

South Carolina School Boards Association

2015 School Law Conference

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*A Survey Of
Select Cases From
The
2015 NSBA Legal
Advocacy Agenda*

nsba
National School Boards Association

Francisco M. Negrón, Jr.
General Counsel/Associate Executive Director
National School Boards Association
fnegron@nsba.org

Goal of This Presentation

- To shine some light on developments in school law in the last year across the federal court and agency dockets.
- To share NSBA perspective/approaches to these developments.



Overview...

1. The federal overreach. Representative Cases: *Tustin and Does*
2. Child abuse reporting is a constitutional violation? *Ohio v. Clark, Wenk v. Riley*
3. The trend towards national bullying legislation.
4. Religious Discrimination, or bonafide business requirement? *EEOC v. Abercrombie & Fitch*
5. The power of the federal policy maker: *Perez v. Mortgage Bankers Ass'n*.
6. When FAPE isn't enough: *MR v. Ridley School District*.
7. A marriage by any other name: *Obergefell v. Hodges*.
8. Race Redux: *Fisher v. University of Texas*.
9. Q&A.

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K.M. v. Tustin Unified School District, Nos. 11-562259/12-56224 (9th Cir. Aug. 6, 2013), *cert. denied*, Nos. 13-770, 13-777 (U.S. Sup. Ct. Mar. 4, 2014)

Issue: Does providing FAPE under IDEA satisfy access requirements under the ADA?

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Background...



- A high school student with hearing disabilities asked school for a word-for-word translation service called Communication Access Realtime Translation (CART) in the classroom.
- School district denied request, but offered other accommodations.
- Parents argued ADA's effective communications regulation provides additional relief and is not preempted by IDEA.

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Hearing Officer and Fed. Ct. rule for school...

- School district complied with IDEA; and
- ADA claims were foreclosed by the failure of the IDEA claims.
- Plaintiffs appeal to 9th Circuit:
 - ADA's effective communications regulation creates obligations in addition to IDEA requirements.

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At the 9th Cir...



- Ruled in favor of students...
- Parents entitled to “Primary consideration” regarding specific services...
- Regardless of appropriateness of IEP team determinations.

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NSBA joined CSBA’s brief on certiorari...

- Need to clarify IDEA is the governing statute re: educational services students with disabilities.
- ADA’s effective communications regulation provides some rights, but must be interpreted in *pari materia* IDEA’s collaborative framework.
- Such interpretation should not alter the IEP process, causing undue financial and administrative burdens on schools.

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DOJ involvement...

- 9th Cir. Deferred to U.S. Department of Justice;
- DOJ argued that because it enforces the ADA, it has authority to opine on the IDEA as it relates to the ADA.
- NSBA argued DOJ's interpretation of IDEA is outside its legal purview and should not be entitled to deference.
- The U.S. Supreme Court denied review on March 4, 2014.

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OCR seizes on *Tustin*
ruling... to issue Effective
Communication
"Dear Colleague Letter"
(DCL)

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But, this time OCR is not alone...

- To round out the triumvirate, OCR enlists the support of OSERS and DOJ.
- Together on November 12, 2014, the agencies issues a DCL with a multi-page FAQ whose salient purpose is the application of the *Tustin* standard across the country.



OSERS
Office of Special Education and Rehabilitative Services

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What OCR said... *inter alia*

- Parents are entitled to primary consideration of a request to accommodate the communications needs of their children regardless of the existence of an IEP or its pendency.

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**On March 5, 2015, NSBA responded.
To OCR...**

- I. Departments' Reliance on *Tustin* to Express a National Standard is Misplaced.
 - a. This Erroneous Standard Will Confuse Parents and School Districts Across the Country About the Requirements of the Law.
 - b. Confusion about the Applicable Standard Will Promote Needless Litigation.

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II. The Departments Should Further Clarify:

- a. The Role of the IEP Process vis-à-vis Section 504 and the ADA.
- b. The Standard to Use to Determine a Fundamental Alteration in the Nature of a Service, Program, or Activity.
- c. The Standard to Use to Determine an Undue Financial and Administrative Burden on Schools.

