasoned that the harm in question was illegal drug use, and there was no indication that the student's banner was likely actually to incite students to use such drugs. Justice Stevens also disagreed with the Court's apparent deference to a third party's reasonable perception to determine

whether the speech even advocated the proscribed activity. He argued that this approach leaves speakers at the mercy of listeners and emphasized his view that it is the Court's responsibility to determine whether the message objectively advocates the activity in question.

Despite the concerns of the dissenters, because of its narrow rationale, *Morse* provides reliable guidance to school officials only in situations involving student speech on the subject of illegal drugs. The Court's decision gives school officials greater authority to regulate student messages advocating illegal drug use.

In the event that student speech does address illegal drug use, school authorities should first determine whether the speech may be reasonably viewed as promoting illegal drug use. If the answer is yes, the school must next determine whether the speech also could be construed as commenting on a political or social issue. If the answer to the second question is no, then the school may discipline the student without infringing on his or her First Amendment rights. On the other hand, if what may be viewed as a pro-drug message is combined with any political or social commentary, the student's speech may be constitutionally protected.

Outside the context of messages promoting illegal drug use, *Morse* provides little guidance. The decision is not likely to affect the regulation of other types of student speech. It seems more likely that the lower courts will continue to rely on the Supreme Court's 1969 and 1986 decisions in *Tinker v. Des Monies Independent School District No. 92* and *Bethel School District No. 43 v. Fraser* to provide the analytical framework for addressing most First Amendment free speech issues in school context.

B. Athletic Recruiting

In its other free speech case this Term, *Tennessee Secondary School Athletic Association v. Brentwood Academy* ("*Brentwood II*"), the Supreme Court revisited a dispute that it previously addressed in 2001, when it found that the athletic association comprised of private and public school members was a state actor subject to constitutional requirements. In the *Brentwood II* decision this past Term, the Court held that such a voluntary athletic organization may prohibit member high schools from using undue influence to recruit middle school athletes without violating coaches' First Amendment rights.

The plaintiff, Brentwood Academy, is a private school that is a member of the Tennessee Secondary School Athletic Association ("TSSAA"), a nonprofit corporation that regulates interscholastic sports among its members. One of TSSAA's regulations prohibits high schools from using "undue influence" to recruit middle school athletes. Ten years ago, in April 1997, the high school coach at Brentwood sent a letter to eighth-grade students telling them that they should attend spring practice sessions and that "getting involved as soon as possible would definitely be to [their] advantage." Although the students had already signed contracts indicating their intent to enroll at Brentwood the following school year, they were not yet considered enrolled students under TSSAA's definition and were therefore subject to

TSSAA's prohibition against "undue influence." After a TSSAA investigation found a violation, Brentwood was sanctioned.

In response, Brentwood brought an action against TSSAA, alleging that the organization had violated the school's First and Fourteenth Amendment rights and that the review had violated the school's right to due process. The district court agreed with Brentwood, but was reversed by the Sixth Circuit, which held that TSSAA was a private voluntary organization and as such was not a state actor subject to constitutional requirements. In 2001, the Supreme Court reversed, holding that TSSAA was a state actor, *Brentwood Academy v. Tennessee Secondary School Athletic Association* ("*Brentwood I* "). On remand, the district court again ruled in favor of Brentwood, holding that its First and Fourteenth Amendment rights had been violated. The Sixth Circuit affirmed, and last year, the Supreme Court again granted *certiorari*.

The Supreme Court reversed the Sixth Circuit in a unanimous decision, holding that it is not a violation of the First Amendment for an athletic organization to require high schools that voluntarily join the organization to abide by a rule prohibiting high school coaches from using undue influence to recruit middle school athletes. The majority opinion, authored by Justice Stevens, was joined by seven other justices (all except Justice Thomas) with respect to all but one part of the opinion. In that part of the opinion, which discusses the applicability of the Court's 1978 decision in *Ohralik v. Ohio State Bar Association*, only three other justices (Justices Souter, Ginsburg, and Breyer) joined Justice Stevens.

Eight other justices, however, agreed about the type of information protected under the First Amendment. The Court emphasized that Brentwood retained the right to distribute truthful information about its athletic program and to try to persuade middle school students that they should enroll in the school for its excellent sports program. However, the Court warned, Brentwood's rights to free speech "are not absolute." The majority emphasized that Brentwood's decision to join TSSAA was voluntary. And, relying on the Court's 2006 decision in *Garcetti v. Ceballos*, Justice Stevens concluded that "[j]ust as the government's interest in running an effective workplace can in some circumstances outweigh employee speech rights, so too can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants." The Court found that TSSAA's rule against using undue influence to recruit middle school students was appropriate to prevent possible exploitation of students, distortion of competition between high school teams, and the creation of an environment in which athletics are prized more highly than academics.

Despite the general agreement that the coach's speech was not protected by the First Amendment, only three justices joined Justice Stevens in a second part of the decision in which he relied upon *Ohralik*. Justice Stevens emphasized that, in his view, rules "prohibiting direct, personalized communication in a coercive setting" are generally more permissible under the First Amendment protection than are "rules prohibiting appeals to the public at large." As an example, Justice Stevens cited *Ohralik*, in which the Court held that a state may ban lawyers from the in-person solicitation of potential clients. In *Ohralik*, Justice Stevens wrote, the Court "reasoned that the solicitation ban was more akin to a conduct regulation than a speech

restriction," and that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." While Justice Stevens acknowledged that the holding in *Ohralik* is limited to conduct that is "inherently conducive to overreaching," he found that "the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grade student." Five justices, however, did not agree that *Ohralik* was applicable.

