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NSBA Legal Advocacy Update

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U.S. Supreme Court Review and Update – 2016 Term

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National School Boards Association

The U.S. Supreme Court decided four cases during the 2016 term involving issues with important implications for public schools. First, the Supreme Court, in *Trinity Lutheran Church v. Comer*, weighed in on a state agency decision to exclude a religious institution from a state funded program. Second, the Court, after having granted review in *Gloucester County School Board v. G.G.*, a case involving accommodating a transgender student's use of school restrooms based on gender identity, vacated the U.S. Court of Appeals for the Fourth Circuit decision and remanded the case back to the Fourth Circuit.

The U.S. Supreme Court also issued decisions in two special education cases in which the National School Boards Association submitted amicus briefs. In *Endrew F. v. Douglas County School District RE-1*, the Court held that to meet its substantive obligation under the Individuals with Disabilities Education Act (IDEA), a school must offer an individual educational plan (IEP) reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. In *Fry v. Napoleon County Schools*, the Court held exhaustion of the IDEA's administrative remedies is unnecessary where the gravamen of the plaintiff's lawsuit is something other than the denial of the IDEA's core guarantee of a free appropriate public education (FAPE).

In addition, the Supreme Court rendered decisions in two other cases of interest: *Cooper v. Harris*, and *McLane Co. v. EEOC*. Finally, this review will briefly summarize three U.S. Court of Appeals cases and a case from the Nevada Supreme Court in which NSBA submitted *amicus* briefs.

Trinity Lutheran Church v. Comer

In *Trinity Lutheran*, the U.S. Supreme Court ruled that Missouri's exclusion of religious institutions from competing for grants under the state's Scrap Tire Program violates the First Amendment free exercise rights of those institutions.[1] Missouri had based its exclusion on a state constitutional provision that barred the use of state funds to aid any church directly or indirectly. (This type of provision along with similar provisions in other state constitutions are known as "Blaine Amendments".) The Court determined that the state's reliance on *Locke v. Davey*, 540 U. S. 712 (2004), was misplaced. In *Locke*, the scholarship applicant was not required to abandon his religious beliefs to obtain the scholarship, rather he was

simply barred from seeking state funds to pay ministry training.[2] In this case the denial of state funds to the church was based solely of the religious status of the recipient.[3]

The decision's focus on religious status has led proponents of private school voucher programs that include sectarian schools to believe that "Blaine Amendments" are on their last leg constitutionally speaking.[4] Fundamental to the Court's reasoning, they say, is that exclusion based on religious status is discriminatory in violation of the First Amendment's Free Exercise of Religion Clause.[5]

Voucher proponents point out that following the *Trinity Lutheran Church* decision, the U.S. Supreme Court vacated the Colorado Supreme Court and New Mexico Supreme Court rulings in cases involving state aid to religious schools. The Court remanded those cases back to the state courts for reconsideration in light of *Trinity Lutheran*.[6]

In contrast, the opponents of voucher programs point to a qualifier in footnote 3 of the majority opinion as limiting the reach of *Trinity Lutheran*.[7] The footnote states: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[8] It should be noted that of the six justices that signed on to the Court's opinion, two dissented regarding footnote 3, leaving only a plurality in agreement with the footnote.[9]

Justice Sotomayor's dissent in *Trinity Lutheran Church* contends that the decision is limited to government programs that provide direct state aid, not ones that provide indirect state aid, such as the voucher program at issue in *Zelman v. Simmons-Harris*, 536 U. S. 639 (2002).[10] Justice Breyer, concurring in the judgment, issued an opinion that made no mention of footnote 3, *Locke* or *Zelman*.[11] Instead, Breyer emphasized that the scrap tire program was akin to providing police and fire protection and as such denial of the benefits of the program on basis on religion brought the case within the scope of the Free Exercise of Religion Clause.[12]

Justices Thomas and Gorsuch's objection to footnote 3 is succinctly summed up in Gorsuch's partial concurrence: "I don't see why it should matter whether we describe that benefit, say, as closed to Lutherans (status) or closed to people who do Lutheran things (use). It is free exercise either way."[13] As a result, Gorsuch found the majority opinion's "reliance on the status-use distinction" as insufficient to distinguish *Trinity Lutheran Church* from *Locke*.[14]

G.G. v. Gloucester County School Board

In March 2017, the U.S. Supreme Court vacated[15] a Fourth Circuit panel decision that a transgender student prohibited from using school bathrooms that correspond to his gender identity would likely succeed on his Title IX claim.[16] The Supreme Court remanded the case for reconsideration in light of the Trump Administration's February 22, 2017 *Dear Colleague Letter*[17] that "withdraw[s] and rescinds[s]"[18] an

Obama Administration Guidance document interpreting Title IX regulations.[19] This guidance stated, “when a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with gender identity.”[20]

The vacated ruling was primarily based on substantial deference to the rescinded guidance. The Fourth Circuit found the guidance was entitled to *Auer* deference and should be given “controlling weight” because (1) there was sufficient ambiguity as to how the regulation would be applied to transgender individuals; and (2) the interpretation was not “plainly erroneous or inconsistent with the regulation or statute.”[21]

In August 2017, the Fourth Circuit panel issued an order sending Gavin Grimm's suit against the Gloucester County School Board back to the federal district court.[22] The Fourth Circuit order instructed the lower court to consider whether the suit should be dismissed for mootness given that Grimm had graduated. The order states: “Because all of the prior litigation was conducted while Grimm was a student, the parties have presented us with nothing more than unsupported assertions regarding Grimm’s continued connection to his high school and the applicability of the school board’s policy. We remand this to the district court for the limited purpose of resolving, in the first instance, whether this case has become moot.”[23]

As many questions remain as to how courts should resolve the issues surrounding the use of school bathrooms by transgender students, the U.S. Supreme Court is presented with another opportunity to provide some definitive answers by granting review in *Kenosha Unified School Dist. Bd of Educ. v. Whitaker*, No. 17-301, (U.S. pet. for cert. filed, Aug. 25, 2017). In that case, the school district has asked the High Court to resolve two questions: (1)Whether a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is sex stereotyping that constitutes discrimination “based on sex” in violation of Title IX; and (2) Whether a school policy requiring boys and girls to use separate bathroom facilities that correspond to their biological sex is a sex-based classification triggering heightened scrutiny under an Equal Protection analysis.

