

# LEADERSHIP Insider

PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

A Membership Benefit of NSBA National Affiliates

## An Update from the Courts

NSBA amicus briefs filed in 2006-07

By Francisco M. Negrón Jr.



Every few years there is a banner year for school law at the U.S. Supreme Court. This issue of *Leadership Insider* provides a brief overview of the major cases before the Supreme Court and some federal courts that will be of consequence to school districts across the country.

Many of the cases that come before the Supreme Court will have an impact that extends well beyond the schoolyard. Two cases arising from Seattle, Wash., and Jefferson County, Ky., known collectively as the “diversity cases,” promise to have this kind of impact when the Supreme Court delivers its opinions later this term.

While the diversity cases deal directly with the use of race in student assignment policies, many observers see the cases as proxies for the debate on the use of race along the entire spectrum of equity-related matters, from school admission to employment policies. In the past the question was *how* to narrowly tailor race-conscious policies to achieve legitimate government objectives or “compelling state interests.” The issue now is *whether* race-conscious policies can be narrowly tailored to pass constitutional muster and, if so, how.

The so-called “Bong Hits 4 Jesus” case will further define the ability of schools to regulate student speech or behavior at school-related events. This case presents the disturbing question of whether the standard for holding administrators and teachers personally liable for violating a student’s First Amendment rights has softened.

Finally, a recent 7th Circuit decision contemplates a teacher’s free speech rights. Coming on the heels of the Supreme Court’s decision in *Garcetti v. Ceballos*, this case makes clearer than ever that claims of academic freedom in K-12 districts are not necessarily commensurate with the same concept in higher education.

From diversity to student speech to academic freedom, this year has been an active one for the courts. This year is nothing short of a banner year ... even beyond the schoolyard.

### DIVERSITY

#### **McFarland v. Jefferson County Public Schools and Parents Involved in Community Schools v. Seattle School District No. 1**

**What it’s all about:** These cases will define the extent to which school districts can use race in student assignment policies. While the use of race has been subject to a narrowly tailored analysis—that is, whether the policy is sufficiently focused and narrow in scope to achieve

the intended objective. That very standard is now up for debate in the Supreme Court.

**Background:** In 2003, the U.S. Supreme Court weighed in on the use of race as a factor in college and university undergraduate and graduate school admissions policies in *Gratz v. Bollinger* and *Grutter v. Bollinger*. The court in *Gratz* struck down the undergraduate admissions policy because it was not narrowly tailored to achieve the school’s compelling interest in student body diversity. The court stated that admissions policies using race as a factor must provide all applicants with individualized consideration in order to pass constitutional muster.

The court concluded the University of Michigan’s undergraduate policy failed to provide such consideration because “underrepresented minorities” were automatically awarded 20 points, which was one-fifth of the number needed for acceptance. The court concluded that under these circumstances the automatic award of bonus points for race makes race a decisive factor for every minimally qualified, underrepresented minority applicant.

However, in *Grutter* the court ruled that the law school’s admissions policy was narrowly tailored. The court concluded that the school’s mission to “enroll a ‘critical mass’ of minority students” avoided the constitutional sins of racial quotas or racial balancing.

The court pointed out that the law school policy’s flexible use of a variety of factors, such as geographic origin, family income, and other individual personal traits, focused on individual applicants rather than groups identified by race or ethnicity. This avoided the mechanical award of bonuses (points) for racial/ethnic membership that were found constitutionally flawed in *Gratz*.

In these cases, the court did not address the use of race in K-12 student assignment plans, reserving that question for another day.

**Lower court decisions:** That day came after the U.S. Court of Appeals for the 6th Circuit in *McFarland v. Jefferson County Public Schools*, and the U.S. Court of Appeals for the 9th Circuit in *Parents Involved in Community Schools v. Seattle School District No. 1*, upheld Jefferson County’s and Seattle’s race-conscious student assignment plans.

In a brief opinion, the 6th Circuit affirmed the ruling by the U.S. District Court for the Western District of Kentucky that Jefferson County Public School’s student assignment plan, which uses race as a factor, does not violate the 14th Amendment’s Equal Protection Clause. The district court ruled that the use of race and gender does not violate students’ 14th Amendment equal protection rights

because these are just two of several factors, such as geography, considered by officials in making such assignments.

