AASPS Annual Conference
June 12, 2017
Columbus, Ohio

Update from Washington: Supreme Court and Federal Agency Activity

Leza Conliffe
Senior Staff Attorney
National School Boards Association
Office of General Counsel

The View From Washington

The U.S. Supreme Court, Federal Agencies, and What May Be Coming Down the Pike

Goals of This Presentation

- To shine some light on developments in school law in the last year, both from Congress and federal agencies, and their impacts on school districts, school employees, and students.
- To share NSBA perspectives and approaches to some of these developments.

The U.S. Supreme Court

The U.S. Supreme Court's October 2016 Term (to date)

Today's Docket for Discussion

- Exhausted Yet? *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (Feb. 22, 2017)
- When FAPE by any other name is (or is not) FAPE: *Endrew F. v. Douglas County School District RE-1*, No. 15-287 (U.S. Mar. 22, 2017)
- One to Watch: *Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 15-577 (U.S. Argued Apr. 19, 2017)

nsba
National School Boards Association

Fry v. Napoleon Community Schools, 137 S. Ct. 743 (2017)

The Question Before the Court:

May parents of a disabled child bypass the IDEA's administrative remedies procedures to bring a suit directly against the school district for damages under the Americans with Disabilities Act and the Rehabilitation Act (Section 504), since monetary damages are not available under the IDEA?

The Facts of *Fry*

The parents of a child with cerebral palsy requested that the school district allow their student's service dog, "Wonder", to accompany her to kindergarten to enhance her independence.

The school district's IEP team determined that the human aide already providing one-on-one support to her as part of her IEP was sufficiently meeting her needs.

Based on that determination, the school district denied her request.

"Never work with animals or children."
— *W.C. Fields*

Exhibit A: The Dog, Wonder.

Exhibit B: Wonder & Ehlena

The Facts of *Fry* (con't)

Rather than using the IDEA's dispute resolution procedures to resolve the disagreement, the parents home-schooled Ehlena and filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR).

After a two-year OCR investigation, the school district agreed to let Wonder accompany her to school. However, her parents decided to enroll her in another school district instead.

The Facts of *Fry* (con't)

The parents subsequently filed suit against the school district seeking tuition reimbursement and monetary damages under the ADA and Section 504 for the first school district's failure to accommodate the presence of the service dog, Wonder.

The Facts of *Fry* (con't)

In their ADA/504 (and related state claim) suit, the parents asserted the following:

- Denial of equal access to school facilities;
- Denial of use of Wonder as a service dog;
- Interference with her ability to form a bond with Wonder;
- Denial of opportunity to interact with other students at school;
- Psychological harm caused by school's refusal to accommodate her as a disabled person.

The Lawsuit Below

Both the trial court and the Sixth Circuit Court of Appeals (KY, MI, OH, TN) ruled in favor of the school district, finding that the case should be dismissed because when the alleged injuries can be remedied through the IDEA's procedures, or they relate to the specific educational purpose of the IDEA, the parents must exhaust the IDEA's procedures before seeking relief in court.

The parents appealed to the U.S. Supreme Court.

NSBA's Advocacy Efforts

NSBA filed an *amicus* brief in support of the school district in the appeal to the U.S. Supreme Court.

NSBA's *amicus* brief included contributions from:

- The Michigan Association of School Boards
- AASA (The School Superintendents Association)
- ASBO (Association for School Business Officials)
- NASDSE (National Association of State Directors of Special Education)

NSBA's Advocacy Efforts

NSBA's *amicus* brief argued:

- A direct route to litigation undermines the IDEA's collaborative process that Congress designed for resolving special education disputes.
- The IDEA's collaboration and administrative hearing processes provide for the best interest of the child through:
  - Educational expertise; expeditious resolution; reduced financial and emotional costs of litigation.

