NSBA’s Legal Advocacy Agenda
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Presented at the 2016 School Law Practice Seminar, October 20-22, Portland, OR

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NSBA Legal Advocacy Agenda: 2015-16

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Introduction

The National School Boards Association (NSBA) filed a merits stage amicus brief in *Fisher v. University of Texas at Austin II*, which was decided by the U.S. Supreme Court (USSC) at the end of term. The USSC also decided five other school law related cases. In addition, NSBA also filed three amicus briefs at the petition stage. *Schott v. Wenk* was denied review in January 2016. The other two petitions were denied review in May 2016.

At the U.S. Court of Appeals level, NSBA has filed amicus briefs in three cases that are pending. At the state level, NSBA filed an amicus brief in a case currently before the Nevada Supreme Court.

The USSC’s 2016 term could be fraught with the unexpected. The Court is currently operating with eight justices, as Congress has taken no action to confirm President Obama’s nominee Merrick Garland to replace the late Justice Antonin Scalia. As a result, whoever is elected President in November could name a different nominee in January 2017, unless the U.S. Senate decides to confirm Judge Garland to the Supreme Court in the “lame duck” session after the election.

At the same time, accommodating transgender students’ use of school facilities, including restrooms, locker rooms and shower areas, has become a “hot button” issue nationally. Currently, the Gloucester County School Board (GCSB) in Virginia has filed a petition for certiorari with the USSC, seeking review of an adverse decision by a U.S. Court of Appeals for the Fourth Circuit three-judge panel in April 2016 that resulted in a federal district court in Virginia issuing a preliminary

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1 136 S. Ct. 2198 (2016).
3 136 S. Ct. 792 (2016).
7 *Legal Clips summary of the Washington Post article* provides background on the filing, including a link to the GCSB’s petition.
injunction barring the enforcement of the school board’s policy restricting use of school restrooms based on the student’s birth gender, thus allowing a transgender student to use the boys’ restrooms at school.

I. Decided

**Fisher v. University of Texas at Austin II,** 8 No. 14-98 (decided June 23, 2016)

**Issue presented:** Whether the Fifth Circuit’s re-endorsement of the use of racial preferences in undergraduate admissions decisions by the University of Texas at Austin can be sustained under the Court’s previous decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. Univ. of Texas at Austin* (*Fisher I*). 9

The U.S. Supreme Court, in a 4-3 split, upheld the University of Texas at Austin’s (UTA) undergraduate admissions policy that considers race, along with a number of other factors, in determining which applicants to admit to the University beyond those students admitted under the Texas Top Ten Percent Plan. The four justice majority concluded that UTA’s race-conscious admissions program passed constitutional muster under the Fourteenth Amendment’s Equal Protection Clause.

Justice Kennedy, joined by Justices Ginsburg, Breyer, and Sotomayor, delivered the Court’s opinion. Justice Thomas filed a dissenting opinion. Justice Alito, joined by Chief Justice Roberts and Justice Thomas, filed a separate dissenting opinion.

The majority, in affirming the U.S. Court of Appeals for the Fifth Circuit’s three-judge panel decision, began by indicating that the U.S. Supreme Court in *Fisher I* laid out three controlling principles in determining the constitutionality of a university’s “affirmative action program.”

First, “[r]ace may not be considered [by a University] unless the admissions process can withstand strict scrutiny.” This requires the University to demonstrate with clarity that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.”

Second, once a university gives “a reasoned, principled explanation” for its decision, deference must be given “to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.”

Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals. Universities bear the ultimate burden of proving that the race-neutral alternatives that are both available and workable are insufficient to achieve diversity.

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8 136 S. Ct. 2198 (2016).
9 133 S. Ct. 2411 (2013).
The majority stressed that UTA’s program is unique, i.e., “sui generis”, because unlike other college admissions policies “it combines holistic review with a percentage plan.” As a result, it concluded that “[t]he component of the University’s admissions policy that had the largest impact on petitioner’s chances of admission was not the school’s consideration of race under its holistic-review process but rather the Top Ten Percent Plan.” It noted that the petitioner would have probably stood a better chance of being admitted if UTA had used a race-conscious review to select all applicants rather than reserving seats for those in the top 10% of their high school class.