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Unclarified federal guidance can have some unintended consequences:

- misplaced litigation
- confusion of legal standards
- delay in implementation of policies
- loss of general revenue dollars

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Doe v. Prince George's County Board of Education, (4th Cir.)

- **Issue.** Is a school district liable under Title IX for alleged harassment and sexual assault by a classmate when school officials respond to alleged harassment, but have no knowledge of alleged assaults until after close of school year?

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Doe v. Prince George's County Board of Education, (4th Cir.)

▪ **Facts:**

- Student alleged that during 4th and 5th grade he was repeatedly sexual harassed another student.
- The district responded to each incident of which it received notice.
- For instance alleged perpetrator was given ISS, and was not allowed to use restroom at same time as alleged victim.
- Alleged victim continued to participate in school activities with no decline in academic performance.
- However, alleged victim's parents withdrew him from the school at the end of the fifth grade year.

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Facts...

- Alleged victim then reported to police that classmate had sexually assaulted him at school on several occasions.
- Police closed case as "unfounded" after investigation.
- The parents subsequently sued the district, asserting a Title IX sexual harassment claim along with a state law claim for negligence.
- Parents claimed school "should have known" of alleged sexual assault. (**Negligence standard NOT Davis v. Monroe Standard**).

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What did the federal court do?

- The district court ruled in favor of the school district on the Title IX claim, finding that :
 1. School District response to reported incidents could not be deemed deliberately indifferent; and
 2. School District had no actual notice of the other alleged assaults.
- The parents appealed to the U.S. Court of Appeals for the Fourth Circuit.

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NSBA Legal Strategy:

- The deliberate indifference standard established in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), should NOT be relaxed to incorporate common law negligence principles.
- 4th Circuit should reject the plaintiff plea to expand *Davis* using the U.S. Department of Education's (ED) Office for Civil Rights (OCR) enforcement guidance and expert opinions on proper investigations or interventions.
- Local school officials are in the best position to respond to known incidents of harassment or bullying---so, retain long-standing precedent deferring to school officials around climate & discipline ***even if*** claims involve federal civil rights statutes.

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4th Circuit rules in April 7, 2015 unpublished opinion:

- Court reaffirmed *Davis* standard.
- School district only liable under Title IX when:
 - it acts with deliberate indifference and
 - has actual knowledge of harassment.

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Decision consistent with NSBA's position.

- Court strongly rejected argument to hold district liable under OCR guidance documents.
- The decision is important authority to establish defense in Title IX peer harassment cases based on OCR enforcement guidance.

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The trend towards a federal definition of bullying and harassment...

- There is no federal definition of “bullying.”
- Since the DCL in 2010 on Bullying and Harassment, there have been 11 bills floated.
- This year alone 3 bills were making the rounds.
- 1 by Sen. Franken (D-MN) and Sen. Baldwin (D-WI) made it to the floor for discussion during cloture.

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Problems with B&H bills...

- Congress turns to DOE OCR and federal agencies first for legal framing regardless of party.
- NSBA was expert on reframing bills as to correct legal framework.
- Strategy by supporters:
 - To equate B&H with same protections as gender and race.
 - Letter by 68 congresspersons to Sec’y Duncan.

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NSBA supports safe school environments, but urges Title IX analysis.

- Sen. Franken's bill would have supported a greater standard for liability than Title IX. (i.e., the OCR standard for enforcement: severe, pervasive OR persistent).
- Title IX analysis holds liability for schools only:
 - where harassment is severe, pervasive and objectively offensive, AND
 - School was deliberately indifferent

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Ohio v. Clark, No. 13-1352 (cert. granted, U.S. S. Ct.)

Issue: Whether teachers or other school personnel who are mandatory child abuse reporters should be treated as law enforcement agents for purposes of the Confrontation Clause.