However, the court did order school district officials to stop sorting applicants as “black male,” “black female,” “white male,” and “white female.” The court reasoned, “If few or no black students apply to a traditional school, a principal would be limited to admitting only those black students who apply at that time,” and that race and gender would become a “defining feature” of a student’s application, rather than just one of several factors as required under the U.S. Supreme Court’s rulings in the Michigan affirmative action cases.

However, the court also ruled that Jefferson County may maintain a standard that black students comprise 15 percent to 50 percent of enrollment at all public schools because such “broad racial guidelines do not constitute a quota.”

On the West Coast, the 9th Circuit ruled that a school district’s student assignment plan that takes the student’s race into account as one factor does not violate the 14th Amendment’s Equal Protection Clause. The 9th Circuit concluded that the school district’s use of race passes constitutional muster because it serves a compelling state interest and is narrowly tailored. Under Seattle School District No. 1’s plan, if a high school has more applicants than seats, four tiebreakers are used to determine which students are admitted.

The 9th Circuit looked to the U.S. Supreme Court decisions in *Grutter* and *Gratz* for guidance. However, the appeals court did not apply the reasoning of these cases in wholesale fashion to the student assignment plan in the Seattle case because *Grutter* and *Gratz* involved competitive admissions to institutions of higher education, while Seattle’s plan involves the noncompetitive assignment of students to public secondary schools.

Applying the first prong of the strict scrutiny test, the 9th Circuit found that Seattle had articulated two compelling state interests: (1) obtaining the educational and social benefits of racial diversity in secondary education; and (2) avoiding racially concentrated or isolated schools resulting from Seattle’s segregated housing patterns.

Regarding the first interest, the court pointed out that the Supreme Court in both *Grutter* and *Gratz* wholeheartedly endorsed the concept of racial diversity as a compelling state interest. Addressing the second interest, the 9th Circuit noted that, time and again, courts have encouraged school districts to ameliorate the effects of *de facto* segregation by developing student assignment policies that prevent or eliminate racial isolation.

Turning to the narrowly tailored prong, the court revisited the five factors laid out in *Grutter* and *Gratz*. The court first dismissed the “individualized consideration of applicants” factor, saying this one was irrelevant. The noncompetitive nature of assigning public high school students largely eliminates the dangers

present in the university context, *i.e.*, substituting racial preference for qualification-based competition.

After reviewing the application of the racial tiebreaker and the proposed race-neutral alternatives, the court found that Seattle had “made a good-faith effort to consider feasible race-neutral alternatives and permissibly rejected them in favor of a system involving a sibling preference, a race-based tiebreaker, and a proximity preference.” As a result, the court concluded that Seattle had satisfied the “absence of quotas” and the “good faith consideration of race-neutral alternatives” factors enumerated in *Grutter* and *Gratz*.

The 9th Circuit also found the “undue harm” factor was satisfied because: “(1) the district is entitled to assign all students to any of its schools, (2) no student is entitled to attend any specific school, and (3) the tiebreaker does not uniformly benefit any race or group of individuals to the detriment of another,” and, as a result, “the tiebreaker does not unduly harm any students in the district.”

Finally, the court concluded that the sunset provision requirement was met because Seattle reviews the plan annually and has been responsive to parents’ and students’ choice patterns and the concerns of the school district’s constituents.

The plaintiffs in both cases appealed to the Supreme Court, which granted review. The Supreme Court heard both cases in tandem on Dec. 4, 2006.

