REVIEW OF DISABILITY CASES INVOLVING JUDGE NEIL GORSUCH

President Donald Trump has nominated 10th Circuit Court of Appeals Judge Neil Gorsuch to be an Associate Justice on the United States Supreme Court. If confirmed, Judge Gorsuch will play a critical role in interpreting and enforcing civil rights protections for people with disabilities. Since becoming an appellate judge in 2006, Judge Gorsuch has participated in numerous 10th Circuit decisions involving disability rights issues, including cases asserting claims under the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA).

The Bazelon Center for Mental Health Law has reviewed Judge Gorsuch's record in disability rights cases. This record demonstrates a troubling approach to the rights of people with disabilities. Judge Gorsuch has frequently written and joined opinions in employment, education, and other cases that limit federal protections for people with disabilities. Further, Judge Gorsuch opposes judicial deference to administrative agencies, threatening to upend the progress agencies such as the Justice, Education, and Health and Human Services Departments have made in advancing the rights of people with disabilities.

Judge Gorsuch's record reveals a consistently narrow view of the ADA, IDEA, and other disability rights laws, as well as of constitutional protections for people with disabilities. This view is consistent with his remarks in a 2005 article, in which he wrote that civil rights lawyers should resort to lawsuits only for "extraordinary cases" and that lawsuits seeking to enforce civil rights statutes and constitutional protections on behalf of minority groups are "bad for the country."[1] These statements demonstrate a misunderstanding of how Congress intended that federal civil rights laws, such as the ADA, would be enforced by "private attorneys general." Such views, together with his opinions in the cases described below, lead to the conclusion that elevating Judge Gorsuch to the Supreme Court would harm people with disabilities in their efforts to protect and advance their rights.

1. Education

Judge Gorsuch has almost always voted in favor of school districts over students with disabilities in education cases under the IDEA, the ADA, and the Constitution.[2] A review of his

[1] Neil Gorsuch, *Liberals 'N' Lawsuits*, NAT'L REVIEW ONLINE (Feb. 7, 2005), http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.

[2] In a notable exception, Judge Gorsuch joined an opinion finding in favor of the mother of a student who was blind, hard of hearing, and autistic. The panel found that the district court had erred in delegating to the student's IEP team the determination of the most appropriate placement for the child. The panel noted that delegation to the IEP team created a conflict of interest because most members of the team were employees of the student's current school,

record in this area shows that Judge Gorsuch misunderstands the broad rights the IDEA and other laws provide students with disabilities and their families.

a. <u>IDEA</u>

Judge Gorsuch has interpreted the IDEA, which requires public schools to provide a "free appropriate public education" (FAPE) to students with disabilities, to impose a minimal standard in meeting that obligation. Judge Gorsuch wrote an opinion in ***Thompson R2-J School District v. Luke P.*, 540 F.3d 1143, 1155 (10th Cir. 2008),** holding that the IDEA requires only "the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals within that program," and he further characterized this standard as "not an onerous one." In this case, he rejected the conclusion unanimously reached by the hearing officer, administrative law judge, and district court that the student's continued inability to generalize the skills he learned at school to the home and other settings demonstrated that the school district had failed to provide him with a FAPE. Judge Gorsuch disagreed, writing that the student's difficulties did not totally preclude him from making *some* progress at the public school between kindergarten and third grade, and thus the school district had satisfied its IDEA obligations. This standard reflects the lowest of expectations for students with disabilities.[3]

In ***A.F. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015)**, Judge Gorsuch wrote an opinion expressing a view of the IDEA's administrative exhaustion requirement that would leave many families of students with disabilities without relief. In that case, the mother of a student with a disability first filed and settled an administrative complaint under the IDEA in order to exhaust administrative procedures as required. The mother then filed suit under the ADA and Rehabilitation Act in federal court seeking remedies available only through these federal court claims. Judge Gorsuch held that the mother could not bring these claims because, by settling her IDEA complaint rather than continuing to an administrative hearing, she had failed to fully exhaust the administrative procedures available to her. A dissenting judge called Judge Gorsuch's reasoning "inconsistent with the overall statutory framework developed by Congress" and "inconsistent with the very purpose of IDEA," since it would require a parent to refuse to resolve an IDEA claim—and in turn allow the district to continue denying FAPE to the child—in order to preserve the ability to pursue relief only available under other statues.[4]