The majority found, however, that the petitioner had not challenged the “Top Ten Percent Plan” component and, thus, her acceptance of that plan complicated the majority’s review. It pointed out that “[i]f the Court were to remand, therefore, further fact finding would be limited to a narrow 3 year sample, review of which might yield little insight.” It also reiterated that because the plan is a state law, UTA “lacks any authority to alter the role of the Top Ten Percent Plan in its admissions process.”

The majority emphasized that UTA has a continuing burden to satisfy strict scrutiny, which requires it to engage “in periodic reassessment of the constitutionality, and efficacy, of its admissions program.” It also cautioned that as UTA examines its admissions data “it should remain mindful that diversity takes many forms” and avoid formalistic racial classifications.

The majority stated that the core issue in the case was: “whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected.” It rejected the petitioner’s argument that UTA had not articulated a compelling interest.

The majority also indicated that because UTA is prohibited from seeking a quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

The majority likewise swept aside the petitioner’s argument that UTA “has no need to consider race because it had already ‘achieved critical mass’ by 2003 using the Top Ten Percent Plan and race-neutral holistic review.” It found that UTA “could not be faulted on this score.”

In addition, the majority rejected the petitioner’s contention that “considering race was not necessary because such consideration has had only a ‘minimal impact’ in advancing the [University’s] compelling interest.” It asserted that the record did not support the petitioner’s argument.

The majority disposed of the petitioner’s final argument that “there are numerous other available race-neutral means of achieving” the University’s compelling interest. The majority indicated that “at the time of petitioner’s application, none of
her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought.”

Finally, the majority warned UTA to remain vigilant regarding its admissions policy, saying:

The Court’s affirmance of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

NSBA and the Texas Association of School Boards Legal Assistance Fund (TASB-LAF) filed a merits-stage amicus brief in Fisher II, urging the Supreme Court to uphold the decision by the U.S. Court of Appeals for the Fifth Circuit. The NSBA/TASB-LAF brief made two arguments in response to the question presented.10 First, the brief argued that the interest in diversity is compelling throughout the education system, including elementary and secondary schools. The diversity argument is divided into three sub-arguments: (1) Preventing racial isolation and creating a diverse student population are compelling interests; (2) Education within a diverse student body provides lifelong benefits to all students; and (3) Stubborn and growing residential segregation heightens the need for diversity in education.

Second, the brief argued that when colleges pursue qualitative diversity through a holistic review process, it furthers the compelling interest in diversity across the education spectrum. This second argument is divided into two sub-arguments: (1) Qualitative diversity programs at the university level reinforce school districts’ efforts to achieve integrated elementary and secondary education; and (2) Restricting universities to mechanical race-neutral alternatives would undermine diversity programs in elementary and secondary schools.

Green v. Brennan,11 No. 14-613 (decided May 23, 2016)

Issue presented: Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, as five circuits have held, or at the time of an employer's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held?

The USSC, 7-1, held: Because part of the “matter alleged to be discriminatory” in a constructive-discharge claim is an employee’s resignation, the 45-day limitations period for such action begins running only after an employee resigns. A constructive-discharge claim accrues—and the limitations period begins to run—when the employee gives notice of his resignation, not on the effective date thereof. The Tenth Circuit is left to determine, in the first instance, the date that

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10 NSBA/TASB-LAF’s amicus brief available at https://cdn-files.nsba.org/s3fs-public/reports/Fisher%20v%20UTA%20NSBA%20Amicus%202015.pdf?mhaccSFEZ49NAhc401P.q84cOn26oNJ.
Green in fact gave notice. It vacated the U.S Court of Appeals for the Tenth Circuit’s decision and remanded the case.

**CRST Van Expedited, Inc. v. EEOC,**\(^{12}\) No. 14-1375 (decided May 19, 2016)

**Issue presented:** Can a dismissal of a Title VII case, based on the EEOC's total failure to satisfy its pre-suit investigation, reasonable cause and conciliation obligations, form the basis of an attorneys’ fee award to the defendant under 42 U.S.C. § 2000e-5(k)?