**NSBA’s argument:** NSBA filed an amicus brief in support of the school boards. The brief’s main arguments were: (1) the tradition of local control of public education gives local school boards wide discretion to adopt student assignment policies that seek to foster the benefits of a racially diverse learning environment in grades K-12; and (2) the U.S. solicitor general’s treatment of the narrow tailoring test is not supported by the Supreme Court’s precedents and would compromise

### CASES IN THIS ISSUE

#### Diversity

*McFarland v. Jefferson County Public Schools and Parents Involved in Community Schools v. Seattle Schools District No. 1*

#### Employment Discrimination

*BCI Coca-Cola Bottling of Los Angeles v. EEOC*

#### Student Speech

*Morse v. Frederick*

#### Teacher Speech

*Mayer v. Monroe County Community School Corporation*

#### Athletics

*Tennessee Secondary School Athletic Association v. Brentwood Academy*

#### Special Education

*Winkelman v. Parma City School District*

local control of public education.

**Current status:** Oral arguments were held Dec. 4. As of this writing, rumor has it that a ruling is expected shortly. If so, many observers believe the court's readiness to issue its ruling before the end of the term does not bode well for the school boards.

**Bottom line:** During oral arguments, the court appeared to agree that the intent of racial diversity is constitutional. But the justices disagreed about the constitutionality of the mechanism to achieve the intent. No one knows how the Court will rule. However, the conventional wisdom is that Justice Kennedy's vote will determine the majority decision. School boards should not undertake major shifts in their student assignment policies until the court issues a decision. A ruling is expected by the end of June.

## EMPLOYMENT DISCRIMINATION

### **BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC**

**What it's all about:** This case presents the question of whether an employer can be liable under federal antidiscrimination laws for an otherwise lawful termination, when the employer's decision was made without knowledge that the employee's supervisor harbored an alleged discriminatory bias against the employee.

**Background:** Stephen Peters failed to report to work as required by his employer. He was eventually discharged by a human resources officer who worked at a remote location. BCI Coca-Cola uses a personnel administration system that removes disciplinary authority from its supervisors. Rather, after considering the facts, the decision whether to terminate an employee is made by a human resources (HR) officer at a location separate from the worksite.

According to Peters, his immediate supervisor harbored racial animus, a fact which, along with the employee's race, was unknown to the HR officer. Peters contended that BCI Coca-Cola is liable for the racial animus of his supervisor regardless of whether this racial animus was known by the HR officer. The Equal Employment Opportunity Commission (EEOC) agreed and sued BCI in federal court on Peters' behalf, claiming a violation of Title VII of the Civil Rights Act.

**Lower court decisions:** The federal district court dismissed the case. It acknowledged evidence that the supervisor harbored a bias against African-Americans. However, the court said, the EEOC had not demonstrated that the supervisor's bias had a significant influence on

the HR officer's decision to fire the employee, especially given that the supervisor had never made any specific recommendations as to what the HR officer should do.

The U.S. Circuit Court of Appeals for the 10th Circuit reversed the district court's summary judgment, concluding the case should go to trial. The 10th Circuit found it did not matter that the supervisor had not recommended firing the employee, because the supervisor's actions had still led to the decision. The court also noted that had the HR officer performed an independent investigation into the employee's version of the story, the employer would not be liable. However, the HR officer had conducted no such independent investigation in this case.

BCI Coca-Cola appealed to the U.S. Supreme Court, which granted review.

**NSBA's argument:** NSBA filed an *amicus* brief in support of BCI Coca-Cola. The brief argued that, "the case presents the strong possibility of serious unintended consequences for the nation's school districts if [the Supreme] Court renders a decision that fails to recognize and account for the particular legal requirements and governance realities that dictate school board operations."

NSBA pointed out that "under many state statutes, school boards are the final decision makers in many school employment decisions, including hirings, firings, and promotions, that are subject to Title VII and other nondiscrimination statutes ... [but] as a matter of sound governance, school boards generally are not involved in the day-to-day operation of schools and necessarily rely on the judgment and recommendations of their school administrators in rendering these personnel decisions."

The brief contended that, by "requiring an employer to investigate for possible racial bias in a subordinate's personnel decision, even in the absence of any evidence of such bias, the 10th Circuit's approach to this case fails to account for these realities among school boards and similarly situated employers."

The brief went on to conclude that the "10th Circuit's holding is unsupported by Title VII itself or by this Court's holdings, and its apparent rationales—that employers may intentionally isolate final decision makers to avoid responsibility for bias and that bias could be unearthed if employers tried harder—are irrelevant in the school board context." The brief also warned that "[a]ffirming the 10th Circuit would ignore—and indeed undermine—the existing safeguards school boards utilize."

