Imani Gandy

Hello, fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire News Group podcast hosted by the legal journalism team that realizes and understands that disability rights is a reproductive justice issue. I'm Rewire News Group's Editor-at-Large, Imani Gandy.

Jessica Pieklo

And I'm Jess Pieklo, Rewire News Group's Executive Editor. Rewire News Group is the one and only home for expert repo journalism that inspires you to give the bird to eugenicists and the Boom! Lawyered podcast is a part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.

So this episode, we are talking about oral arguments in a case that could upend disability rights in education and potentially wreck disability discrimination law as we know it.

The case is called AJT versus Osseo Area Schools. And I'm putting it mildly here when I say that things got really spicy during arguments.

Imani Gandy

These oral arguments turned into a downright hootenanny, right? Yeah, I said hootenanny. Thanks to the antics of legendary and irascible Supreme Court advocate, Lisa Blatt.

Jessica Pieklo Hoot Nanny? Irascible?

Imani Gandy Blame it on my Word of the Day toilet paper.

Jessica Pieklo I'm sorry, you have a word of the day toilet paper?

Imani Gandy No, I don't really, but I just really like thesauruses. Okay. I like words.

This case was supposed to be a narrow education rights case. You know, just your standard "Do students with disabilities have to meet an impossibly high bar to sue their schools under the ADA?"—that type of thing.

Jessica Pieklo

And then, yeah, yeah, yeah. And then, you know, here comes Lisa Blatt busting through the Supreme Court doors like, oh yeah, the Kool-Aid woman for all people with disabilities to meet this uniquely stringent bad faith or gross misjudgment standard in all disability discrimination cases. Not just students, not just in education, all disability discrimination cases, even though...

lmani Gandy Hahaha!

Imani Gandy Yeah. Nope. Nope.

Jessica Pieklo

...that's not what she argued in the courts below, according to the plaintiffs. And even the justices were confused about what Blatt was claiming during oral arguments versus what she claimed in both the district court and Eighth Circuit proceedings.

Imani Gandy

There was actually a lot of confusion over what the question presented even was, right? That's the question that the Court took and is supposed to resolve. At one point, Justice Jackson read the question presented aloud, right? And which is really ridiculous, right? So the Court agreed to hear this case on a pretty focused question, and it is, do the ADA and Section 504 of the Rehabilitation Act require children with disabilities to satisfy...

Jessica Pieklo bananas.

Imani Gandy

...a uniquely stringent quote, bad faith or gross misjudgment standard when seeking relief for discrimination related to their education. The ADA and section 504 of the Rehab Act require public entities and organizations that receive federal funding to provide reasonable accommodations for people with disabilities. Now we've talked about section 504 before in this podcast. We did a whole episode on how the conservative legal movement may be probably overstepped when it started to play along with having the historic civil rights law declared unconstitutional. It is a great meaty episode and you should listen to it when you get a chance.

Jessica Pieklo

And we know how smart our listeners are because we got a question from Blue Sky preemptively before this podcast about whether or not this case Osseo overlaps with that section 504 case. And the TLDR is we think it does, but we don't know just how much so yet until the decision in Osseo drops and also conservatives resolve what they're going to do in that case. So I guess I would say listeners stay tuned.

Imani Gandy Stay tuned. Yes.

Jessica Pieklo

But back to Osseo, okay? In this case, in the decision below, the Eighth Circuit, which I just want to point out, was conservative and issuing wild decisions well before the Fifth Circuit came along and was like, hold my beer. The Eighth Circuit had held for discrimination claims based on educational services brought by children with disabilities that the ADA and Rehab Act are violated only, and I want to make this clear, only if school officials acted with bad faith or gross misjudgment.

Now that rule comes from a 1982 case called *Monahan v. Nebraska*, which plaintiffs want overturned. So again, see my earlier point about the Eighth Circuit acting out back before that was what all the conservative courts of appeals did.

Imani Gandy

Now when you think about it, the quote bad faith or gross misjudgment standard is a wild bar to have to meet, right? That means that schools can be negligent, they can be dismissive, they can be entirely unhelpful, but unless they're twirling a mustache or petting a hairless white cat while doing it, then good luck with your lawsuit, children with disabilities.

Jessica Pieklo Mm-hmm.