Endrew F. v. Douglas Country School District RE-1

For school districts, the U.S. Supreme Court decision in *Endrew F.*[24] affirms that there is no universal test to measure whether a student with a disability has made “appropriate” progress as required by the FAPE provision.[25] Writing for the Supreme Court, Chief Justice Roberts emphatically rejected a test that would allow any IEP to satisfy the FAPE requirement, so long as it conferred a "barely de minimis" benefit to the student. [26] Additionally, the unanimous decision declined a standard that would require public schools to provide a "substantially equal" education to a child with a disability.[27]

Instead, the *Endrew F.* decision concluded that educational benefits must be measured relative to the individual student, with deference to the expertise of school authorities.[28] The ruling echoes an essential argument of NSBA's amicus brief that the IEP team is in the best position to define the educational outcome necessary to meet the FAPE requirement for each student.[29]

Following the decision in *Endrew F.*, an IEP must enable the student to make progress, and for students with disabilities, progress must be appropriate in light of the child's circumstances.[30] Thus, to determine whether a school district has offered or provided a FAPE, the standard is whether the IEP is reasonably calculated to provide "some" educational benefit, where "some benefit" is evaluated "in light of the child's circumstances."[31]

Fry v. Napoleon Community Schools

When a dispute concerns the provisions of a student's FAPE, as the case in *Endrew F.*, the IDEA establishes administrative remedies that must be exhausted before a lawsuit can be filed in federal court.[32] However, protections against discrimination based on disability under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act are not subject to the IDEA's exhaustion requirement; these statutes also provide for additional monetary and injunctive remedies.[33] NSBA filed an amicus brief after the U.S. Supreme Court granted certiorari to address the scope of the IDEA's exhaustion requirement in *Fry v. Napoleon Cmty. Sch.*[34]

In a unanimous decision, the Court explained that the IDEA's exhaustion requirement hinges on whether a lawsuit seeks relief for the denial of a FAPE.[35] The complaint before the Court was filed by the parents of E.F., a student with a disability, under the ADA and Section 504.[36] It made no reference to the adequacy of the special education services provided to E.F.[37] Rather, the complaint alleged that the school district's refusal to accommodate E.F.'s service dog, Wonder, resulted in denial of equal access to school facilities and psychological harm.[38]

The Court held that a complaint is subject to the exhaustion of administrative remedies requirement if the "gravamen," or the substance, of the complaint seeks relief for the denial of a FAPE. [39] To determine the gravamen, a court should push aside "magic words" and consider whether the "crux" of the complaint seeks redress for a school's failure to provide a FAPE, even if it is not "phrased precisely" in those terms.[40] Writing for the Court, Justice Kagan offered "clues" to distinguish complaints alleging disability-based discrimination from those alleging the denial of a FAPE. [41] First, a court can consider the "means and ends" of the statutes: while the IDEA guarantees individually tailored educational services, the ADA and Section 504 promise non-discriminatory access to public institutions. [42] Applying this clue, a court can ask whether the student could seek similar relief in a non-school setting, like a public movie theatre.[43] Similarly, a court can ask whether an adult could seek relief for the alleged conduct in a school setting. [44] Second, a court can look to the "history of the proceedings" to determine whether formal administrative proceedings were initially invoked to resolve the dispute. [45] However, in a separate

opinion written by Justice Alito and joined by Justice Thomas, these clues were rejected as "misleading."[46]

Nonetheless, the Court briefly applied the clues it established, noting that without the history of the proceedings on record, it could not foreclose the possibility that E.F.'s complaint was subject to the IDEA's exhaustion requirement. [47] Under the first test, if a public movie theatre denied admittance to Wonder, then E.F. could file a similar complaint alleging disability-based discrimination.[48] Similarly, under the second test, if an adult visitor to the school was barred from bringing Wonder inside, then the adult could file a complaint alleging disability-based discrimination as E.F. did. [49] Thus, on remand to the U.S. Court of Appeals for the Sixth Circuit, the reviewing court may find that E.F. is not subject to the IDEA's exhaustion requirement even though the alleged discrimination occurred on school grounds.

Haddon Heights Bd. of Educ. v. S.D.[50]

In light of the ruling in *Fry v. Napoleon Cmty. Sch.*, the U.S. Supreme Court vacated the judgment in *Haddon Heights Bd. of Educ. v. S.D.* and remanded the case for further consideration to the U.S. Court of Appeals for the Third Circuit.[51] Similar to the complaint in *Fry*, the complaint in *Haddon Heights* alleged violations of the ADA and Section 504 and sought monetary damages unavailable under the IDEA.[52] The complaint asserts the attendance policy enacted by the school board had a discriminatory impact on S.D.'s ability to matriculate, and that S.D.'s Section 504 education plan resulted in him falling "further and further behind."[53]

S.D. is a student with a disability based on a diagnosis of asthma and sinusitis.[54] His parents contend that S.D. is ineligible for IEP services, but also admit he has never been evaluated for IDEA-eligibility. [55] The school board developed accommodations for S.D. pursuant to Section 504, which provide him with extra time to complete assignments and directs teachers to send him weekly updates providing class notes.[56] Following a mandate issued by the state, the school board enacted a new attendance policy specifying that students will be retained when their absences surpass the allocated limit, even if those absences are excused by a medical note.[57]

The Third Circuit affirmed the dismissal of the lawsuit, holding that the parents had to exhaust administrative remedies even though the cause of action was not raised expressly under the IDEA.[58] On remand, the court will determine whether parents are actually seeking redress for the denial of a FAPE, thus necessitating the IDEA's exhaustion requirement.