Regarding Brentwood's second claim involving denial of due process, the Court held that TSSAA did not violate Brentwood's due process rights because the decision to sanction Brentwood came only after an investigation and because Brentwood failed to present any evidence that the TSSAA board had considered any facts to which Brentwood had lacked an opportunity to respond.

Justice Kennedy, with Chief Justice Roberts and Justices Scalia and Alito, concurred in part and concurred in the judgment. Although he agreed with most of Justice Stevens's opinion, Justice Kennedy wrote to express his disagreement with the majority's application of *Ohralik*. Justice Kennedy noted that the Court had previously declined to apply *Ohralik* to any case not involving an attorney-client relationship. For example, the Court had declined to uphold a ban on in-person solicitation from accountants to potential clients. By relying on *Ohralik*, Justice Kennedy argued, the majority opinion "is open to the implication that the speech at issue is subject to state regulation whether or not the school has entered a voluntary contract with a state-sponsored association." Instead, Justice Kennedy suggested, the only reason that the coach's speech is not protected is because Brentwood voluntarily joined TSSAA and agreed to abide by the organization's rules.

As he did in *Morse,* Justice Thomas wrote a separate concurrence, setting out his own unique view of the case. It is a "stretch," Justice Thomas argued, to apply rules derived from cases about the speech rights of government employees and contractors to "speech by a private school that is a member of a private athletic association." Rather than apply a First Amendment framework to the case, Justice Thomas wrote that he would instead overrule the Court's 2001 decision in *Brentwood I* and hold that the that TSSAA was not a state actor. Finally, Justice Thomas agreed with the argument set forth in Justice Kennedy's concurrence that *Ohralik* is not applicable outside of the context of attorney solicitation.

Brentwood II provides some guidance regarding the free speech rights of public and private schools that belong to athletic organizations similar to TSSAA. Specifically, if athletic organizations enact rules prohibiting coaches from using undue influence to recruit middle school athletes, those rules may apply to both public and private schools that are members of the organization. Such rules seem likely to survive First Amendment scrutiny, however, only where the member schools have voluntarily joined the organization. A state-mandated association's rules are likely to be viewed more critically.

C. Free Speech Cases the Court Denied Review

The Supreme 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 stand as binding precedent for each respective jurisdiction:

- In *Guiles v. Marineau*, the Second Circuit held that a public middle school could not enforce its dress code policy to require a seventh-grade student to cover a T-shirt that, through text and images, accused the President of being a chicken-hawk president, a "Cocaine Addict," and a "Lying Drunk Driver." In its analysis, the Second Circuit found that *Hazelwood School District v. Kuhlmeier* did not apply because no reasonable observer would believe that Guiles's T-shirt bore the imprimatur of the school and that *Fraser* did not apply because the images on Guiles's T-shirt were not plainly offensive. The court concluded its analysis by applying the standard from *Tinker*, under which it found Guiles's First Amendment rights were violated when the school disciplined the student without any evidence that the T-shirt caused disruption in the school.
- In *Cioffi v. Averill Park Central School District*, the Second Circuit held that comments made in a letter and at a press conference by the athletic director of a public high school about a hazing incident involving members of the school football team were matters of public concern and therefore protected by the First Amendment, regardless of whether the athletic director was primarily motivated by his personal interest in making the statements. The court of appeals also concluded that its decision would not be affected by the Supreme Court's then-forthcoming decision in *Garcetti*, since the athletic director was speaking as a private citizen and not strictly as a public employee.
- In *In re Amir X.S.*, the Supreme Court of South Carolina held that a South Carolina statute prohibiting any person from willfully or unnecessarily interfering with or disturbing a school is not impermissibly overbroad since the statute (1) specifically addresses interference and disturbance of a school and not "just any public forum;" (2) prohibits only expression or gatherings that disturb the learning environment in schools; and (3) prohibits only willful or unnecessary disturbance or interference.

III. SPECIAL EDUCATION

For the third consecutive Term, the Supreme Court decided a special education case during 2006–2007. In that case, *Winkelman v. Parma City School District*, the Court held that the parents of a special education student do not need to be represented by an attorney in order to bring an action in federal court to challenge an individualized education plan ("IEP") developed for the child under the Individuals with Disabilities Education Act ("IDEA" or the "Act"). The Court also denied *certiorari* in several other special education cases.

A. *Pro Se* Representation in Federal Court Actions Under IDEA

Jeff and Sandee Winkelman, parents of a child with a disability, worked with the Parma City School District to develop an IEP for their son Jacob. Dissatisfied with the resulting plan, the Winkelmans filed an administrative complaint alleging that the school district failed to provide their son with a

free appropriate public education as required by IDEA. The hearing officer decided in favor of the district, and this decision was upheld in a state administrative appeal.

The Winkelmans then filed a complaint in federal district court, asking for reversal of the administrative decision upholding the IEP, reimbursement of private school tuition, and payment of the attorney fees that they had already incurred. The Winkelmans had been assisted by an attorney at several points during the administrative proceedings, but they filed their federal complaint and their subsequent appeal without the assistance of legal counsel. The district court ruled in favor of the school district, finding that it had provided Jacob with a free appropriate public education.