NSBA then argued that allowing employees who have failed to report discrimination to their employer to then sue

discourages employees from using in-house equal employment opportunity grievance channels to resolve concerns, thus leading to more litigation. The inability to address discrimination through internal processes would harm not only the victim, but also other employees, while threatening both the school district's operational efficiency and needlessly diverting limited taxpayer dollars from the classroom to litigation.

**Current status:** The Supreme Court had scheduled oral arguments, but on April 12 dismissed the case because the parties reached a settlement. However, the court could decide to hear one of several other cases that present the same issue.

**Bottom line:** Notwithstanding the EEOC's conclusion in this case, the best tool for managing discrimination/harassment issues is a strong policy that includes training and an accessible grievance/complaint procedure. School districts should ensure that their employees are aware of their standards against discrimination and harassment; should train their employees to those standards; and should widely disseminate complaint procedures.

## STUDENT SPEECH

### **Morse v. Frederick**

**What it's all about:** This case brings a new twist to the arena of student free speech, testing the boundaries of school control over students at school-related activities and implicating the qualified immunity rights of administrators and teachers.

**Background:** Joseph Frederick, along with the rest of Juneau-Douglas High School's students, was released from class to watch the passing of the Olympic torch on a street adjacent to the school. Frederick had plans that went beyond merely observing the historic moment; he planned to become a part of that history.

During the passing of the torch, Frederick and some classmates unfurled a 20-foot banner that read "Bong Hits 4 Jesus." Principal Deborah Morse crossed the street and asked the students to drop the banner. All did except Frederick. Morse suspended Frederick after he failed to show up for a disciplinary meeting. He appealed the decision through all levels of administrative and school board review and then sued in federal court, claiming that his First Amendment rights had been violated.

**Lower court decisions:** The trial court granted the school district's motion for summary judgment, holding that the

principal had authority under school district policy to discipline students for displaying offensive materials, including materials that could be reasonably construed as advocating drug use, and that this authority extended to off-campus, school-sponsored events, such as the assembly to watch the Olympic torch relay.

The 9th Circuit Court of Appeals vacated the trial court's decision and remanded the case. The appeals court found that the student's right to free speech was violated, citing the Supreme Court case *Tinker v. Des Moines Independent Community School District*. That decision, generally speaking, allows school officials to restrict a student's private speech only if it materially and substantially interferes with school operations or infringes on the rights of others, not merely because the student advocates for a position contrary to government policy.

The court distinguished the case from two other U.S. Supreme Court cases that permit school officials to restrict student speech. Unlike the speech restricted in *Hazelwood School District v. Kuhlmeier*, Frederick's speech was not school-sponsored, school-endorsed, part of the school's curriculum, or made as part of a school activity. In *Bethel School District No. 403 v. Fraser*, the Supreme Court upheld school officials' discipline of a student for engaging in speech at a school assembly that contained "pervasive sexual innuendo" that was "plainly offensive" and that resulted in immediate disruption.

Noting parenthetically that "sexual speech can be expected to stimulate disorder among those new to adult hormones," the 9th Circuit observed that the student's sign neither was sexual nor caused disruption. "The phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view," the court concluded, "but it is not 'plainly offensive' in the way sexual innuendo is." Rather, speech about marijuana use was more akin to the "political viewpoint" speech in *Tinker*, especially since the question of marijuana legalization has been the subject of repeated state referenda and a recent controversial court decision in Alaska.

If *Fraser's* holding that a school may restrict speech that "would undermine the school's 'basic educational mission'" is to be consistent with *Tinker's* principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the court concluded, there must be "some limit on the school's authority to define its mission." Schools can only suppress speech if it "disrupts the good order necessary to conduct their educational function."

While conceding that there is no 9th Circuit case law directly on point, the court cited two of its prior decisions as consistent with its conclusion that student speech that is neither school-sponsored, as in *Hazelwood*, nor vulgar, lewd, obscene, or plainly offensive, as in *Fraser*, can only be punished or prohibited under *Tinker* if school officials demonstrate a risk of substantial disruption.