The USSC, unanimously, held: A favorable ruling on the merits is not a necessary predicate to find that a defendant is a prevailing party. Title VII’s fee-shifting statute allows prevailing defendants to recover whenever the plaintiff’s “claim was frivolous, unreasonable, or groundless.” *Christiansburg Garment Co. v. EEOC*, 434 U. S. 412. Various courts of appeals likewise have applied the *Christiansburg* standard when claims were dismissed for non-merits reasons. The Court declined to decide the argument, raised by the Commission for the first time during the merits stage of this case, whether a defendant must obtain a preclusive judgment in order to prevail.

**Heffernan v. City of Patterson,**\(^{13}\) No. 14-1280 (decided Apr. 26, 2016)

**Issue presented:** Does the First Amendment bar the government from demoting a public employee based on a supervisor's perception that the employee supports a political candidate?

The USSC, 6-2, held: When an employer demotes an employee out of a desire to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment and § 1983 even if, as here, the employer’s actions are based on a factual mistake about the employee’s behavior. To answer the question whether an official’s factual mistake makes a critical legal difference, the Court assumed that the activities that Heffernan’s supervisors mistakenly thought he had engaged in are of a kind that they cannot constitutionally prohibit or punish.

**Harris v. Arizona Indep. Redistricting Com’n,**\(^{14}\) No. 136 S. Ct. 1301 (decided Apr.20, 2016)

**Issues presented:** (1) Does the desire to gain partisan advantage for one political party justify intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied equal protection because their individual votes are devalued, violating the one-person, one-vote principle; (2) Does the desire to obtain favorable preclearance review by the Justice Department

\(^{12}\) 136 S. Ct. 1642 (2016).

\(^{13}\) 136 S. Ct. 1412 (2016).

\(^{14}\) 136 S. Ct. 1301 (2016).
permit the creation of legislative districts that deviate from the one-person, one-vote principle; And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby Cnty. v. Holder*, 2013 BL 167707, 81 U.S.L.W. 4572 (U.S. June 25, 2013) (82 U.S.L.W. 15); (3) Was the Arizona redistricting commission correct to disregard the majority-minority rule and rely on race and political party affiliation to create Hispanic “influence” districts?

The USSC, unanimously, held that the district court did not err in upholding Arizona’s redistricting plan. The Court found that the appellants failed to meet that burden here, where the record supported the district court’s conclusion that the deviations predominantly reflected Commission efforts to achieve compliance with the Voting Rights Act, not to secure political advantage for the Democratic Party. Because the record well supported the district court’s finding that the Commission was trying to comply with the Voting Rights Act, appellants did not show that it is more probable than not that illegitimate considerations were the predominant motivation for the deviations. They thus failed to show that the plan violates the Equal Protection Clause. Appellants’ additional arguments were deemed unpersuasive.

**Friedrichs v. California Teachers Ass’n,**15 No. 14-915 (decided Mar. 29, 2016)

**Issues presented:** (1) Should *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), be overruled and public-sector “agency shop” arrangements invalidated under the First Amendment; (2) Does it violate the First Amendment to require that public employees affirmatively object to subsidizing nonchargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech?

The USSC, 4-4 in a *per curiam* decision, affirmed the judgment of the Ninth Circuit upholding public sector “agency shop arrangements per *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). The legal effect of the Court’s ruling is that the U.S. Court of Appeals for the Ninth Circuit’s decision upholding *Abood* remains the law for all states and territories within the Ninth Circuit (Alaska, Arizona, California, Hawaii, Guam, Idaho, Montana, Nevada, Northern Mariana Island, Oregon and Washington.

On June 28, 2016, the USSC denied Friedrichs’s petition for rehearing.16

15 136 S. Ct. 1083 (2016).
II. Review Denied

*Bible v. United Student Aid Funds, Inc.*,¹⁷ No. 15-861 (review denied May 16, 2016)

**Issue presented.** Should a court give deference to an agency’s interpretation of its own regulations when the agency has changed its position without notice to, and opportunity to comment by, the affected stakeholders?