The Supreme Court's Decision

A unanimous 8-0 decision that held:

(1) Exhaustion under the IDEA is unnecessary when the "gravamen" of the suit is something other than the denial of FAPE;

(2) The case was sent back down to determine whether the gravamen of the complaint -- which alleges only disability-based discrimination without reference to adequacy of special-education services -- seeks relief for denial of a FAPE.

The Supreme Court's Thinking…

- Plaintiff must first use the IDEA's administrative proceedings only if she contends that she has been denied FAPE.
- A hearing officer is limited in the relief that can be awarded in an IDEA proceeding.
- If a plaintiff must begin with the IDEA proceedings only when she is alleging that she has been denied FAPE, the court continued, how are courts supposed to decide when a plaintiff is seeking relief for denial of FAPE and when she is not? In other words, to the exclusion of the ADA or Section 504?

Some Guidance from the Court's Opinion

Courts should pose "a pair of hypothetical questions" —

- First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school — say, a public theater or library?
- And second, could an *adult* at the school — say, an employee or visitor — have pressed essentially the same grievance?
- If YES to both, then failure of "a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about [the IDEA]." Ergo, no exhaustion necessary.

Some Guidance from the Court's Opinion

If the answer to both is NO, the Court found it probable that the complaint does concern FAPE, which brings the IDEA's exhaustion requirements back into play.

The Court also noted that another indicator that the gravamen of the complaint involves the denial of FAPE is when there is a history of the plaintiff invoking the IDEA's formal procedures to handle the dispute.

What Does *Fry* Mean For Schools?

- Unfortunately, it creates an easier pathway for parents to litigation.
- This will affect how your special education staff members document services being provided to students under the ADA/504 vs. the IDEA.
- This suggests training of all central office and school-based staff may be needed in the development and implementation of IEPs to ensure consistent adherence to the IEP's terms, i.e., be clear about nature of service(s).

What Does *Fry* Mean For Schools?

- If an IEP service is substantive in nature, or related closely to a substantive academic service, that should be articulated clearly in the IEP.
- Parent concurrence (i.e., sign-off on the IEP itself) about the nature of services may be useful in any subsequent hearings.
- If the IEP service is about access, and clearly not about the provision of a substantive educational service, think about notating the distinction in the IEP.

Endrew F. v. Douglas County School District RE-1, No. 15–827, 2017 WL 1066260 (U.S. Mar. 22, 2017)

A revisit of the *Rowley* standard

- FAPE is not currently defined in the IDEA or its regulations regarding the level of educational benefit. Should it be?
- Members of COSA's IDEA Reauthorization Working Group have been considering this question.
- Potential Congressional action?

Endrew F. v. DCSD

Endrew F., a child with autism, attended DCSD in Colorado from preschool through fourth grade. During that time, he progressed academically and socially, but continued to exhibit problem behaviors. By Endrew's fourth grade year, Endrew's parents became dissatisfied with his progress. In Spring 2010, after being presented with DCSD's proposed IEP for Endrew's fifth grade year, his parents removed him from DCSD, unilaterally placed him in a private school, and requested tuition reimbursement, claiming that DCSD failed to provide FAPE.

Endrew F. v. DCSD

In November 2010, his parents rejected another IEP proposed by DCSD as similarly inadequate. Subsequently, in February 2012, his parents filed a claim with CDE seeking tuition reimbursement, contending that the final proposed IEP was not "reasonably calculated to enable Endrew to receive educational benefits" and therefore denied FAPE.

Citing the *Rowley* standard, the Hearing Officer rejected the parents' claims, and appealed that decision, and every decision thereafter, up to the U.S. Supreme Court.

Lower Court Rulings in *Endrew F.*

The U.S. Court of Appeals for the 10th Circuit upheld the HO's and district court's decisions that Endrew had been receiving FAPE, as defined in its precedent.

His parents petitioned the Supreme Court to hear the case, noting a split in the federal circuits about whether the substantive prong of the FAPE test requires a showing of something more than trivial *de minimis* educational benefit.

Endrew F. v. DCSD

The Supreme Court invited the Solicitor General to file a brief expressing the views of the U.S. on this issue.