Still unrepresented by counsel, the Winkelmans appealed the decision to the Sixth Circuit. That court dismissed the appeal, citing its 2005 decision in *Cavanaugh v. Cardinal Local School District*, for the proposition that the Jacob must be represented by a lawyer to proceed with his claims in federal court. In *Cavanaugh*, the Sixth Circuit had held that parents themselves do not have substantive rights under IDEA and, therefore, cannot file suit under the Act unless they are attorneys representing the interests of their children. Although adults are generally permitted to proceed *pro so* in federal courts to seek to enforce their own rights without legal counsel, the court of appeals in *Cavanaugh* concluded that the right to a free appropriate public education "belongs to the child alone, and is not a right shared jointly with his parents." The court also held that IDEA did not disturb the common law rule that parents who are not attorneys may not represent their minor children in court proceedings.

The Sixth Circuit's position was at odds with an earlier First Circuit decision, which had held that parents themselves have substantive rights under IDEA and may seek to vindicate those rights in federal court on their own behalf. The Supreme Court granted *certiorari* to resolve this disagreement among the lower courts.

In *Winkelman,* the Supreme Court in a 7–2 decision reversed the Sixth Circuit and agreed with the First Circuit. Justice Kennedy, writing for the majority, found that "IDEA grants parents independent, enforceable rights," which include the "entitlement to a free appropriate public education for the parents' child." Accordingly, parents may prosecute IDEA claims in federal court on their own behalf without necessarily being represented by a lawyer.

Recognizing that no single IDEA provision explicitly states that parents have the status of real parties in interest, the majority reasoned that such rights were implicit in the statutory framework, which depends heavily on parental involvement. For example, the Court observed that the IDEA requires school districts to afford parents a significant role in the creation of their child's IEP; establishes procedures designed to protects the parents' involvement in their child's education; and permits parents to seek an administrative hearing to review complaints about the provision of a free appropriate public education to the child. In addition, the Court recognized that IDEA allows parents to recover costs associated with private school education in certain circumstances and authorizes the award of attorneys' fees to the parent or guardian if he or she is a prevailing party in litigation.

Considering such provisions in the aggregate, the majority agreed with the Winkelmans that the Act should be interpreted to accord parents independent, enforceable rights.

The Court next addressed the possibility that only a limited number of rights under IDEA might actually be directly enforceable by parents. Several lower courts had held, for example, that the claims available to parents themselves are restricted to those involving certain of IDEA's "procedural mandates" and "reimbursement demands." The Supreme Court, however, rejected this position, finding that IDEA's specific language regarding parents' rights to certain procedural protections and cost recovery "does not resolve whether they are also entitled to enforce IDEA's other mandates, including the one most fundamental to the Act: the provision of a free appropriate public education to a child with a disability." Emphasizing that the statute affords parents the right to "participate . . . in the substantive formulation of their child's educational program" and to assert "challenges based on a broad range of issues," the Court found that "IDEA, through its text and structure, creates in parents an independent stake not only in the procedures and costs implicated by the process but also in the substantive decisions to be made." The Court also expressed concern that a decision to the contrary would create inequity, as some parents who are unable to afford legal representation could be left with no effective remedy.

Finally, the Court rejected the school district's argument that construing IDEA to provided substantive rights to the parents of children with disabilities would violate the Spending Clause's clear notice requirement. The majority reasoned that recognizing enforceable parental rights does not impose any substantive condition or obligation on states they would not otherwise be required by law to observe. Furthermore, the basic measure of monetary recovery is not changed by recognizing that some rights repose in both the parent and the child.

Justice Scalia, joined by Justice Thomas, concurred in part and dissented in part. Justice Scalia argued that the text of IDEA affords parents the right to file an action without representation by counsel so long as the action pertains to the recovery of costs associated with private school enrollment or "redress for violations of [the parents'] own procedural rights." He disagreed with the majority's conclusion that parents may proceed without an attorney when they ask a court to decide that their child's free appropriate public education is substantively inadequate, arguing that the majority's holding "sweeps far more broadly than the text [of IDEA] allows."

The *Winkelman* decision removes a barrier from the path of parents who seek to challenge an IEP they have developed in collaboration with their local school district. Because parents who feel aggrieved may now file suit in federal court without retaining a lawyer, the decision allows parents to prosecute their IDEA claims at a lower cost. Consequently, school districts may see an increase such lawsuits. In addition, school districts may face more frivolous lawsuits, since some parents may file challenges in federal court without the benefit of a lawyer's independent assessment of the strength or weakness of their legal claim. Moreover, IDEA litigation in which parents represent themselves may prove challenging to school districts and courts,

since many non-lawyer parents are likely to be unfamiliar with federal court rules and procedures.

B. Special Education Cases the Court Declined to Review

This Term, the Supreme Court also denied review in a couple of other interesting special education cases involving school districts. As a result, the rulings of the lower courts in the following cases remain valid and operate as binding precedent for each respective jurisdiction:

- In *P.N. v. Clementon Board of Education*, the Third Circuit considered whether a party who receives minimal compensation as part of a settlement can be considered a "prevailing party" under the IDEA provision that provides for the award of attorney fees. Rejecting the school board's argument that the award in question was too slight to confer prevailing party status, the court held that a disabled child is eligible to recover attorney fees whenever he or she prevails on any significant issue.
- In *Shelby S. v. Conroe Independent School District*, the Fifth Circuit held that a school district acted within its rights under IDEA when it required a student seeking a free appropriate public education to undergo a medical examination. According to the court of appeals, a school district can overcome parental objections if it can articulate reasonable grounds for the necessity of a medical evaluation.

The Supreme Court also granted *certiorari* in another important IDEA case involving the question of whether a child must receive special education or related services from a public school district before being eligible for reimbursement of private school tuition under the Act. This case, which has been fully briefed, will be argued on the first day of the October 2007 Term and is discussed below in Section VI.