This case arose when Bryana Bible defaulted on her student loan. USA Funds stepped in as guarantor of the loan. The loan was governed by a promissory note subject to the Higher Education Act and regulations promulgated by the U.S. Department of Education (ED). Under the terms of the loan, Bible had agreed to pay collection costs and legal fees in the event she defaulted. After USA Funds paid the default claim, it entered into a rehabilitation agreement with Bible and assessed collection costs. Bible sued the guarantor on behalf of a nationwide class of defaulted borrowers, alleging that charging collection costs violated the terms of the regulations. After the trial court dismissed her claim, Bible appealed to the Seventh Circuit, and the appeals court requested ED’s views.

In its *amicus* brief, ED announced for the first time that the regulations categorically prohibit the assessment of collection costs when a borrower undertakes a “repayment agreement” satisfactory to the guaranty agency, and that “rehabilitation agreements” always fall into that category. ED took this position even though its own website and the governing statute state that collection costs may be applied to rehabilitation agreements. The website also described “repayment” as an option separate from “rehabilitation” for those in default. In a divided decision, the controlling concurring opinion held that the regulations are ambiguous, requiring the court to defer to ED’s position as set forth in the agency’s *amicus* brief. USA Funds sought review by the U.S. Supreme Court.

NSBA joined other state and local governmental organizations in a brief arguing that the Court should accept the case to restore the balance between agency discretion and the reliance interests of regulated entities that the Administrative Procedures Act sought to protect.¹⁸ The brief pointed out that there are dangers and inequities in courts deferring to federal agencies’ interpretations of their own regulations. Where interpretive rules are given the same force and effect as regulations, notice and comment procedures are necessary to ensure that agencies do not have the power to impose new, onerous conditions arbitrarily, and without consideration of the financial and operational constraints facing the regulated entities.

¹⁷ 136 S. Ct. 1607 (2016).
By granting deference sparingly in situations where entities have had no opportunity to provide input to regulators through notice and comment procedures, courts can help prevent federal agencies from overstepping the statutory authority delegated to them and ensure that local governmental entities are not unfairly surprised by newly announced obligations or restrictions. The brief provided the High Court with real life examples of the negative effects endured by state and local governments when courts have deferred to abruptly changed enforcement positions asserted by federal agencies without notice and the opportunity for public comment.

The brief asked the USSC to overrule two precedential cases, *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), or, at the very least, overrule *Auer* and limit *Seminole Rock* to its original scope on the grounds that: (1) *Auer* creates incentives for agencies to promulgate vague regulations, undermining the efficacy of notice-and-comment rulemaking; and (2) *Auer* creates unique problems for state and local governments.

**City of Houston v. Zamora**,¹⁹ No. 15-868 (review denied May 16, 2016)

**Issue presented:** In a Title VII retaliation case, may an employer that undertakes an extensive investigation and review process of alleged employee misconduct be held liable for the discriminatory animus of lower level employees who testified in hearings resulting in employee discipline or termination?

The case was brought by Zamora, a Houston police officer, who was suspended for untruthful statements made during an internal affairs division investigation. The investigation had been prompted by his own complaint that three of his supervisors had lied during depositions taken as part of an earlier retaliation claim he brought asserting that he had been removed from a prestigious position because his father (also a police officer) had brought an earlier race discrimination claim against the department. Zamora’s suspension was based on the recommendation of a police lieutenant that was reviewed and affirmed by an administrative discipline committee made up of non-law enforcement civilians.

That decision was subsequently reviewed several more times and ultimately upheld by the chief of police. Zamora brought a retaliation claim under Title VII, although an arbitrator later overturned his suspension. The federal trial court ruled in Zamora’s favor, as did the Fifth Circuit, which found that “but for” the untruthful testimony of the three supervisors, he would not have been suspended. Because these supervisors held discriminatory motives, the city could be held liable under Title VII because the many layers of review between the supervisors’ statements and the ultimate decision-maker did not break the chain of causation. The city sought review by the U.S. Supreme Court. The International Municipal Lawyers’ Association (IMLA) and NSBA filed an amicus brief in support of the petition for review.