The SG's *amicus* brief told the Court:

- There is an entrenched and acknowledged circuit conflict on the question presented.
- The Tenth Circuit's "merely *** more than *de minimis*" standard is erroneous.
- The question presented is important and recurring, and the court should resolve it in this case.

NSBA's Advocacy Efforts

NSBA's *amicus* brief made the following points:

1. Reading a higher substantive educational benefit standard into the IDEA would, in effect, be legislating from the bench. As it did in *Arlington Central Sch. Dist. v. Murphy*, 548 U.S. 291 (2006), another IDEA case, the Court should avoid expanding statutory definitions to meet policy goals that are within the authority of the legislative branch to set.

NSBA's Advocacy Efforts

a. Congress initially promised to provide 40% of the additional cost of educating children with disabilities, but has never appropriated more than 14% since the passage of the IDEA.
b. A Court ruling imposing a greater standard of responsibility without a commensurate increase in the level of funding by Congress could place schools in an untenable position of using more and more ***general education*** dollars to meet the new higher ***special education*** standard.

NSBA's Advocacy Efforts

2. A new higher substantive educational benefit standard is unnecessary to ensure that students with disabilities receive the special education and related services contemplated by the IDEA's FAPE standard.

The current IEP process designed by Congress is a collaborative framework that has worked well for several decades to ensure that students receive educational plans uniquely tailored to their needs.

NSBA's Advocacy Efforts

At oral argument, the Justices reflected on many of the points raised by NSBA in its *amicus* brief:

- A one-size fits all standard is not workable.
- A new standard will increase litigation.
- Increases in cost will tax an already burdened school system with Congressional broken promises to fund the IDEA.
- A new standard will be confusing and unworkable.

Where Might the Court Go?

- Likely, the Court will say some educational benefit is not *de minimis*.
- The Court could say the educational benefit must be meaningful.
- Meaningful will likely mean "progress" to some goal or standard.
- ~~Court could decide this standard only applies to students who are capable of "progress" and limit application.~~

Three out of four ain't bad.

So, What DID the Court do?

- Another 8-0 decision, but this time in favor of the student.
- Found that *Rowley* is "markedly more demanding than the 'merely more than de minimis' test applied by the Tenth Circuit."
- Reiterated that the IDEA guarantees a substantively adequate program of education to all eligible children.
- Requires IEPs to "be **appropriately ambitious** in light of [the student's] circumstances."

What the Court DID NOT do:

- Adopt a "bright-line rule."
- Establish a **new** standard defining FAPE under the IDEA:
  - The Court expressly rejected the parents' requested standard of "equality of opportunity" (i.e., "opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities").
  - The Court declined to do what Congress has not done since passage of the IDEA and the Court's *Rowley* decision.

What Does the *Endrew F.* Decision Mean for Schools?

- Individualized treatment. "[F]ocus on the particular child is at the core of the IDEA…."
- Ensure that the IEP contains an analysis of progress "in light of the child's circumstances."
- If progress towards the IEP goals is not attainable, clearly state why. What undergirds that determination?
- Note: If it is not a reasonable prospect for a student, the "IEP need not aim for grade level." However, again, it is recommended that a discussion of the basis for that decision be included somewhere in the IEP.

One to Watch: *Trinity Lutheran Church of Columbia, Inc. v. Comer*

The Question Before the Court: Does Missouri's practice of excluding religious entities from a playground-surfacing program violate protections provided by the First (Free Exercise of Religion) and Fourteenth (Equal Protection) Amendments of the U.S. Constitution?

Facts: Trinity Lutheran was denied state playground funds because of its religious mission, reflecting the Missouri state constitution's restriction on state aid to religious institutions.

One to watch: *Trinity Lutheran*

Why Could This Case Be Important?

- The Court could clarify and/or change its case precedent on disbursement of funds by state and local governments to religious institutions.
- If the Court decides that the First and Fourteenth Amendments trump the state's constitutional restrictions on aid to religious institutions, programs that award state and/or local funds to religious schools could possibly expand.