In ***Garcia v. Board of Education of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008)**, Judge Gorsuch wrote another opinion denying relief to a high school student with a learning disability because of her failure to consistently attend school. The student, Myisha, had been receiving special education services for several years and had started ninth grade in 2002

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which would have to pay for the private placement requested by the student's mother. *M.S. ex rel. J.S. v. Utah Sch. for Deaf & Blind*, 822 F.3d 1128 (10th Cir. 2016).

[3] During this term, in *Endrew F. v. Douglas County School District*, the Supreme Court is expected to address what level of educational benefit schools must provide to students with disabilities under the IDEA's guarantee of a FAPE. Since the Supreme Court first interpreted the FAPE requirement in *Board of Education v. Rowley*, 458 U.S. 176 (1982), lower courts have reached different conclusions on the level of benefit schools are required to provide.

[4] The Supreme Court is also considering a second IDEA case this term, *Fry v. Napoleon Community Schools*, which focuses on the scope of the statute's administrative exhaustion requirement.

with an Individualized Education Program (IEP) revised that year. She frequently skipped class during the fall semester, and after she was arrested in December, she spent the spring semester at a juvenile detention center and a residential treatment center. When she returned to the public high school in 2003 to repeat ninth grade, the district failed to revise her IEP but did provide some special education services. She continued to skip classes and was suspended in December. Also in December, the district realized there was no IEP in place and began the process of developing one for that year. However, Myisha transferred to a different high school in January, and she essentially dropped out of school in the autumn of 2005.

Myisha's mother filed an administrative complaint and then a court claim challenging the school district's failure to provide a FAPE to Myisha during both 2002 and 2003. On appeal, Judge Gorsuch and the panel affirmed the district court's holdings that Myisha's own behavior, not the district's procedural deficiencies, caused any loss of educational opportunity and, alternatively, that even if the district were liable, no award of compensatory educational services was warranted as a matter of equity because Myisha had demonstrated a pattern of failing to use the educational opportunities provided to her by the district. Judge Gorsuch wrote that the "significant record of disciplinary problems and truancy, while not justifying the school district's non-compliance with IDEA in Fall 2003, does tend to confirm the district court's skepticism of whether Myisha will in fact choose to benefit from the compensatory services that she might receive from the court." Although he acknowledged that behavior or attendance issues are often related to a student's disability, Judge Gorsuch nevertheless pointed to these issues as a reason to absolve the district of liability for Myisha's education finding that there was "strong evidence indicating that, regardless of what actions the school district did or did not take in Fall 2003, Myisha's poor attitude and bad habits would have prevented her from receiving any educational benefit."

Other opinions Judge Gorsuch has joined further illustrate his constrained view of the IDEA's protections. In ***Chavez v. New Mexico Public Education Department,*** **621 F.3d 1275 (10th Cir. 2010)**, Judge Gorsuch joined a decision reversing a district court's finding that a state education department had denied plaintiffs' son a FAPE by failing to provide services required by the IDEA. The plaintiffs, parents of a sixth-grade student with autism, alleged that the school refused to send a staff member to the their home in the mornings to help address their son's refusal to go to school, then stopped sending homework home for the student, and eventually dropped him from the rolls. The parents thereafter homeschooled him for almost two years until he returned to public school.

The parents initially filed due process complaints against both their son's middle school and the state education department. After settling with the school, the plaintiffs continued their case against the department, seeking systemic relief to improve the state's treatment of students with autism. The panel refused to hold the department liable, holding that the IDEA did not require a state education agency, such as the department, to provide services directly to the student when the local education agency failed to do so. The panel noted, but was unpersuaded by, the district court's observation that allowing the department to do nothing for nearly two years while the student was dropped from the rolls was "contrary to the main purposes of the

IDEA, which was designed to make sure that all children with disabilities were provided free education in the public schools."

