What is new in DC?

Federal Legislative and Legal Update

August 11, 2017

National School Boards Association

Topics Covered

- Update on Healthcare Reform
- Update on ESSA
- Funding Update
- Update on School Choice
- Update on Child Nutrition Services
- Update on United States Department of Education Activities
- United States Supreme Court Update

Presenters

- **Neil Putnam** *National School Boards Association Western Region Director; President, Board of Directors, NSBAC; and Mitchell School Board Member*

And

- **Tammy T. Carter**, *Senior Staff Attorney, National School Boards Association*

National School Boards Association

Healthcare Reform

- On May 4, 2017, the United States House of Representatives passed House Bill 1628, which would have repealed and replaced the Affordable Care Act.
- School districts receive approximately $4 billion annually in Medicaid reimbursements, which they use to provide services to disabled students and to students who live in poverty.
- House Bill 1628 would have changed the way that states received their Medicaid funding. It would have imposed a per capita allotment funding structure, which would have caused schools to have to compete for Medicaid funding.
- The Senate tried several different methods of repealing and replacing, or just repealing, the Affordable Care Act, but they were unsuccessful. Therefore, no change was made to the Affordable Care Act.

ESSA

- In December of 2015, President Barack Obama signed the Every Student Succeeds Act (“ESSA”) into law.

- ESSA differs from its predecessor, “ No Child Left Behind” in that it is more collaborative and left many of the details regarding the education of students to states and local school boards.

- As is the case with most new federal laws, the Department of Education (“ED”) had to develop regulations to implement ESSA. It developed a set of regulations in November of 2016.

ESSA (continued)

- Many members of Congress from both parties felt that the regulations were too detailed and too aggressive and constituted an “overreach,” which was inconsistent with the collaborative intent of ESSA.

- In February of 2017, the House overturned a number of the ESSA regulations that had been developed by ED by using the Congressional Review Act.

- The Senate passed a similar resolution and President Donald Trump signed it.

- The changes that they made left ESSA on the books, but the Secretary of Education has more flexibility in how to apply it.

ESSA (Continued)

- Many states were working on their state plans at the time Congress overturned the regulations.
- In a Policy Letter signed in March of 2017, Secretary of Education, Betsy DeVos, advised state departments of education that the U.S. Department of Education had developed a new state plan template, consistent with Congress' action with regard to the regulations, which was meant to give states more flexibility, while continuing to protect disabled students, English language learners and economically disadvantaged students.
- https://www2.ed.gov/policy/elsec/guid/secletter/170313.html(letter to states); www2.ed.gov/documents/press-releases/essa-consolidated-state-template-faqs.doc (FAQs on consolidated plans template).

Fiscal Year 2018 Budget & Appropriations

- House Budget Committee reported FY2018 budget resolution, "Building a Better America: A Plan for Fiscal Responsibility," on a party-line vote.

- Four education-related amendments to budget resolution were rejected along party lines.

- Appropriations bill for Departments of Labor, Health & Human Services, Education (H.R. 3358) would be funded $5 billion below the FY2017 allocation.

- H.R. 3358 reported by House Appropriation Committee with provisions for $200 million increase in special education grants, sustained allocation of $15.4 billion for Title I grants, and $0 allocation for Title II grants (effective teachers and leaders).

Appropriations: NSBA urges Congress' passage of a final Fiscal Year 2018 appropriations bill that maximizes the investments in special education, Title I grants for disadvantaged students, and related education programs that our students need for a strong future. Additionally, NSBA urges Congress' bipartisan efforts to avert further across-the-board budget cuts to education in FY2018 and future fiscal years that impact the success of our students, school districts and communities.

- Influencing policy in Congress and the states through research, public hearings and briefings, national coalitions and appropriations.

- Working with and through state associations to amplify the success of public school choice and oppose the diversion of resources to non-public entities.

- As of July 25, NSBA has opposed funding measures for private school choice ($250 million) that were proposed by the Administration in the FY18 appropriations process.

- Proactively advocating against adverse provisions in any upcoming federal tax reform efforts.

Educational Choice

Forms of School Choice

- Inside the public system – neighborhood schools, magnet schools, charter schools & inter/intra-district transfers.
- Outside the public system – private schools, vouchers & tax credits, homeschooling, Education Savings Accounts.
- Either inside or outside public system – virtual schools.
- Availability and governing polices vary by state.