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Facts:

- Darius Clark was charged with abusing his girlfriend's three year old son.
- Charge stemmed from CPS and Police Investigation.
- CPS and Police had received a report of suspected abuse from a teacher at a Head Start center.
- Teacher notice injuries on child's body and asked child how he received the injuries.
- Child eventually identified Clark as perpetrator.
- Because child was deemed incompetent to testify.
- But, teacher's testimony admitted to support charge that Clark was the perpetrator.
- Clark was convicted and sentenced to 28 years in prison.

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Plaintiff wins in state courts...

- State appellate court later reversed the conviction.
- The Ohio Supreme Court upheld the reversal, finding that when teachers suspect and "investigate" child abuse, including asking questions about the identity of the perpetrator, they are acting as law enforcement agents.
- Victim statements are subject to the Confrontation Clause.
- The U.S. Supreme Court granted the State of Ohio's request for review.

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NSBA's brief argued:

- Treating school personnel as LEOs confuses educator role in protecting children.
- Schools have responsibility under state laws to report suspected abuse.
- School officials play key role in protecting children through mandated reporting.
- School's role in this is not to investigate crime but to prevent further harm.
- Schools not equipped to provide law enforcement training to employees
- Problems with potential liability school officials are reclassified as LEOs.

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Oral arguments were heard in the case on March 4, 2015.

- County Assistant Prosecutor and Asst. U.S. Solicitor General argued the lower court rulings misinterpreted the Constitution by “viewing teachers as police.”
- Justice Ginsberg questioned why unreliable statements by a child should be deemed reliable enough to admit as evidence if they're from teachers.



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- ASG said it would be a mistake to decide that anything such a small child says is unreliable. “It’s a choice between hearsay and nothing when dealing with a three-year-old.”
- ASG also argued teachers who care about their kids would ask about injuries even if not required to report abuse. “Ohio’s teachers are horrified to learn that the Ohio Supreme Court views them as cops when talking to students.”

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- Stanford University Law Professor Jeffrey Fisher argued on Clark’s behalf:
- Ohio “wants to have it both ways” by admitting the abuse statements that small children give to caregivers, without allowing defense lawyers to cross-examine the children.
- “Innumerable” reasons a Court might doubt the truth of small children’s statements to teachers, including leading questions that teachers might ask.

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Justices seemed sympathetic to county's argument that statements small children give to their teachers do not equal statements to LEOs.



"It's a leap to assume the child understands the criminal process," Sotomayor.



"The teacher is concerned about the safety of the child, period," Alito.

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Sure enough, Court rules in favor of Defendants.

Ohio v. Clark, No. 13-1352 (U.S. Jun. 18, 2015)

- Supreme Court, with all the justices agreeing in the judgment, reversed the Ohio Supreme Court's decision.
- Justice Alito issued the Court's opinion.

- Held: Confrontation Clause does not bar every statement that satisfies the "primary purpose" test.

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PPT: If a statement was made with the intent of leading to prosecution it is testimony, and subject to 6th Amend. right to confront an accuser.

- “[PPT] is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause.”
- No categorical ruling adopted; child statements in this case “clearly were not made with the primary purpose of creating evidence for ... prosecution.
- Therefore, no Confrontation Clause violation.

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Reasoning:

- Teachers’ “first objective was to protect [the child].”
- “[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause.” And,
- Similar statement were admissible at common law.

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Important to Alito was the reality of the teacher-student relationship.

- Nature of relationship: “It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police.”

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So, what's next on the horizon?

Wenk v. O'Reilly (on petition for Cert. to US Sup. Ct.)

Issue. Whether teachers or other school personnel who are mandatory child abuse reporters are entitled to qualified immunity against First Amendment retaliation claims asserted by the alleged abuser.

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Facts...

- Parent aggressively engaged school staff about the needs of his 17-year-old, special ed. daughter.
- Father made several unusual demands, including urging district to help daughter find a boyfriend and sponsor a separate prom for students with disabilities.
- Two teachers reported to the Director of Pupil Services that student made several statements about home interaction with father.
- The DPS made a report of suspected abuse.

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Disturbing allegations, but no finding of wrongdoing.

- Allegations involved touching of private parts and other behavior.
- Nonetheless, investigations by child protective services and law enforcement resulted in no further legal action against the father.
- As a result, father brought suit in federal court against several school officials, asserting that they had violated the First Amendment by making the report of suspected abuse in retaliation for his advocacy for his daughter.