IV. LABOR AND EMPLOYMENT

During its 2006–2007 term, the Supreme Court decided three labor and employment cases that are likely to affect school districts, *Ledbetter v. Goodyear Tire & Rubber Co.*, and two consolidated cases *Davenport et al. v. Washington Education Association* and *Washington v. Washington Education Association*. The High Court also declined to review many other employment cases, including two raising an issue that the Court was expected to decide this Term but did not.

A. Filing Deadlines for Title VII Discriminatory Pay Claims

In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court, in another 5–4 decision, held that employees must file an Equal Employment Opportunity Commission ("EEOC") charge within the applicable statute of limitations in order to bring a subsequent action in federal court challenging allegedly discriminatory pay under Title VII. In most cases, such a charge must be filed within 180 days (300 days in some jurisdictions) of the alleged discrimination. The question in *Ledbetter* was when such discrimination should be considered to have occurred in unequal pay cases.

Rejecting the "paycheck accrual rule" adopted by the EEOC and several lower courts, the majority of the Court, in an opinion written by Justice Alito,

concluded that receiving a paycheck affected by a past discriminatory decision does not extend the deadline for filing a charge with the EEOC. Rather, the time period for challenging discriminatory pay begins when the pay rate is set. As a result of this decision, employees will be time-barred from suing employers, including school districts, for discriminatory compensation decisions made in prior years, even if those decisions continue to have adverse effects on their wages.

Lilly Ledbetter filed an EEOC charge shortly before she retired, alleging that she had received poor evaluations in prior years because of her gender and that, as a result, she also had received lower pay raises and reduced compensation throughout her employment. Ledbetter argued that her claim was timely because paychecks she received in the 180 days prior to filing with the EEOC were lower because of past discrimination by her manager. She relied heavily on the Supreme Court's 1986 decision in *Bazemore v. Friday*, which states that "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." A jury found in Ledbetter's favor, but the Eleventh Circuit reversed concluding that her compensation was the result of decisions made more than 180 days prior to the filing of her charge and that her claims were therefore time-barred by Title VII.

Justice Alito, joined by Chief Justice Roberts and Justices Kennedy, Scalia, and Thomas, agreed with the Eleventh Circuit's decision. The majority held that the time for filing a charge of employment discrimination begins when the discriminatory act occurs. For purposes of EEOC filing deadlines, the Court distinguished between harassment claims, which may continue over time with ongoing and cumulative effects, and pay claims, which it concluded should be treated as discrete acts of discrimination that occur when the pay rate is established. The Court also reasoned that Title VII's time limit is intended to protect employers from allegations of discrimination based on conduct from many years prior, noting that evidence relating to intent may fade with time.

Rejecting Ledbetter's reading of *Bazemore*, the Court concluded that a new period does not begin with each paycheck affected by a discriminatory pay decision. Rather, the filing deadline is extended only in cases where a facially-discriminatory pay policy is continued. Thus, *Bazemore* was not applicable to Ledbetter, who failed to show "that Goodyear initially adopted its performance-based pay system in order to discriminate on the basis of sex or that it later applied this system to her within the charging period with any discriminatory animus."

In contrast, Justice Ginsburg's dissent, joined by Justices Stevens, Souter, and Breyer, reasoned that the current payment of salaries infected by discrimination should be considered unlawful even if the original infection significantly preceded the plaintiff's filing of an EEOC charge. The dissenting justices argued that discriminatory pay claims merit such treatment because pay disparities are often noticeable only after future raises make them more readily apparent, and employees cannot easily discover unequal treatment when employers keep comparative pay information hidden. The vehement dissent, read from the bench by Justice Ginsburg, concluded by urging Congress to remedy the majority's "cramped interpretation of Title VII."

Ledbetter was a significant victory for employers, including school districts, and could benefit districts by limiting the scope of their potential liability for claims of discriminatory pay practices under Title VII. On the other hand, there are several ways that plaintiffs might still overcome the deadline recognized in *Ledbetter*. For example, a plaintiff might argue that the charging period should not begin until he or she discovers facts showing pay discrimination. The Supreme Court declined to address whether Title VII should be interpreted to allow the charging period to begin only when evidence of discrimination is discovered rather than from the date it actually occurred. In addition, the Court also implied that its decision in *Ledbetter* would not affect claims of gender-based discriminatory pay brought under the Equal Pay Act, which does not require filing with the EEOC or proof of intentional discrimination.

Moreover, the Democratically-controlled Congress has already indicated that it will take up the dissent's invitation to attempt legislatively to overrule the majority's interpretation of Title VII. Indeed, the House voted on July 31, 2007 to reverse the Supreme Court's decision. Prominent lawmakers in the Senate, including Senators Kennedy and Clinton, also have announced similar plans to introduce bills to overturn the Court's decision in order to allow employees to challenge pay decisions made at any time during their employment. On the other hand, President Bush has indicated his intention to veto any such legislation. As a result, the High Court's decision in *Ledbetter* seems likely to stand, at least for the time-being.

B. Opt–In Requirement For Political Use of Union Fees

In two consolidated cases this Term, *Davenport et al. v. Washington Education Association* and *Washington v. Washington Education Association*, the Supreme Court unanimously upheld a Washington law requiring a union to get permission from non-members before using their agency fees for political activities. These cases were consolidated into *Davenport et. al. v. Washington Education Association*.