Other Supreme Court Decisions of Interest

Cooper v. Harris[59]

The United States Supreme Court held that North Carolina's redrawing of District 1 and District 12 violated the Fourteenth Amendment because the revised boundaries were predominantly based on race.[60] The Fourteenth Amendment limits racial

gerrymanders in legislative districting plans by preventing a state, "in the absence of 'sufficient justification,' from 'separating citizens into different voting districts on the basis of race.'"[61] After the 2010 consensus, the districts in question were both transformed into majority black voting-age population (BVAP) districts. In District 1, the state added almost 100,000 people to increase the district's BVAP from 46.6 to 52.7 and reconfigured District 12 to increase the BVAP from 43.8 to 50.7.[62]

The court employed a "two-step analysis" to determine whether the state improperly drew district lines based on race.[63] It stated that a violation occurs when the plaintiff establishes that: (1) "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district" and (2) the racial redistricting is subject to strict scrutiny, requiring a "compelling interest" for sorting by race and means "narrowly tailored" to that end.[64] Importantly, complying with the Voting Rights Act (VRA) is sufficient for establishing a compelling interest, but to meet the narrowly tailored prong, the state must show that it had good reasons for concluding that the VRA compelled its action.[65]

In the lower court decision, a three-judge district court panel found (1) racial considerations predominated in both District 1 (unanimously) and District 12 (majority of the panel); and (2) that the justifications for District 1 failed strict scrutiny and that there were seemingly no justifications for District 12.[66] On appeal, the Supreme Court stressed that the factual determinations of the district court, including whether racial considerations predominated, were subject to the deferential clear error review.[67]

In regard to District 1, the Supreme Court affirmed the district court's holding that the legislature's motivation to craft a majority-minority district was obviously racial.[68] In analyzing the second prong, the Court reasoned that North Carolina's justification of complying with the VRA was misplaced because while complying with the VRA is a compelling interest, North Carolina failed to state "good reasons" for why it believed it needed to comply.[69]

The Court attacked North Carolina's justification that a majority-minority district was necessary to avoid liability for vote dilution under § 2 of the VRA,[70] saying the redistricting failed the third threshold requirement under *Thornburg v. Gingles.* To prove the claim, a state must demonstrate that a minority group: (1) is "'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district"; (2) "politically cohesive"; and (3) prefers a candidate that is usually defeated by a white majority that "votes sufficiently as a block."[71] Since District 1 was an "extraordinarily safe district" for African American interests[72]—because white voters did not vote as a bloc in that district—there was no good faith reason to believe threshold requirement three would be fulfilled.[73]

In defending the newly drawn District 12, North Carolina argued its redistricting was for strictly political purposes. Highlighting the required deference, the majority of justices found that the district court's fact finding was sufficient to "clear[ ] the

bar of clear error review."[74] The justices were "far from having a 'definite and firm conviction'" that a mistake was made.[75]

The majority opinion additionally held that the plaintiff need not present a map that "achieves the legislature's political objectives while improving racial balance" to demonstrate that race predominated.[76] It found *Cromartie II* to only require a showing that race predominated over politics, and it asserted that if the plaintiffs could establish that race predominated without a map, an additional map, while potentially helpful, would not be necessary.[77] Justice Alito's dissent takes issues with this conclusion, arguing that the failure to produce a map was a "critical factor in our analysis" in *Cromartie II* and the majority opinion threw away precedent by not requiring such.[78]

Alito's dissenting opinion arguing that race did not predominate in District 12, highlighted the importance of presuming the good faith of the legislature.[79] He parroted the majority's sentiment in *Cromartie II* that race and politics are difficult to disentangle, and used this as justification for why the map requirement makes intuitive sense, calling it a "logical response to [a] difficult problem."[80] He argued that if the motivations were racial, a computer program could easily generate another map achieving similar political objectives without disturbing the racial distributions, and the failure to produce that led to the likely conclusion that there could not be a showing that race predominated.[81] Justice Alito concluded by asserting that even if the map was not required, the finding of the lower court in regard to District 12 was clearly erroneous because in the current case, like *Cromartie II*, it was clear error for the lower court to use the facts given to conclude that race predominated over politics.[82]

Justice Thomas penned a short concurrence affirming the opinion of the Court. His separate opinion stated his understanding that § 2 of the Voting Rights Act never justifies racial gerrymandering and highlighted his belief that the Court today rectified the problems of *Cromartie II.*[83]

***McLane Co. v. EEOC*[84]**

In a 7-1 decision, the U.S. Supreme Court vacated the judgment of the U.S. Court of Appeals for the Ninth Circuit, ruling that a district court's decision to enforce an EEOC subpoena is reviewed for abuse of discretion.[85] By rejecting the *de novo* standard of review applied by the Ninth Circuit, the Court affirmed the EEOC's broad discretion to obtain "virtually any material that might cast light on the allegations against the employer."[86]

A district court will enforce an EEOC subpoena unless an employer can prove the information request is unduly burdensome, not relevant, too indefinite, or serves an illegitimate purpose.[87] The Supreme Court's ruling settles that such a decision by the district court will be upheld unless the district court abused its discretion.[88]

The Court's opinion examined two factors to determine the scope of appellate review for decisions related to enforcement of EEOC subpoenas.[89] First, the Court

considered “appellate practice,” and noted that nearly all federal courts of appeals had a history of reviewing such decisions for abuse of discretion.[90] Second, the Court considered “institutional capacity,” and reasoned that whether to enforce a subpoena is a fact-intensive inquiry more amenable to the expertise of district courts.[91] Thus, deferential review of the district court’s decision would free an appellate court from reconsidering facts already weighed in a “satellite proceeding” designed to facilitate the EEOC’s investigation. [92]

In the proceedings before the Supreme Court, the challenged subpoena was part of investigation begun after a former employee of McLane filed a charge alleging she had been unlawfully terminated under Title VII when she failed a physical strength test issued by the employer.[93] The employee returned to work from maternity leave and took the physical test three times, failing each time.[94] McLane's policy required any employee returning from medical leave to take and pass the test.[95] When the EEOC realized the physical test was administered to employees nationwide, it expanded its investigation to include those employees as well.[96] The EEOC requested each test-taker's name, social security number, telephone number and last known address.[97] The district court denied the EEOC's subpoena, holding the pedigree information was not relevant because it was not yet "necessary" to the charge.[98]

On remand from the Supreme Court, the Ninth Circuit again vacated and remanded the judgment denying enforcement of the EEOC subpoena, holding that the district court applied an erroneous legal standard when it conflated “necessity” with “relevance.” [99] The ruling employed the logic of Justice Ginsburg’s brief dissent, which reasoned that because the district court initially required “more than relevance” to enforce the subpoena, the original judgment by the Ninth Circuit should have been affirmed. [100] Otherwise, her opinion concurred in part, and stated that generally, abuse of discretion is the proper standard of review for an EEOC subpoena.[101]

U.S. Court of Appeals and State Supreme Court Decisions

M.L. v. Smith[102]

