

Written Testimony to the United States Senate Judiciary Committee

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Good morning Mr. Chairman and members of the committee. My name is Eve Hill. I am a Partner at Brown Goldstein & Levy and was formerly a Deputy Assistant Attorney General at the U.S. Department of Justice, Civil Rights Division. As an attorney with more than 20 years of experience enforcing laws protecting the rights of people with disabilities, I have serious concerns about Supreme Court nominee Judge Neil Gorsuch's approach to, and acceptance of, America's disability civil rights laws and the most basic principles of disability rights.

People with disabilities have long experienced what former President (then candidate) George W. Bush called "the soft bigotry of low expectations." Unfortunately, Judge Gorsuch bakes exactly such low expectations into his disability rights jurisprudence, in spite of Congress' bipartisan attempts to dismantle them through the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act (IDEA), and other laws.

For example, Judge Gorsuch's decisions on the education of our children with disabilities are troubling, both for their callousness and for their dismissiveness of the law as written by Congress. Access to quality public education is one of the greatest attributes of this country. Quality public education offers Americans the opportunity to succeed and be judged on their merits, without regard to their income, race, gender, religion, or other factors. Until the 1970s, that opportunity was largely denied to students with disabilities, who were mostly excluded from public education or required to participate without accommodations, even if that made their participation impossible.

In 1975, Congress passed the IDEA both to stop the exclusion of children with disabilities from public education, and to provide the flexibility and services those children need to succeed in education. Based on constitutional equal protection and due process requirements, the IDEA recognizes that students with disabilities must be welcome in, and benefit from, our public schools; that children's disabilities should not create a presumption that they cannot benefit from education; and that students with disabilities may need different teaching methods, different supportive services, and different means of demonstrating their knowledge than the usual

methods. The IDEA, therefore, requires public schools to provide special education and related services to ensure a “free appropriate public education” for each student with a disability through an Individualized Education Program (known as an IEP). The IDEA provides federal funding to subsidize schools’ efforts and provides administrative processes to ensure parents have input into their children’s education and to resolve disputes without protracted litigation.

Judge Gorsuch’s opinions in the Tenth Circuit Court of Appeals have repeatedly undermined the goals of the IDEA. In 2008 in *Thompson R2-J School Dist. v. Luke P.*, 540 F.3d 1143 (2008) (“*Luke P.*”), for example, he read the IDEA’s requirement of a meaningful and appropriate education to require only an education that is “merely ... ‘more than *de minimis*.’” The notion of “merely more than *de minimis*” appears nowhere in the statutory text of the IDEA. Judge Gorsuch adopted the standard in an act of judicial activism that runs contrary to the language and purpose of the statute. He claimed to ground his ruling in a Supreme Court case (*Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)) that said the IDEA requires students to receive a meaningful benefit, but does not require their potential to be maximized. But even a non-lawyer could see the enormous distance between just above *de minimis* and maximum potential.

Moreover, Judge Gorsuch’s decision ignored Congress’ clear expectations for interpreting the IDEA. After the Supreme Court decision that Judge Gorsuch pointed to, but well before his ruling in *Luke P.*, Congress repeatedly updated the IDEA to raise its standards, bring them in line with the standards for all children, and elevate the expectations for educating children with disabilities. In making these changes, Congress made clear its intent to provide much more than merely a *de minimis* education to students with disabilities, stating that: “Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible....”

Judge Gorsuch substituted his own opinion for that of a hearing officer, an administrative law judge, and a district court, all of whom had found that the IEP for Luke did not meet the requirements of the IDEA. For an appellate judge that claims fidelity to principles of judicial conservatism, a decision to overrule the findings of three lower court decisionmakers, in a manner that ignores statutory text and congressional intent, is deeply troubling.

Even more troubling is that Judge Gorsuch's judicial activism in that case created a result that can only be described as heartless. Luke has severe autism. By the time he was nine and in the second grade, it was clear that his school was unable to meet his needs. The school's own records showed that Luke was consistently regressing instead of progressing in his education, failing over 75% of the goals set in his IEP, and his behavioral problems were getting worse. Yet Judge Gorsuch, overruling three fact finders, found that a 25% success rate was a passing grade for Luke's school. After a little over a year at a new school that had the capacity to achieve Luke's IEP, Luke was meeting goals and generalizing his progress to areas of life outside the classroom. It was Judge Gorsuch's expectations, not Luke's capabilities, that were *de minimis* in this case. To suggest that a student capable of making progress should be relegated to a school demonstrably unable to meet his needs is to deny the very notion that children with disabilities have any real right to an education at all.