NSBA's position on school choice

Public education choice: NSBA supports "locally elected school boards in expanding public school choices to meet the needs of students in a rapidly changing world." This support extends to charter schools as long as the local school board "retains sole authority" to grant and revoke charters. NSBA opposes charter schools "not subject to oversight of the local school board."

Non-public education choice: NSBA "recognizes and upholds the right of any group to establish and maintain schools so long as such schools are fully financed by their own supporters." At the same time, NSBA believes public tax dollars should "only support public schools" and opposes "vouchers, tax credits, and tax subsidies for use at non-public K-12 schools." NSBA further believes that "private and home schools should be subject to governmental regulation that assures a minimum standard of instruction under state law and adherence to the Constitution and laws of the United States."

Child Nutrition Services

- Schools have long complained about waste of food and other challenges that they faced as they attempted to implement new federal regulations with regard to school meals.

- On May 17, 2017, the U.S. Secretary of Education, Sonny Perdue, signed a proclamation indicating that the USDA will provide greater flexibility in nutritional requirements for school meals in order to make them both healthful and appealing and to restore local control to schools.

Child Nutrition Services (Continued)

<u>The proclamation states that:</u>

- The USDA will begin the regulatory process to provide schools with additional options with regard to the mandate to serve whole grains.
- The USDA will take regulatory action that will allow schools that have fulfilled their sodium Target 1 for 2017-2020 to be considered compliant with regulations regarding USDA sodium requirements.
- The USDA will give schools discretion with regard to serving flavored and/or 1% milk. https://www.usda.gov/sites/default/files/documents/secretary-Perdue-child-nutrition-proclamation.pdf.

U.S. Department of Education

In February of 2017, ED and the Department of Justice rescinded the "Dear Colleague Letter" that the Obama Administration issued in May of 2016, which required school districts to accommodate transgender students by allowing them to use bathrooms and locker rooms consistent with their gender identity. The Trump administration basically indicated that such decisions should be left to states and the local districts. School districts no longer need to worry about losing federal funding if they fail to accommodate transgender students. https://assets.documentcloud.org/documents/3473560/Departments-of-Education-and-Justice-roll-back.pdf (The February "Dear Colleague Letter").

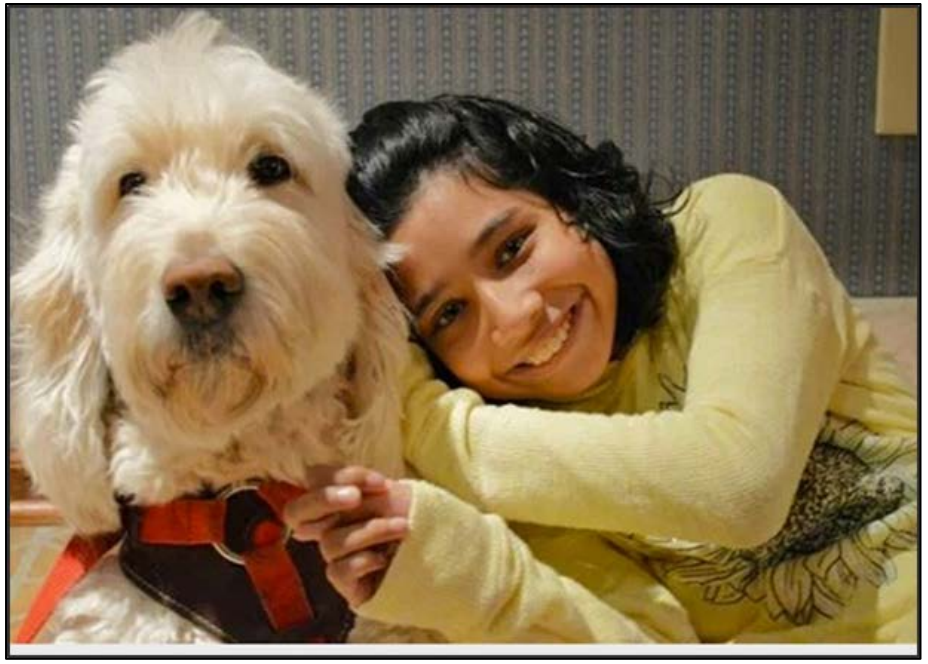
U.S. Department of Education (Continued.)