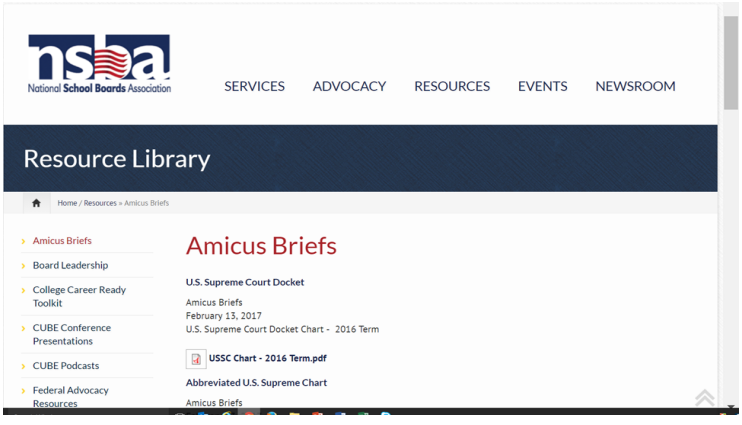
NSBA Resource Reminder

U.S. SUPREME COURT DOCKET CHART

- This week's update from the current term
- Color-coded to show status of the case

https://cdn-files.nsba.org/s3fs-public/reports/USSC%20Chart%20-%202016%20Term%20(4).pdf?XbIj_qCRHbdVZvPW1cn1Qn78Ff63NyaV

NSBA Amicus Briefs and Supreme Court Charts



http://www.nsba.org/amicusbriefs

www.drmarksarver.com

govcentral.monster.com

United States Department of Agriculture

educationinmichigan.org

workplacechoice.org

Highlights of Federal Regulation and Agency Activities

ED/DOJ Transgender Student Guidance

Recall: ED/DOJ jointly issued a Dear Colleague Letter in May 2016 on accommodating transgender students. The guidance expressed an interpretation of Title IX that remains unsettled in the law.

On February 22, 2017, ED/DOJ issued a letter withdrawing the May 2016 guidance, as well as an informal letter written by an ED official in January, and issued a brief, generally worded guidance letter.

www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx.

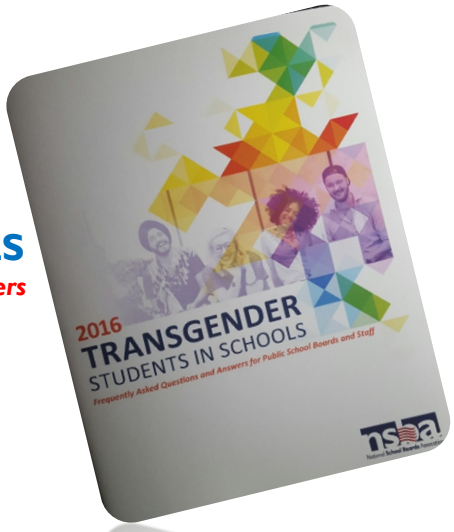
ED/DOJ Transgender Student Guidance

- Both of the withdrawn letters asserted the Obama Administration's position that Title IX's protections against discrimination "on the basis of sex" include discrimination based on gender identity, which in turn would require schools to permit access to single-sex facilities, including bathrooms based on gender identity.
- The new guidance notes significant litigation on this topic and the primary role of the States and LEAs in establishing educational policy.

