NSBA Legal Advocacy Update

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Presented at the 2017 School Law Seminar, March 23-25, Denver, Colorado

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Introduction

The current term of the U.S. Supreme Court (USSC), which commenced on Monday October 3, 2016, began with the late Justice Antonin Scalia’s seat still vacant. On January 31, 2017 President Trump nominated Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to fill the late Justice Scalia’s seat. It remains uncertain as to when a ninth justice will be confirmed.

The eight justices have granted review in three school law cases. Two address issues involving federal disability laws. The third case revolves around a transgender student’s access to restroom gender specific restroom facilities based on gender identity rather than biological gender.

Argument in both special education/disability cases has been completed. The transgender student facilities accommodation case has not yet been scheduled for oral argument.

The National School Boards Association has submitted amicus briefs on the merits in each of the cases. NSBA has also submitted amicus briefs in cases pending before the U.S. Courts of Appeals in three circuits. The cases currently in the Fourth and Ninth Circuits involve issues under the Individuals with Disabilities Education Act (IDEA). The case before the Fifth Circuit addresses Title IX sexual harassment protections.

In addition, NSBA submitted an amicus brief to the Nevada Supreme Court in a case challenging the validity under the state constitution of a private school scholarship program. That case was decided in September 2016.

I. USSC 2016 Term: Cases Argued

Fry v. Napoleon Cmty. Sch., No. 15-497 (U.S., argued Oct. 31, 2016)\(^1\)

**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?

**Facts:** E.F., suffers from cerebral palsy and was prescribed a service dog (Wonder) to assist her with everyday tasks. Her school, which provided her

\(^1\) 788 F.3d 622 (6th Cir. 2015).
an Individualized Education Program (IEP) under the IDEA, refused to permit her to bring her service dog to school.

At the time this dispute arose, E.F. could not handle Wonder on her own, but at some point in the future she was expected to be able to handle the dog. In October 2009, when Wonder’s training was complete, her school, Ezra Eby Elementary School, refused permission for Wonder to accompany E.F. at school. There was already an IEP in place for E.F. for the 2009–2010 school year that included a human aide providing one-on-one support. In a specially convened IEP meeting in January 2010, school administrators confirmed the decision to prohibit Wonder from accompanying E.F. to school, reasoning in part that Wonder would not be able to provide any support that the human aide could not provide. In April 2010, the school agreed to a trial period, to last until the end of the school year, during which E.F. could bring Wonder to school. During this trial period, however, Wonder was not at all times permitted to be with E.F. or to perform some functions for which he had been trained. At the end of the trial period, the school informed the Frys that Wonder would not be permitted to attend school with E.F. in the coming school year.

**Procedural History:** The Frys then began homeschooling E.F. and filed a complaint with the U.S. Department of Education’s Office for Civil Rights (OCR) under the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act. Two years later, in May 2012, OCR found that the school’s refusal to permit Wonder to attend school with E.F. was a violation of the ADA.

At that time, without accepting the factual or legal conclusions of OCR, the school agreed to permit E.F. to attend school with Wonder starting in the fall 2012. However, the Frys decided to enroll E.F. in a school in a different district where they encountered no opposition to Wonder’s attending school with E.F.

The Frys filed suit on December 17, 2012, pursuant to Title II of the ADA and § 504, seeking damages for the school’s refusal to accommodate Wonder between the fall of 2009 and the spring 2012. The Frys alleged the following particular injuries: denial of equal access to school facilities, denial of the use of Wonder as a service dog, interference with E.F.’s ability to form a bond with Wonder, denial of the opportunity to interact with other students at Ezra Eby Elementary School, and psychological harm caused by the defendants’ refusal to accommodate E.F. as a disabled person.

On January 10, 2014, the district court granted the defendants’ motion to dismiss, finding that the IDEA’s exhaustion requirements applied to the Frys’

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claims. The court noted that although the Frys did not specifically allege any flaws in E.F.’s IEP, if she were permitted to attend school with Wonder, that document would almost certainly have to be modified in order to articulate the policies and practices that would apply to the dog. Therefore, the Frys’ request for permission for E.F. to attend school with Wonder “would be best dealt with through the administrative process,” and exhaustion was required. Because the Frys had not exhausted IDEA administrative remedies, the district court dismissed their suit without prejudice.