Finally, in ***Sytsema v. Academy School District No. 20,*** **538 F.3d 1306 (10th Cir. 2008)**, Judge Gorsuch joined a decision rejecting a claim that a school district deprived a child with autism of a FAPE due to serious procedural deficiencies in developing the child's IEP. Concerned that the IEP developed by the school was inadequate, the parents provided the child with home instruction while they negotiated, ultimately unsuccessfully, with the district regarding his IEP. After another unsuccessful negotiation concerning the IEP for the following year, the parents placed the child in a private school. The parents requested a due process hearing, then judicial review, seeking reimbursement for the homeschooling and private school expenses. The district court found that the first IEP offered to the parents was procedurally deficient, but the appellate panel reversed, holding that the procedural failure did not itself deprive the child of a FAPE. Instead, Judge Gorsuch and his colleagues held, the parents were at fault for not completing the IEP development process, and the lack of a final IEP did not substantively harm the child. The panel thus remanded to the district court to determine whether the IEP was substantively defective in providing a FAPE. The panel rejected the parents' claim that the second IEP was substantively deficient, concluding that the child would have received an educational benefit that was "more than de minimis" had he attended public school.

b. <u>Restraint and Seclusion</u>

Judge Gorsuch has repeatedly sided with schools and teachers who used extreme and ineffective disciplinary methods, including the use of seclusion and physical force, against students with disabilities. Judge Gorsuch joined an opinion in ***Couture v. Board of Education of Albuquerque Public Schools,*** **535 F.3d 1243 (10th Cir. 2008),** holding that it was constitutional for the teachers of a first-grade student with mental health disabilities to place him in an isolated timeout room even for minor violations, such as failing to follow directions to begin an assignment, for time periods up to one hour and forty-two minutes. The panel rejected the district court's finding that at least some of the timeouts were illegal, holding that none of the incidents violated the student's Fourth Amendment right against unreasonable seizures. Judge Gorsuch ruled as he did even though the child was kept in a closet-like space that did not meet state standards for timeout rooms because it lacked an exterior window, had dim lighting, and its interior window was covered with black paper. In addition, the school district used this extreme discipline over the course of two months, even though the timeouts were not effective in addressing the student's behavioral issues. Nevertheless, Judge Gorsuch and his colleagues concluded that the pattern of timeouts did not constitute a denial of the student's education because they were intended to teach him self-control and were therefore part of his educational program.

More recently, in ***Muskrat v. Deer Creek Public Schools,*** **715 F.3d 775 (10th Cir. 2013)**, Judge Gorsuch joined another opinion rejecting the claims brought by the parents of an elementary student with developmental disabilities. Even after the student's IEP was modified to specifically prohibit placing him in a timeout room, his teachers continued the practice, isolating him at least 30 times over the course of two school years. The student's parents also alleged that

staff members physically abused him on three occasions. The panel, including Judge Gorsuch, ruled against the parents, finding that none of the allegations of inappropriate seclusion or physical abuse "shocked the conscience" such that the student could state a claim under the Fourteenth Amendment.

2. Employment

Title I of the ADA and the Rehabilitation Act prohibit employment discrimination on the basis of disability. Judge Gorsuch's decisions in cases involving two major concepts related to disability discrimination in employment – reasonable accommodations and the definition of a "qualified individual" with a disability – reveal a misapprehension of Congress's intent in enacting these laws.

a. Reasonable accommodations

The obligation of employers to provide reasonable accommodations is a core element of the ADA and the Rehabilitation Act. These statutes require covered employers to take affirmative steps to ensure that qualified people with disabilities have full access to employment, including, for example, modifying policies and practices that generally apply to everyone if such policies and practices act as a barrier to the full participation by employees with disabilities. Unfortunately, Judge Gorsuch has expressed a very narrow view of the types of accommodations that should be required under these statutes.