The *amicus* brief argued the USSC should not hold the employer liable for retaliation under Title VII for the hidden discriminatory animus of an employee who provides information during an investigation or disciplinary process that ultimately results in an adverse action against the complainant. Under Supreme Court precedent, this type of liability (known as “cat’s paw liability”) may be imposed only in cases where the statute imposes liability based on discriminatory animus that is a motivating factor for the employment decision – *i.e.*, discrimination played at least some role in the employer’s action.

The brief also argued that such liability should not extend to Title VII retaliation claims which require proof that the desire to retaliate was the “but for” cause of the challenged employment action. This type of causation requires the complainant to show that the discriminatory motive not only played a role in the employer’s decision-making process, but had a *determinative influence on the outcome*. Where an employer (1) undertakes an independent, good faith, and thorough review of the allegations underlying an adverse employment action, and (2) concludes that credible allegations of misconduct have been levied against the affected employee, the alleged discriminatory statements of another employee made during an investigation or a hearing should not be deemed a “determinative influence on the outcome” of the independent review.

The Fifth Circuit’s rule needlessly exposes local governments to “almost absolute liability” even where they employ rigorous and independent internal review processes designed to protect employees and the public alike. Local governments employ rigorous review procedures to investigate disputes involving employees in a variety of contexts. They operate these procedures in good faith to ensure that legitimate grievances are addressed and illegitimate grievances are resolved in the employee’s favor.

Many employee complaint review procedures call on the expertise of professionals familiar with commonly arising issues; many also allow for citizen participation. Yet, according to the Fifth Circuit, there is no review mechanism rigorous enough, no amount of process adequate enough, to avoid Title VII liability for retaliation if the procedurally-appointed fact-finder conducts an investigation and decides to credit the testimony of a supervisor who, unbeknownst to the decision-maker, harbored some retaliatory animus. The Fifth Circuit’s rule discourages employers from expending scarce resources on internal reviews, as litigation is more likely to follow if the employee is unhappy with the result. Under this rule, employers conducting internal reviews will be hesitant to rely upon information from the very people charged with monitoring and reporting on employee behavior. Without relying on facts collected from employees and supervisors, officials charged with making decisions will be unable to carry out their reviewing responsibilities even when the employer has absolutely no reason at the time to question either the supervisor’s honesty or motives.

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20 IMLA/NSBA’s *amicus* brief available at https://cdn-files.nsba.org/s3fs-public/reports/City%20of%20Houston%20v%20%20Zamora.pdf?yJ5Xd6U.dJ6Fayau3JZVIA3Y6eRe0Hj
III. U.S. Court of Appeals – Pending Amicus Cases


**Issue presented:** Whether a school district is required to provide for a student’s religious and cultural needs when developing the student’s Individualized Education Program (IEP) in order to satisfy the IDEA’s requirement to provide a free appropriate public education (FAPE)?

In this case, the parents of a mentally challenged Orthodox Jewish child requested that the child’s IEP address the child’s religious and cultural needs by requiring the school district to pay for his placement at a private facility that prepares children with disabilities for life in an Orthodox Jewish community. The parents contended that the child’s functional life skills are different from those of a non-Orthodox Jewish child and that his disability requires consistent reinforcement throughout the day from home to school.

The school district proposed placing the child at a public school without any instruction in the rules and customs of Orthodox Judaism. In response, the parents requested a due process hearing. The administrative law judge ruled in favor of the school district, finding that the IDEA was intended to provide children with disabilities with access to the general public school curriculum and not to provide them access to a religious community. The federal district court upheld the ALJ’s decision. The parents appealed the district court’s decision to the Fourth Circuit.

The NSBA/MABE brief, filed in support of MCPS and its school board, makes three arguments.22

First, the brief contends IDEA is not intended to address every need of a child with qualifying disabilities, but instead is designed to provide FAPE through special education and related services. That argument is divided into four sub-arguments: (1) IDEA is focused on providing access to the general curriculum to prepare a child with disabilities for future education, employment and independent living; (2) IDEA does not require school districts to address every need of a child with disabilities, including the need to be indoctrinated with the religious beliefs and practices of the particular faith community in which he resides; (3) IDEA clearly limits the obligations of school districts to children with disabilities who are unilaterally enrolled by parents in private institutions; and (4) appellants’ demands would impose on school districts unworkable burdens not supported by the purpose, intent, or statutory requirements of IDEA.