The Frys then filed an appeal with U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the lower court’s decision dismissing the § 504 and ADA claims. The court concluded that the IDEA’s exhaustion requirement applied to the Frys’ claims. It stated that “the nature of the Frys’ claims required them to exhaust IDEA procedures before filing suit under the ADA and the Rehabilitation Act.”

Crucial to the court’s conclusion that exhaustion of administrative remedies was required, was its determination that “E.F.’s school’s decision regarding whether her service animal would be permitted at school denied her a free appropriate public education.” It indicated that the primary harm associated with not allowing E.F. her service dog, such as “inhibiting the development of E.F.’s bond with the dog and, perhaps, hurting her confidence and social experience at school” fell within “the scope of factors considered under IDEA procedures.”

The majority, therefore, concluded that “developing a working relationship with a service dog should have been one of the ‘educational needs that result from the child’s disability’ used to set goals in E.F.’s IEP.” It pointed out that the school utilized “IDEA procedures to attempt to resolve its dispute, and the injuries alleged by the Frys here could have been raised then.”

The court also rejected the notion that the exhaustion requirement was excused because the Frys were seeking monetary damages, which are not available under IDEA. The court stated that ”[a]lthough the Frys seek money damages, a remedy unavailable under the IDEA, rather than an injunction, this does not in itself excuse the exhaustion requirement......Otherwise plaintiffs could evade the exhaustion requirement simply by ‘appending a claim for damages.’"

Finally, the court rejected the Frys' reliance on Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947 (E.D. Cal. 1990), where a California court refused to require exhaustion under the IDEA in a situation where a school refused to allow a wheel-chair bound student to use his service dog at school. The majority found that “applying that case’s logic to this complaint would allow any ADA or Rehabilitation Act lawsuit to avoid the IDEA exhaustion requirement by not explicitly alleging a denial of a FAPE.”
The Frys subsequently filed a petition for certiorari with the U.S. Supreme Court, which granted review on June 28, 2016.

**NSBA Brief:** The National School Boards Association (NSBA), along with the Michigan Association of School Boards (MASB), the School Superintendents Association (AASA), the Association of School Business Officials International (ASBO), and the National Association of State Directors of Special Education (NASDSE), filed an *amicus* brief with the U.S. Supreme Court asking it to affirm the decision of the Sixth Circuit.

The brief asserted that a “strong exhaustion requirement supports the carefully crafted, collaborative framework Congress designed for students, parents, and school districts to develop a comprehensive and integrated education program for a child.” Amici made two arguments: (1) IDEA’s long-standing exhaustion requirement must be interpreted in the context of its collaborative framework; and (2) weakening IDEA’s exhaustion requirement would undermine the collaborative framework Congress designed to resolve educational matters concerning students with disabilities.

**Oral Argument:** On October 31, 2016, the Supreme Court heard argument from the parties. According to an Associated Press (AP) report from the U.S. News & World Report, the justices seemed to agree that federal disability laws allow the Frys to pursue the case in court without having to first exhaust their administrative remedies. Chief Justice John Roberts said it would be "kind of a charade" to force the family through administrative proceedings if they cannot get the relief they want. He noted that the Frys are seeking money damages for the emotional harm their child suffered; they are not trying to work out a compromise with school officials.

Justice Stephen Breyer, on the other hand, said he was concerned about gutting the informal process Congress planned, but said allowing the lawsuit made sense if exhausting administrative remedies "would be futile."

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3 NSBA’s brief is available at [https://cdn-files.nsba.org/s3fs-public/reports/Fry%20v.%20NCSD%20Amicus%20Brief%202016.pdf?kQha6TxaDTf.sf4Cpm92Ng_uCY2BF](https://cdn-files.nsba.org/s3fs-public/reports/Fry%20v.%20NCSD%20Amicus%20Brief%202016.pdf?kQha6TxaDTf.sf4Cpm92Ng_uCY2BF).


**Issue Presented:** What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. §1444 *et seq.*?

**Facts:** E.F. is an autistic child whose parents' dissatisfaction with his education in a local public school prompted them to enroll him in a private school and to seek reimbursement for the cost of tuition. Finding that the school district did not have to reimburse the parents, the Tenth Circuit ruled that schools must merely provide some non-trivial educational benefit in order to comply with the IDEA’s requirement to provide a child with disabilities a free appropriate public education (FAPE). Other courts of appeals have ruled that schools must provide a substantial benefit, while still other courts fall somewhere in between.

