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Update from Washington: Supreme Court and Federal Agency Activity

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The View From Washington

The U.S. Supreme Court, Federal Agencies, and What is Coming Down the Pike

Goals of This Presentation

- To shine some light on developments in school law in the last year, both from Congress and federal agencies, and their impacts on school districts, school employees, and students.
- To share NSBA perspectives and approaches to some of these developments.

The U.S. Supreme Court

The U.S. Supreme Court's October 2015 Term

Today's Docket for Discussion

- *Mortgage Bankers* by any Other Name? *United Student Aid Funds v. Bible* (S. Ct.)
- Grumpy Cat's Paw: *City of Houston v. Zamora* (S. Ct.)
- Race-Based Admissions - Part Deux: *Fisher v. University of Texas II* (S. Ct.)
- To Impute or Not Impute Under Title IX: *Salazar v. South San Antonio Independent School District* (5th Cir.)
- Is My FAPE Kosher? *M.L. v. Bowers* (4th Cir.)

United Student Aid Fund v. Bible, No. 15-861 (on petition for cert.)

Question Presented: Whether a court should give deference to agency rule interpretation change without stakeholder input.

Déjà-vu? *Mortgage Bankers* — Take Two!!!

United Student Aid Fund v. Bible

Facts of the case:

- Bryanna Bible defaulted on a student loan that USA Funds guaranteed.
- Bible's promissory note required her to pay collections costs and legal fees upon default.
- USA Funds paid the default claim and entered into a "rehabilitation agreement" with Bible in which USA Funds assessed collection fees.
- Bible sued USA Funds in a class action, alleging that the collection costs violated terms of ED's own regulations under the Higher Education Act.

United Student Aid Fund v. Bible

- The district court dismissed Bible's claim. Bible appealed to 7th Circuit.
- At the 7th Circuit's request, ED filed an *amicus* brief.
- In its brief, ED announces ***for the first time*** that collection costs are prohibited by ED's own regulations when a borrower undertakes a "repayment agreement."
- AND that ED classified Bible's "rehabilitation agreement" as a "repayment agreement."

United Student Aid Fund v. Bible

So, why should we care?

- ED's position is contrary to its own statute (the HEA) which states that collection costs may be applied to "rehabilitation agreements".
- ***BTW***: ED's own website said this too!
- ***AND***: ED's website said that "repayment" and "rehabilitation" agreements were two ***separate*** options. Not one, like ED said in its brief.

An agency conveniently changing its interpretation of its own regulations? Say it isn't so!

United Student Aid Fund v. Bible

Outcome: The 7th Circuit deferred to ED.

Why? The court found the regulations were ambiguous. Therefore, the court was required to defer to ED's position as set forth in its brief.

Now, USA Funds is seeking review by the U.S. Supreme Court.

NSBA supports USA Funds' request for review.

United Student Aid Fund v. Bible

In its *amicus* brief, NSBA argues:

- The court should take the case, because a decision is necessary to restore the intent of the APA to balance agency discretion with stakeholder interests.
- If interpretive rules have force of regulation, notice and comment is even more important to avoid arbitrary and onerous "rulemaking."
- Judicial restraint in granting agency deference is important to limit overreach beyond statutory authority.

City of Houston v. Zamora, No. 15-868 (on petition for cert.)

Facts of the case:

- Zamora, a Houston cop, was suspended for lying in an IA investigation.
- The IA investigation was a result of Zamora's claim that three supervisors lied during his previous retaliation claim.
- A police lieutenant recommended Zamora's suspension.
- The suspension was upheld by a host of departmental entities, including the Chief of Police.

But that wasn't the end of the story .....

City of Houston v. Zamora

- An arbitrator overturned Zamora's suspension.
- The district court and the 5th Circuit ruled in Zamora's favor, finding:
  - "But for" the untruthful testimony of the three supervisors, Zamora would not have been suspended.
  - The many layers of review between the supervisor's testimony (and discriminatory motive) and the final decision maker did not break the "chain of causation."
- The City of Houston is seeking review.