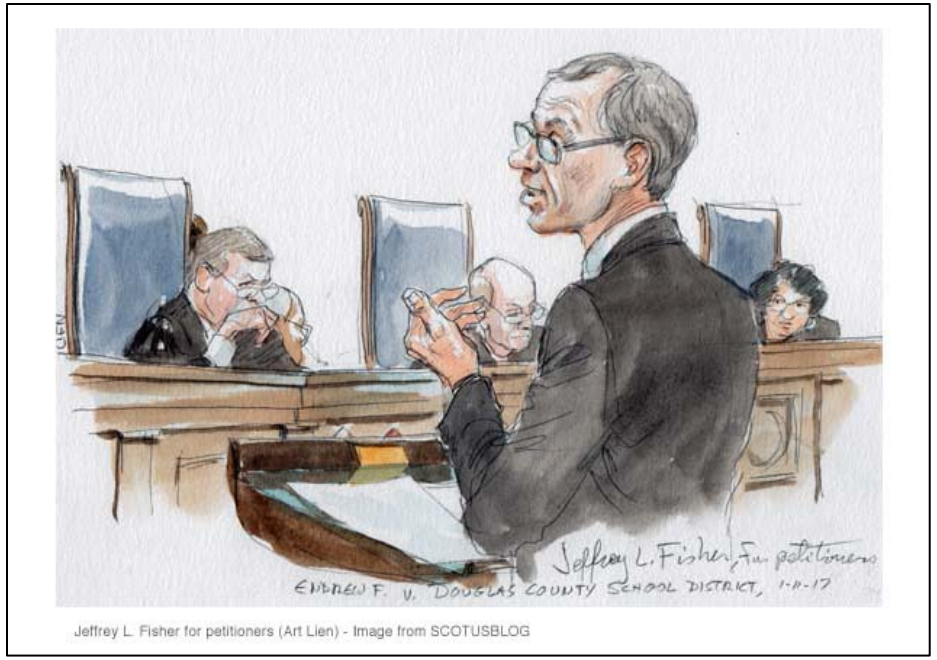
The Department of Education has also circulated an internal memorandum indicating that it is narrowing the scope of investigations. https://www.nsba.org/legalclips/2017/06/16/eds-dept-civil-rights-disseminates-internal-memorandum-narrowing-scope.

Cases Before the U.S. Supreme Court

Two Special Education Cases were Before The Court This Term:

- *Fry v. Napoleon Comm. Sch.*, 137 S.Ct. 743 (2017)
- *Endrew F. v. Douglas Cnty. Dist. Re-1*, 137 S.Ct. 988 (2017)
- Both pre-Gorsuch = 8 justices





Jeffrey L. Fisher for petitioners (Art Lien) - Image from SCOTUSBLOG

Fry v. Napoleon Comm. Sch., 137 S.Ct. 743 (2017)

The lawsuit below: Courts rule parents must exhaust IDEA procedures before filing suit.

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

Fry v. Napoleon Comm. Sch., 137 S.Ct. 743 (2017)

NSBA's amicus brief was written by:

- Thomas B. Allen, W. Joseph Scholler, Alexander L. Ewing, Jack B. Hemenway II, of Frost Brown Todd

And included:

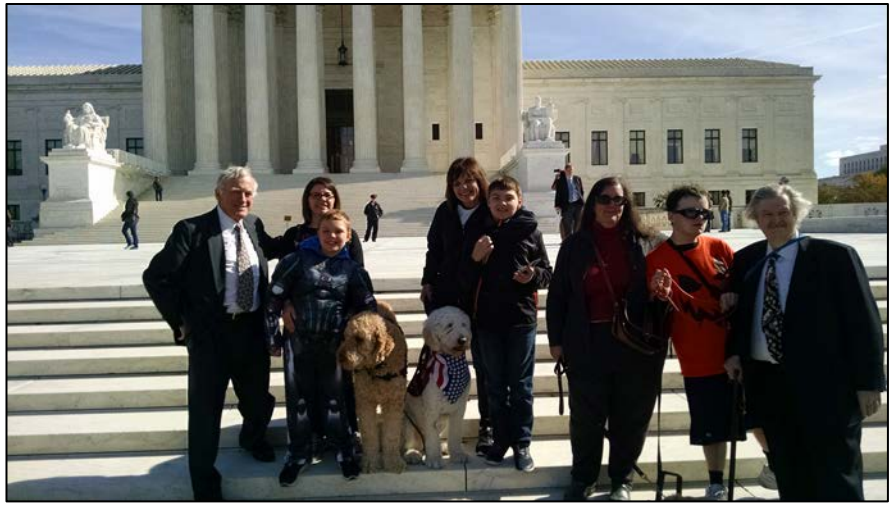
- The Michigan Association of School Boards
- AASA (The School Superintendents Association)
- ASBO (Association for School Business Officials)
- NASDSE (National Association of State Directors of Special Education)