Jessica Pieklo

I mean, that's the truth. And what is so bananas about it is that it singles out children, students with disabilities and makes them meet a higher burden than anybody else is forced to meet. As if children with disabilities don't already have the chips stacked, right? Not even college students, adults here have to meet that high bar. Just, you know, elementary and high school kids.

And it just, cannot be that kids with disabilities seeking relief for education related discrimination have to meet a more stringent standard than any other plaintiffs suing under the ADA or the Rehab Act. It just, look, it doesn't make sense, but they do. And that's solely because of the standard that the Eighth Circuit invented requiring kids with disabilities who suffer discrimination in schools to meet that higher standard.

Imani Gandy

Especially when Congress has explicitly recognized that disability discrimination is most often the product not of invidious animus or egregious misconduct, but rather of thoughtlessness and indifference, of benign neglect.

Jessica Pieklo

Exactly. I mean, even the Eighth Circuit in ruling in Osseo was basically like, man, this standard sucks, but we are bound by it because of precedent.

Imani Gandy

Imagine saying that you're bound by something because of precedent. It's very quaint. But let's backtrack and set the scene.

Imani Gandy

AJT, the plaintiff in this case, is Ava. She's a teenage girl with a severe seizure disorder that causes her to have multiple seizures every morning. Now, her seizures are so intense and so frequent in the morning that she physically cannot attend school before noon. That means without accommodations, she's missing out on hours of instruction every single day.

When she lived in Kentucky, her old school made it work. They shifted her class schedule; they gave her evening tutoring. They did what they needed to do because, spoiler alert, the law says you have to accommodate students with disabilities. But when Ava's family moved to Minnesota and asked the Osseo Area School District to work with them to find a solution, the Osseo Area School District was basically like, nah, bitch, we're good. No evening instruction, no meaningful adjustments. They gave her a short day and said, that's it.

Jessica Pieklo Oh.

Imani Gandy

The district court said that the school district didn't show any concern about Ava's needs and was more concerned about making sure that no teachers had to work after hours to accommodate Ava.

Jessica Pieklo

So Ava's parents did the reasonable thing and sued the school district under the Individuals with Disabilities Education Act or IDEA, as well as the ADA and Rehab Act. The IDEA is a law that guarantees kids with disabilities the right to a free, appropriate public education or FAPE.

They went through the hearing process and an administrative law judge found that the Osseo school district had denied Ava a FAPE, a free appropriate public education, and ordered the district to revise her IEP, that's the individualized education plan, and provide almost 500 hours of compensatory instruction. That is how far behind she was at this point. So that's a win, right?

Imani Gandy

Kind of. Here's the problem. The IDEA, right? The Individuals with Disabilities Education Act is great for fixing the future.

Jessica Pieklo Okay.

Jessica Pieklo Mm-hmm.

Imani Gandy

It gets kids the services they need going forward. But it doesn't let you sue for money to make up for the harm that's already been done.

Jessica Pieklo Okay.

Jessica Pieklo

All right, so enter the ADA and Section 504 of the Rehabilitation Act, which Ava's lawyers say lets plaintiffs establish a statutory violation and obtain an injunctive relief without proving intentional disability discrimination. Ava's lawyers also say that Ava can obtain compensatory damages, so money, right, by proving that the defendant was deliberately indifferent to her federally protected rights. So here's what she and her family wants. Give her an injunction so she can finally get the full school day that she deserves and financially compensate her for the years she spent shortchanged on her education.

Imani Gandy

So by the time the case reached oral arguments this week, the Supreme Court wasn't deciding whether or not Ava was harmed. That question had already been decided in the affirmative. The Supreme Court was tasked with figuring out whether disabled students must meet a higher bar, this bad faith or gross misjudgment standard, in order to get damages, money, under the ADA and Section 504 of the rehab.

Jessica Pieklo

And here is where Lisa Blatt is doing the most.

Imani Gandy The absolute fucking most.

Jessica Pieklo

So enter Lisa Blatt, who basically out of the blue argued that it wasn't just children in education settings who need to meet the higher bad faith gross misjudgment standard. Nope, it's all people with disabilities for all disability claims. Ava's lawyers were basically like, oh, fuck this. You know that makes no sense for children with disabilities to meet the super high standard. So to save face, you're arguing for the first time that all people with disabilities have to meet this standard?