City of Houston v. Zamora

Question Presented: Whether an employer is liable for retaliation under Title VII for the discriminatory animus of a lower level employee.

A major issue of discussion: Does the "Cat's Paw" theory of liability extend to employment actions taken after an extensive internal review process, just because a jury ultimately reached a different conclusion about witness credibility?

Grumpy Cat's Paw Theory…

The "cat's paw" theory gets its name from the fable of a 17th Century French poet, about a monkey who persuaded a cat to pull chestnuts out of the fire, so the cat gets burned and the monkey makes off with the chestnuts.

Grumpy Cat's Paw Theory

In the workplace context, in its simplest form, the employer gets the legal blame even if the actual executive or supervisor who fires or demotes a worker or refuses a promotion does not act out of biased intent, but the bias of another executive or supervisor along the way worked its way into the final decision.

The final decision-maker is the cat, so to speak, and the biased associate is the monkey.

City of Houston v. Zamora

NSBA participated in an *amicus* brief, arguing:

- The hidden animus of an employee in an investigation that leads to discipline should not automatically create strict liability for an employer.
- Under Supreme Court precedent, "cat's paw" liability is only imposed where the discriminatory animus is a motivating factor for the employment action.
- NSBA argued that this kind of liability shouldn't apply to retaliation cases, because these cases require the animus to be the "but for" cause of the employment action.

City of Houston v. Zamora

In other words ....

- In a retaliation case, the employee must show not only that the animus played a role in the employment action, but also had a ***determinative influence*** on the outcome.
- So, if a school board finds animus existed in an employment process, but still had credible unrelated evidence of misconduct, the school board should be able to act.
- The animus should NOT be presumed to have determined the outcome.

City of Houston v. Zamora

Possible policy implications if it stands?

- The 5th Circuit's standard imposes a strict liability standard that cannot be overcome by even rigorous, independent investigations.
- Even if testimony of a supervisor with animus is credible, an employer could not rely on it.
- The inability to rely on supervisor testimony or evidence restricts the ability of school boards to make necessary employment decisions, because boards rely on the employment recommendations of others by law.

Race-Based Admissions - Part *Deux*

Fisher v. University of Texas at Austin II, No. 14-981

Question Presented: Can the 5th 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*?

It's baaaa-aaack!

Fisher v. UT at Austin

Facts of the case:

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

Fisher v. UT at Austin

Court dynamics in Round One:

- Justice Kagan recused herself, leaving 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.
- With Justice Scalia's death, the dynamic is unchanged, because Kagan is still recused.
- Kennedy remains the swing vote in a decision involving only a 7-member court.

Fisher v. UT at Austin

Round One:

- On June 24, 2013, the Supreme Court vacated the 5th Circuit's decision which upheld the constitutionality of UT's admission policy.
- The 5th Circuit was required to conduct an exacting analysis, but it did not.
- The case was sent back to the 5th Circuit 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."

Fisher v. UT at Austin

- On remand, a three-judge panel of the Fifth Circuit again rejected Fisher's claim that UT's race-conscious admissions policy violated the Fourteenth Amendment.
- As ordered by the Supreme Court, the 5th Circuit applied a "more exacting scrutiny" to UT's policy.
- In so doing, 5th 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."

Fisher v. University of Texas at Austin, 758 F.3d 633 (5th Cir. July 15, 2014).

Fisher v. UT at Austin

Fisher again appealed the 5th Circuit's decision to the U.S. Supreme Court.

NSBA again filed an amicus brief in support of UT's "holistic" admissions policy, arguing:

- The Court should retain the concept of diversity as an educational goal/benefit.
- The diversification process is essential not only college-wide, but also with regard to programs and degrees, *i.e.*, STEM programs.

Fisher v. UT at Austin

- As society and communities voluntarily resegregate, schools remain one of the last vehicles for pluralistic educational experiences.
- Texas' "Top Ten Percent" law alone rewards racial isolation at the secondary school level.
- Removing UT's ability to rely on more "holistic" diversity practices discourages secondary schools from diversifying.