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Federal courts agreed with father.

- The federal district court:
 - Denied the administrators' request for qualified immunity,
 - Allowed case against Director of Pupil Services to proceed to trial.
- On appeal the Sixth Circuit:
 - Upheld the denial of qualified immunity and summary judgment,
 - Declared reasonable official would have understood that filing a child abuse report in bad faith violates parent's free speech rights.

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NSBA's Legal strategy... builds on *Ohio v. Clark*.

- Urge High Court review and reversal 6th Circuit.
- Qualified Immunity is critical to maintaining the important role school personnel play in reporting suspected child abuse.
- State law immunity exists to protect mandatory reporters when reasonable grounds exist to suspect abuse.
- Investigative findings by CPS or law enforcement of no abuse are irrelevant to qualified immunity.
- Reporting laws recognize vulnerability to subsequent legal claims brought by the suspected abuser would discourage mandatory reporting.
- Effectiveness of reporting laws intended to protect children from further abuse at the earliest point possible would be severely hindered.


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- Exposing mandatory reporters to federal claims for retaliation based on the alleged abuser's prior exercise of his free speech rights would also hinder potential for safeguarding children.
- Question: Unless reporter is lying, how would school personnel who carry out their reporting duties under state law know that their actions violated the free speech rights of the suspected abuser?
 - *(Legal standard is knowing that a constitutional right was reasonably established at the time of the report).*
- Thus, if there are reasonable grounds to suspect abuse and makes a report in compliance with the law, reporter's alleged retaliatory motive should be irrelevant.

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Equal Employment Opportunity Commission (EEOC) v. Abercrombie & Fitch, No. 14-86 (U.S. S. Ct. cert. granted)

Issue: Whether an employer may be held liable under Title VII of the Civil Rights Act for failing to provide a religious accommodation to an applicant when the employer had no actual knowledge of the applicant's faith or the need for an accommodation.

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Facts:

- A young woman applied to Abercrombie & Fitch to be a sales associate.
- Company requires sales associates to wear clothes consistent with the Abercrombie style. No hat are allowed.
- Applicant, who was aware of the appearance policy, and wore black head scarf to interview.
- Store manager conducting interview had no knowledge about applicant's religion or that head scarf was a religious observance.
- The manager explained the appearance policy, but applicant had not questions or concerns.
- Abercrombie did not hire the applicant.

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- The EEOC filed suit on behalf of the plaintiff, alleging Abercrombie violated Title VII for failing to accommodate the applicant's religious practice of wearing a head scarf.
- Tenth Circuit reversed district court, because plaintiff had failed request a religious accommodation.
- The U.S. Supreme Court granted the EEOC's request for review.

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The joint brief NSBA filed with other state and local government organizations argued

- Supreme should adopt prevailing view that employers may be held liable for failing to provide a religious accommodation only where the applicant/employee has notified the employer of his religious views and the need for an accommodation.
- EEOC took a new position on this issue contrary to its previous guidance that placed the burden on employees to inform their employers of the need for religious accommodation.

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- EEOC's shift place school boards, in a no-win situation, facing potential liability regardless of the action they take:
 - if they fail to make inquiries about an individual's need for religious accommodation they risk liability under Title VII, but if they do ask such questions based on stereotypes, they may face claims under other anti-discrimination laws.

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The case was argued on February 25, 2015.

- Chief Justice Roberts and Justices Scalia & Kennedy questioned what level of certainty of a potential religious clash would trigger the need for accommodation.
- Deputy Solicitor General: employer doubt about possible clash between workplace rules and applicant's religious practices should result in dialogue over the issue.
- Justice Scalia dismissed DSG's view and supported the Appellate Court saying, "If you want to sue me for denying you a job for a religious reason, the burden is on you to say, 'I'm wearing a headscarf for a religious reason.' "

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Justice Alito was thought to be the vote that would drive the decision.