Imani Gandy

Yeah, and most of the justices were like, I'm sorry, what now? Like, you want us to do what exactly? Meanwhile, the lawyer for Ava was like, hey man, you can't just introduce a whole ass new theory, right? If we had known that you wanted everyone filing disability discrimination claims to meet this high bad faith, gross misjudgment bar, we would have definitely flipped the fuck out. Like the entire disability community would have flipped the fuck out.

Jessica Pieklo

And, and I mean, point of order, they also would have briefed the issue.

Imani Gandy Thank you very much. And does that remind you of something, Jessica Mason "Cassandra of the Courts" Pieklo?

Jessica Pieklo

Holy shit, *Dobbs* just doesn't go away, does it? We're like creeping up on the three-year anniversary of Sammy the Leak Alito just letting that opinion slide before it was released.

And again, to remind folks, the *Dobbs* case was supposed to be about whether or not Mississippi's 15-week ban was constitutional under *Planned Parenthood v. Casey* and *Roe v. Wade*—under precedent. And then, what happened? Oh, presto change-o. Let's just switch up the question and make it *should the Court overturn Roe?* And here we are today.

Imani Gandy Yeah. And in the Osseo oral arguments, even ACB wasn't having it, right?

Jessica Pieklo I mean, that's some audacity given she's the reason the *Dobbs* case flipped but go on.

Imani Gandy

Right. So she called what Lisa Blatt was arguing a potential sea change in discrimination law, a sea change.

Jessica Pieklo And then things got spicy. Lisa Blatt came in hot. At one point she accused...

Imani Gandy So hot.

Jessica Pieklo

... the other side of lying about whether or not the district had changed its legal position.

Imani Gandy

She literally used the word "lie" on the record in front of the Supreme Court. This isn't something you're supposed to do. Non-lawyers may not understand how absolutely out of pocket this is. You're supposed to refer to opposing counsel as "my friends on the other side," not "those lying fucks." And okay, that's not exactly what she said, but she might as well have given her tone.

Jessica Pieklo I mean.

Jessica Pieklo No.

Jessica Pieklo Right.

Jessica Pieklo Right!

Jessica Pieklo

And I mean her calling the other side liars made Justice Gorsuch big mad. He stepped in and was like, we do not do that here, which okay, I'm sorry, Imani. It was kind of giving daddy vibes from the bench. I'm liked it maybe a little bit. I'm sorry. I don't know why I'm like this. I'm working on it. I promise.

Imani Gandy

Oh my God. Jess, you sweet summer child. We love you, we love you, but you are a sweet summer Gorsuch child.

But I do find it amusing that Gorsuch, right, who once left a truck driver to freeze to death in a snowstorm, who was like, hey, ma'am, let's keep it civil. Right, do you remember that case? Like, I'm gonna just say a little bit about that case, right? There was this truck driver named Alphonse Madden...

Jessica Pieklo Oh my gosh. Please do.

Imani Gandy

... who was stranded on the side of the road in sub-zero temperatures when his trailer brakes froze. And after hours of waiting without heat, his body going numb and fearing for his life, he unhooked the trailer and drove off to find help. And then his employer fired him for disobeying orders to stay put. And Neil Gorsuch dissented. He was like, you know what? They had the legal right to fire him. He had this cold literal reading of the law that ignored basic human decency. So the fact that he had the audacity to scold Lisa Blatt, for being uncivil in court? Man, please, right? Like that's rich coming from Mr. Hypothermiais-an-HR issue.

Jessica Pieklo Right.

Jessica Pieklo

Right, right. And I think, you know, even Blatt took notice of that. She eventually walked back her remark that Ava's lawyer and the Solicitor General for the Trump administration were lying because of course she called the Solicitor General a liar too. But the damage in arguments had been done. The whole argument had this tone of hostility, chaos, confusion, and I mean...

Imani Gandy Right.

Jessica Pieklo

...Not a great look when you're trying to radically overhaul federal anti-discrimination law on the fly. Just gonna say it.

Imani Gandy

Yeah, and she kept interrupting. Like it was kind of uncomfortable to listen to. And she was rude to Justice Jackson, which I really didn't like. She kept... at one point she interrupted her as Justice Jackson was asking a question and she was like, "please let me get this out" because she had a point that she really wanted to make. Hey man. Lady. Ms. Blatt. Justices are allowed to interrupt you when you're talking, but you're not supposed to interrupt them. But she kept...