Washington, like many states, permits public-sector unions to collect "agency fees" from employees who choose not to join the union but are nonetheless represented by it in collective bargaining. In earlier cases the Supreme Court has held that, in such circumstances, non-union members have a First Amendment right not to subsidize a union's political activities and, therefore, a union must provide its workers with the option to obtain a refund of the portion of their fees that otherwise would be used to subsidize the union's political activities. This practice is commonly known as an "opt-out." The Washington law challenged in these cases, by contrast, did not merely require unions to provide a right to opt-out, it also required them to secure every non-member's authorization to use his or her agency fees for political purposes. Washington effectively required non-members to "opt-in" before their fees could be used for political activities.

The Washington Education Association ("WEA"), a union representing approximately 70,000 teachers and other educational employees, however, continued to send its non-members an opt-out packet semi-annually allowing them thirty days to object in writing to the use of their agency fees for purposes not germane to collective bargaining and provided refunds to those

who timely objected. In 2001, Washington and a group of non-members filed separate lawsuits arguing that WEA's opt-out procedure did not comply with the State's opt-in requirement. The union argued that the opt-in requirement unconstitutionally infringed upon its First Amendment rights. A state trial court upheld the opt-in requirement and found that the union's actions had violated state law. In 2006, the Washington Supreme Court overturned the trial court's order. The State's high court struck down the law for violating the union's First Amendment rights of expressive association and deviating from Supreme Court precedent by imposing the more burdensome opt-in requirement.

A unanimous Supreme Court reversed. Justice Scalia wrote the opinion for the Court, holding that the union has no constitutional entitlement to agency fees and because the State could abolish the fees altogether, it may also restrict their use. The Court explained that the its previous decisions requiring an opt-out provision established a minimum standard for respecting the free speech rights of non-members. States, however, remain free to exceed this minimum standard and require more of unions.

The Court found that Washington's opt-in requirement did not limit the union's First Amendment right to spend its own funds. Rather, it simply placed a condition on the union's "extraordinary state entitlement to acquire and spend *other people's* money." The Court noted that the union remains free to participate in political activities with its other funds. Moreover, because government agencies compelled their employees to pay the fees, the Court concluded that they were more akin to taxes than private monies. The Court rejected, therefore, WEA's argument that the law is an impermissible campaign-finance regulation or content-based restriction on free speech.

Justice Breyer, joined by Chief Justice Roberts and Justice Alito, concurred in the judgment and most of the Court's reasoning. The concurring justices, however, did not join in the Court's opinion relating to campaign-finance law or content-based restrictions because they believed those arguments, raised by WEA for the first time in the Supreme Court, should have been initially presented to and addressed by the lower courts.

These decisions have important implications for school districts, teachers' unions, and teachers who pay dues but are not members of their designated unions. Other states may now shift the burden to unions to get non-members' opt-in approval before spending their money for political purposes. Ironically, the effect of the Court's opinion will not be felt in Washington because local unions successfully lobbied the State legislature to amend the law and require non-members who object to supporting the union's political efforts to opt-out. The impact of these decisions thus clearly rests in the hands of state legislatures nationwide.

C. Labor and Employment Cases Denied Review in the 2006–2007 Term

During its 2006–2007 Term, the Supreme Court declined to review more than a hundred other cases raising labor and employment issues. In such cases, the lower courts' rulings remain intact and constitute the governing law in each respective jurisdiction. A number of these decisions involved educational institutions.

Sawicki v. Morgan State University is one of those cases of potential interest to school districts in their role as employers. In *Sawicki*, the Fourth Circuit, in an unpublished decision, granted summary judgment for a university because an associate professor alleging she was denied tenure on the basis of her race and gender failed adequately to demonstrate that alleged discrimination by a lower level employee at the university was principally responsible for the employer's decision. The fact that the Supreme Court denied *certiorari* in this case and another Fourth Circuit case raising similar issues, *Ray v. CSX Transportation*, is interesting because a settlement in another case pending before the Court this Term, *EEOC v. BCI Coca–Cola Bottling Co. of Los Angeles*, deprived the Court of the opportunity to address this issue.

The High Court had agreed to hear *BCI Coca–Cola*, but this employment discrimination case was dismissed by agreement of the parties a week before oral arguments in April 2007. The Court would have decided whether an employer is liable for an adverse employment decision by a supervisor who harbors no discriminatory motive but relies on information infected by another subordinate's discriminatory animus. This "cat's paw" theory of liability has split the lower courts and has been used in several cases brought against public school districts.

In *BCI Coca Cola*, the company's manager Pat Edgar discharged Stephen Peters, a black employee, for insubordination after he refused to work on one of his days off. Edgar, who was unaware of Peters' race, based the decision on information provided by Peters' direct supervisor, Cesar Grado, and a review of Peters' personnel files. Grado, who knew Peters was black, had allegedly treated black workers poorly and made disparaging racial comments on the job. The EEOC sued claiming that Peters' was fired due to racial animus because Edgar's decision was based on biased information provided by Grado. The Tenth Circuit concluded that the case should go to trial for a jury to decide whether Grado's bias had affected Edgar's decision to fire Stephens. The Supreme Court granted *certiorari*, but the case was dismissed without objection prior to argument.

As a result, the split among the courts of appeal on this issues remains. Thus, in some jurisdictions, a subordinate's discriminatory motives or conduct may be held to taint the decision of a superior who does not harbor any discriminatory animus. This rule can be problematic for school districts, who may make non-discriminatory decisions but still be sued based on the discriminatory conduct of subordinate employees. Thus, in situations where an employee has been subjected to arguably discriminatory treatment of any kind, even by lower level employees, school districts should be particularly careful that any employment decisions are made on the basis of well-documented, non-discriminatory grounds.