Fry v. Napoleon Comm. Sch., 137 S.Ct. 743 (2017)

NSBA amicus brief argued:

- IDEA's long-standing exhaustion requirement must be interpreted in the context of its collaborative framework -- A direct route to litigation undermines the IDEA's collaborative process for resolving special education disputes.
- Weakening IDEA's

exhaustion requirement would undermine the collaborative framework.



Fry v. Napoleon Comm. Sch., 137 S.Ct. 743 (2017)

The court reversed 8-0, in an opinion by Justice Kagan on February 22, 2017, holding:

- (1) Exhaustion under IDEA is unnecessary when "gravamen" of suit is something other than denial of FAPE, as relief for denial of FAPE is the only relief IDEA makes available;
- (2) Case remanded to determine whether the gravamen of complaint-- which alleges only disability-based discrimination without reference to adequacy of special-education services -- seeks relief for denial of a FAPE.

Fry v. Napoleon Comm. Sch., 137 S.Ct. 743 (2017)

SCOTUS Noted:

- Plaintiff must first use the IDEA's administrative proceedings only if she contends that she has been denied FAPE.
- A hearing officer is limited in relief awarded in an IDEA proceeding.
- If a plaintiff must begin with the IDEA proceedings only when she is alleging that she has been denied a FAPE, the court continued, how are courts supposed to decide when the plaintiff is seeking relief for the denial of a FAPE and when she is not?

Fry v. Napoleon Comm. Sch., 137 S.Ct. 743 (2017)

SCOTUS Guidance on Cases That Don't Require Exhaustion:

- Courts should pose "a pair of hypothetical questions:
  - First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?
  - And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?"
  - If YES then "a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about [the IDEA]." No exhaustion necessary.

Fry v. Napoleon Community Schools, 137 S.Ct. 743 (2017)

What the decision means for schools:

- Easier pathway to litigation
- May affect how your special education staff document services provided under ADA v. IDEA.
- Be clear about nature of service.
- If service is substantive in nature, or related closely to a substantive academic service, articulate that clearly in the IEP. Parent concurrence about nature of service may be useful in subsequent hearing.
- If service is about access, and clearly not about the provision of a substantive educational service, think about notating the distinction.

Fry v. Napoleon Community Schools, 137 S.Ct. 743 (2017)

What the decision means for school attorneys:

- Easier pathway to litigation means there will be more cases, and new routes created.

- *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 944 (8th Cir. 2017)
  - Claim brought under 504, ADA + for compensatory and punitive damages
  - Exhaustion required in R&S case
  - Court found claim bout how use of isolation and restraints failed to provide proper and sufficient supportive services to permit child to benefit from instruction was NOT alleging discrimination, but a denial of FAPE
  - "The complaint here shows the IEP is a central dispute of this litigation." (internal quotations omitted)

Some Benefit…
or Some *Benefit*?

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017)

- **Question:** What is the level of educational benefit that school districts must offer/provide children with disabilities to achieve the "free appropriate public education" (FAPE) guaranteed by the Individuals with Disabilities Education Act (IDEA)?
- **Facts:** Endrew F. is a child with autism who attended kindergarten through fourth grade in Douglas County schools.
- During that time, he progressed academically and socially but continued to exhibit problem behaviors. Endrew's parents unilaterally placed him in a private school and requested tuition reimbursement, claiming the district had failed to provide FAPE.

