



Supreme Modesty

From strip searches to school funding, the Court treads lightly

by JOSHUA DUNN and MARTHA DERTHICK

The Supreme Court under John G. Roberts is not looking to be our national school board, if opinions handed down in three varied cases at the end of its last term are a guide. The cases involved strip searches, private placement, and funding, which the media covered in inverse proportion to their significance for public policy.

The strip-search decision in *Safford v. Redding* got by far the most media attention. The case involved a 13-year-old girl in Arizona who had been ordered to strip to her bra and underpants, and to pull them away from her body so that school officials could look for prescription-strength Ibuprofen. The Court ruled 8 to 1 that this violated the Fourth Amendment ban on unreasonable searches. The media largely neglected that the ruling was limited to similarly invasive searches for similarly innocuous drugs and that it granted qualified immunity to the school officials who were responsible for the search.

Next in order of publicity was *Forest Grove School District v. T. A.*, a case from Oregon in which the Court held 6 to 3 that parents could receive reimbursement for private school tuition even when their disabled child had never enrolled in a public school special education program. A brief filed by urban school districts raised the specter of wealthy parents gaming the system and driving up costs, but the effect of this decision will also likely be limited. Certainly, some parents will try to use the decision to fund private school, but significant requirements under the Individuals with Disabilities Education Act (IDEA) remain in effect. For families to be eligible for reimbursement, an administrative board or court will still have to find that a public program could not meet the child's needs. In general, the cost and incidence of private placements appear to have been exaggerated in the media (see "The Case for Special Education Vouchers," *features*, page 36, and "Debunking a Special Education Myth," *check the facts*, Spring 2007).

Receiving almost no attention but potentially of utmost significance was *Horne v. Flores*, a case about English-language learning in which the Court divided narrowly along ideological lines, with Kennedy joining the five-member majority. The central issue is whether Arizona has satisfied the Equal Educational Opportunity Act (EEOA) of 1974, which provides that no state shall fail "to take appropriate action to overcome language barriers that impede equal participation...in its instructional programs" (see "Language Barriers," *legal beat*, Winter 2009).

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The case called for the Court to weigh in on several controversial issues, the most important of which is the extent to which the judiciary should be able to dictate education spending by state and local governments. In considering whether Arizona was meeting the requirements of the EEOA, Justice Samuel Alito's majority opinion faulted the district court and the Ninth Circuit for focusing on the "narrow question" of funding, and ignoring whether managerial and instructional reforms had brought the state into compliance.

The plaintiffs and lower courts had consistently used funding as the barometer of quality. Alito jumped headlong into the funding debate by citing "a growing consensus in education research that funding alone does not improve student achievement." While the case does not bind state courts, it provides an important source of support for those opposing state school-funding lawsuits.

The Court also emphasized that cases such as *Flores* risk making the courts a manipulated contestant in disputes where one side uses litigation to insulate its policy and spending preferences from political debate. The majority was clearly distressed at the often collusive nature of institutional reform cases, as illustrated by *Flores*, in which then Governor Janet Napolitano, a Democrat, supported the lawsuit against the state as a way to leverage more school spending out of the Republican legislature.

Flores, then, sent perhaps the strongest signal of any of the cases that the Roberts Court was seeking to define a path of judicial modesty. Indeed, Roberts himself seemed to say as much at a judicial conference soon after the strip-search decision. Asked about it, he replied, "You can't expect to get a whole list of regulations from the Supreme Court. That would be bad. We wouldn't do a good job at it."

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