**Procedural History:** The parents’ petition for certiorari with the U.S. Supreme Court was granted on September 29, 2016.

**NSBA Brief:** NSBA, along with the California School Boards Association (CSBA) and its Legal Alliance Fund (LAF), the Colorado Association of School Boards (CASB), and the Horace Mann League (HML), filed an amicus brief on the merits, urging the Court to uphold the standard enunciated in *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), for determining whether public schools have met their obligation to provide a FAPE to children under the IDEA. NSBA's brief makes two main arguments: (1) Congress intended to defer to states and local educational agencies the essential tasks of improving educational outcomes for students; and (2) imposing a new FAPE standard would violate the Spending Clause by failing to provide state and local education agencies with appropriate notice of the scope of their obligations under IDEA and their acquiescence to a national educational standard. The brief concludes: “Deference to the IEP process is the only workable manner by which to achieve the goals of IDEA. Amici urge the Court to reaffirm the standard it set forth in *Rowley* rather than adopt an artificial national standard that would call millions of [IEPs] into question and require schools to re-examine and litigate more claims, contrary to the purposes of the IDEA.”

**Oral Argument:** On January 11, 2017, the Court heard oral arguments on whether schools must provide disabled children "some" educational benefit, which

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7 NSBA's brief is available at https://cdn-files.nsba.org/s3fs-public/reports/Endrew_F_v._Douglas_County_Sch._Dist.pdf?B7kisyHVW1DAJzGgnNsTUXsYTI5mgty.

8 Emma Brown and Robert Barnes, *Supreme Court wrestles with defining rights for students with disabilities, including autism*, THE WASHINGTON POST (Jan. 11, 2017),
several lower courts have interpreted to mean just more than trivial progress, or whether students legally deserve something more. According to The Washington Post report, the justices seemed ready to increase the educational benefits the country’s public schools owe to millions of children with disabilities.

Most of the justices appeared to think the “some” benefit standard was less than what Congress envisioned. But they also seemed to be struggling to come up with language for a higher standard that would be grounded in the law and clear enough to be meaningful and enforceable, but flexible enough to apply to children with widely varying levels and types of disabilities. The justices wrestled with the differences between various levels of educational benefit: “some,” “barely more than de minimis,” “significant,” “meaningful,” “appropriate in light of the child’s circumstances.” “What is frustrating about this case and this statute,” said Justice Alito, “is we have a blizzard of words.”

The New York Times report noted the justices appeared uneasy with a standard used by many appeals courts to say that providing a modest educational benefit was enough. But some of the justices indicated that they were concerned about the costs that any changes could impose. Justice Breyer said that a new standard might also invite costly litigation. “If we suddenly adopt a new standard, all over the country we’ll have judges and lawyers and people interpreting it differently,” he said. “I foresee taking the money that ought to go to the children and spending it on lawsuits and lawyers and all kinds of things that are extraneous.”

Justice Alito also appeared wary. “No matter how expensive it would be and no matter what the impact in, let’s say, a poor school district would be on the general student population, cost can’t be considered?” he asked. Responding to parents’ argument that public schools should be required “to provide substantially equal educational opportunities” to disabled children, Justice Ginsburg said the Court had tacitly rejected it in a 1982 decision, Board of Education v. Rowley. Justice Kagan said she had “some feeling that the word ‘equality’ is a poor fit for this statute.”

Justice Sotomayor asked if the Court could substitute “meaningful” for “significant.” Irv Gornstein, arguing for the federal government in support of the parents, responded that the two were synonymous, adding that he would also be content with “appropriate.” But he asked the court to avoid “meaningful” because “it means different things to different courts.” Justice Kagan responded that whatever standard the court announced might have the same problem. “So we should come up with our own that can then be applied in different ways in different courts?” she asked. That was the challenge, Justice Alito said. “What everybody seems to be looking for is the word that has just the right nuance,” he added.

II. USSC 2016 Term: Cases Granted Review


**Issues Presented:** (1) Should Auer 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; and (2) 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?