A U.S. Court of Appeals for the Fourth Circuit three-judge panel ruled that a Maryland school district had provided a disabled student with a free appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act (IDEA), even though the student’s individualized education plan (IEP) failed to provide him with religious and cultural instruction that would allow the student to function in the Orthodox Jewish community. Citing the U.S. Supreme Court’s recent decision in *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE–1*, 580 U.S. __, 137 S. Ct. 988 (2017), it pointed out the Supreme Court rejected the argument that “a FAPE is an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” [103]

The panel agreed with the federal district court that schools have no duty under IDEA to provide disabled students with religious and cultural instruction. It likewise found IDEA imposes no duty in regard to "how a student may absorb such instruction at home."[104] The panel stated that IDEA does not guarantee an outcome that furthers a student's practice of his religion of choice.[105]

The parents sought public funding of the private religious education they determined their child, M.L., a child with disabilities, needed in order to function in the Orthodox Jewish community. They contended the FAPE requirement in the IDEA includes providing religious instruction to children with disabilities who need it to function in their faith communities. Montgomery County Public Schools (MCPS) argued that the IDEA itself contains no such requirement and further asserted that such a mandate would place school districts in the untenable position of either having to become religious experts themselves or paying religious persons or institutions to indoctrinate children with sectarian beliefs and practices.

The administrative law judge (ALJ) concluded that neither the IDEA nor Maryland law requires a public school to provide religious instruction to disabled students as part of an IEP. According to the ALJ, a FAPE primarily requires that a school provide the disabled student with "access [to] the general curriculum." The ALJ found that the IEP proposed by MCPS provided M.L. with a FAPE under the IDEA. In view of that holding, it was not necessary for the ALJ to address any of the Establishment Clause defenses made by MCPS.

The parents then requested that the federal district court "order[MCPS] to reimburse plaintiffs for the costs associated with enrolling M.L. at Sulam School for the 2012–13 school year" and also "[o]rder [MCPS] to place and fund M.L. at Sulam School for the 2013–14 school year and declare it to be his current educational placement under the IDEA."

The district court recognized that "beyond the alleged problematic interplay between the IEP and [M.L.'s] role in his Orthodox community, including the ALJ's failure to account for [M.L.'s] inability to generalize and the consequent (in Plaintiffs' view) failure to place [M.L.] at Sulam, Plaintiffs do not identify any faults in the IEP or the ALJ's review of it."

The district court concluded that outside of their religious and cultural argument, the Plaintiffs had not shown that the IEP was in any way deficient or treated M.L. in a different way than any other disabled student. Because MCPS provided a FAPE to M.L. under the IDEA, it was unnecessary to reach the Establishment Clause issues that would arise had the Plaintiffs prevailed and placement of M.L. at Sulam resulted.

The Fourth Circuit panel affirmed the district court. It stressed that following *Board of Education v. Rowley*, 458 U.S. 176 (1982), courts have consistently held that "a school provides a FAPE so long as a child receives some educational benefit, meaning a benefit that is more than minimal or trivial, from special instruction and

services."[106] However, it acknowledged that following the filing of the appeal in *M.L.,* the U.S. Supreme Court decided *Endrew F.*, wherein it rejected the Tenth Circuit's "merely more than de minimis" FAPE standard.[107]

Nonetheless, the panel concluded:

> For purposes of the case at bar, though, we need not delve into how Endrew F. affects our precedent because the IDEA does not provide the remedy the Plaintiffs want, regardless of the standard applied. Moreover, the Plaintiffs never raised any issue about the standard before the ALJ or district court, and it was never at issue on appeal. The Plaintiffs have not identified in post-argument briefing any way in which Endrew F. affects the resolution of this case.[108]

Instead, the panel found the case involved a question of statutory interpretation. It indicated that "[t]he Plaintiffs do not point to any section of the IDEA or its implementing regulations that requires a school to develop a religious or cultural curriculum, such as the Plaintiffs' requested teaching of "blessings [and] Hebrew words." It agreed with the district court "that religious and cultural instruction does not fall within the school's duty to provide a disabled student with access to the general curriculum."[109]

The panel noted that the "[p]laintiffs concede that their only objection to the IEP proposed for M.L. is the absence of religious instruction on M.L.'s cultural preferences."[110] It also noted that MCPS offered uncontested evidence that it would make reasonable accommodations for M.L.'s religious preferences.[111]

In addition, the panel rejected the plaintiffs' argument that the district court and ALJ erroneously disregarded their argument that an IEP must allow M.L. "to generalize what he learns from one setting to another."[112] It emphasized that the "IDEA does not mandate that a school instruct a student in his preferred religious practices." It stated: "Because the IDEA does not require a school to provide religious and cultural instruction inside the schoolhouse gates, it likewise does not contemplate how a student may absorb such instruction at home."[113]

Lastly, the panel addressed the plaintiffs' argument that "to the extent that M.L.'s religious and cultural needs resulting from his inability to generalize skills across settings do not fall within his progress in the general education curriculum, they are squarely within the context of the [IDEA's] 'other educational needs' section."[114] It said, "Assuming for the sake of argument that the Plaintiffs are correct that these 'other educational needs' are much broader than the needs of the child to be involved in and make progress in the general education curriculum the IEP did appropriately address those other needs."[115]

The panel concluded that the plaintiffs erroneously read "other educational needs" as "all other educational needs." It found "the IDEA does not require a public school to account for every deficiency a disabled student might possess, just like a school

does not have to exhaust its resources to enable a nondisabled student to achieve his ultimate potential."[116]

NSBA and the Maryland Association of Boards of Education (MABE) filed an amicus brief in *M.L. v. Smith*,[117] which successfully urged the Fourth Circuit not to expand the Individuals with Disabilities Education Act's (IDEA) free appropriate public education (FAPE) requirement to include religious/cultural instruction. The NSBA/MABE brief, filed in support of MCPS and its school board, made three arguments.

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. Sub-arguments 1 and 2, in particular, dovetail with the Fourth Circuit panel's reasoning.

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. The brief was written by Leslie Robert Stellman of Pessin Katz Law, P.A., Towson Maryland. Mr. Stellman is a member of NSBA's Council of School Attorneys.