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017)

- U.S. Court of Appeals for the 10th Circuit upheld HO and district court's decisions that Endrew had been receiving a FAPE, as defined in its precedent -- "some benefit" or "more than merely *de minimis*" standard.
- Parents petitioned SCOTUS to hear the case, noting a split in the circuits about whether the substantive prong of the FAPE test requires a showing of something more than trivial *de minimis* educational benefit.

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017)

- SCOTUS invited the Solicitor General to file a brief expressing the views of the U.S.
- SG filed an *amicus* brief August 18 telling the Court:
  - There is an entrenched and acknowledged circuit conflict on the question presented.
  - The Tenth Circuit's "merely *** more than *de minimis*" standard is erroneous.
  - The question presented is important and recurring, and the court should resolve it in this case.
- Cert. granted.

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017)

NSBA's amicus brief was written by:

- Jonathan P. Read, John W. Norlin, Emily E. Sugrue, Sarah E. Orloff of Fagan Friedman & Fulfrost

And included:

- California School Boards Association and its Education Legal Alliance,
- Colorado Association of School Boards
- Horace Mann League

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017)

NSBA argument highlights:

- Reading a higher substantive educational benefit standard into IDEA in effect would be legislating from the bench. As it did in *Arlington Central Sch. Dist. v. Murphy*, 548 U.S. 291 (2006), another IDEA case, the Court should avoid expanding statutory definitions to meet policy goals that are within the authority of the legislative branch to set.

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017)

Oral Argument topics reflected many of the points raised by NSBA:

- **A one-size fits all standard is not workable:**
  - Chief Justice Roberts questioned how a single new standard would "work with students whose disabilities generally wouldn't allow them…with their own potential to follow the general educational curriculum?"
  - Justice Breyer asked if court "suddenly adopt[ed] a new standard, all over the country we'll have judges and lawyers and -- and -- and people interpreting it differently[…]
- **A new standard will increase litigation:**
  - Justice Breyer said, "I foresee taking the money that ought to go to the children and spending it on lawsuits and lawyers and all kinds of things that are extraneous. That is what's actually bothering me."

- **Increases in cost will tax an already burdened school system with Congressional broken promise to fund IDEA**
  - Justice Alito asked, “[W]hat percentage of the funds that are spent by school districts for this program are paid by the Federal government?
  - Solicitor General responded, “I think it's like 15 percent or something like that.”
  - Justice Alito also wanted to know the role of cost in the court’s ruling. “No matter how expensive it would be and no matter what the impact in, let's say, a poor school district would be on the general student population, cost can't be considered? And do you think in the real world, school boards are disregarding costs entirely?”

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

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017)

SCOTUS held March 22 in an 8-0, measured decision with no concurrences:

- *Rowley* " … is markedly more demanding than the 'merely more than de minimis' test applied by the Tenth Circuit."
- [IDEA] guarantees a substantively adequate program of education to all eligible children.
- Require IEP to "be appropriately ambitious in light of his circumstances."

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017)

- No "bright-line rule."
- Not a new FAPE standard, but an expansion of *Rowley*, which "had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level."
  - Court expressly rejected equality of opportunity standard requested by parents.
  - Declined to do what Congress has not done since passage of IDEA and Rowley.

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017)

"To meet its substantive obligation under the IDEA, a school must offer an IEP **reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances**. The 'reasonably calculated' qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. ... The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. ... Any review of an IEP must appreciate that the question is whether the IEP is **reasonable, no**t whether the court regards it as **ideal**."

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017) - THOUGHTS ON IMPLEMENTATION

- Individualized treatment. "[F]ocus on the particular child is at the core of the IDEA…"
- Ensure that IEP contains an analysis of progress "in light of the child's circumstances."
- If progress is not attainable state why. What undergirds determination?
- Note: If it is not a reasonable prospect for a student, "IEP need not aim for grade level."

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017) - THOUGHTS ON IMPLEMENTATION

- Families may request review of IEPs and progress.
- The decision provides much deference to educational judgements of school authorities. If a case gets to a court, the school will have to show “a cogent and responsive explanation for their decisions.”