- “There would be no reason for not hiring [her] unless you assumed that she was going to wear a scarf every day,”
- “Just because she wore a scarf on that one day wouldn’t mean that she necessarily was going to wear it every day.”
- “Maybe she’s just having a bad hair day,” he suggested. “Would you reject her for that? No.”
- “The reason that she was rejected was because you assumed she was going to do this every day, and the only reason why she would do it every day is because she had a religious reason.”

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EEOC v. Abercrombie & Fitch Stores, 14-86
(U.S. Jun. 1, 2015)

- 8-1 split.
- Reversed 10th Circuit’s decision.
- Held: In a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer’s decision, not that the employer had knowledge of his need.

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Justice Scalia, writing for the majority, said...

- Title VII “does not impose a knowledge requirement.”
- Instead, what matter is not what the employer knows, but what he intends, what his motives are.
- There is no actual knowledge requirement to Title VII.
- Court said that requirement can only be added by Congress, in its legislative capacity.

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Rule of the case for practical purposes...

- Employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice
- *Unless* the employer show it is unable to reasonably accommodate that observance or practice without undue hardship.
- Burying head in the sand, won't work: If you see something that doesn't mesh with your policy (i.e., dress code), just ask, “Do you need a reasonable accommodation?”

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It was 8-1. Who was the 1?



- Why? Because, unlike the majority, he said, “*Mere application of a neutral policy cannot constitute ‘intentional discrimination,’*” Thomas.

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MBA

MORTGAGE BANKERS ASSOCIATION

Perez v. Mortgage Bankers Association,
No. 13-1041 (U.S. S. Ct. March 9, 2015)

- Issue:
- Does a federal agency need to provide notice and an opportunity for interested parties to comment when it proposes to alter an interpretive rule adopted to clarify an agency regulation?

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Flippy Floppy Facts:

- DOL issued an opinion letter changing its interpretation of a regulation under the FLSA regarding exempt employees.
- In 2001, DOL had issued opinion letter stating that mortgage loan officers are not exempt administrative employees.
- In 2006, DOL issued another letter, stating mortgage loan officers are exempt/
- In 2010, DOL withdrew its 2006 opinion letter, reverting to its initial position.
- DOL took all these actions without engaging in any notice and comment rulemaking.
-

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NSBA argued in its brief...

- Court should restore the balance between agency discretion and the reliance interests of regulated entities that the Administrative Procedures Act sought to protect.
- There are dangers and inequities in allowing federal agencies to be both the author and the interpreter of their own regulations.
- Where interpretive rules are given the same force and effect as regulations, notice and comment procedures are necessary to ensure that agencies do not have the power to impose new onerous conditions arbitrarily.
- Particularly important to require agencies to consider the financial and operational constraints facing the regulated entities.

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The Court heard oral argument on December 1, 2014 and issued its unanimous decision on March 9, 2015.

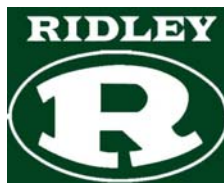
- Held:
 - The Administrative Procedures Act (APA) clearly exempted interpretive rules from notice and comment requirements, both when a federal agency initially issues the interpretation and when the agency seeks to change it.
 - The APA “sets forth the full extent of judicial authority to review executive agency action for procedural correctness.”
 - Recourse of regulated entities against agency decisions that skirt notice and comment provisions is to challenge in court as arbitrary and capricious.

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Ridley School Dist. v. M.R., No. 13-1547 (U.S. S. Ct. cert. denied May 18, 2015)

Issue:

Whether a school district is liable under the stay put provision of the Individuals with Disabilities Education Act (IDEA) for tuition reimbursement for a unilateral private placement of a student with disabilities *after* a school district is found by a court to have offered the student a free appropriate public education (FAPE) in a public school setting.



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Facts...

- Parents disagreed with proposed IEP after Kindergarten and 1st grade.
- Beginning second grade parents enrolled student in a private school.
- Parents claimed lack of FAPE.
- Nearly two years later, court ruled in favor of the school district, finding the IEP had offered FAPE.
- On appeal Third Circuit Court of Appeals agreed.
- Parents filed a separate action seeking tuition reimbursement through the end of all the judicial appeals.
- Third Circuit granted the parents' request for reimbursement.