Salazar v. San Antonio Independent School District[118]

The U.S. Court of Appeals for the Fifth Circuit found a school district could not be held liable under Title IX for teacher-on-student sexual harassment where the only school official who had knowledge of the sexual harassment was the perpetrator himself, even though the school official had the authority to take corrective action to end the discrimination.[119] The Fifth Circuit overturned a jury award of 4.5 million dollars for a student who was sexually abused from third to sixth grade by a vice-principal, who was later promoted to principal.[120]

Both parties relied on the U.S. Supreme Court case, *Gebser v. Largo Vista Indep. Sch. Dist.*[121], which built on previous Supreme Court cases to recognize an implied

cause of action under Title IX for teacher harassment of students.[122] The plaintiff argued that the principal's knowledge of and failure to report his own abuse satisfied *Gebser*'s required elements: (1) an official of the school district had "authority to instate corrective measures on the district's behalf," (2) had actual notice of the abusive conduct, and (3) was deliberately indifferent in responding.[123] The school district argued that the principal's knowledge did not factor into the analysis because, as *Gebser* states, "Where a school district's liability rests on actual notice principles . . . the knowledge of the wrongdoer himself is not pertinent to the analysis."[124] Thus, the school district contended that since the perpetrator's knowledge was not pertinent to the analysis, it was not liable under Title IX.

The Fifth Circuit sided with the school district. It held that the majority opinion in *Gebser* stands for the proposition that if the abuser is the only person with knowledge of the abuse, a court cannot hold a school district to be deliberately indifferent, even if the abuser is in a position to stop the abuse.[125]

The Fifth Circuit continued its analysis, providing four additional arguments why liability for the school district was inappropriate: (1) liability in this circumstance would be against the statutory intent expressed in 20 U.S.C. § 1682 ("the department or agency concerned has advised the appropriate person or persons of failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means") because (A) the words "has advised" requires the "appropriate person" to be initially unaware of the abuse[126] and (B) the "appropriate person" to rectify the problem designation likely does not refer to the abuser because it is highly improbable that the abuser would incriminate him or herself;[127] (2) because the only person who knew about the abuse was the perpetrator, there was an absence of the meaningful notice that is required for Title IX liability;[128] (3) to imply a cause of action in this case imposes a liability that parallels strict liability or *respondeat superior*, which was deemed inappropriate for Title IX implied cause of action cases in *Gebser;*[129]and (4) the Title IX "deliberate indifference" standard is far from met when only the perpetrator knew of the abuse. Lowering this standard is problematic because if a school district does not know about the abuse, the court cannot determine whether the district was unwilling to take corrective actions.[130] The Fifth Circuit, therefore, reversed the district court's judgment because the principal's abuse "does not comport with Title IX's express provisions or implied remedies."[131]

A number of points made by the Fifth Circuit in its analysis paralleled arguments in the National School Board's Association's amicus brief.[132] The brief highlighted the absence of proper notice, arguing that there cannot be a failure to intervene or properly respond (the essence of Title IX liability) when there is no knowledge of the abuse.[133] The brief also argued against a strict-liability approach, asserting that it runs contrary to Title IX's commitment to promote practices that protect individuals from discrimination (compared to the Title VII primary aim of compensation).[134] Related to that, the brief made the pragmatic argument that funds used for lawsuits deprive the school of funds used to implement strategies of

protection.[135] Additionally, the brief asserted that the strict-liability approach would be financially devastating, as a single adverse judgment could "easily exceed a district's annual federal funding."[136] This reasoning was referenced in the Fifth Circuit's opinion when it stated that "an award of damages in a particular case may well exceed a recipient's level of federal funding."[137]

K.G. v. Unified School District[138]

In a three-judge panel decision, the U.S. Court of Appeals for the Ninth Circuit affirmed that a special education student was a prevailing party entitled to attorneys' fees under IDEA because he secured an administrative ruling designating which educational agency would be responsible for providing him with a FAPE.[139] However, the fee award was vacated and remanded to the district court to explain how such fees are appropriately allocated to the work performed before and after K.G.'s graduation. [140]

The case arose from a dispute over which state agency would be responsible for funding K.G.'s FAPE. [141] The administrative ruling determined the Irvine Unified School District was the financially responsible government entity. The school district challenged the administrative decision in federal court, contending that the State of California was responsible for funding K.G.'s FAPE. [142] During litigation proceedings, K.G. graduated with a high school diploma, and his lawyer continued her "zealous advocacy," arguing alongside the school district in support of holding the state responsible for the FAPE. [143] Nonetheless, the Ninth Circuit noted that when "it still mattered," K.G. secured a judicially enforceable judgment and the subsequent lawsuit by the school district "kept the meter running." [144]

The court held that K.G. was a prevailing party for the purposes of attorneys' fees because he received relief on the merits when the ALJ designated the school district as the financially responsible agency.[145] Even though K.G. graduated from the high school before the district court decided the case, he secured the initial administrative relief well before graduation ceremonies occurred. [146] Accordingly, the ALJ ruling eliminated any "residual risk" that K.G. could be discharged from school and thus provided K.G. a more than de minimis benefit.[147]

In its amicus brief, the NSBA urged the court against awarding attorneys' fees, pointing out that the hours billed after K.G.'s graduation were not reasonably calculated to advance K.G.'s interests. [148] The majority opinion accepted some of the brief's reasoning by vacating the fee award for further review. [149] However, the dissent reasoned that because K.G.'s attorney had to stay in litigation until the entry of final judgment to ensure K.G.'s status as a prevailing party, the graduation date should not be relevant to the fee award. [150]

Lopez v. Schwartz[151]

The Nevada Supreme Court, sitting *en banc*, issued an opinion holding that legislation diverting state funds from public education to support an unlimited number of Educational Savings Accounts (ESA) was unlawful under the Nevada Constitution.[152]

Under the challenged legislation, ESAs are available to fund educational expenses, including private school tuition and transportation to and from private school.[153] The parents of a school-aged child may enter into an "agreement" with the state treasurer to establish an individual education savings account.[154] Money is deposited into the account in quarterly installments, diverting the equivalent payment away from a school district that would have enrolled the student.[155] If an agreement is terminated, any remaining funds in the account revert to the Distributive School Account (DSA), which in turn funds school districts.[156] However, if the agreement is renewed, the account carries forward any remaining funds into the next year.[157] The state may audit an account to determine whether funds are being misused, and if so, may freeze or terminate the account.[158] Thus, the state retains oversight of the educational savings accounts, even during the time the funds are in the account.[159]