TRANSGENDER STUDENTS IN SCHOOLS

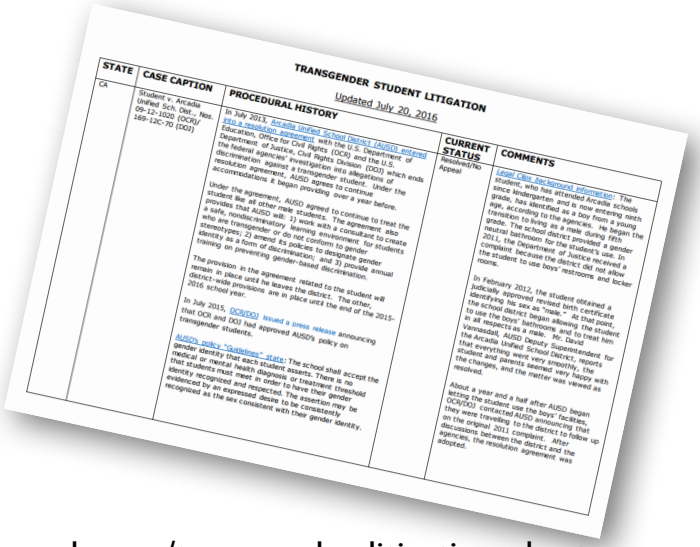
Frequently Asked Questions and Answers for Public School Boards and Staff

Available online from NSBA!



http://www.nsba.org/nsba-faqs-transgender-students-schools

NSBA/COSA Resource: Transgender Litigation Chart



TRANSGENDER STUDENT LITIGATION

Updated July 20, 2016

STATE	CASE CAPTION	PROCEDURAL HISTORY	CURRENT STATUS	COMMENTS
CA	Student V. Arcadia Unified Sch. Dist., Nos. 08-12-1020 (OCR)/ 168-12C-70 (DOJ)	In July 2013, Arcadia Unified School District (AUSD) entered into a resolution agreement with the U.S. Department of Education, Office for Civil Rights (OCR) and the U.S. Department of Justice, Civil Rights Division (DOJ) which ends the federal agencies' investigation into allegations of discrimination against a transgender student. Under the resolution agreement, AUSD agrees to continue accommodations it began providing over a year before. Under the agreement, AUSD agreed to continue to treat the student like all other male students. The agreement also provides that AUSD will: 1) work with a consultant to create a safe, nondiscriminatory learning environment for students who are transgender or do not conform to gender-stereotypes; 2) amend its policies to designate gender identity as a form of discrimination; and 3) provide annual training on preventing gender-based discrimination. The provision in the agreement related to the student will remain in place until he leaves the district. The other district-wide provisions are in place until the end of the 2015-2016 school year. In July 2015, OCR/DOJ issued a press release announcing that OCR and DOJ had approved AUSD's policy on transgender students. AUSD's policy "Guidelines" state: The school shall accept the gender identity that each student asserts. There is no medical or mental health diagnosis or treatment threshold that students must meet in order to have their gender identity recognized and respected. The assertion may be evidenced by an expressed desire to be consistently recognized as the sex consistent with their gender identity.	Resolved/No Appeal	Legal Case Summary (abridged information): The student, who has attended Arcadia schools since kindergarten and is now entering ninth grade, has identified as a boy from a young age according to the agencies. He began the transition to living as a male during fifth grade. The school district provided a gender neutral bathroom for the student's use. In 2011, the Department of Justice received a complaint because the district did not allow the student to use boys' restrooms and locker rooms. In February 2012, the student obtained a judicially approved revised birth certificate identifying his sex as "male." At that point, the school district began allowing the student to use the boys' bathrooms and to treat him in all respects as a male. Mr. David Vanasdat, AUSD Deputy Superintendent for the Arcadia Unified School District, reports that everything went very smoothly, the students and parents seemed very happy with the changes, and the matter was viewed as resolved. About a year and a half after AUSD began letting the student use the boys' facilities, OCR/DOJ contacted AUSD announcing that they were travelling to the district to follow up on the original 2011 complaint. After discussions between the district and the agencies, the resolution agreement was adopted.

http://www.nsba.org/transgender-litigation-chart

Statutory Prohibitions on Federal Control of Education

- An April 2017 Executive Order was issued, stating the executive branch's policy of protecting and preserving state and local control of education.
- EO directs the Sec'y of ED to review all ED regulations and guidance documents relating to specific federal statutes and examine whether they comply with federal laws prohibiting ED from exercising any direction, supervision, or control over areas subject to State and local control.