Judge Gorsuch's opinion in *Luke P.* has shaped the law of the Tenth Circuit for nearly the last decade, eroding the education afforded to students with disabilities in Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming. His decision remains in question, however, and has culminated in a case now before the Supreme Court, *Andrew F. v. Douglas County School Dist. RE-1*, 798 F.3d 1329 (10th Cir. 2015), which will answer the question of whether the IDEA's meaningful, appropriate educational benefit requirement is "merely more than *de minimis*" or whether Congress meant what it said about high expectations.

In *Luke P.* and beyond, Judge Gorsuch's decisions interpreting the IDEA consistently limit the rights of students with disabilities but inconsistently apply procedural rules and standards of review to shape the outcome. When Judge Gorsuch disagrees with a lower court decision in favor of a student with a disability, such as in *Luke P.*, he applies a standard of review under which he, as the appellate court judge, need not defer to lower courts in order to find against a student. In stark contrast, when reviewing a lower court's decision to award no remedy for an IDEA violation, he applies a higher "abuse of discretion" standard to defer to the lower court decision against the student. In *Garcia v. Bd. of Educ. of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008), this allowed Judge Gorsuch to simply defer to the decision below that a student with a disability who was left with no IEP for a semester should have no remedy. Judge Gorsuch even blamed the victim by claiming that because the student skipped school while her

educational needs were not being met, she was unlikely to benefit from her education even if it were provided. This assumption is flatly contrary to Congress' statements in the IDEA, No Child Left Behind Act, and Every Student Succeeds Act, that students must not be assumed to be unable or unwilling to benefit from appropriate education.

Judge Gorsuch's opinions also have attempted to transform the administrative processes of the IDEA from a means to reach effective resolutions of conflicts about a child's education outside of court into a minefield that parents must navigate perfectly or lose their rights. In one case, *A.F. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015), a school delayed an evaluation and services for several months while a child with learning disabilities was failing or getting Ds in all her classes. The parent filed an IDEA administrative claim in order to quickly obtain necessary services and get her child back on track. She participated in mediation and settled, successfully getting special education services for her child. Having used the right legal tool to address the immediate needs of her child, she then exercised her legal right under the ADA and Section 504 of the Rehabilitation Act to get compensatory damages, which are not available under the IDEA, for the time her child lost due to the school's failure to follow the law.

Despite the fact that the claims were for different things, and that the IDEA administrative process has no jurisdiction over the family's claims under the ADA or Section 504, Judge Gorsuch threw the family's case out because they settled rather than going through the entire IDEA administrative hearing process. Judge Gorsuch required that the family refuse to accept a mediation offer of the services their child desperately needed and, instead, take the IDEA claim to hearings, and then file a federal suit. Only then, under Judge Gorsuch's formulation, could they assert separate rights under starkly different statutes to compensatory damages. Judge Gorsuch stated that as long as the educational injuries "could be redressed to any degree by the IDEA," they had to be litigated (and not settled) via the IDEA process. As Judge Briscoe pointed out in dissent, "The interpretation of [the IDEA] adopted by the majority is ... inconsistent with the overall statutory framework developed by Congress. Indeed, why would Congress ... force a claimant to avoid resolution of her claim by mediation ... and lose at both the due process hearing and administrative appeal stages? Doing so would effectively render superfluous the mediation ... provisions of the statute. ... It forces a claimant to choose between mediating a resolution to her IDEA claim (even if the local educational agency were

willing to admit and correct the alleged errors) and thereby obtaining some or all of the relief sought under the IDEA ... or foregoing any relief at all and waiting (while the child ages and potentially continues to receive something other than the requisite ‘free appropriate public education’) in the hopes of later filing suit and obtaining relief under both IDEA and other statutes. That ... could not have been the intent of Congress....”