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Supremes ask Obama Administration for input...

- On October 6, 2014, the Court requested that the U.S. Solicitor General provide its view of whether the Court should grant review in this case.
- On November 14, NSBA General Counsel Francisco Negrón and Deputy General Counsel Naomi Gittins along with Ridley School District's counsel met with the U.S. Deputy Solicitor General to advocate our position urging the Supreme Court to grant certiorari.

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NSBA's position:

- Encouraged the Supreme Court to take this case because of its significant impact to our membership.
 - There is a circuit split.
 - Court rulings:
 1. Penalize school districts despite their full compliance with their FAPE obligations under the IDEA.
 2. Encourage parents to continue to pursue costly extended litigation and private placements.
 3. Discourage collaborative resolution of IDEA claims.
-
- The Solicitor General submitted its views to the Court on April 10, 2015, urging court not to take the case.
 - On May 18, 2015, the Court denied review.

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Obergefell v. Hodges

- SCOTUS issues its first sweeping civil rights decision in 40+ years.
- a. 14th Amendment and Equal Protection analysis
- b. State law changes and how they will affect school districts:
 - i. Employment considerations
 - ii. Student-related issues (parent rights)

NSBA Resource.



SAME-SEX MARRIAGE WHAT THE OBERGEFELL DECISION MEANS FOR SCHOOL DISTRICTS JULY 2015 | VERSION 1.0

On June 26, 2015, the United States Supreme

Court issued a landmark ruling in *Obergefell v. Hodges*, legalizing same-sex marriage across the country.¹ Intrinsic to the decision was the Court's determination that marriage, regardless of whether it is between persons of the same or opposite sex, is a fundamental constitutional right protected by the Fourteenth Amendment of the U.S. Constitution. It follows that under **both federal and state laws**, lawfully married same-sex spouses are now entitled to the same rights and benefits as opposite-sex partners. This is consistent with the position taken by the Obama administration, as announced by U.S. Attorney General Loretta Lynch, who stated that federal marriage benefits will be available to same-sex couples nationwide, beginning with social security and veterans benefits.² Because of its breadth, the *Obergefell* ruling will affect school districts in their roles as public employers. Collectively, school districts form the largest employer in the country, with over 6.9 million employees.

1 In the *Obergefell* decision, the Court held that "[t]he Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when the marriage was lawfully licensed and performed out-of-State." As a result of this decision, the bans on same-sex marriages that remained prior to *Obergefell* are now invalid, and same-sex individuals have the right to marry and have their marriage recognized in every state within the United States.

FAQ Format...



Who should be interested in the *Obergefell* ruling?

School boards, school superintendents, school district human resource departments, payroll departments, benefit administrators, employees, employee associations, and third-party plan or benefits administrators also should be interested in the decision in *Obergefell*.

Do school districts need to provide benefits to same-sex spouses?

Yes. School districts should provide employees with same-sex spouses the same benefits provided to other employees who have opposite-sex spouses, which may include federal benefits, state benefits, and any benefit conferred pursuant to a district policy or a collective bargaining agreement. Additionally, states that did not recognize same-sex marriages prior to *Obergefell* now are required to provide marital benefits to same-sex married couples who were married in states that licensed and recognized same-sex marriages prior to the Court's ruling.

Which school board policies and benefits are affected?

Every policy and benefit that defines or refers to marriage or spouses in the application of federal benefits, state benefits, or benefits conferred by school district policy or collective bargaining agreements are affected. The reference to marriage may occur through the use of the term "husband," "wife," or "spouse." Examples of major areas that likely will be affected include, but are not limited to, health benefits, retirement benefits, insurance benefits, leave of absence benefits, FMLA policies, collective bargaining agreements, beneficiary designations, health care spending accounts, dependent child care, COBRA benefits, nepotism statutes, and any rights already provided to opposite-sex spouses under any school district policy or collective bargaining agreement.

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Fisher v. University of Texas at Austin

- Can the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions be sustained under the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. Univ. of Texas at Austin*?