**Facts:** The legal dispute between Gavin Grimm, also identified as G.G., who is a student at Gloucester High School, began after the Gloucester County School Board (GCSB) adopted in December 2014 a policy restricting transgender students’ use of restroom facilities. The policy states that transgender students can only use single-stall bathrooms or facilities assigned to their biological gender. At the beginning of the 2014-15 school year, Grimm was allowed to use a single-stall restroom at the nurse’s station and some of the staff restrooms. He received permission to use the boys’ restrooms in October 2014, after telling the principal that the earlier arrangement made him feel alienated and isolated.

In June 2015, the American Civil Liberties Union of Virginia filed on behalf of Grimm a suit against GCSB, alleging the policy violates both the Fourteenth Amendment’s Equal Protection Clause and Title IX.

**Procedural History:** In July 2015, the federal district court dismissed Grimm’s Title IX claims on the ground that the federal law allows schools to have separate restrooms based on sex. The ruling came after the U.S. Department of Justice (DOJ) filed a “statement of interest” in court in support of Grimm’s Title IX claims. DOJ argued GCSB’s policy violates Title IX because it discriminates on the basis of sex, which DOJ asserts includes gender identity and transgender status. Although the Title IX claims were been dismissed, the Fourteenth Amendment’s Equal Protection Clause claims continued.

In September 2015, the district court issued a memorandum opinion regarding its earlier dismissal of a student’s Title IX claim and the denial of the student’s motion for a preliminary injunction. Grimm had sought the injunction to allow him to use the bathroom that corresponds with his gender identity pending the court’s ruling on his Equal Protection claim. The court

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dismissed the student’s claim that the school board’s policy excluding him from using the boys’ restroom based on his gender identity amounts to sex discrimination in violation of Title IX. It concluded that “the Title IX claim is precluded by Department of Education [(ED)] regulations.”\textsuperscript{12} Specifically, it pointed out that ED regulation 34 C.F.R. § 106.33 expressly “allows schools to provide separate bathroom facilities based upon sex, so long as the bathrooms are comparable.”\textsuperscript{13}

With regard to the preliminary injunction, the court focused on balancing the hardships faced by the parties. It found that while the school board sought to protect students’ interest in bodily privacy, which has been long recognized by the U.S. Court of Appeals for the Fourth Circuit, Grimm sought to “overturn a long tradition of segregating bathrooms based on biological differences between the sexes.”\textsuperscript{14}

Grimm filed an appeal to the Fourth Circuit seeking to overturn the lower court’s decision. In April 2016, the Fourth Circuit reversed the district court’s denial of G.G.’s motion for a preliminary injunction and remanded the case to that court with instructions to give ED’s interpretation of its Title IX implementing regulation \textit{Auer} deference.\textsuperscript{15} The appeals court noted that 34 C.F.R. § 106.33 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.”\textsuperscript{16} 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.”\textsuperscript{17}

As a result, the court concluded that since “the regulation is susceptible to more than one plausible reading because it permits both the Board’s reading—determining maleness or femaleness with reference exclusively to genitalia—and [ED’s] interpretation—determining maleness or femaleness with reference to gender identity,” it is ambiguous.\textsuperscript{18} Having determined that the regulation is ambiguous as applied to transgender students, the majority stated “[ED’s] interpretation is entitled to \textit{Auer} deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute.” After reviewing the difficulty in determining the character of what is male and what is female, the majority concluded that “[ED’s] interpretation of how § 106.33 and its underlying assumptions should

\textsuperscript{12} \textit{Id.} at 744.
\textsuperscript{13} \textit{Id.}
\textsuperscript{14} \textit{Id.} at 750.
\textsuperscript{16} \textit{Id.} at 720.
\textsuperscript{17} \textit{Id.} at 730.
\textsuperscript{18} \textit{Id.} at 720.
apply to transgender individuals is not plainly erroneous or inconsistent with
the text of the regulation.”

The court also found that the novelty of ED’s interpretation was not
a sufficient reason to deny it Auer deference. It stated that ED’s
interpretation was not “merely a convenient litigating position.” It indicated
that the interpretation could not be considered “a post hoc rationalization
because it is in line with the existing guidances and regulations of a number
of federal agencies—all of which provide that transgender individuals should
be permitted access to the restroom that corresponds with their gender
identities.” In sum, the court stated:

“We conclude that ED’s interpretation of its own regulation, § 106.33,
as it relates to restroom access by transgender individuals, is entitled
to Auer deference and is to be accorded controlling weight in this case.
We reverse the district court’s contrary conclusion and its resultant
dismissal of G.G.’s Title IX claim.”