In ***Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014)**, Judge Gorsuch wrote an opinion ruling against a longtime professor at a state university who had taken a six-month leave of absence to recover from her cancer treatment. At the end of that period, she requested a short period of additional leave at the advice of her doctor in order to avoid a severe flu outbreak on campus that could endanger her already compromised immune system. The university refused to grant additional leave. Judge Gorsuch began his analysis of Professor Hwang's claim by asking: "Must an employer allow employees more than six months' sick leave or face liability under the Rehabilitation Act? Unsurprisingly, the answer is almost always no." Although the ADA and Rehabilitation Act say nothing about the length of leaves granted by employers and specifically require that that such accommodation requests by evaluated on a case-by-case basis, Judge Gorsuch held that a leave of absence as long as six months would "turn employers into safety net providers for those who cannot work." He also described Professor Hwang as "a problem other forms of social security aim to address"—even though the professor was willing and able to resume her duties through online classes immediately, or through in-class teaching after the additional short leave. Judge Gorsuch also rejected her argument that the university's inflexible six-month leave policy was discriminatory, instead reasoning that applying the same leave policies to all employees, without providing reasonable accommodations for qualified employees with a disability, would protect employees with disabilities from being "secretly singled out for discriminatory treatment." Judge Gorsuch thus concluded that the six-month leave policy was "more than sufficient to comply" with the Rehabilitation Act.

In reaching this result, however, Judge Gorsuch applied an approach that is fundamentally at odds with the ADA's and Rehabilitation Act's bedrock principle that an individualized analysis be used in evaluating reasonable accommodation requests. Judge Gorsuch's interpretation of the reasonable accommodation requirement would wreak havoc on existing disability rights law and constrict rights currently afforded people with disabilities. Judge Gorsuch's opinion also reinforces unfounded stereotypes about people with disabilities using these protections to avoid working – even though Professor Hwang had sought the accommodations so that she could continue teaching.

b. "Qualified individual" standard

The ADA prohibits employment discrimination only against a qualified individual with a disability, *i.e.*, an employee who 1) has a physical or mental impairment that substantially limits a major life activity; and 2) can perform the essential functions of a job with or without reasonable accommodations. Judge Gorsuch has joined several opinions interpreting these requirements so narrowly as to exclude many employees with disabilities from the protections of the ADA.

In ***Wehrley v. American Family Mutual Insurance Company*, 513 F. App'x 733 (10th Cir. 2013)**, a panel including Judge Gorsuch found that the plaintiff had not established that he had a disability that entitled him to the ADA's protections. Wehrley, an insurance field claim adjuster, injured his knee and back in a workplace accident, and his employer fired him because of his inability to work on claims that involved going onto roofs. At trial, Wehrley introduced evidence of significant limitations in major life activities, including a medical report stating that he could not walk or stand for prolonged periods, that his pain disrupted his sleep, and that he had to change positions every 30 minutes while sitting. Judge Gorsuch and the panel concluded, however, that Wehrley had not shown that these impairments were substantial because the report did not say that he was unable to "walk or stand in the ordinary course of a day," nor did it describe the extent or severity of the disruption to his sleep. Without sufficient evidence of a substantial impairment in a major life activity, the panel found that he did not meet the definition of a person with a disability.

In ***Adair v. City of Muskogee*, 823 F.3d 1297 (10th Cir. 2016)**, Judge Gorsuch joined an opinion affirming summary judgment against the plaintiff after finding that he was unable to perform an essential function of his position. The plaintiff, a firefighter who held the position of HazMat Director, injured his back during a training exercise. The city required that he complete a functional-capacity evaluation, which showed that he had some restrictions on his lifting ability. He sued the city under the ADA for disability discrimination, alleging that he was constructively discharged when the city encouraged him to retire rather than be terminated because it regarded him as disabled. The plaintiff argued that he was capable of performing the essential functions of the HazMat Director position even with the lifting restrictions, testifying that he did not need to lift in his position and had never performed regular firefighter duties during his four years as HazMat Director. However, Judge Gorsuch and the panel discounted the plaintiff's testimony and instead deferred to a state law listing the ability to lift up to 200 pounds as an essential function for all firefighters, regardless of specialized roles. Since the plaintiff

suggested no potential accommodations other than being relieved of the lifting duty, the panel concluded that he was not a qualified individual under the ADA.