Oral arguments were held in December 2015.

Noteworthy Cases Before Federal Appellate Courts

Salazar v. South San Antonio Indep. Sch. Dist., No. 15-50558 (5th Cir.)

Question Presented: Whether a school district is liable under Title IX for the sexual assault of a student by a school principal when the abuser was the only school official with actual knowledge of the wrongdoing.

Adrian Salazar, a student, filed a Title IX claim against the South San Antonio Independent School District and its former employee, Michael Alcoser, based on the alleged sexual abuse of Salazar by Alcoser.

Salazar v. South San Antonio Indep. Sch. Dist.

The parties stipulated to the following facts:

- Alcoser abused Salazar while Alcoser was the vice principal and principal of two elementary schools in the District;
- No one with the District other than Alcoser had knowledge of Alcoser's abusive conduct; and
- Alcoser's abusive conduct violated the District's policies.

Salazar v. South San Antonio Indep. Sch. Dist.

- Based on those stipulations, the School District moved for judgment as a matter of law on the ground that it lacked "actual notice" of the alleged abuse.
- District court denied the motion.
- A jury found the School District liable for damages under Title IX, and awarded Salazar $4.5M in compensatory damages.
- The district court permitted the award, imputing Alcoser's knowledge to the School District.
- The School District appealed.

Salazar v. South San Antonio Indep. Sch. Dist.

In NSBA's *amicus* brief supporting the School District's appeal, NSBA argues:

- The 5th Circuit should apply the standard set forth in *Gebser v. Lago Vista Indep. Sch. Dist.,* 324 U.S. 274 (1998), that the knowledge of a wrongdoer of his own sexual misconduct does not satisfy the actual knowledge requirement.
- Rationale? The likelihood of the wrongdoer not reporting his/her own misdeeds means the school district has no actual knowledge of the harm and no opportunity to fix it.

Salazar v. South San Antonio Indep. Sch. Dist.

NSBA's *amicus* brief (con't):

- The 5th Circuit should reverse, because upholding the ruling would make a school district strictly liable for ***covert*** misconduct of its officials, even when the offending official's activities violate the school district's own policies.
- The liability regime created by the lower court's decision will dramatically expand school district liability under Title IX in a manner that is not contemplated by the law.

Is My FAPE Kosher?
M.L. v. Bowers, No. 15-1977 (4th Cir.)

Facts of the case:

- Parents of an Orthodox Jewish student with an IQ in the first percentile requested that their student's IEP address his religious and cultural needs.
- They also claimed that the student's functional life skills were different from non-Orthodox Jewish students and must be continually reinforced.
- When the school district said no, the parents asked the school district to pay for placement in private facility to prepare student for life in Orthodox Jewish community.

M.L. v. Bowers

- The ALJ ruled for the school district, supporting denial of Orthodox instruction at school, in that the IDEA is intended to provide access to the public school curriculum, not religious education.
- The district court agreed with the ALJ.
- The parents appealed to 4th Circuit.
- Question Presented: Whether in order to provide FAPE, a school district must address a student's religious and cultural needs in an IEP.

M.L. v. Bowers

In supporting the school district, NSBA's *amicus* brief argues:

- The IDEA is not intended to address every need of a disabled child. (For example, medical treatment is expressly excluded.)
- The parents' claim expressly requires the school to conduct religious instruction in violation of the Establishment Clause.
- A cultural/religious exception to the IDEA would create a slippery slope, requiring the school district to weigh dogma and practices beyond the scope of the school's mission and staff's expertise.

S.B. v. Bd. of Educ. of Harford Cnty., No. 15-1474 (4th Cir. Apr. 8, 2016)

Facts of the case:

- A student with disabilities experienced sexual harassment, physical threats, and racial incidents at school.
- When the student or parents reported the incidents, the school investigated the complaints and disciplined the offenders.
- The school provided a one-on-one safety monitor.
- The parents, who also worked for the school district, publicly criticized the school district's response to their complaints.