V. SCHOOL FINANCE

This Term, the Supreme Court decided one case that involved funding for public school districts. In *Zuni Public School District No. 89 v. Department of Education,* the Court upheld the United States Department of Education's (the "Department") formula for determining when states may take into

account Federal Impact Aid Program funds received by local school districts in determining the amount of state aid allocated to such districts.

The Federal Impact Aid Program provides financial assistance to school districts that are adversely affected by a federal presence, such as a military base or a large amount of federal land. The statute generally forbids a state from off-setting such federal aid against the amount of state funding provided to a school district. However, an exception is made for states that have a program of equalizing per pupil expenditures across the state. The exception allows states that have such programs to take federal aid into account to protect their equalization efforts.

The Federal Impact Aid Act (the "Act") thus includes a formula for determining whether a state has a funding equalization program. The formula requires the Department to compare the funding of the highest and lowest funded districts in the state, disregarding the districts in the top and bottom five percent of per pupil expenditures. The Department's regulations interpret the Act to exclude the top and bottom five percent of school districts based on student population.

Petitioners Zuni Public School District No. 89 ("Zuni") and Gallup–McKinley Public Schools ("Gallup"), two public school districts in New Mexico that receive Federal Impact Aid challenged the Department's regulations on the grounds that they allegedly conflict with unambiguous statutory language requiring the Department to disregard the top and bottom five percent of school districts based solely on the number of districts ranked by their per pupil expenditures. Using the methodology described in its regulations, taking account of student population, the Department determined that New Mexico had an equalization program and therefore, the amount of state aid given to both districts was reduced. Zuni and Gallop argued that the plain language of the statute required the Department to disregard the top and bottom five percent of school districts based solely on the number of districts. Using this methodology, New Mexico would not have satisfied the equalization requirement, and Zuni and Gallup would both have been entitled to their full share of state education funding in addition to their Federal Impact Aid. An administrative law judge and the Secretary of Education both rejected petitioners' challenge to the Department's methodology. The Tenth Circuit, sitting *en banc,* affirmed in a split vote.

In a 5–4 decision, the Supreme Court affirmed. Justice Breyer, writing for the majority, upheld the Department's regulations. In determining whether to defer to an agency's interpretation of a statute that it administers, under its 1984 decision in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, the Court normally asks first whether the statutory language is clear and unambiguous and then whether the agency's interpretation of any ambiguity is reasonable. In this case, the majority inverted that analysis, first addressing the reasonableness of the Department's methodology and then considering whether the Act is ambiguous.

Justice Breyer first considered whether the Department's interpretation was reasonable given the background and purpose of the statute. He concluded that considerations other than the language of the Act indicated that Congress had intended to leave the Department free to use the method that

it had adopted and that this method was reasonable. He noted that the highly technical question at issue in the case was the sort of determination Congress usually delegated to specialized agencies. The majority was also influenced by the history of the Act and its implementation. The Department has been using the same methodology for its equalization analysis for more than 30 years, and the newer statutory language, enacted in 1994, was drafted by the Department itself. Justice Breyer reasoned that the Department would not have been likely to propose statutory language that would outlaw its own longstanding methodology.

After determining that the Department's interpretation was reasonable in light of the purpose and history of the Act, Justice Breyer then addressed the first step of the typical *Chevron* inquiry—whether the statutory language was ambiguous. He acknowledged that neither the history of the Act nor the reasonableness of the Department's approach would control if the statutory language clearly precluded the use of that method. He concluded that while the Act "limits the Secretary to calculation methods that involve 'per-pupil expenditures,' [it did] not tell the Secretary which of several different possible methods the Department must use" nor "rule out the present formula." Having thus determined that the statute was ambiguous, the majority opinion concluded that the Department was entitled to deference under *Chevron.*

Three of the justices in the majority, however, wrote concurring opinions that expressed concerns about this analysis. Justice Stevens wrote to argue that the intent of Congress should drive judicial decisions in the rare cases where the plain language of the statute is clearly contrary to the intent of the drafters. Justice Kennedy, joined by Justice Alito, wrote to express his concern that inverting the order of the *Chevron* analysis would give the false impression that agency policy concerns, not principles of statutory interpretation, were controlling the judicial analysis. Finding, however, that the inverted analysis did not lead to an incorrect outcome, he joined the majority opinion.

In dissent, Justice Scalia, joined by Justice Thomas and Chief Justice Roberts, rejected the Court's holding and Justice Breyer's inversion of the *Chevron* inquiry. Justice Scalia began the dissent by arguing that the plain language of the Federal Impact Aid Act unambiguously foreclosed the Secretary's methodology. The second part of the dissent rejected Justice Stevens's argument that congressional intent can trump unambiguous legislative language. Justice Souter wrote a separate dissent and joined only the first part of Justice Scalia's opinion.

The decision in *Zuni* has fairly limited implications for most school districts. *Zuni* directly affects only school districts receiving Federal Impact Aid. Moreover, for those districts, the Court's decision upholds the Department's current practice, so it will not affect the treatment of Federal Impact Aid. The impact of the decision on administrative law more generally is also difficult to gage. Given the unusual situation in the case, its implications would seem to be limited. Presumably, it is not often that an agency itself secures the adoption by Congress of statutory language that inadvertently calls into question a longstanding regulatory practice that the agency fully intended to continue. It seems in this case that a majority of the Supreme Court decided to save the Department of Education from itself.