3. Scope of antidiscrimination laws

In ***Elwell v. Oklahoma*, 693 F.3d 1303 (10th Cir. 2012)**, Judge Gorsuch wrote an opinion holding that the protections of Title II of the ADA do not apply to the employment practices of state and local governments. The plaintiff in that case worked for the University of Oklahoma when she began suffering from a degenerative spinal disc condition. She alleged that the university failed to provide reasonable accommodations and ultimately fired her because of her disability. Judge Gorsuch rejected the plaintiff's argument that the first clause of Title II, which prohibits discrimination on the basis of disability in the "services, programs, or activities of a public entity," applied to employment discrimination. Judge Gorsuch interpreted the Title II language to apply only to the "outputs" the public entity provided to the public. Employment, he wrote, is not such an output but rather a means or method by which the public entity may provide the services, programs, and activities. This analysis appears to conflict with the Supreme Court's holding in *Commonwealth v. Yeskey*, 524 U.S. 206, 212 (1998) (that a statute can apply to situations not expressly anticipated by Congress "does not demonstrate ambiguity. It demonstrates breadth."), and if adopted by the Supreme Court or other courts would narrow the anti-discrimination protections that Title II provides.

Further, Judge Gorsuch also rejected the plaintiff's claim under the second clause of Title II, which provides that "no qualified individual with a disability shall, by reason of such disability … be subjected to discrimination by any such entity." According to Judge Gorsuch, the protection this clause provides is limited to "individual[s] with a disability who ... meet[ ] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity" and is again limited to a public entity's "outputs." In concluding that Title II did not prohibit employment discrimination, Gorsuch also refused to consider the Title II regulations promulgated by the Attorney General, which prohibited employment discrimination by public entities, because he determined that the language of Title II was so clear that there was no need to consult or defer to the regulation.

In another case involving alleged disability discrimination by a public entity, ***Barber v. Colorado Department of Revenue*, 562 F.3d 1222 (10th Cir. 2009)**, a panel including Judge Gorsuch considered the claim of a mother who challenged a Colorado statute allowing a driver under 16 to practice driving only under the supervision of the parent or guardian who held a valid driver's license. The mother, who was blind, asked the Department of Motor Vehicles (DMV) for a reasonable accommodation of allowing her daughter to practice with another licensed driver, such as her grandfather, but the DMV denied her request. The mother then sued under the Rehabilitation Act, arguing that the statute discriminated against parents like her who were blind and therefore did not hold a license. The panel rejected her claim, noting that the DMV offered a reasonable solution of having the mother give the grandfather some form of guardianship and that the DMV was aware that the state legislature was in the process of amending the statute with unusual speed. Judge Gorsuch filed a concurring opinion in the case, writing separately to emphasize that the Colorado law "was not discriminatory" in the first place

because the mother had the option of assigning some form of guardianship to the grandfather. He stated that "no one has shown why this option—designed to ensure that 15-year-old minors operate motor vehicles under the supervision of an adult with lawful authority over them—discriminated against the handicapped, such that the need for a remedial interactive process aimed at finding a reasonable accommodation was triggered."