S.B. v. Harford Cnty.

- The student's father applied for, but did not receive, a summer teaching position.
- The parents filed suit for violations of Section 504, alleging discrimination for the school district's failure to eliminate bullying and for retaliation against the father himself.
- The district court ruled in favor of the school district, concluding that there was no deliberate indifference by the school's response, and no causal connection between the father's advocacy and any adverse employment actions.

S.B. v. Harford Cnty.

- More importantly, the district court found that the lack of a specific disability-related harassment policy was insufficient to meet the liability standard of deliberate indifference under Davis, given the board's efforts to address every incident of harassment reported by the student and his parents.
- The parents appealed to the 4th Circuit.
- NSBA supported the school district by filing an *amicus* brief.

S.B. v. Harford Cnty.

In its *amicus* brief, NSBA argues:

- Section 504 claims seeking monetary damages for alleged peer harassment based on disability are subject to the deliberate indifference Title IX standard as set forth in *Davis*.
- The Supreme Court's intentionally narrow *Davis* standard should not be expanded, resulting in more of a strict liability standard.
- School officials are in the best position to respond to known incidents of bullying or harassment.

S.B. v. Harford Cnty.

- The 4th Circuit agreed with NSBA that the *Davis* deliberate indifference standard applies to bullying claims under Section 504.
- This requires more than showing that the school district failed to eliminate ***all*** bullying. Here, the school district responded to every incident reported.
- The 4th Circuit also found that the school district is not required to impose the disciplinary sanctions requested by the victim. School administrators are entitled to "substantial deference when they calibrate a disciplinary response to student-on student bullying."

NSBA Resource Reminder

U.S. SUPREME COURT DOCKET CHART

- This week's update from the current term
- Color-coded to show status of the case

https://cdn-files.nsba.org/s3fs-public/reports/USSC%20Chart%20-%202015%20Term_33.pdf?Z5zpg5mpj__sGFRLsY1FJAQZmAHkktVW

Highlights of Federal Regulation and Agency Activities

Federal Agencies:
Another Busy Year

Federal Policy and Regulation

With eight months left in its second term, the Obama Administration continues to be very active in federal agency regulation, and shows no sign of slowing down:

Between October 1, 2012 and May 13, 2016, the federal agencies have published 8,707 proposed rules for federal rulemaking.

However, the method of "regulating" has not always involved the formal rulemaking process.

Federal Policy and Regulation

Notice of the federal government's regulatory actions have been taking other forms over the past few years:

- Guidance Documents
- Agency "Notices"
- "Dear Colleague Letters"
- Advisory Memoranda
- FAQs
- Fact Sheets
- Blogposts

HIGHLIGHTS THIS YEAR: Federal Agency Guidance and Regulation

- OSERS DCL on IDEA Dispute Resolution Procedures
- DOJ online guide on commercial sexual exploitation of children
- DOL employer's guide to restroom access for transgender workers
- ED 10-Chapter English Language Learner "Toolkits" and other ELL resources "
- EEOC Q&As on Workplace Discrimination
- EEOC Fact Sheet, "Living with HIV Infection: Your Legal Rights in the Workplace Under the ADA

Highlights This Year (con't)

- ED/HHS Guidance on Including Children with Disabilities in High-Quality Early Childhood Programs
- OSERS DCL on Oversight of Public Charter Schools
- DOS Final Rule on Teachers and the Exchange Visitor Program
- EEOC Proposed Enforcement Guidance on Retaliation and Related Issues
- ED Practice Brief, "The Educational Rights of Children and Youth Experiencing Homelessness: What Service Providers Need to Know"

Highlights This Year (con't)

- DOJ Guidance, "ADA Update: A Primer for State and Local Governments"
- FCC Final Rule implementing next steps to modernize the E-Rate program
- DOL resource guide, "Employer's Guide to the Family and Medical Leave Act"
- EEOC resource document, "Employer-Provided Leave and the Americans with Disabilities Act"
- ED/DOJ Dear Colleague Letter and OESE Best Practices Guide for Transgender Students

TRANSGENDER
STUDENTS IN SCHOOLS
Frequently Asked Questions and Answers for Public School Boards and Staff

Available now online from NSBA!