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22 NSBA/MABE brief available at [https://cdn-files.nsba.org/s3fs-public/reports/ML%20v.%20King%204-5-16%20Amicus%20Brief.pdf?WOSewF7bO3bmSrTNhxxtImOaQVIL5HoE](https://cdn-files.nsba.org/s3fs-public/reports/ML%20v.%20King%204-5-16%20Amicus%20Brief.pdf?WOSewF7bO3bmSrTNhxxtImOaQVIL5HoE).
Second, the NSBA/MABE brief contends appellants’ interpretation of IDEA is fraught with constitutional peril that the Fourth Circuit should avoid. Specifically, the second argument warns that the parents’ position would force school staff to become entangled in religious matters resulting in First Amendment Establishment Clause and Free Exercise of Religion Clause violations. It also stresses that schools are willing to make reasonable accommodations of students’ religious beliefs that avoid First Amendment concerns. Third, the brief argues that requiring parents to remain responsible for their child’s religious education does not infringe on the parents’ free exercise of religion rights.

**Salazar v. South San Antonio Indep. Sch. Dist.**, No. 15-50558 (5th Cir. amicus brief filed Sept. 28, 2015)

**Issue presented:** Whether a school district may be held liable under Title IX of the Education Amendments of 1972 for the sexual assault of a student by a school principal when the abuser was the only school official with actual knowledge of the wrongdoing?

A student, Adrian Salazar, filed a Title IX claim against the South San Antonio Independent School District and its former employee, Michael Alcoser, based on the alleged sexual abuse of Salazar by Alcoser. Prior to trial, the parties stipulated that (i) Alcoser abused Salazar while Alcoser was the vice principal and principal of two elementary schools in the district; (ii) no one with the district other than Alcoser had knowledge of Alcoser’s abusive conduct; and (iii) Alcoser’s abusive conduct violated the district’s policies. Based on these stipulations, the district moved for judgment as a matter of law on the ground that it lacked “actual notice” of the alleged abuse, but the district court denied the motion. After a two-day trial, the jury found the district liable for damages under Title IX, and awarded Salazar $4.5 million in compensatory damages. The district court permitted the award, reasoning that because the perpetrator was an official who would ordinarily have authority to take corrective action against sexual harassment, his knowledge of his own wrongdoing could be imputed to the district and satisfy the Title IX liability requirements of actual knowledge and failure to respond. The district appealed this decision to the U.S. Court of Appeals for the Fifth Circuit.

NSBA and the Texas Association of School Board Legal Assistance Fund (TASB) filed an amicus brief urging the U.S. Court of Appeals for the Fifth Circuit to reverse the district court’s ruling holding the school district liable under Title IX for the sexual harassment of a student by a school official in a supervisory position on the ground that the perpetrator’s guilty knowledge was chargeable to the school district and that such knowledge satisfied the actual knowledge requirements of Title IX. The NSBA/TASB brief calls upon the Fifth Circuit to reject imposing a strict liability


standard under Title IX and instead follow the U.S. Supreme Court’s decision in Gebser v. Lago Vista Independent School District, which indicates that the wrongdoer’s knowledge of his own misconduct does not equate to “actual knowledge” under Title IX.

The brief makes four arguments:

(1) Liability for damages based solely on the knowledge of the wrongdoer has never been part of the Title IX contract between the federal government and public schools;

(2) Under Gebser, liability for damages does not attach unless the school district receives a meaningful opportunity to end the discrimination and refuses to intervene. This opportunity does not exist when the perpetrator is the only person who knows about the discrimination;

(3) Current legal standards advance the policy objectives of Title IX by providing an incentive for schools to offer training programs aimed at the prevention of child sex abuse and harassment. A strict liability standard that permits large damage claims will impair these critical prevention efforts and ultimately will undermine Congress’s policy objectives; and

(4) A strict liability standard would discourage mentoring and other legitimate educational practices which promote academic achievement and which serve as a protective factor against abuse.