NSBA filed an amicus brief in support of public school students and their parents, who sought to enjoin the state treasurer from implementing the ESA program.[160] The complaints asserted that the ESA violated the uniformity clause, anti-sectarian clause and appropriations clause of the state constitution.[161] The court recognized a public-importance exception and granted standing to the plaintiffs.[162] The court unanimously agreed that the funding mechanism of the ESA was unconstitutional and must be permanently enjoined.[163] A separately filed opinion dissented in part, contending that upon this determination, it was no longer necessary to resolve the other constitutional challenges.[164] However, the majority opinion proceeded in its analysis and held that the ESA did not deprive students and their families of their rights to a free, public education. [165]

First, the majority opinion held that the ESA program did not violate the state's obligation to provide "a uniform system of common schools."[166] The constitutional provision's plain language requires uniformity *within* the public school system, a requirement easily satisfied so long as a system of public schools, "open and available to all," exists.[167] However, the court did not address the amicus brief's contention that the *impact* of the ESA would threaten the state's ability to sustain the public school system, even though the ESA was exclusively funded by taking equivalent per-pupil payments from school districts.[168] Instead, the court adopted the analysis in *Meredith v. Pence* to conclude that the legislature generally *can* offer educational programs apart from public schools.[169]

Second, the court held that the ESA program did not violate the constitutional prohibition of using public funds for sectarian purposes.[170] According to the court's reasoning, once the public funds are deposited into an individual savings account, they are effectively converted into private funds.[171] The court buttressed its argument by emphasizing that the funds deposited in the ESA may be used for *any* private school, religiously affiliated or not.[172] However, the dissenting opinion maintained that whether deposited funds in educational savings accounts are public or private in nature is a matter of first impression and requires factual determinations that were undeveloped by the record.[173] However, under the majority opinion's analysis, the state's administration of the *account* is to promote *education* and nothing else.[174] In sum, the funds that live in an individual educational savings account belong to a parent, and not the state, and therefore do not implicate the anti-sectarian clause.[175]

Finally, the court addressed the funding mechanism supporting the ESA's operation.[176] The court determined that the ESA was not a lawful appropriation because it did not limit either the quantity of accounts nor the total amount of dollars that could be re-directed into ESAs.[177] Thus, the court held that any funds diverted from the public school system into the ESA would be unconstitutional. [178]

The decision of the Nevada Supreme Court is a narrow victory for advocates of both public schools and school choice programs. For advocates of school choice, the decision is a tangible precedent in Nevada state courts, which suggests a similar program could prevail with a properly designed funding mechanism. However, funding may not be so simple.[179] Although advocates of public schools prevailed on a technical ruling turning on the appropriation mechanism, they were also granted standing to bring their challenges and ultimately, were awarded permanent injunctive relief.

2017-2018 Amicus Efforts

M.R. v. Ridley School District[180]

Issue: Whether parents who succeed on their claim for reimbursement for the student's "stay put" placement pursuant the Individuals with Disabilities Education Act (IDEA) are a "prevailing party" under IDEA and, therefore, entitled to attorneys' fees?

Facts / Procedural History: The parents of a special education student, identified as E.R., pressed their claim that Ridley School District (RSD) had failed to provide E.R. with a free appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act (IDEA). After the federal district court denied the claim and a U.S. Court of Appeals for the Third Circuit panel upheld the district court's decision, the parents sought reimbursement for the cost of private school placement during the pendency of their FAPE claim under IDEA's stay-put provision.

Both the district court and a Third Circuit panel upheld the parents' entitlement to reimbursement for the private school placement under IDEA's stay-put provision. The parents filed a motion for attorneys' fees as a prevailing party based on the success of their stay-put claim. The district court denied the motion, holding that reimbursement for the costs of E.R.'s temporary "stay put" placement was only "interim" relief and thus E.R.'s parents were not "prevailing parties."

The Third Circuit panel reversed the lower court's denial of the motion and remanded the case to it for further proceedings consistent with the panel's ruling. The panel concluded that the parents were prevailing parties within the meaning of IDEA and thus eligible for award of attorneys' fees. It acknowledged that the district court was faced with a novel fee motion because prior Third Circuit precedent had "addressed forward-looking and injunctive IDEA 'stay put' relief, but [had] never before addressed eligibility for fees in a case where a party received backward-looking and compensatory relief arising from the IDEA's 'stay put' provision."

The panel held such relief, i.e., backward-looking and compensatory stay put relief, "is merits-based and confers 'prevailing party' status."[181] It found that IDEA's attorneys' fees provision and 42 U.S.C. § 1988's attorneys' fees provision should be interpreted in the same way.[182]

According to the panel, "E.R.'s interim forward-looking right under § 1415(j) to stay in private school was not at issue, and, in contrast to a contempt order that we must consider in relation to an underlying preliminary injunction."[183] Instead, it said, "E.R.'s parents' reimbursement award equated to backward-looking compensatory relief intended 'to redress the concrete loss that the plaintiff[s] . . . suffered by reason of the defendant's wrongful conduct.'"[184]

The panel, therefore, concluded: "The reimbursement award, in other words, had its own, independent merits and sought relief separate from any other relief that E.R.'s parents had sought from Ridley— characteristics that confer 'prevailing party' status."[185]

The panel stated:

> Where the action enforces the child's physical right to "stay put" and the parents obtain temporary forward-looking injunctive relief, there is no determination "on the merits" and the parents are not eligible for a fee award. But where the action enforces the parents' right to reimbursement or the child's right to compensatory education and the parents obtain backward-looking compensatory relief, the action requires an independent merits determination and the parents are eligible for a fee award.

E.R.'s parents' reimbursement litigation falls into the latter category: When Ridley refused to pay for E.R.'s "stay put" placement, E.R.'s parents sued for backward-looking compensatory relief, and, when they won the relief they sought, they obtained a merits-based victory.[186]

On September 5, 2017, Ridley School District filed a petition with the Third Circuit requesting a rehearing *en banc*.

NSBA Amicus Brief: On September 12, 2017, NSBA filed an amicus brief in support of the school district's petition for rehearing *en banc*.[187] The brief makes two arguments. First, the panel decision severely undermines the legal primacy of FAPE under IDEA. It states: The panel's most recent decision to uphold an award of attorneys' fees to parents who obtain only interim stay-put relief severely undercuts the centrality of FAPE under the IDEA and significantly magnifies the burden on a school district despite its compliance with its IDEA obligations.[188]

Second, the panel decision imposes substantial financial burdens on school districts that have met their IDEA responsibilities at the expense of the educational need of all school children. The contends: "When legal costs become such a potent force affecting parent-school discussions, the purpose and effectiveness of the IEP process is drastically diminished to the detriment of the child."[189]

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[1] *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2023 (2017).