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

The Employee Workplace

The Fair Labor Standards Act

In July 2015, DOL issued an "Administrator's Interpretation" on the issue of who is an employee versus an independent contractor.

The Administrator states that this analysis applies not only the FLSA, but also the FMLA with regards to who is eligible for benefits under both statutes.

http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf

The Employee Workplace

The Fair Labor Standards Act

DOL states that whether a worker is an employee or an independent contractor depends on whether the worker is "economically dependent" on the employer or in business for himself.

Courts, however, rely on a multi-factor "economic realities" test to make such a determination.

The Employee Workplace

The Fair Labor Standards Act

The multi-factor "economic realities" test:

1. The extent to which the work performed is integral to the employer's business
2. The worker's opportunity for profit or loss depending on his/her managerial skill
3. The extent of the relative investments of the employer and the worker
4. Whether the work performed requires special skills and initiative
5. The permanency of the relationship
6. The degree of control exercised or retained by the employer.

The Student Environment

In October 2015, ED released a resource guide that is designed to help educators and other school personnel in their efforts to support undocumented students in high school and college.

http://www2.ed.gov/about/overview/focus/supporting-undocumented-youth.pdf

The Student Environment

The guide provides information about:

- Legal guidelines for elementary and secondary education
- Legal rights of undocumented students, including equal access to education and freedom from discrimination
- Tips for secondary school educators, counselors, and other personnel in how to support their students in the school environment
- Resource lists

The Student Environment

- Tips, example actions, and models used in the field are not required to be put in place.
- Information is meant to be helpful to educators and for use at their discretion.
- Many of the suggestions in the guide imply that training of staff would be necessary.
- ED plans on issuing a similar guide for the elementary school and early learning grades.

The Student Environment

The guide follows the earlier publications of ED's "English Learner Toolkits".

- A 10-part series of chapters
- Designed to help state and local educational agencies meet their legal obligations towards English Learners attending their schools.

http://www2.ed.gov/about/offices/list/oela/English-learner-toolkit/index.html

What is Coming Down the Pike?

From the Federal Government . . .

For the 2015-16 Fiscal Year, the federal government had set out an extremely ambitious agenda with respect to the regulatory work of the federal agencies.

(Un)Fortunately for school districts, the federal government did not make much progress on some of its regulatory agenda.

The Fed's Regulatory Agenda

Agencies are behind schedule on key areas affecting schools. As a result, the federal government has reassessed its timelines for certain regulatory initiatives.

Here is what the agencies now state they attempt to achieve over the next six to nine months ...

USDA

- Final Rule for Local School Wellness Policy Implementation
  - Anticipated in March 2016 (was April and June 2015)
  - Comment period closed in April 2014
- Final Rule for Administrative Reviews of School Nutrition Programs
  - Anticipated in April 2016
- Final Rule for the Fresh Fruit and Vegetable Program
  - Anticipated in March 2016 (was July 2015)

USDA (con't)

- Interim Final Rule for Implementing Provisions for Seamless Summer Option for Schools Participating in NSLP
  - Anticipated in November 2015
  - Still not published as of 5/13/2016
- Final Rule for Nutrition Standards for "Competitive Foods" - All Foods Sold in School Outside the School Meal Programs
  - Anticipated in March 2016 (was December 2015)
  - Interim Rule took effect in August 2013
- Proposed Rule for Child Nutrition Program Integrity
  - Published March 29, 2016
  - Comments due May 31, 2016

USDA (con't)