Endrew F. v. Douglas Cnty. Dist. Re-1, 137 S.Ct. 988 (2017) - THOUGHTS ON IMPLEMENTATION

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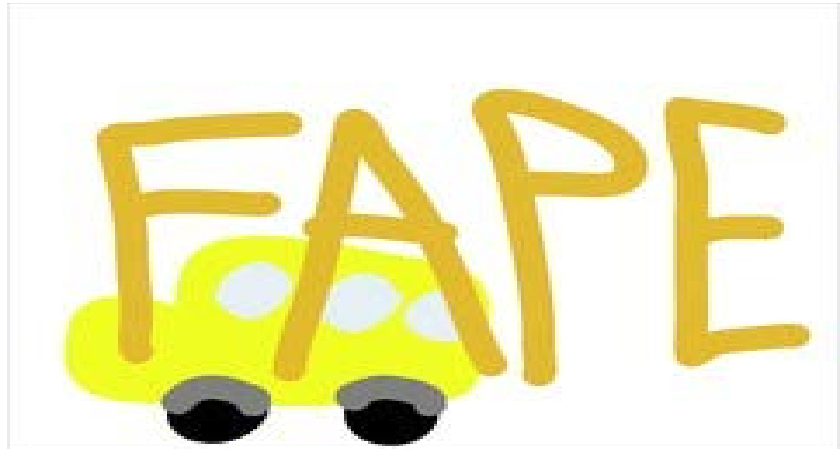


?

- FAPE is not currently defined in IDEA or its regulations re: level of educational benefit. Should it be?
- Members of COSA's IDEA Reauthorization Working Group have been considering this question.
- Potential Congressional action?

“A little case about tire scraps and playgrounds…”

Trinity Lutheran Church of Columbia, Inc. v. Comer, ___ S.Ct. ___, no. 15-577 (U.S. June 26, 2017)

- Argued April 19, 2017
- **Question:** Does Missouri's practice of excluding religious entities from a playground- surfacing program violate the federal constitution's Free Exercise (1st Amendment) protection?
- **Facts:** Church was denied state playground funds because of its religious mission, reflecting state constitution's restriction on state aid to religious institutions.

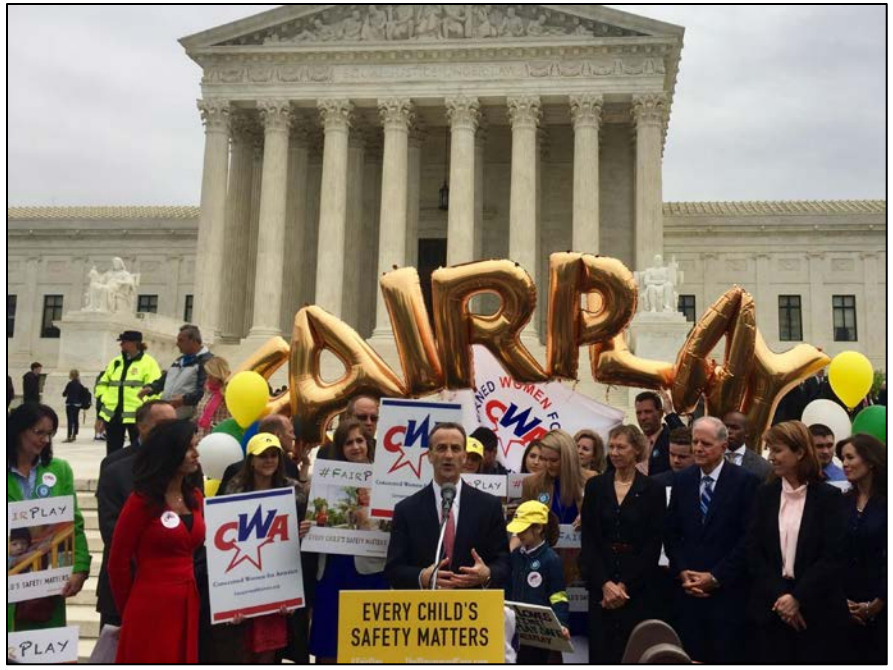
Trinity Lutheran Church of Columbia, Inc. v. Comer, cont'd

Why it's important:

- The Court re-examines direct state and local government funding to religious institutions.
- The Court explores the "play in the joints" between the Free Exercise and Establishment Clauses.
- Although the dissent distinguishes this case from the line of decisions about indirect aid programs (*Zelman*, see FN2), the majority's Free Exercise analysis might be used to argue expansion of some state voucher programs.