VI. PREVIEW OF THE 2007–2008 TERM

The 2007–2008 Term of the Supreme Court again promises to hold many developments of interest to public schools, although it seems unlikely that the Court will decide as many major cases involving school districts as it did in 2006–2007. Nonetheless, the Court will hear at least one case involving IDEA, continuing the recent trend of taking cases in this area during the last two Terms, after having taken none in a decade. The Court also will decide several important cases involving employment issues. Moreover, the Court will continue to accept new cases over the course of the upcoming Term. Several petitions for *certiorari* in education cases are already pending, and more will certainly be filed.

Now that the two new justices have both served together for an entire term, it also will be interesting to see whether the patterns that began to emerge in 2006–2007 continue or whether the Court moves in a new direction. Moreover, as the presidential primaries begin in 2008, greater public attention will return to the current composition of the Court, its jurisprudential and ideological leanings, and the possible impact of new Justices on that balance. While those discussions intensify, the current Justices will continue to resolve important education law questions, including some of those discussed below.

A. Special Education

The Supreme Court already has granted *certiorari* and will be hearing oral argument in one special education case on the first day of its 2007–2008 Term. In *Board of Education of the City School District of the City of New York v. Tom F.*,[4] which the Court will hear in October, the Justices will consider whether IDEA permits a court to award private school tuition reimbursement to the parents of a disabled child who has not been previously enrolled in a public school special education program.

A 1997 amendment to IDEA expressly states that private school tuition reimbursement can be an appropriate remedy for a school district's failure to provide a free appropriate public education, a remedy that the Supreme Court already had found implicit in the statute in its 1985 and 1993 decisions in *Burlington School Commission v. Department of Education* and *Florence County School District Four v. Carter.* The 1997 amendment, however, states that such reimbursement may be made where the child "previously received special education and related services under the authority of a public agency." *Tom F.* presents the question of whether in adopting this amendment, Congress limited the tuition reimbursement remedy allowed in *Burlington* and *Carter* only to students who have tried a public school placement.

The plaintiff in *Tom F.* is the father of a learning disabled child, Gilbert F., who lived in New York and was eligible to attend public schools. In 1997 and 1998, while Gilbert was enrolled at a private school, the school district evaluated his educational needs as required by IDEA and developed individualized education programs ("IEPs") for him. In both years, the parents

4. Hogan & Hartson prepared an amicus curiae brief in this case for the National School Boards Association in support of the school district.

challenged the adequacy of the proposed IEPs, and in both years the school district voluntarily paid the child's private school tuition.

In 1999, the Board again evaluated Gilbert and proposed an IEP that would have placed Gilbert in a special education program at a local public school. Once more disputing the appropriateness of the IEP, the parents chose to keep Gilbert enrolled in private school and petitioned for tuition reimbursement. A hearing officer granted the petition, citing the Court's decisions in *Burlington* and *Carter,* and that decision was upheld in an administrative appeal.

The school district then challenged that decision in federal court. The district court ruled in favor of the school district, holding that the clear implication of the plain language of the 1997 amendment to IDEA is that where a child has not previously received special education services from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school. On appeal, the Second Circuit issued a summary order vacating and remanding "for further proceedings in light of this Court's decision in *Frank G. v. Board of Education of Hyde Park*." In *Frank G.*, the court of appeals had held that IDEA does not limit tuition reimbursement to the parents of students who have previously been enrolled in public school special education programs. The school district filed a petition for *certiorari*, which the Supreme Court granted.

If the High Court agrees with the Second Circuit, school districts nationwide may be forced to bear the cost of private school tuition for increasing numbers of special education students. The lower court's rule would make it more likely that parents will prematurely reject a proposed IEP, rather than working with a school district to refine and improve it. In addition, parents of students already attending private schools may be prompted to ask public school districts to develop IEPs. Some of these parents may not have any intention of enrolling their children in public school, but instead may simply intend to reject whatever IEP is proposed and seek tuition reimbursement. In such circumstances, school districts would be forced to choose whether to spend funds challenging the parents' claim that an untested IEP is inadequate or paying the students' private school tuition.

In contrast, if the Supreme Court reverses the decision below, parents would be required to work cooperatively with school districts and at least try a public school placement if one is offered. Only then would they become eligible for private school tuition reimbursement as a remedy for the failure to provide a free appropriate public education. This result would not only increase cooperation between parents and school districts, it would also likely reduce both the number of tuition reimbursement requests and the amount of litigation over the adequacy of proposed IEPs.

The School District in *Frank G.* has also petitioned for *certiorari*. Because *Frank G.* and *Tom F.* concern the same issue of law, the Supreme Court will almost certainly hold the *Frank G.* petition until after it decides *Tom F*.

B. Employment

The Supreme Court has agreed to review two cases next Term that may affect school districts in their role as employers. The first, *Mendelsohn v. Sprint/United Management Co.*, involves the admissibility of a particular type of evidence in cases brought under the Age Discrimination in Employment Act ("ADEA"). In the second case, *Howlowecki v. Federal Express Corporation*,, the Court will address what constitutes a "charge" filed with the Equal Employment Opportunity Commission ("EEOC") that is a prerequisite to instituting an action in federal court under the ADEA.

The Court has granted *certiorari* in *Mendelsohn* to examine the admissibility of testimony by non-party co-workers regarding alleged discrimination by personnel not involved in an employment decision challenged by the plaintiff under the ADEA. Ellen Mendelsohn alleged she was fired because of her age during a company-wide reduction in force. The trial court excluded testimony from five other employees over forty who experienced similar alleged discrimination during the same layoffs because none of them worked under the same supervisor. On appeal, the Tenth Circuit held that excluding this "me too" evidence deprived Mendelsohn of a full opportunity to present her case to the jury and ordered a new trial. The company sought review by the Supreme Court, pointing out that four other circuits have held that such evidence is irrelevant to the issue of whether a specific plaintiff was fired unlawfully, and five more have concluded that "me too" evidence, while relevant, nevertheless may be excluded under Federal Rule of Evidence 403 because its probative value is substantially outweighed by the danger of unfair prejudice or confusion.