4. <u>Restrictions on administrative agencies</u>

Judge Gorsuch is far outside the mainstream of legal thought on the issue of deference to administrative agencies (often called "*Chevron* deference"), which even Justice Scalia understood to be appropriate in many circumstances. In ***Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016)**, Judge Gorsuch wrote a lengthy concurring opinion proposing an end to *Chevron* deference, under which courts traditionally defer to the reasonable interpretations of administrative agencies when statutes are ambiguous or leave gaps for agencies to fill. Judge Gorsuch referred to *Chevron* deference as the "elephant in the room" and stated that the doctrine "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." In addition, Judge Gorsuch has criticized the extent to which agencies promulgate regulations, writing in ***Caring Hearts Personal Home Services, Inc. v. Burwell*, 824 F.3d 968 (10th Cir. 2016)** that the *quantity* of regulations and other guidance issued by agencies – absent any other evidence of administrative overreach -- is itself sufficient to raise constitutional concerns about due process and the separation of powers.

Judge Gorsuch also espoused an extreme view of the related "nondelegation" doctrine. In his view, Congress should be greatly restricted in its ability to let agencies decide, based on their expertise, some of the details of the civil rights laws and other statutes they are authorized to implement and enforce. Thus, in a dissenting opinion in ***United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015)**, he argued that the panel should have used this rarely-invoked doctrine—which the Supreme Court has not used to invalidate a statute since the New Deal era—to preclude Congress from delegating to the Attorney General the decision whether to apply sex offender registration requirements retroactively.

If he is given the opportunity as a Supreme Court justice to weaken *Chevron* deference or revive the nondelegation doctrine, Judge Gorsuch could undermine the substantial work that administrative agencies do to protect the rights of people with disabilities. Laws that prohibit discrimination on the basis of disability, such as the ADA, Rehabilitation Act, IDEA, Fair Housing Act, and Voting Rights Act, as well as social service programs that benefit many people with disabilities, such as Medicaid, Medicare, the Children's Health Insurance Program, and Social Security Disability Insurance, are all implemented by administrative agencies with the expertise and flexibility to respond to changing circumstances and to develop new policy initiatives. These agencies issue regulations enforcing disability rights only after receiving public input using a "notice and comment process." Judge Gorsuch's record raises significant concerns regarding whether as a Supreme Court justice he would ignore or even invalidate such regulations, many of which have provided major advances and important rights protections for people with disabilities.

5. Class actions

Class action lawsuits, which allow groups of similarly affected individuals to consolidate their claims into one suit, are an essential tool for civil rights litigation. Without the ability to join together in a class action to challenge unlawful practices, many people with disabilities would lack the resources to pursue individual actions to protect their rights. Judge Gorsuch has demonstrated hostility toward this crucial means of fighting disability discrimination.

In ***Shook v. Board of County Commissioners of County of El Paso*, 543 F.3d 597 (10th Cir. 2008)**, Judge Gorsuch wrote an opinion affirming the denial of class certification to a group of current and future inmates at the El Paso County Jail who had mental health needs. Judge Gorsuch upheld the district court's finding that the proposed class did not satisfy the requirement that final injunctive relief must be appropriate for the class as a whole. According to Judge Gorsuch, the variety of mental illnesses among the inmates precluded the court from fashioning a single injunction requiring safe and appropriate housing for inmates with mental health needs and limiting the use of restraints and Tasers on these individuals since the injunction would not be able to take into account the specific circumstances of each inmate. Judge Gorsuch also noted that the fluid nature of the class would mean that some requested relief, such as adequate staffing, would have to be monitored over time as the population changed. For Judge Gorsuch, these complications justified denying the inmates the opportunity to pursue systemic relief.

Before he was placed on the bench, Judge Gorsuch drafted an amicus brief arguing that efforts to bring class action securities cases should be closely scrutinized. *See* Brief of Amicus Curiae for the United States Chamber of Commerce, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005). He also advocated for tighter restrictions on the use of class actions in securities fraud cases. *See* Neil M. Gorsuch & Paul B. Matey, Settlements in Securities Fraud Class Actions: Improving Investor Protection, WASHINGTON LEGAL FOUNDATION (2005); Neil M. Gorsuch & Paul B. Matey, *No Loss, No Gain*, LEGAL TIMES, Jan. 31, 2005. At the least, such views raise significant questions about how, as a Supreme Court justice, he would view class actions involving issues of importance to people with disabilities.