With regard to the district court’s denial of G.G.’s motion for a preliminary
injunction, the appeals court found the lower court had “misstated the
evidentiary standard governing preliminary injunction hearings.” It said,
“Thus, although admissible evidence may be more persuasive than
inadmissible evidence in the preliminary injunction context, it was error for
the district court to summarily reject G.G.’s proffered evidence because it
may have been inadmissible at a subsequent trial.” Because the district
court had incorrectly evaluated G.G.’s proffered evidence by using a stricter
standard than warranted at the preliminary injunction stage, it concluded
that “the district court abused its discretion when it denied G.G.’s request for
a preliminary injunction without considering G.G.’s proffered evidence.”

The court, therefore, vacated the district court’s denial of the motion and
remanded the case to the lower court “for consideration of G.G.’s evidence in
light of the evidentiary standards set forth herein.” With regard to G.G.’s
request that the case be reassigned to a new district court judge, the court
conceded the judge “did express opinions about medical facts and skepticism
of G.G.’s claims,” but the court found “the record does not clearly indicate
that the district judge would refuse to consider and credit sound contrary
evidence.” In addition, it declined to find that the district court’s written
order in the case raised a question about the judge’s fundamental fairness in
conducting the proceedings.

19 Id. at 722.
20 Id.
21 Id. at 723.
22 Id. at 725.
23 Id.
24 Id. at 726.
25 Id.
26 Id. at 727.
27 Id.
In August 2016, GCSB filed a petition for certiorari with the U.S. Supreme Court, asking it to review the Fourth Circuit panel’s decision. The petition raised three questions:

1) Should this 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?
3) 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?

On October 28, 2016, the Supreme Court granted review. However, the Court limited its review to questions two and three.

NSBA Brief: On January 10, 2016, NSBA and the School Superintendents Association (AASA) submitted an amicus brief urging the U.S. Supreme Court to reverse the Fourth Circuit's decision, holding that the U.S. Department of Education’s interpretation of 34 C.F.R. § 106.33, should be given Auer deference. The Department of Education's interpretation of the regulation, 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."

The NSBA/AASA brief made two arguments in support of reversing the decision: First, the brief contends that as an interpretation of the statute, the Ferg-Cadima letter (unpublished ED letter) does not qualify for Auer deference. It asked the Court to "avoid granting the force and effect of law to informal interpretive guidance and agency litigation and enforcement positions that seek to impose more expansive obligations on local school districts without first undergoing the rigorous and careful consideration demanded by the formal rulemaking process."

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29 Legal Clips sua sponte item reporting the Court granting review of GCSB’s petition available at https://www.nsba.org/legalclips/2016/10/31/sua-sponte-us-supreme-court-has-granted-certiorari-virginia-school-district-gg.
31 The NSBA/AASA brief is available at https://cdn-files.nsba.org/s3fs-public/reports/GCSB%20v.%20GG%20-%20Amicus%20Merits%20Brief.pdf?UVYARRVsVAGUsA7JpBYonI7kTTwcmqeK.
Second, the NSBA/AASA brief argued that granting Auer deference to the unpublished ED letter would impose unexpected and untenable burdens on school district efforts to accommodate all students. The brief asserted: deferring to the letter would allow federal agencies to short circuit important principles of federalism by minimizing state and local expertise and experience on matters affecting public schools; and deferring to the letter would force public schools to make untenable legal choices that undermine public confidence in their ability to provide students with safe learning environments.

The Court will hear oral arguments on March 28, 2017.