Issue presented: Is a prevailing party entitled to automatic attorneys’ fees and costs under the IDEA, or is a court required to consider the degree of success achieved by the “prevailing party” in determining the size and appropriateness of the award of attorneys’ fees and costs?

A student with disabilities, “KG,” was a ward of the state of California. The student’s attorney brought suit against the state department of education, the county department of education, and the Irvine Unified School District, seeking funding for the student’s out-of-state residential placement. All three defendants agreed that one of them was obligated to fund the placement, but disputed which of them was legally responsible. In an earlier ruling, the Ninth Circuit assigned the responsibility to the state consistent with the student’s contention throughout almost all the litigation that the state was ultimately responsible. After numerous appeals, this decision was reconsidered and the school district was ordered to fund the placement. The student’s attorney then sought to recover legal fees from the school district, including for proceedings she pursued after the student had graduated from

25 No. 2:10-cv-01431 (C.D. Cal. decided Nov. 8, 2013), Nos. 14-56457/14-56524 (9th Cir. filed Sept. 4, 2014).
NSBA, along with the California School Boards Association’s Education Legal Alliance (CSBA), filed an *amicus* brief that argued that courts should award attorneys’ fees based on equitable considerations and not automatically to parties that achieve no real change in their legal position. The CSBA/NSBA brief makes two main arguments: (1) that the federal district court, in changing its fee analysis, backtracked from the correct legal standard and shifted to an “automatic” fee grant; and (2) “the district court’s interpretation and application of fee-shifting imposes significant additional costs on school districts already overburdened by the enormous expense of providing special education.”

In urging the Ninth Circuit to reject allowing the “automatic” grant of fees, the brief contends that attorney fee awards are not automatic once a party is determined to be a prevailing party. It also asserts that the district court failed to properly consider the degree of success achieved by the “prevailing party” in determining the size and appropriateness of the award of attorneys’ fees and costs. With regard to the financial burden imposed on school districts, the CSBA/NSBA asserts that litigation costs, including attorney fee awards, are a significant additional burden under the IDEA. Their brief also stresses that Congress has yet to appropriate the promised level of funding for special education and related services that school districts must provide under the IDEA.

### IV. State Court Amicus Briefs


**Issue presented:** Whether Nevada’s Education Savings Accounts Program (ESAP) diverts state funds from public education in violation of the state constitution?

A state district court issued a preliminary injunction prohibiting the state from operating the ESAP until a decision on the merits of the plaintiffs’ claims is reached. It held that while the plaintiffs had failed to carry their burden of showing likely success on their claims that the ESAP violated Sections 2 and 3 of Article II of the Nevada Constitution, the plaintiffs had met their burden with respect to the claims that the ESAP violated Sections 6.1 and 6.2 of Article II of the Nevada Constitution.

The state filed an appeal to the Nevada Supreme Court. The Nevada Attorney General (AG) is asking the Nevada Supreme Court to overturn the injunction preventing the state from implementing the ESAP.

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27 The First Judicial Court of Nevada’s order granting the preliminary injunction is available at https://cdn-files.nsba.org/s3fs-public/reports/Lopez%20v.%20Schwartz%20-%20Prem%20Injunc.pdf?4TAzZJC4bs31SUPSs.cS18k8wQEmcr5S.
NSBA filed its *amicus* brief, initially filed with First Judicial Court, with the Nevada Supreme Court. On July 29, 2016, the Nevada High Court heard oral argument on the AG’s appeal to overturn the preliminary injunction. According to a report from *Courthouse News Service*, the Nevada Supreme Court peppered the parties with several questions during oral argument in two separate suits challenging the state’s Education Savings Account (ESA) program. In particular, questions focused on how the state legislature’s public school spending bill coincided with state funds for private school tuition.

The justices appeared to focus most of their attention on the issue of whether the law is unconstitutional because it siphons off state funds that can only be used for the operation of public schools. Much of the argument and questions from the justices centered on whether the legislature had met its constitutional mandate to pass an appropriations bill to sufficiently fund public schools while also enacting the school-choice measure.