Statutory Prohibitions on Federal Control of Education

Most importantly, the EO directs the Sec'y of ED to **rescind and/or revise** any regulations or guidance that is inconsistent with the relevant statutory prohibitions by no later than 300 days of the issuance of the EO.

https://www.whitehouse.gov/the-press-office/2017/04/26/presidential-executive-order-enforcing-statutory-prohibitions-federal.

Statutory Prohibitions on Federal Control of Education

Areas identified in the EO as subject to state and local control:

(i) The curriculum or program of instruction of any elementary and secondary school and school system;
(ii) School administration and personnel; and
(iii) Selection and content of library resources, textbooks, and instructional materials.

Labor Department

DOL issued its final rule on overtime pay for exempt workers on May 23, 2016, that had an effective date of December 1, 2016.

The final rule, when effective, would:

- Raise the salary threshold for professional, executive and administrative employees to $913 per week; $47,476 annually for a full-year worker;
- Raise the salary threshold for highly compensated employees (HCE) to the annual equivalent of $134,004; and
- Establish a mechanism for automatically updating the salary and compensation levels every three years.

Labor Department

However,

- In November 2016, a Texas federal district court issued a **nationwide** injunction stopping the rule from taking effect. The Obama Administration appealed the injunction.
- No ruling yet.
- The Fifth Circuit Court of Appeals granted the Trump Administration's request for an extension of time to file its brief until May 1, 2017.

Labor Department

- Recently, a second extension was granted to the Trump Administration, because at the time, the appointee for Secretary of DOL had not yet been confirmed.
- Second extension expires on June 30, 2017.
- Possible outcomes?
  - DOL could abandon appeal and any further efforts to implement and enforce new overtime rule.
  - DOL could pull existing final rule, and submit new proposed rule with adjusted wage scales for notice and comment.

Health and Human Services

Proposed Health Care Legislation/Medicaid Funding:

- The proposed terms of the "repeal and replace" program for the Affordable Care Act continue to be in flux.
- The first proposed plan, the "American Health Care Act" contained language that could impact school-based Medicaid reimbursement for health services to students.

The new administration and Congress are still in the early stages of legislative drafting, so it is too early to tell.

HIGHLIGHTS THIS YEAR: Federal Agency Guidance and Regulation

- ED/HHS Guidance on Foster Care Children
- ED DCL on Gender Equity on CTE Programs
- ED Actions to address religious discrimination - website, updated complaint form, addition of religion-based bullying on the CRDC
- ED DCL and "Know Your Rights" document on civil rights of students with ADHD
- ED DCL on "Ensuring Equity and Providing Behavior Supports to Students with Disabilities"

HIGHLIGHTS THIS YEAR: Federal Agency Guidance and Regulation

- DHS Revised Form I-9
- USDA Local School Wellness Policy Outreach Toolkit
- USDA Web-based School Meals Application Prototype
- EEOC Updated Enforcement Guidance on National Origin Discrimination
- ED/HHS/HUD DCL on meeting needs of families with young children experiencing and at risk of homelessness

HIGHLIGHTS THIS YEAR
Federal Agency Guidance and Regulations

- ED's School Volunteer Brochure on Responsibilities to Preserve Student Privacy
- ED Non-Regulatory Guidance on Early Learning under ESSA
- ED Non-Regulatory Guidance on State and Local Report Cards under ESSA
- ED Guidance on Civil Rights of Students with Disabilities
- ED/OCR DCL on Preventing Race Discrimination in Special Education

What is Coming Down the Pike?

What to Expect?

- Federal Regulatory Agenda
- Federal Budget Provisions
- Possible Rollback of Additional Regulations

Are there any questions?

howthehellshouldiknow-wallyworld.blogspot

Thank you!

Leza Conliffe
Senior Staff Attorney
Office of General Counsel
National School Boards Association

nsba
National School Boards Association

Working with and through our State Associations, to advocate for equity and excellence in public education through school board leadership.

www.nsba.org