Judge Gorsuch’s opinions on disability rights for adults also rely on, rather than challenge, the stereotypes that Congress intended to dismantle in federal disability rights law. Congress passed the ADA (and Section 504 of the Rehabilitation Act, which applies the same standards to recipients of federal funding) to open doors to the workplace for people with disabilities. But Judge Gorsuch has seemed to go out of his way to avoid ruling in favor of people with disabilities. In 2010, for example, Judge Gorsuch held that an employee with multiple sclerosis did not have a disability under the ADA because she was still able to work. *Johnson v. Weld County*, 594 F.3d 1202 (10th Cir. 2010). Therefore, she could not challenge her employer’s refusal to promote her to a job she had already been doing successfully. Both the ADA in 1990 and the ADA Amendments Act (ADAAA) in 2008 were enacted to put an end to exactly such arguments and to make clear that the ADA provides, and has always provided, protection to all disabilities, including multiple sclerosis, and that people with disabilities who can work are protected. Judge Gorsuch concluded that this case, which was filed before 2008, was not subject to the ADAAA. However, even under the ADA prior to the amendments, multiple sclerosis was the kind of impairment that was intended to be protected. Senate Statement of Managers on the ADAAA, Congressional Record S8840-8841, September 16, 2008 (“Thus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court’s narrower standard. These can include individuals with impairments such as ... multiple sclerosis The resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA.”)

The ADA and Section 504 are intended to address, not just animus and discriminatory treatment of people with disabilities, but also the ways employment processes, benefits, and buildings were built on the assumption that people with disabilities could not work. Therefore, they were

designed in ways that exclude people with disabilities, even though they can do the work, but do it differently, with different equipment, or on a different schedule. This is the basis for the central ADA requirement of reasonable accommodation. Leave time to recover from a disability and return to work is one type of reasonable accommodation that is required unless it causes an undue hardship for the particular employer.

Judge Gorsuch has repeatedly ruled against employees with disabilities who need extended leave time in order to return to their jobs, even when other employees are allowed to take such leave. Judge Gorsuch argues that “It perhaps goes without saying that an employee who isn’t capable of working . . . isn’t an employee capable of performing a job’s essential functions – and that requiring an employer to keep a job open for so long doesn’t qualify as a reasonable accommodation.”

In the case of *Hwang v. Kansas State University*, 753 F.3d 1159 (10th Cir. 2014), a college professor who had worked successfully for the University for 15 years, was recovering from cancer and, therefore, more vulnerable to infection. As a result, she needed to delay her return to work because of a potentially life-threatening H1N1 outbreak on campus. The University routinely allowed certain professors to take extended sabbaticals, suggesting that granting Professor Hwang extended leave would not create an undue hardship on the employer. However, Judge Gorsuch insisted that Professor Hwang must demonstrate that other nondisabled professors at her level of seniority would have qualified for a sabbatical. Because Professor Hwang did not have tenure, she could not prove that. Judge Gorsuch wrote, “The Rehabilitation Act seeks to prevent employers from callously denying reasonable accommodations that permit otherwise qualified disabled persons to work—not to turn employers into safety net providers for those who cannot work.”

In reaching that decision, Judge Gorsuch ignored the legal test of the ADA, which asks whether a requested accommodation is reasonable and not an undue hardship on the employer, not simply whether the employee was already entitled to the accommodation under the employer’s existing system of workplace benefits. The ADA guarantees employees with disabilities access to the same benefits nondisabled employees receive. However, it also requires reasonable accommodations. The question in a reasonable accommodation case is whether a requested accommodation (e.g., leave time) is reasonable and necessary, regardless of whether other

employees without disabilities receive the same benefit. Judge Gorsuch’s approach looked only at whether Professor Hwang was being offered the same leave benefits nondisabled employees were provided. He, in essence, did not do a reasonable accommodation analysis at all.

Judge Gorsuch further suggested that Congress was wrong to require leave as an accommodation at all and that any leave of over 6 months was inherently unreasonable, no matter what other employees were given. Established law, including in the Tenth Circuit, and EEOC guidance provide that a request for leave due to a disability must be evaluated on a case-by-case basis to decide whether, on the specific facts, the request would present an undue hardship. Yet, instead of asking a jury to consider whether Professor Hwang’s request was reasonable or an undue burden, Judge Gorsuch upheld a motion to dismiss, finding her request unreasonable as a matter of law. He wrote that the “leave policy here granted all employees a full six months’ sick leave” and that such leave was “more than sufficient.”

Judge Gorsuch took a similar approach in *Cinnamon Hills Youth Crisis Center v. Saint George City*, 685 F.3d 917 (10th Cir. 2012), holding that a group home for children with mental disabilities was not entitled to locate in a neighborhood because the commercial zoning of the neighborhood prohibited residential stays of more than 29 days. Judge Gorsuch conducted no analysis of whether the requested accommodation was reasonable or would create an undue hardship, as the Fair Housing Act would require. Instead, he decided that, because people without disabilities were not permitted to violate the 29-day rule, people with disabilities were not entitled to an accommodation allowing them to live in an area more than 29 days. Judge Gorsuch noted that the city did, in fact, allow nondisabled people – namely “law enforcement personnel and the like” – to live more than 29 days in commercial zones. Unbelievably, Judge Gorsuch found that fact irrelevant. This is simply not the reasonable modification analysis called for by the Fair Housing Act.