[2] *Id* at 2022-24.

[3] *Id.*at 2023.

[4] Erica L. Green, *Supreme Court Ruling Could Shape Future of School Choice*, THE NEW YORK TIMES (Jun.27, 2017), https://www.nytimes.com/2017/06/27/us/politics/supreme-court-school-choice ruling.html?rref=collection%2Fsectioncollection%2Fus&action=click&contentCollection=us&region=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=sectionfront.

[5] *Id.*

[6] *Id*.

[7] *Id*.

[8] *Trinity Lutheran*, 137 S.Ct. at 2023, n. 3.

[9] *Id.*at 2016.

[10] *Id.*at 2028-29 n.2 (Sotomayor, J., dissent), footnote 2.

[11] *Id.*at 2026 (Breyer, J., concurring).

[12] *Id.*at 2017.

[13] *Id.*at 2026 (Gorsuch, J., concurring in part).

[14] *Id*.

[15] *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd*., 822 F.3d 709 (4th Cir.), *cert. granted in part,* 137 S. Ct. 369 (2016), and *vacated and remanded,* 137 S. Ct. 1239 (2017).

[16] *Id.*at 719.

[17] *See Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).

[18] Sandra Battle, Acting Assistant Secretary for Civil Rights: U.S. Department of Education, *Dear Colleague Letter* (Feb. 22, 2017), http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf [hereinafter Battle *Dear Colleague*]

[19] *See id.; see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Comparable Facilities, 34 C.F.R. § 106.33 (1972) ("A recipient may provide separate toilet, locker room, and shower facilities, on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities of the other sex").

[20] Catherine E. Lhamon, Assistant Secretary for Civil Rights: U.S. Department of Education, *Dear Colleague Letter on Transgender Students* (May 13, 2016), http://i2.cdn.turner.com/cnn/2017/images/02/22/colleague-201605-title-ix-transgender.pdf.

[21] *See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721, 723 (4th Cir.), *cert. granted in part,* 137 S. Ct. 369 (2016), and *vacated and remanded,* 137 S. Ct. 1239 (2017).

[22] *Grimm v. Gloucester Cty. Sch. Bd*., No. 15-2056 (4th Cir. Aug. 2, 2017), *available at* http://www.ca4.uscourts.gov/Opinions/Published/152056R2.P.pdf.

[23] *Id.*at *7-8.

[24] Endrew F. v. Douglas Cnty Sch. Dist. RE-1, 137 S. Ct. 988 (Mar. 22, 2017).

[25] *Id.*at 1001.

[26] *Id.*

[27] *Id.*

[28] *Id*.

[29] Brief of National School Board Ass'n et al. as Amici Curiae Supporting Respondents at 3, *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827).

[30] *Endrew F.,* 137 S.Ct. at 1002.

[31] *Id.*

[32] *See Fry v. Napoleon Cmty. Sch.,* 137 S. Ct. 743,749 (2017).

[33] *See id.*

[34] *See generally* Brief of National School Board Ass'n et al. as Amici Curiae Supporting Respondents, *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017) (No. 15-497).

[35] *Fry*, 137 S. Ct. at 754.

[36] *Id.*at 752.

[37] *Id.*at 758.

[38] *Id.*

[39] *Id.*at 752.

[40] *Id.*at 755.

[41] *Id.*

[42] *Id.*

[43] *Id.*at 756.

[44] *Id.*

[45] *Id.*at 757.

[46] *Id.*at 759 (Alito, J., concurring in part).

[47] *Id.*at 758.

[48] *Id.*

[49] *Id.*

[50] *Haddon Heights Bd. of Educ. v. S.D.*, 833 F.3d 389 (3d. Cir. 2016), *vacated*, 137 S. Ct. 2121 (2017).

[51] *Id.*

[52] *Id.*at 390.

[53] *Id.*at 391-92.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*at 396.

[59] Cooper v. Harris, No. 15-1262 (U.S. May 22, 2017).

[60] *Id.*, slip op. at 1, (citing *Bethune-Hill v. Virginia State Bd. of Elections*, No. 15-680, slip. op., at 6 (U.S. March 2017)).

[61] *Id.*

[62] *Id.*, slip op. at 6.

[63] *See id.,* slip op. at 1.

[64] *Id.*, slip op. at 1.

[65] *See id.*, slip op. at 12.

[66] *Id.*, slip op. at 6.

[67] *Id.*, slip op. at 20.

[68] *Id.*, slip op. at 10-12.

[69] *Id.*, slip op. at 12.

[70] *See* 52 U. S. C. § 10301.

[71] *Cooper,* slip op. at 12.

[72] *Id.*, slip op. at 13.

[73] *Id.*, slip op. at 14.

[74] *Id.*, slip op. at 27.

[75] *Id.*, slip op. at 28.

[76] *Id.*

[77] *See id.*, slip op. at 33.

[78] *See id.*, slip op. at 2 (Alito, J., dissenting); *see also* Easley v. Cromartie, 532 U.S. 234, 258, 121 S. Ct. 1452, 1466, 149 L. Ed. 2d 430 (U.S. 2001) ("The party attacking the legislatively drawn boundaries must show at least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about greater racial balance").

[79] *See id*., slip op. at 3 (Alito, J., dissenting).

[80] *Id.*, slip op. at 6 (Alito, J., dissenting).

[81] *Id.*, slip op. at 10-11 (Alito, J., dissenting).

[82] *Id.*, slip op. at 29 (Alito, J., dissenting).

[83] *Id.*, slip op. at 2 (Thomas, J., concurring).

[84] *McLane Co. v. EEOC*, 137 S. Ct. 1159 (Apr. 3, 2017).

[85] *Id.*at 1164.

[86] *Id.*at 1168 (citing *EEOC v. Shell Oil Co.*, 104 S. Ct. 1621, 1631 (1984)).

[87] *Id.*at 1165.

[88] *Id.*at 1164.

[89] *Id.*at 1166 (citing *Pierce v. Underwood*, 108 S. Ct. 2541, 2546 (1988)).