Jessica Pieklo Mm-hmm.

Imani Gandy

...doing it. And I have to say, I have really mixed feelings about Lisa Blatt. But before we get into my mixed feelings, we should talk about who Lisa Blatt is and why we're dedicating basically an entire podcast to her antics.

Jessica Pieklo Yeah.

Jessica Pieklo Mm-hmm.

Jessica Pieklo

Right, I mean, because she's not just any lawyer walking into the Supreme Court. This woman has argued nearly 50 cases at the Supreme Court, which is more than any woman in US history. And Imani, her win rate is around 85%. She's a powerhouse and a legend in her own right.

Imani Gandy Bananas.

Imani Gandy

But she's also not exactly subtle, right? Her style is sharp, combative, and often downright hostile. And that was on full display in oral arguments. And I really didn't like the low-key racist feel of the disrespect that she showed Justice Jackson. But then again, she also showed Kavanaugh some serious disrespect. And I was absolutely here for that, right? She basically told him something to the effect of, hey, Kav, do your fucking job.

Jessica Pieklo Yes.

Jessica Pieklo

I mean, it was pretty wild. It was a moment. I'm not gonna lie. Here's what she said. "I know it's sometimes easier for you to say we don't have to do a lot, but you cause real harm to the parties who don't have Supreme Court counsel and lower courts." Then she straight up called Kavanaugh out and said, "while it is part of your job, Justice Kavanaugh, to set the law sometimes. And I understand it's easier for you and you have a lot going on to not set the law."

Like, what? What? This woman who was basically like, listen, bro, do your job. We should remind folks that she had an op-ed in Politico around the time Democrats were trying to keep Kavanaugh off the bench because he was a rapey beer enthusiast. And here comes Lisa Blatt saying like, Hey folks, I'm a liberal feminist lawyer. You leave justice Kegstand alone.

What is happening?

Imani Gandy Yeah. What's her deal? What is her deal?

But when she was having this colloquy with Kavanaugh, or basically scolding Kavanaugh, that's when Gorsuch jumped back in to basically smack Lisa Blatt down for calling the other side liars. And I'm glad he jumped in because it made for really interesting and explosive Supreme Court oral arguments, but I kinda wish he'd held off a little bit because I wouldn't have mind listening to Lisa Blatt continue to tell Justice Bozo to do his goddamn job.

Jessica Pieklo Mm-hmm.

Imani Gandy

But Gorsuch was mad and he wasn't having it, so he jumped right in.

Jessica Pieklo

Yeah, and I mean to the like tiniest degree of credit to Blatt. She walked back her comments, right? But because she was basically forced to.

Imani Gandy

Yeah, she was forced to after Gorsuch was like, hey, you better withdraw those remarks or else, right? At one point, he got so annoyed with her interruptions that he just outright snapped at her. He was like, *I'm not finished!* And then he proceeded to read a bunch of quotes from her brief to demonstrate that it wasn't necessary for her to say that the other side was lying or misrepresenting the position. They just had a different interpretation. And that's really what lawyering is about.

Jessica Pieklo Ha ha!

Imani Gandy

That's why we don't call each other liars, because we look at an issue and we just take different sides. We interpret it differently, right? Gorsuch was basically like, *a reasonable person could think you were arguing for a special standard*. And Lisa Blatt was all, "Fine." And then Gorsuch was all "fine? FINE?" I mean, it was a trip. I've actually never heard anything like it during oral arguments at the Supreme Court.

Jessica Pieklo It was.

Jessica Pieklo

It's wild to have Justice Gorsuch at the center of all this given his, I don't know, curious relationship with the truth in evangelical cases. I mean, think about last week. Wouldn't it have been nice if the lawyer arguing in the *Taylor* case had taken a page from Blatt's playbook and said, "these mofos are lying about what Pride Puppy is about," right? Like that would have been refreshing.

Also, it's just funny that Gorsuch was the one who called her out for lying since he's a big fat liar himself.

Imani Gandy Exactly. Like as you said, last week he lied about having read Pride Puppy. Jessica Pieklo

Clearly didn't.