- Proposed Rule for Processing of Donated Foods for Use in the NSLP and Other Food Assistance Programs
  - Anticipated in December 2015
- Final Rule for Direct Certification of Children in SNAP Households and Certification of Homeless, Migrant, and Runaway Children for Free Meals in NSLP, SBP, and SMP
  - Anticipated in December 2015 (was July 2015)
  - Interim Final Rule took effect in June 2011
- Final Rule for School Food Service Account Revenue Amendments
  - Anticipated in May 2016
  - Interim Final Rule took effect in July 2011

Education

- Final Rule on Title I Amendments to Improve the Academic Achievement of the Disadvantaged, including Migrant Education Programs
  - Migrant: Anticipated in May 2016 (was March/November 2015)
  - Disadvantaged: Published in August 2015
- Proposed Rule for State Implementation Plans
  - Anticipated in April 2016

EEOC

- Proposed Rules for Procedures for Employment Discrimination Complaints Filed Against Federal Funds Recipients
  - Anticipated in October 2015 (was December 2014)
- Proposed Rules to Amend Regulations Under the Genetic Information Nondiscrimination Act (GINA) of 2008
  - Published on October 30, 2015
  - Comment period ended Month Day, 2015
- Final Rule for Amendments to Regulations Under the Americans with Disabilities Act
  - Anticipated in February 2016

Health & Human Services

- Final Rule for Nondiscrimination Under the Affordable Care Act
  - Anticipated in June 2016
- Final Rule for Head Start Performance Standards
  - Anticipated in June 2016 (was March/May 2015)

Homeland Security

- Proposed Rules for Nondiscrimination on the Basis of Sex in Education Programs Receiving Federal Funding
  - Anticipated in June 2016 (was March/Sept. 2015)
  - Interim Final Rule took effect in March 2003
- Proposed Rule for Nondiscrimination on the Basis of Race, Color, or National Origin in Programs or Activities Receiving Federal Financial Assistance
  - Anticipated in June 2016
  - Interim Final Rule took effect in March 2003

Homeland Security (con't)

- Proposed Rules for Eligibility Checks of Designated School Officials of Schools Certified to Enroll F and M Nonimmigrant Students
  - Anticipated in December 2015 (was October 2015)
- Proposed Rules for Strengthening Oversight of Schools Certified to Enroll F and M Nonimmigrant Students
  - Anticipated in April 2016

Justice

- Proposed Rule for Nondiscrimination on the Basis of Disability in Accessibility of Web Information and Services of State and Local Governments
  - Anticipated in January 2016 (was December 2014 and May 2015)
  - Recent development: SANPRM is expected to be published in Summer 2016, with comment period ending 90 days later
- Proposed Rule for Implementation of the ADA Amendments of 2008 (and Section 504)
  - Anticipated in May 2016 (was May/October 2015)
  - Final Rule anticipated in December 2016

Justice (con't)

- Final Rule for Implementation of the ADA Amendments of 2008 (Titles II and III of the ADA)
  - Anticipated in January 2016 (was March/Sept. 2015)
  - Adds illustrative lists of "major life activities", including "major bodily functions"
  - Provides more examples of covered activities and covered conditions
  - Adds rules of construction regarding the definition of disability to provide guidance in applying the term "substantially limits"

Labor

- Final Rule for Procedures for Handling Retaliation Complaints Under the Affordable Care Act
  - Anticipated in September 2015 (was April 2015)
- Final Rule for Improving Tracking of Workplace Injuries and Illnesses
  - Anticipated in September 2015
- "Request for Information" on Hours Worked Under the FLSA
  - Anticipated in February 2016 (was August 2015)
  - DOL will be seeking information on the use of technology, including portable electronic devices, by employees away from the workplace and outside of scheduled work hours.

Labor (con't)

- Final Rule for Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees
  - Anticipated in May 2016

Get ready for this one!

Every employer is affected!

NSBA's Work Continues

NSBA and OGC/COSA will continue to monitor for any new and additional guidance and regulations that may be issued by the multiple agencies involved, so that we may continue to be of assistance to NSBA and COSA members and your school district clients as more rules roll out in the coming months.

Are there any questions?

Thank you!

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

www.nsba.org