[90] *Id.*at 1167-68.

[91] *Id.*

[92] *Id.*

[93] *Id.*at 1165.

[94] *Id.*

[95] *Id.*

[96] *Id.*at 1166.

[97] *Id.*

[98] *Id.*

[99] *McLane Co. v. EEOC,* 857 F.3d 813, 815 (9th Cir. 2017).

[100] *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017) (Ginsburg, J., concurring in part and dissenting in part).

[101] *Id.*

[102] M.L. v. Smith, No. 15-1977, 2017 WL 3471257 (4th Cir. Aug. 14, 2017).

[103] *Id.*at *6.

[104] *Id.*at *7.

[105] *Id.*at *8.

[106] *Id.*at *5.

[107] *Id.*at *6.

[108] *Id.*

[109] *Id.*

[110] *Id.*at *7.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at *8.

[115] *Id.*

[116] *Id.*

[117] NSBA/MABE amicus brief available at https://cdn-files.nsba.org/s3fs-public/reports/ML%20v.%20King%204-5-16%20Amicus%20Brief.pdf?WOSewF7bO3bmSrTNhxxTlmOaQVlL5HoE.

[118] *Salazar v. South San Antonio Indep. Sch. Dist.*, No. 15-50558, 2017 WL 2590511 (5th Cir. June 15, 2017).

[119] *Id.*at *1.

[120] *Id*.

[121] *See generally Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 118 S. Ct. 1989, 1991 (1998).

[122] *See Salazar,* 2017 WL 2590511, at *3 (citing *Franklin v. Gwinnet County Public Schools*, 504 U.S. 60 (1992)); *see also Cannon v. University of Chicago* 441 U.S. 677 (1979)).

[123] *See Salazar,* 2017 WL 2590511, at *3.

[124] *Id.*

[125] *See Id.*("Writing for a majority of the Court, JUSTICE O'CONNOR succinctly rejected JUSTICE STEVENS' understanding of the contours of a private right of action the Court had crafted, saying "where a school district's liability rests on actual principles, however, the knowledge of the wrongdoer himself is not pertinent to the analysis").

[126] *Salazar,* 2017 WL 2590511, at *4.

[127] *Id.*

[128] *Id.*at *5, 7.

[129] *Id.*

[130] *Id.*at *6-7.

[131] *Id.*at *8.

[132] *See* Brief for National School Board Ass'n et al. as Amici Curiae Supporting Appellant, *Salazar v. South San Antonio Indep. Sch. Dist*. No. 15-50558 (5th Cir. June 15, 2017), Sept. 28, 2016.

[133] *Id.*at 9-10.

[134] *Id.*at 16.

[135] *Id.*at 20-21.

[136] *Id.*at 6

[137] *See Salazar,* 2017 WL 2590511, at *6.

[138] *K.G. v. Unified Sch. Dist.,* 853 F.3d 1087 (9th Cir. Apr. 13, 2017)

[139] *Id.*at 1094.

[140] *Id.*at 1095.

[141] *Id.*at 1089.

[142] *Id.*

[143] *Id.*at 1094.

[144] *Id.*at 1093.

[145] *Id.*

[146] *Id*.

[147] *Id.*

[148] *See* Brief of National School Board Ass'n et al. as Amici Curiae Supporting Appellants at 6, *K.G. v. Irvine Unified Sch. Dist*., 853 F.3d 1087 (9th Cir.) (No. 14-56457(L), 14-56524).

[149] *K.G.*, 853 F.3d at 1094-95.

[150] *Id.*at 1096 (Callahan, J., concurring in part and dissenting in part).

[151] *Lopez v. Schwartz*, 382 P.3d 886, 891 (Nev. Sept. 29, 2016).

[152] *Id.*at 891.

[153] *Id.*

[154] *Id.*at 892.

[155] *Id.*at 893.

[156] *Id.*

[157] *Id.*at 892.

[158] *Id.*

[159] *Id.*at 899.

[160] *Id.*at 893.

[161] *Id.*at 891.

[162] *Id.*at 894-95.

[163] *Id.*at 891.

[164] *Id.*at 903 (Douglas, J., concurring in part and dissenting in part).

[165] *Id.*at 891.

[166] *Id.*; *see also* Nev. Const. art. 11, § 2 (requiring the legislature to provide a public school system in which each school district maintains at least one school).

[167] *Lopez*, 382 P.3d at 898.

[168] *See generally* Brief of National School Board Ass'n et al. as Amici Curiae Supporting Appellants, *Lopez v. Schwartz*, 382 P.3d 886 (Nev. 2016) (No. 69611).

[169] *Lopez*, 382 P.3d at 897-98; *see also Meredith v. Pence*, 984 N.E.2d 1213, 1223 (Ind. 2013) (upholding state voucher program based on broad legislative authority "to encourage, [sic] by all suitable means . . . and to provide . . . uniform system of [c]ommon [s]chools . . . .").

[170] *Lopez*, 382 P.3d at 891; *see also* Nev. Const. art. 11, § 10 (prohibiting the use of public funds for sectarian purposes).

[171] *Lopez*, 382 P.3d at 899.

[172] *Id.*

[173] *Id.*at 903 (Douglas, J., concurring in part and dissenting in part) (noting the anti-sectarian challenge was ripe because the complaint had been dismissed for failure to state a claim).

[174] *Id.*at 899.

[175] *Id.*

[176] *Id.*at 891.

[177] *Id.*at 901.

[178] *Id.*at 891.

[179] Letter from Grant Hewitt, Chief of Staff, *Education Savings Account Program Unfunded*, Nevada State Treasurer (Jun. 2017), http://www.nevadatreasurer.gov/SchoolChoice/Home/.

[180] No. 16-2465, 2017 WL 3597707 (3d. Cir. Aug. 22, 2017).

[181] *Id.* at *4.

[182] *Id.*

[183] *Id.* at *8.

[184] *Id.*

[185] *Id.*

[186] *Id.* at 9.

[187] NSBA's amicus brief is *available at* https://cdn-files.nsba.org/s3fs-public/reports/M.R.%20%20J.R.%20v.%20Ridley%20School%20District%20-%20Amicus%20Brief.pdf?N9rQqzOmgZ9GdNKIlQB8dypXMUyepvsU.

[188] *Id.* at *2.

[189] *Id.* at *10-11.