Imani Gandy

Several years ago, he lied in the "Coach Can Pray" case, *Kennedy v. Bremerton*, saying that it was just a private ceremony when in reality the teams were in the middle of the field with their helmets raised up like it was goddamn Friday Night Lights. They were straight up like clear eyes, full hearts, can't lose.

Jessica Pieklo

Right, right. But let's get back to Blatt for a second here because, you know, we're talking about our mixed feelings about her and overall, you know, her argument style is interesting. I think she has a tendency to be really kind of casual at this point because she's been there so many times and maybe that's part of what wasn't landing.

Imani Gandy

Yeah, I think— that's exactly what I was thinking, right? She's just real familiar with them. Like, real goddamn familiar. And so I think she probably gets away with a lot. Even when she's hostile towards the judges, like takes swipes at them, they hand her unanimous victories. So obviously her style works for her.

Jessica Pieklo

And that's what it is, like that's real familiar talk.

And I mean, look, I kind of hate to say it, but it's also kind of refreshing. I mean, how many times has Kavanaugh been on the bench asking lawyers, *Hey man, tell me what to do here*, right? Like that's literally again, what he did in the *Mahmoud v. Taylor* case. *Where do I draw the line? Tell me what the law should be, counsel from the Becket Fund*. Like that's his whole thing. So to have him called out on it, kind of scratched an itch.

Imani Gandy

Yeah, it did. But also, I really, really don't like the way she talks to Justice Jackson. And that just may be how she talks to all of the justices. But with Jackson being the only Black woman on the bench and me being a Black woman, it's like, I feel like we have to protect her at all costs, right? And there was another case where that involved uh a trademark issue...

Jessica Pieklo Yeah, that's real fair.

Imani Gandy

...where there was a plush toy that was called like Jack Spaniels or something and it was made to look like a bottle of Jack Daniel's whiskey. And on the bottom of the plush toy, it says something like 43 % poo by volume. And so Jack Daniel sued, like it was gonna cause confusion in the marketplace. Someone might look at this 43 % poo by volume and they didn't want to associate that or make people think there was like dog shit in their whiskey or something—like, I don't know.

Jessica Pieklo Oh god!

Imani Gandy

Jackson and Blatt were going back and forth about the Lanham Act, which governs trademark. And Blatt at one point said to Jackson just kind of frustratedly, *well, I'm happy for you to make stuff up*. Which like, what? And Jackson was like, *I'm not making stuff up*. I mean, was, she's a little bit out of pocket.

Jessica Pieklo What?

Jessica Pieklo Yeah, she is.

Imani Gandy

And then also I was reading an article about her in the Seattle Times. And at one point in another case, she told Justice Kagan that her question was "factually and fundamentally wrong." Like, can you imagine saying that to a Supreme Court justice

Jessica Pieklo No, i can't!

Jessica Pieklo I mean.

Imani Gandy

And then in another case where she felt like her Harvard-educated opponent on the other side was being super condescending, she said, "I didn't go to a fancy law school, but I'm very confident in my representation of the case law." She went to University of Texas, which is a pretty fancy law school. Like, it's top 15, I think. So, you know, and actually, funnily enough, at the end of those arguments, Ruth Bader Ginsburg, RIP, said to her, Texas is a fine law school. And then they handed her a unanimous win in that case. Right? So she often gets unanimous wins even when her combative argument style is just on full display. And so it's like, I kind of love slash hate her.

Jessica Pieklo

Yeah, yeah. Are we going to be frenemies with Lisa Blatt, Imani? Like, I can kind of feel it. I don't like it, but I got a feeling. And here's the thing too. She's really the anti-Prelogar, right? Like the woman who argued as Solicitor General during the Biden administration. So the reality is, is there just are not a lot of women who argue cases before the court. And what

we have are these two really different bookend styles. We've got Blatt who is just, like we said, the Kool-Aid man coming through and like, you know, just destroying what is in her path in the name of advocacy. And then we have Prelogar who is very measured and at the same time was absolutely holding her own with barbs and jabs with the conservatives on the Court, but in a way that just didn't quite have as sharp of an elbow to it.