Facts...



- Two Texas residents denied undergraduate admission sued UT for racial discrimination.
- UT used "a holistic, multi-factor approach, in which race [was] but one of many considerations."
- Policy premised on *Grutter*.
- Texas Top Ten Percent Law. (May be the undoing of the policy on the basis of necessity.)

Court Dynamics in first round...

- Justice Kagan recused herself.
- This left a 5-3 court with conservatives in a strong majority position
- Only Ginsburg and Breyer on original *Grutter* decision remain on the court.
- Kennedy was expected to be a crucial voice.

NSBA's approach... broad policy arguments aimed at retention of *Grutter* & Kennedy's concurrence in *PICS*

- 1) 21st Century K-20 educational excellence goals necessarily include diversity.
- 2) Consideration of race is appropriate and essential educational concern.
- 3) Schools rely on *Grutter* and *PICS* framework to guide educational policy development, and should not be undone.

Supreme Court ruled June 24, 2013...

- Vacated 5th Circuit's decision upholding the constitutionality of UT admission policy.
- "Strict scrutiny" analysis requires a court to conduct an exacting analysis, which 5th Cir. didn't do.
- 5th Cir. to "assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."

Good News...

- Nothing new for K-12.
- Standard laid out in the Court's previous decisions is a "given."
- Standard permits schools to consider race to achieve educational benefits of a more diverse student body.
- But, Court said university's needed to look toward race neutral alternatives.
- *PICS* (2007) decision restated for higher education.

Fisher v. University of Texas at Austin, ___ F.3d ___, 2014 WL 3442449 (5th Cir. Jul. 15, 2014)

- On remand a Fifth Circuit panel again rejected Fisher's claim that UT's race-conscious admissions policy violated the Fourteenth Amendment.

- Applying "more exacting scrutiny" to UT's policy as ordered by the Supreme Court,
- The Fifth Circuit concluded that the "holistic review" of "what little remains after over 80% of the class is admitted on class rank alone—does not, as claimed, function as an open gate to boost minority headcount for a racial quota."

- Instead, the Court found: “Minorities being under-represented in holistic review admission relative to the impact of holistic review on the class as a whole holds true almost without exception for both blacks and Hispanics for every year from 1996–2008...”
- The Court cited Supreme Court precedent in *Bakke* and *Grutter*, because the UT holistic policy patches “the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission.”

NSBA will again argue in favor of UT's diversity policy...

- Court should retain the concept of diversity as an educational goal/benefit.
- Diversification process is essential not only college wide, but also with regard to programs/degrees, i.e., STEM programs
- As society and communities voluntarily resegregate, schools remain one of the last vehicles for pluralistic educational experiences.
- Diverse settings ensure not only access, but deliver cognizable academic benefits across all backgrounds.



Thank you.

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Resources

- **1. NSBA Comments on the DOJ Proposed Rule for Amendments to the Americans with Disabilities Act, Titles II and III:** <http://www.regulations.gov/#!documentDetail;D=DOJ-CRT-2014-0001-0042>
- **2. NSBA Comments on the ED Notice re Request for an Information Collection on the Impact of Professional Development in Fractions for Fourth Grade:**
<http://www.nsba.org/sites/default/files/reports/NSBA%20Comments%20on%20ED%20Fractions%20Notice%20%284-7-14%29.pdf>.
- **3. NSBA Comments on the USDA's Proposed Rule on Expanded Local School Wellness Policy Requirements:**
<http://www.nsba.org/sites/default/files/reports/4-28-2014%20Comments%20onLocal%20School%20Wellness%20Policy%20Implementation%20under%20the%20Healthy%2C%20Hunger-Free%20Kids%20Act%20of%202010.pdf>
- **4. 2013 DCL on Student in Extra Curricular Athletics:**
<http://www.nsba.org/sites/default/files/reports/Letter%20to%20Hon%20%20Seth%20Galanter%20%28Re-DCL-1-125-13%29May%202013.pdf>
- **5. 2013 Proposed Expansion of Data Collection:**
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