Trinity Lutheran and public schools

- 39 state constitutions have “Blaine Amendments” –barring government aid to religion.
- Missouri’s: “No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination or religion”
- Have been barriers to vouchers and tax credit programs and have been relied upon to exclude religious schools



Trinity Lutheran and public schools

- But recent decisions in state supreme courts have upheld savings account/voucher programs despite these provisions, finding funds become parents' once awarded.
- **Nevada:** No violation of the prohibition of using public funds for sectarian purposes, because "[o]nce the public funds are deposited into an education savings account, the funds are no longer 'public funds' but are instead the private funds of the individual parent who established the account."'
- **Oklahoma:** No violation of "no aid" provision of constitution, because parents are free to choose sectarian or non-sectarian schools. Money flows as a result of parental choice, so not direct benefit to religion or religious schools. State exerts no influence on choice of the parents. Statute is neutral on its face.

Trinity Lutheran Church of Columbia, Inc. v. Comer, HOLDING

- 7-2
- CJ Roberts wrote for the majority (Except as to FN3), joined by Kennedy, Kagan, Alito, with concurrences by Gorsuch (joined by Thomas) and Breyer
- Sotomayor dissented (joined by Ginsburg)
- **Held:** State's policy of expressly denying a qualified religious entity a public benefit solely because of its religious character "goes too far." State's interest in "skating as far as possible from religious establishment concerns" not enough to survive strict scrutiny of this penalty imposed on the free exercise of religion.

Trinity Lutheran Church of Columbia, Inc. v. Comer, HOLDING cont'd

Footnote 3 attempts to limit the holding:

"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."

But only 4 justices signed on to FN3 – so it's not part of the "majority."

Trinity Lutheran Church of Columbia, Inc. v. Comer, HOLDING cont'd

- Majority: Distinguished *Locke* by noting that case turned on what the scholarship recipient intended to *do* with the public funds – pursue a religious degree. "Here, … [the church] was denied a grant simply because of what it is – a church." "In this case, there is no dispute that Trinity Lutheran *is* put to the choice between being a church and receiving a government benefit."
- Gorsuch and Thomas concurring: doubtful of the stability of legal theory distinguishing between "laws that discriminate on the basis of religious status and religious use."
- Breyer concurring: would limit the holding to public programs designed to secure or to improve the health and safety of children – akin to police and fire.

Trinity Lutheran Church of Columbia, Inc. v. Comer, HOLDING cont'd

- Sotomayor and Ginsburg dissenting:
  - "This case is about nothing less than the relationship between religious institutions and the civil government – that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the constitution requires the government to provide public funds directly to a church."
  - Court should have invoked the Establishment Clause itself, rather than following the parties' agreement that it didn't prevent Missouri from including the church in the program. Establishment Clause bars Missouri from granting the church's funding request because it uses the school in conjunction with its religious mission.
  - "The government may not directly fund religious exercise."
  - Establishment Clause precedent says key issue is whether public funds subsidize religion, not whether the approach is "secular and neutral."

Cert. Granted and Remanded

G.G. v. Gloucester Cty. Sch. Bd. – was set for oral argument March 28

- On March 6, the Supreme Court vacated the ruling of the U.S. Court of Appeals for the 4th Circuit (which had granted the student's injunction based on the Obama administration guidance) and remanded to that Court for further consideration in light of the guidance issued by the Trump administration on February 22, withdrawing previous guidance issued by Obama administration.
- Decision expected soon.

Law continues to evolve in the courts

- Challenge to North Carolina “bathroom bill” – dropped by DOJ
- Illinois case challenging resolution agreement on bathrooms
- Pennsylvania court ruled for student under equal protection concept
- Texas suit brought by 20+ states on hold after change in Administration’s position – dismissed
- And more!

South Dakota Congressional Delegation

Senator John Thune

Committees: Commerce, Science & Transportation – Chairman *(E-Rate program/ education technology/ STEM subjects)* · Agriculture *(child nutrition)* · Finance *(school bonds, tax credits)*

Senator Mike Rounds

Committees: Armed Services · Banking, Housing & Urban Affairs · Environment & Public Works · Small Business & Entrepreneurship · Veterans' Affairs

Representative Kristi Noem

Committee on Ways and Means *(school bonds, tax credits)*

QUESTIONS