Imani Gandy

Yeah, and also I think it's worth pointing out that there are a lot of Lisa Blatts in the male advocacy community, right? Like there are a lot of men who show up in court and act like complete dickheads. And I'm not saying Lisa Blatt was acting like a dickhead, but men get away with so much more than women advocates can. So I think that we need to keep that in mind as we're talking about Lisa Blatt's arguments.

Jessica Pieklo Oh, definitely.

Jessica Pieklo Completely.

Jessica Pieklo

And just one more point on that. One of her good friends is just that person, Paul Clement, who is a conservative advocate and represented the Bush administration in some of its worst cases and would frequently yuck it up and then also be very familiar with the justices during arguments. Why? Because he was there all the goddamn time.

Imani Gandy

Yeah, Okay, Jess, let's talk stakes. What's at stake here?

Jessica Pieklo

Okay. Well, a lot. I mean, we say that in damn near every episode, but that's really truly the times right now. If the court buys what Osseo and Lisa Blatt are selling, it's not just bad news for Ava. It could make it hard for every person with disabilities who wants to sue for discrimination related to that disability. This case started out as *Hey, let's clarify disability rights in school*. And now it's threatening to become, *hey, let's make it nearly impossible to win any disability rights case unless you can prove someone was cackling maniacally while violating your rights*.

Imani Gandy

And if the court adopts the higher bar nationwide, it's gonna be devastating because discrimination usually looks like indifference, not overt villainy, right? Discrimination on the basis of disability, I mean. These aren't people who are twirling their mustaches and announcing their intent to discriminate against people with disabilities. It looks like a person having to crawl upstairs because a school doesn't have the funds to fix the elevator or add ramps.

Jessica Pieklo Yeah.

Jessica Pieklo Mm-hmm.

Jessica Pieklo

Right. And, you know, I rarely say anything good about this court, but here I will. During arguments, they seem to recognize that. Most of the justices were side-eyeing the idea of bad faith standard going that far. Even the conservatives were like, I can't explain it, ma'am, but this does not feel okay.

Imani Gandy

Right, and I have a question, a question that's been bothering me for a while now. Why do you think the Trump administration sided with petitioners? Because in this case, Lisa Blatt was calling Ava's lawyers liars, but also the Solicitor General. I think her name is Nicole Reaves. And the Solicitor General, on behalf of the Trump administration, was arguing with Ava.

Jessica Pieklo Okay.

Jessica Pieklo Right.

Imani Gandy

So what's up with that? Like they were arguing against this super high bad faith standard being applicable for all disability discrimination cases. And that seems really weird to me, given the administration's crusade against accessibility.

Jessica Pieklo

It is really weird given the administration's crusade against accessibility. And I don't have a clear answer. Honestly, the Trump administration proactively took steps to insert itself into this case for oral arguments in a letter brief. And that letter brief basically said, well, this would create chaos. And again, head scratcher, cause it's not like the Trump regime is into law and order generally speaking. So I don't know. It could be that this is a bridge too far. even for the attorneys in the Solicitor General and Department of Justice here. It could be that they have other plans related to 504 and the ADA and that we have not yet heard about. It could be that this is—I mean, I literally, have no idea. You would think given the straight eugenicists driving things in this administration that that would be the case because this is about money.

This is about whether or not schools have to pay for damages done from creating environments that are inaccessible for disabled students. And so, like, you would again

think the administration would be like, that seems cool. Don't make the schools pay. Set this incredibly high bar. I don't know. If anybody knows, let us know.

Imani Gandy

Yeah. I mean, our listeners are really smart. So if you have any theories, let us hear them. Please, you can, I gotta know, man, I gotta know.

Jessica Pieklo

They are! Share 'em, please, I need to know. Inquiring minds.

Imani Gandy

If you wanna share your theories with us, you can share them on BlueSky. Both Jess and I are on BlueSky. I am AngryBlackLady. She is Hegemommy. H-E-G-E-M-O-M-M-Y. You should definitely follow @rewirenewsgroup.com on BlueSky. We've got a new social media manager working in concert with our very own BeigeBabyJesus. and they're pumping out really awesome content. Also Instagram, follow us there. TikTok, follow us there. And make sure you check out our website because A, it looks lovely and B, we've got a lot of interesting articles that are up there that I think might interest you. So on that note, what are we gonna do Jess?

Jessica Pieklo We are going to see on the tubes, folks.

Imani Gandy We're gonna see you on the tubes, folks.