Judge Gorsuch wrote a concurrence in *Barber v. Colorado Dept. of Revenue*, 562 F.3d 1222 (10th Cir. 2009), in which a blind single mother sought a reasonable accommodation to a state law that required a parent or guardian to supervise mandatory driving practice for anyone under age 16 pursuing a driver’s license. Because Ms. Barber was blind, she could not drive or effectively supervise her daughter’s driving practice. She asked the state to allow the child’s grandfather to ride along with Ms. Barber to supervise the driving practice. The state rejected the proposed

accommodation. Judge Gorsuch's concurring opinion maintained flatly that Colorado had no duty to accommodate the plaintiff because the driver licensing statute already allowed the appointment of a guardian in this circumstance. Instead of Colorado having to modify its requirement in a minor way that met its legitimate interests, Judge Gorsuch would require a parent to legally forfeit authority over her child.

Judge Gorsuch's cramped approach to disability rights, as well as a lack of respect for Congress' purposes in enacting disability rights laws, seems to be consistent with a broader set of negative attitudes toward civil rights suits generally. He has called them "bad for the country," and has questioned the value of class actions, which are a critical tool for disability rights enforcement. This general view, as well as Judge Gorsuch's approaches to deference and delegation to federal agencies, threatens the rights of people with disabilities.

One case, in particular, demonstrates this threat. In *Shook v. Bd. of County Comm'rs.*, 543 F.3d 597 (10th Cir. 2008), county jail inmates with mental illness sought certification of a class action alleging constitutional violations because the jail denied or delayed medication and mental health care and subjected them to restrictive housing, restraints, and pepper spray. Judge Gorsuch upheld the lower court's decision to deny certification of the case as a class action, finding that the class members' mental health conditions were too individual and the relief they sought was not specific enough. Even though the plaintiffs challenged the jail's lack of a system or policy and procedure for identifying and responding to mental illness and sought simply injunctive relief to create such a system, class certification was denied.

Because disabilities affect people in individual ways, this approach threatens the ability of people with disabilities to challenge any covered entity's failure to have any process to recognize and respond to them. Instead of looking at the relief as the creation of a process to identify and determine the appropriate response to inmates with mental illness, the district court and Judge Gorsuch focused on what the anticipated results of such a system might be – i.e., individualized responses to individuals' mental illnesses - even though that is not what the plaintiffs were litigating. Judge Gorsuch relied on the fact that the plaintiffs sought a system designed to provide "appropriate" and "adequate" responses to find that the relief was too individualized and not sufficiently specific.

Taking Judge Gorsuch's approach to its logical conclusion, no group of people with disabilities could challenge a school, hospital, or government agency for lacking any policy or process under the ADA because the ultimate outcome of that policy or process would need to be individualized. Judge Gorsuch suggests that plaintiffs should, instead, bring individual claims and seek damages, an approach that should worry covered entities as much as it worries the disability community, because they may face an avalanche of resource-intensive individual suits and damages awards.

In the *Shook* case, Judge Gorsuch acknowledged, but discounted, the fact that precisely this kind of class-wide systemic relief has been successfully required, implemented, and monitored by courts in cases brought by the Department of Justice. In fact, class-wide systemic relief has been particularly effective for both people with disabilities and the institutions that serve them in cases involving the integration mandate of the ADA (described in *Olmstead v. L.C.*, 527 U.S. 581 (1999)). Class-based systemic relief allows the appropriate balance, called for by the Supreme Court, between the integration interests of people with disabilities as a group and the system-wide resource limitations of state and local governments. Pursuing a series of individual actions would not allow that balance.

These views and his record of rulings in disability rights cases call into serious question whether Judge Gorsuch is qualified to be a Supreme Court justice. You may believe that a judge's role is to protect the dignity of all people and especially that of overlooked and disempowered minority groups. Or you may simply believe that a judge's role is to remain faithful to the clear intent of Congress in statutes designed to protect individual rights. Either way, Judge Gorsuch's approach to disability issues reveals a lack of fidelity to the proper role of a judge. The notion of his elevation to our nation's highest court sends fear into the hearts of the many Americans who rely on federal protections to ensure that disability is not an unfair and unjust barrier to accessing jobs, housing, and education for themselves and their children.