III. U.S. Court of Appeals – Pending Amicus Cases

*M.L. v. Starr,*\(^32\) No. 15-1977 (4th Cir. amicus brief filed Apr. 5, 2016)

**Update:** The court heard arguments in the case on December 8, 2016. On January 23, 2017, the court granting M.L.’s motion, placed the case in abeyance pending a decision by the United States Supreme Court in *Endrew F. v. Douglas Cnty Sch. Dist.*\(^33\)

**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)?

**Facts:** 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.

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\(^{33}\) 798 F.3d 1329 (10th Cir. 2015), *cert. granted,* 137 S. Ct. 29 (Sept. 29, 2016) (No. 15-827).
NSBA Brief: The NSBA brief, joined by the Maryland Association of Boards of Education, made three arguments.34

First, the brief contended that the 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. IDEA is focused on providing access to the general curriculum to prepare a child with disabilities for future education, employment and independent living, but 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. IDEA clearly limits the obligations of school districts to children with disabilities who are unilaterally enrolled by parents in private institutions. The parents’ demands would impose on school districts unworkable burdens not supported by the purpose, intent, or statutory requirements of IDEA.

Second, the NSBA/MABE brief contended that the parents’ interpretation of IDEA is fraught with constitutional peril that the Fourth Circuit should avoid. Specifically, 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 argued 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.,35 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?

Facts: 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

34 NSBA/MABE brief available at https://cdn-files.nsba.org/s3fs-public/reports/ML%20v.%20King%204-5-16%20Amicus%20Brief.pdf?WOSewF7bO3bmSrTNhxSTlmOaQVI5HoE.

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 Brief: NSBA and the Texas Association of School Board Legal Assistance
Fund (TASB) filed an amicus brief urging the Fifth Circuit to reverse the district
court’s ruling. 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.

K.G. v. Irvine Unified Sch. Dist.,37 Nos. 14-56457/14-56524 (9th Cir. amicus
brief filed Mar. 25, 2015)

36 NSBA/TASB amicus brief, available at https://cdn-files.nsba.org/s3fs-
public/reports/Salazar%20v.%20SSAISD%20-
%20Amicus%20Brief%202015.pdf?
37 No. 2:10-cv-01431 (C.D. Cal. Nov. 8, 2013), Nos. 14-56457/14-56524 (9th Cir. filed Sept. 4,
2014).
**Update:** The Ninth Circuit heard arguments in the case on August 1, 2016. On September 2, 2016, the court granted the parties’ joint motion to dismiss K.G.’s crossclaim, No. 56524.

**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?

**Facts:** 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 high school. After initially denying the request, the district court reversed course and ordered the school district to pay the attorney $175,000.

**NSBA Brief:** 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 made 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 contended that attorney fee awards are not automatic once a party is determined to be a prevailing party. It also asserted 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 brief asserted that litigation costs, including attorney fee awards, are a significant additional burden under the IDEA. Their brief also stressed 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**

**Lopez v. Schwartz,** 39382 P.3d 886 (Nev. 2016)

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

**Procedural History:** 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) asked the Nevada Supreme Court to overturn the injunction preventing the state from implementing the ESAP.

On September 29, 2016, the Nevada Supreme Court held that the ESAP, also known as SB 302, does not violate Article 11, Section 2 of the Nevada Constitution, which requires the state legislature to provide for “a uniform system of common schools.” It also concluded that SB 302 does not run afoul of Article 11, Section 10, which prohibits the use of public funds for sectarian purposes. However, the state supreme court found that the use of funds appropriated in SB 515, for K-12 public education, to instead fund the ESA program violated the requirements of Article 11, Sections 2 and 6.

The Nevada Supreme Court, therefore, affirmed in part and reversed in part the lower court’s order in *Duncan v. State of Nevada,* dismissing the suit and remanding the case to the state district court to enter a declaratory judgment and permanent injunction prohibiting enforcement of section 16 of SB 302 in the absence of an appropriation consistent with the supreme court’s opinion. The supreme court also affirmed in part and reversed in part the district court’s order in *Schwartz v. Lopez* granting a preliminary injunction, and remanding the case to the district court to enter a declaratory judgment and permanent injunction prohibiting enforcement of section 16 of SB 302 consistent with the Nevada Supreme Court’s opinion.

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39 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.


42 Id. at 899.

43 Id. at 901-02.

44 Id. at 902-03.

45 Id. at 903.
NSBA/NASB Brief: NSBA and the Nevada Association of School Boards (NASB) filed an amicus brief that advanced two arguments for halting the ESAP.\(^\text{46}\)

First, the brief contended 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 asserted 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 pointed out that private hands are, in fact, the true beneficiaries of the Nevada ESAP. The NSBA/NASB brief urged the court to discourage the Nevada ESAP from becoming a national model.

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