Regardless of its outcome, *Mendelsohn* will affect employment discrimination litigation. If the Supreme Court permits "me too" evidence, plaintiffs would have greater flexibility to showcase the discrimination of others at their workplace or allege a culture of discrimination. The admissibility of such evidence also would make it harder for large employers, including many school districts, to defeat ADEA claims on summary judgment because of the likelihood that plaintiffs will be able to find other employees or former employees who believe they have suffered similar discrimination at the hands of other supervisors. Allowing such evidence would also make the trial of such discrimination cases more complex and costly because it likely would lead to the calling of additional witnesses.

On the other hand, if the Court decides to restrict the use of "me too" evidence, employers would benefit from having evidence excluded that might allow a jury to infer a discriminatory motive based on unrelated instances of alleged discrimination. The prospects for summary judgment for defendants also would be better, particularly for large employers. Finally, where cases go to trial, the number of witnesses and thus costs the of litigation would likely be reduced.

The Supreme Court has also granted *certiorari* in another ADEA case, *Federal Express Corporation v. Holowecki.* In *Holowecki,* the Court has been asked to determine whether an intake questionnaire submitted to the EEOC satisfies the requirement of filing a "charge" with the EEOC. The Second Circuit held that Patricia Kennedy did not satisfy the filing requirement when

she submitted an EEOC intake questionnaire along with a four-page affidavit identifying her age discrimination claims. The EEOC did not assign a case number, investigate or attempt to resolve the dispute, nor did it inform the employer of the allegations. The Supreme Court now must resolve a split among the courts of appeal regarding the sufficiency of an intake questionnaire absent evidence that the EEOC treated it as a charge or that the plaintiff reasonably believed it constituted a charge.

The impact of this case on school districts and other employers will be to clarify whether or not cases in which a questionnaire (or perhaps other documents not formally constituting a "charge") is submitted to the EEOC are allowed to proceed in federal court.

C. Free Speech

Although the Court has not yet granted *certiorari* in any free speech case in the education context for the upcoming term, the Court is still considering whether to review a couple of such cases in which school districts are parties.

In *Mayer v. Monroe County Community School Corporation*, a public school teacher brought a § 1983 action against her former employer, alleging that the school district violated her First Amendment rights by firing her for sharing her political views with her students. The teacher, who was working in her first year as a teacher with Monroe County schools, told her students during a current-events lesson that when she passed a demonstration against the war in Iraq with a sign encouraging drivers to "Honk for Peace," she would honk her horn in support. In response to parent complaints, the school's principal told teachers at the school "not to take sides in any political controversy." Because the case reached the Seventh Circuit at the summary judgment stage, the court assumed for the purposes of its disposition that the teacher's contract was not renewed for a second year as a result of the incident.

In ruling for the school district, the Seventh Circuit held that primary and secondary teachers do not have the right under the First Amendment to share viewpoints or cover topics in front of a captive audience of students if their speech departs from the curriculum adopted by the school district. The court of appeals emphasized that teachers are hired for their speech and are therefore required to adhere to both the subject matter and the perspective prescribed by the principal and higher school officials. As the court stated, the First Amendment "does not entitle teachers to present personal views to captive audiences against the instructions of elected officials." The court found that the teacher's comments (about current events and made during a class devoted to that topic) were "part of her assigned tasks in the classroom," and, therefore, the Supreme Court's decision last Term in *Garcetti v. Ceballos* controls. In *Garcetti*, the Supreme Court held that public employees who make statements in the course of their official duties are not shielded from disciplinary action based on such speech.

In *Brandt v. Board of Education of Chicago*, eighth-grade students in a gifted program at a public middle school brought a § 1983 action against the school board and school officials, alleging that their First Amendment rights were violated when they were disciplined for wearing T-shirts to demonstrate

their disapproval of the school's judging of the official eighth-grade T-shirt contest. The gifted students showed their disapproval by wearing a T-shirt designed by one of the gifted students that they believed should have won the school's contest for the official class shirt but, due to what they perceived as unfair judging practices, was not chosen as the official shirt.

The Seventh Circuit held that the T-shirt was not protected speech. Furthermore, the court of appeals stated that even if the shirt became protected expression "when worn as part of a protest against the election to choose the official class shirt," the principal acted within his discretion to "regulate students' conduct in order to maintain an atmosphere conducive to learning." Any injury to the students' First Amendment rights was "minimal," since the students were free to protest using several alternative and less disruptive means. The court seemed to adopt a broad reading of Supreme Court precedent relating to student speech, stating that even if the T-shirt were considered "speech," the court "must not ignore the Supreme Court's admonition that a school need not tolerate student speech that is inconsistent with its basic educational mission."

The Supreme Court may decide to review neither, one, or both of these cases, although it seems somewhat more likely that the Court would grant *certiorari* in a case like *Brandt.* The Seventh Circuit's decision in *Brandt* raises an issue that has been addressed recently with varying results by many lower federal courts and one that has not been addressed recently by the High Court. The narrow scope of the Court's holding in *Morse v. Frederick* means that case provides little guidance in student free speech cases not involving the promotion of illegal drug use. Therefore, the Court might well grant review in *Brandt* or another student speech case that raises broader First Amendment issues in the school context.

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Other Authorities: