It's a School Law Year in the Supreme Court

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Outline

1. Exhaustion of Administrative Remedies under IDEA (service animal): *Fry v. Napoleon Comm. Sch.* (6th Cir.)
2. Definition of FAPE: *Endrew F. v. Douglas Cnty. Dist. Re-1*, 798 F.3d 1329 (10th Cir. 2015)
3. *Auer* deference to ED/DOJ Guidance on Transgender Student Policy: *Gloucester County School Board v. G. G.* (4th Cir.)
4. Q & A

Fry v. Napoleon Comm. Sch., 15-497, 788 F.3d 622 (6th Cir.), *cert.* granted June 28, 2016

- Question Presented:

May parents of a disabled child bypass IDEA procedures to bring directly a suit for damages under the Americans with Disabilities Act and the Rehabilitation Act, as damages are not available under the IDEA?

Facts…

- Parents of a child with cerebral palsy requested school district allow service dog to accompany the child to kindergarten to enhance her independence.
- School's IEP team determined the human aide already assisting the child as part of her IEP sufficiently met her needs, and denied the request.

"Never work with animals or children."

-W.C. Fields

Exhibit A: The dog, Wonder.

Exhibit B: Wonder & Ehlena

Facts, continued…

- Instead of using IDEA 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 two-year OCR investigation, district agreed to let the service dog accompany the child, but the parents instead enrolled her in another district.

The Lawsuit below: Courts rule Parents must exhaust IDEA procedures before filing suit.

- Parents brought a suit seeking monetary damages under Section 504 and the ADA for the first school district's failure to accommodate the presence of the service dog.
- Both the trial court and the Sixth Circuit agreed that the case should be dismissed, because when the injuries alleged can be remedied through IDEA procedures or they relate to the specific educational purpose of the IDEA, parents must exhaust IDEA procedures before seeking relief in court.

NSBA's amicus brief included:

- 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)

Fry v. Napoleon Comm. Sch., 15-497, 788 F.3d 622 (6th Cir.), *cert.* granted June 28, 2016 – cont'd

- NSBA amicus brief argued:
  - A direct route to litigation undermines the IDEA's collaborative process for resolving special education disputes.
  - The collaboration and administrative hearing processes provide for best interest of the child through:
    - educational expertise, expeditious resolution, reduced financial and emotional costs of litigation.

Endrew F. v. Douglas Cnty. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015)

Re-visitation of *Rowley* standard.

- FAPE is not currently defined in IDEA or its regulations re: 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. Douglas Cnty. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015)

- The case was brought by the parents of Endrew F., a child with autism who attended kindergarten through fourth grade in Douglas County schools.
- During that time, he progressed academically and socially but continued to exhibit problem behaviors. Endrew's parents unilaterally placed him in a private school and requested tuition reimbursement, claiming the district had failed to provide FAPE.

- U.S. Court of Appeals for the 10th Circuit upheld HO and district court's decisions that Endrew had been receiving a FAPE, as defined in its precedent.
- Parents petitioned SCOTUS to hear the case, noting a split in the 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. Douglas Cnty. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015) – cont'd

- SCOTUS invited the Solicitor General to file a brief expressing the views of the U.S.
- SG filed an *amicus* brief August 18 telling 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 filed an amicus brief on December 21, 2016:

1. Reading a higher substantive educational benefit standard into IDEA in effect would 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.

a. Congress initially promised to provide 40% of the additional cost of educating children with disabilities, but has never appropriated more than 14%.
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 standard.

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 is a collaborative framework that has worked well for several decades to ensure that students receive educational plans uniquely tailored to their needs.

At Oral Argument… the justices reflected many of the points raised by NSBA:

- A one-size fits all standard is not workable:
  - Chief Justice Roberts questioned how a single new standard would "work with students whose disabilities generally wouldn't allow them…with their own potential to follow the general educational curriculum?"
  - Justice Breyer asked if court "suddenly adopt[ed] a new standard, all over the country we'll have judges and lawyers and -- and -- and people interpreting it differently[…]
- A new standard will increase litigation:
  - Justice Breyer 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. That is what's actually bothering me."
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- Increases in cost will tax an already burdened school system with Congressional broken promise to fund IDEA
  - Justice Alito asked, "[W]hat percentage of the funds that are spent by school districts for this program are paid by the Federal government?
  - Solicitor General responded, "I think it's like 15 percent or something like that."
  - Justice Alito also wanted to know the role of cost in the court's ruling. "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? And do you think in the real world, school boards are disregarding costs entirely?"

- A new standard will be confusing and unworkable.
  - Parents and their amici offer 9 different new standards.
  - Justice Alito said, "What is frustrating about this case and about this statute is that we have a blizzard of words."

One person’s some is another person’s some.

“It says "some benefit," but you're -- you're reading it as saying "some benefit," and the other side is reading it as saying "some benefit,“”

- CHIEF JUSTICE ROBERTS

Substance v. Process

- JUSTICE KAGAN: An IEP must have the goal of advancing a child in the general education curriculum and, to the extent possible, enable her to be educated in the school's regular classes." And, to me, that sounds exactly like what the chief justice just said, that an IEP has to be reasonably calculated to do those things. And if it's not, then relief follows.

- MR. KATYAL: …it's just a procedural guarantee that they have to think about and consider grade-level progress. It does not mean sort of substantive standard –

- JUSTICE KAGAN: That's wrong. This is not just a procedural guarantee. Yes, the IDEA has lots of procedures in it, but they're all geared towards a particular substantive result. And it's that substantive result that's the focus of the -- both the administrative process and then judicial review of what comes out of the administrative process.

Where might the Court go?

- Likely, the Court will say some educational benefit is not *de minimus*.
- 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.

Gloucester County School Board v. G. G., 822 F.3d 709 (4th Cir. 2016), mandate recalled, stay granted Aug. 3, 2016

Transgender boy seeking use of restrooms based on his gender identity.

Gloucester County School Board v. G. G., 822 F.3d 709 (4th Cir. 2016), mandate recalled, stay granted Aug. 3, 2016 – cont'd

- At issue:
  - Whether the Title IX regulations on separation of students by "sex" (34 C.F.R. 106.33) are ambiguous; and
  - If so, whether the Department of Education's interpretation is entitled to deference under *Auer v. Robbins* (1997).
- U.S. Court of Appeals for the 4th Circuit's decided in April:
  - Regulation is ambiguous *as applied to transgender students;*
  - ED's interpretation was entitled to deference.

Gloucester County School Board v. G. G., 822 F.3d 709 (4th Cir. 2016), mandate recalled, stay granted Aug. 3, 2016 – cont'd

- In the May 31, 2016 order denying the school district's petition for *en banc* review.
- The dissenting justice noted the "… *the momentous nature of the issue deserves an* ***open road to the Supreme Court****…."

Gloucester County School Board v. G. G., 822 F.3d 709 (4th Cir. 2016), mandate recalled, stay granted Aug. 3, 2016

- SCOTUS granted (5-3) the district's emergency petition seeking a stay of 4th mandate and district court's preliminary injunction allowing use of boys' restroom/
- The stay terminates upon SCOTUS' ruling.
- Potential Impact of 8 member court & Kennedy, J.

NSBA Brief was filed on January 10, 2017.

- NSBA's brief, did not address the question of transgender student rights under Title IX or the Equal Protection Clause of the Fourteenth Amendment.
- Instead NSBA challenged theit urged the Court not to afford judicial deference to the U.S. Department of Education's guidance by making two main arguments.

1. 4th Circuit improperly deferred to feds position on it's interpretation of "sex" under Title IX and its regulations.
2. Deference shifted legislative authority to the executive at the expense of state/local authorities who are better placed to resolve difficult emerging issues when courts have failed to provide clarity.
3. Major regulatory changes should be subject to the procedures set forth in the Administrative Procedures Act requiring Notice & Comment.
4. Public and stakeholder comment:
   - Ensures federal agencies have benefit of implementation challenges
   - Minimizes potential litigation
   - Avoids delegitimizing underlying goals to protect students by ensuring open process.

Between Scylla and Charybdis: The untenable position of school boards…

- Deference to agency "guidance" potentially endows such pronouncements with the force of law.
- Potential for conflict between multiple jurisdictions (federal/state).
- Places schools in an untenable position, because any position they take may subject them to agency enforcement and litigation.

ED Transgender Students Resources

- **May 13, 2016 Guidance from ED/DOJ**

  The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its regulations.

http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

- **U.S. ED OCR LGBT guidance page (letters and Resolution Agreements)**

http://www2.ed.gov/about/offices/list/ocr/lgbt.html

- **U.S. ED OCR April 2014 guidance on sexual violence**

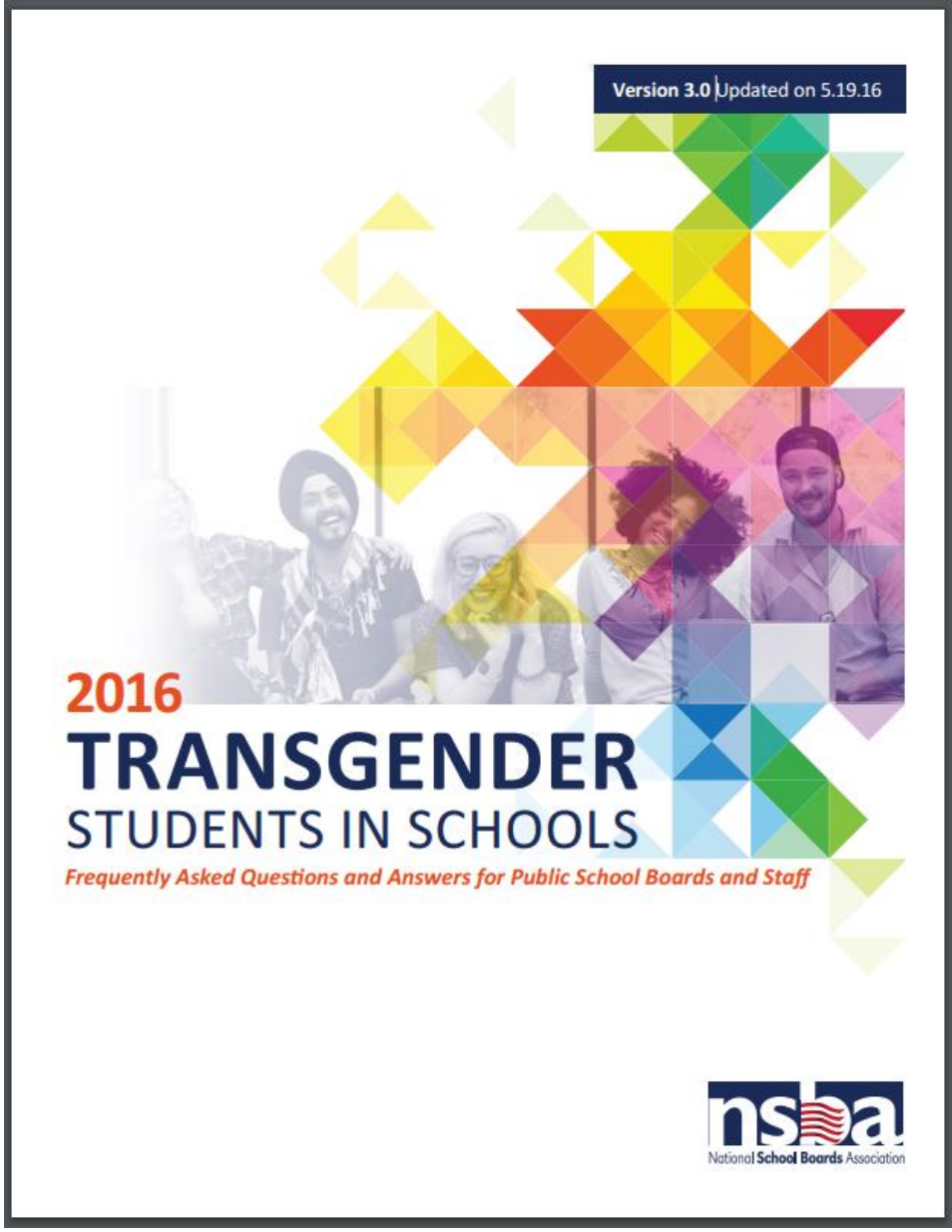
http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

NSBA Resource Reminder

Transgender Students in Schools:

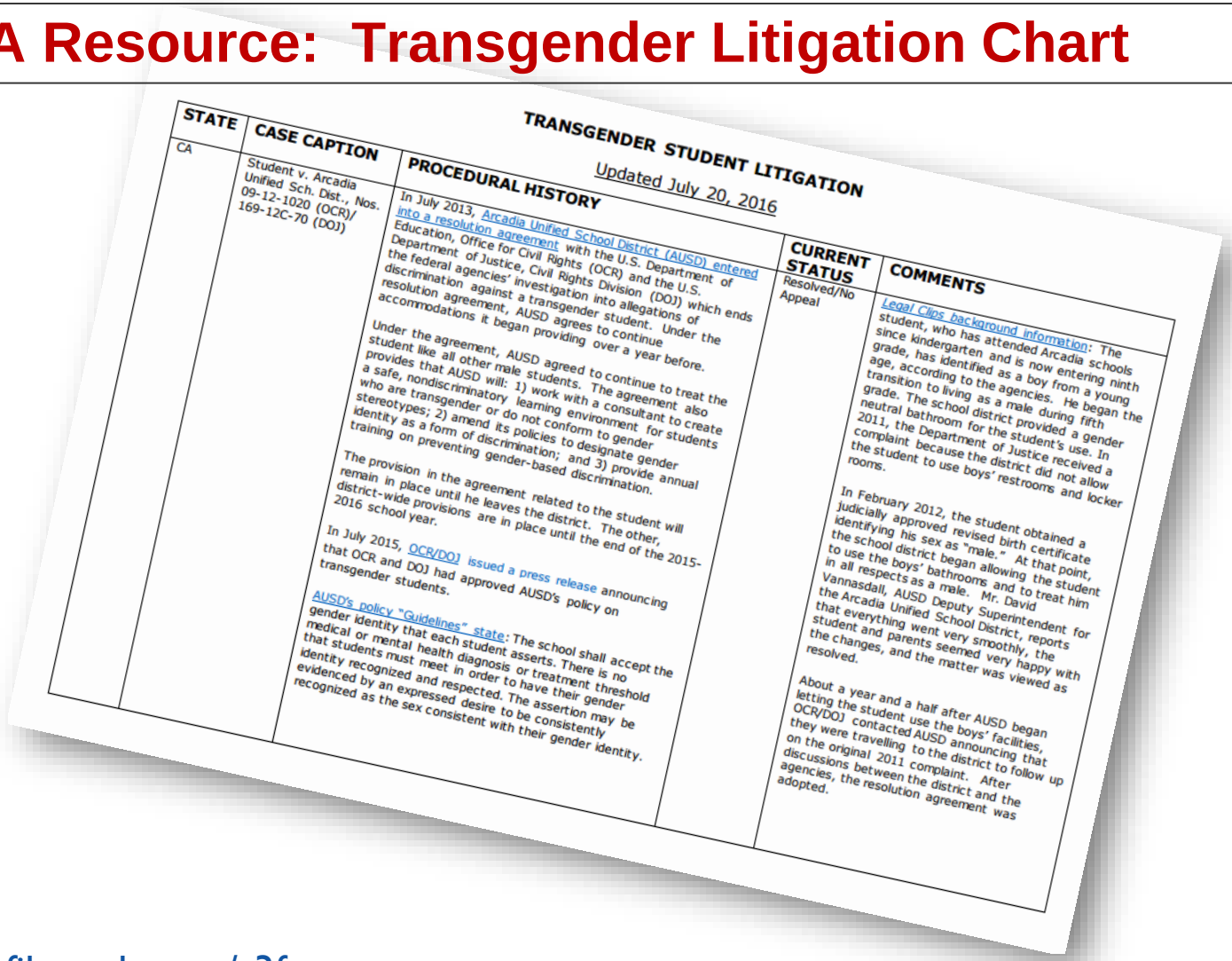
Frequently Asked Questions and Answers for Public School Boards and Staff

Version 7 (November 22, 2016)



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

NSBA 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. 09-12-1020 (OCR)/ 169-12C-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 Clips background 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 Vannasdall, AUSD Deputy Superintendent for the Arcadia Unified School District, reports that everything went very smoothly, the student 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.

https://cdn-files.nsba.org/s3fs-public/reports/TRANSGENDER%20LITIGATION.%20CHART%20-%20December%202016%20Snapshot.pdf?gQH7wQyYSbYi7FpDKCA.WrWN2G.YWhcx

Questions & Answers

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

www.nsba.org