NSBA and the Nevada Association of School Boards (NASB) filed an *amicus* brief that advanced two arguments for halting the ESAP.

First, the brief contends that the Nevada ESAP harms public education. It conflicts with the judiciary’s commitment to public education as an inherent American value. The program’s diversion of public dollars away from schools harms Nevada public schools. In addition, the ESAP’s lack of accountability harms Nevada students and taxpayers.

Second, the brief asserts that the court should not be part of a troubling wave of a nationwide effort by special interest groups to undermine public education by diverting scarce public tax dollars to private entities. It points out that private hands are, in fact, the true beneficiaries of the Nevada ESAP. The NSBA/NASB brief urges the court to discourage the Nevada ESAP from becoming a national model.

**USSC 2016 Term – Outlook**

**Gloucester Cnty. Sch. Bd. v. G.G.**

**Issues presented:**

1. Should the Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?
2. If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?

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With or without deference to the agency, should the Department’s specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?30

As noted in the introduction, GCSB has filed a petition for certiorari,31 asking the USSC to review the April 2016 Fourth Circuit panel decision holding that the U.S. Department of Education (ED) guidance on the Title IX implementing regulation, 34 C.F.R. § 106.33, should be given Auer32 deference because the Title IX section allowing schools to provide segregated bathroom facilities based on sex is “silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms.”33 The Department of Education’s interpretation of the regulation, which it outlined in a letter dated January 7, 2015, indicates that Title IX should be applied to transgender students and that “when a school elects to separate or treat students differently on the basis of sex...the school must generally treat transgender students consistent with their gender identity.”34

The Fourth Circuit panel remanded the case to the district court with instructions to give ED’s interpretation Auer deference during its consideration of whether to issue a preliminary injunction barring the school board from enforcing its policy restricting the use of restrooms in schools on the basis of gender at birth.35

After the case was remanded, the district court issued an order granting the transgender student’s motion for a preliminary injunction allowing him to use the boys’ bathroom at school.36 The Fourth Circuit subsequently denied GCSB’s emergency motion to stay enforcement of the preliminary injunction pending GCSB’s appeal to the Fourth Circuit or in the alternative grant the stay while GCSB petitions the U.S. Supreme Court to overturn the Fourth Circuit’s mandate in G.G. v. GCSB.37

In August, the USSC issued an order staying the Fourth Circuit’s mandate from its April 2016 decision and the district court’s order granting the preliminary injunction, stating: “pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the judgment of this Court.”38

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34 Id.
35 Id. at 727.
**Fry v. Napoleon Cnty. Sch.**, No. 15-497

**Issue presented:** Whether the exhaustion requirements under the Individuals with Disabilities Education Act apply to a claim asserting damages under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act based on the school district’s refusal to allow a service dog to accompany an elementary school student with a disability to school?

NSBA is filing an *amicus* brief at the merits stage in *Fry v. Napoleon Cnty. Sch. Bd.*[^39] A U.S. Court of Appeals for the Sixth Circuit three-judge panel, in a 2-1 split, ruled that a disabled student seeking to be accompanied at school by a service dog was required to exhaust her administrative remedies under the Individuals with Disabilities Education Act (IDEA), even though she made a claim for monetary damages under the federal Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act (§ 504).[^40] The panel’s majority concluded that because the claims arose out of educational harms that could have been addressed by the IDEA, the IDEA’s exhaustion requirement applied because “the legal injury alleged is in essence a violation of IDEA standards.”[^41]

NSBA’s brief will urge the USSC to preserve the Individuals with Disabilities Education Act’s collaborative framework and reject expansion of the law that encourages litigation between parents and schools. It will also warn that when the exhaustion requirement can be circumvented, it harms the crucial work of educating students with disabilities. In addition, the brief will stress that spending school districts’ limited financial resources on defending such lawsuits is a misallocation of funds better utilized to provide for students’ special education needs.

[^39]: 788 F.3d 622 (6th Cir. 2015).
[^41]: 788 F.3d at 630.