In *Burch v. Barker*, the court ruled that school officials violated students' free speech by disciplining them for on-campus distribution of a student newspaper produced off-campus without prior approval. In *Chandler v. McMinnville School District*, the court invalidated the suspensions of students for refusing to remove buttons that referred to replacement teachers as "scabs" during a teachers' strike.

While acknowledging that under *Tinker* school officials have broad authority to act



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to “avert perceived potential harm,” the school district officials in this case conceded that they acted to punish Frederick’s speech because it was inconsistent with the school’s mission. The court also cited cases from other circuits.

Turning to the issue of whether Principal Morse was entitled to qualified immunity from the lawsuit, the court found that the right violated by her actions was clearly established at the time. The court determined this was the case, noting that Morse acknowledged she was aware of the case law from her school law class. There was, therefore, no basis for concluding that she reasonably, but mistakenly, believed her actions did not violate Frederick’s right to free speech.

Principal Morse and the school district asked the Supreme Court to review the case. In a rare step, NSBA filed an *amicus* brief at this initial stage, asking the high court to take the case because of: (1) the serious implications for school district authority to maintain order and discipline in support of their educational mission; and (2) concern that the removal of qualified immunity will chill the ability of administrators and teachers to fulfill their educational duties.

**NSBA’s argument:** After the Supreme Court granted review, NSBA again filed an *amicus* brief in support of the Juneau school board and Principal Morse. The main thrust of NSBA’s brief is that it is vital that school districts be afforded reasonable latitude in defining their educational mission in order to maintain a safe learning environment free of disruptive speech or expression that is inconsistent with that mission.

The brief argues that student expression, such as Frederick’s, can be regulated under *Fraser* because schools can regulate messages inimical to fundamental school and civic mores, such as messages that tout or trivialize illegal drugs use in all school-authorized settings.

**Current status:** Oral arguments were heard March 19.

**Bottom line:** This case will decide the extent to which the school district’s authority extends to school-related activities. The court could also articulate a new standard for regulating student speech that expands the “plainly offensive” standard from sexually offensive speech to a broader standard involving student health, safety, and welfare. Finally, this case will address the extent to which administrators and teachers are protected by qualified immunity in carrying out their duties to maintain order and fulfill the educational mission when student speech is at issue.

## TEACHER SPEECH

### **Mayer v. Monroe County Community School Corporation**

**What it’s all about:** As Chief Justice Roberts pointed out, quoting Oliver Wendell Holmes, “You may have a right to speak your mind, but you don’t have a constitutional right to be a police officer.” This case supports the established principle that school boards have ultimate control over curricular speech in the classroom. Thus, a teacher, whose speech in the form of instruction is commissioned by the school board, must adhere to school board proscriptions against certain speech.

**Background:** During a class discussion of an article about peace marches in protest of U.S. military involvement in Iraq, Deborah Mayer, a probationary teacher at Clear Creek Elementary School

in Bloomington, Ind., voiced the opinion that peace was preferable to war and said she personally supported the peace marchers. When parents complained, the school’s principal told all teachers to refrain from taking sides in political controversies in class.

When the school district later failed to renew her contract for a variety of performance-related reasons, Mayer sued, alleging that the decision was based on her political expression and violated her First Amendment right to free speech.

**Lower court decisions:** The U.S. district court dismissed the case, holding Mayer was acting as an employee rather than a citizen when she spoke, because her speech took place during instructional time in the classroom and was directed at her students. Therefore, her speech was not protected by the First Amendment.

Mayer appealed to the U.S. Court of Appeals for the 7th Circuit. The 7th Circuit includes Indiana, Illinois, and Wisconsin. On appeal, the school district argued that under the U.S. Supreme Court’s subsequent ruling in *Garcetti v. Ceballos*, a public employee who speaks pursuant to his or her official duties does so as an employee and is not protected by the First Amendment. Mayer countered that principles of academic freedom supersede *Garcetti* in the classroom.

**NSBA’s argument:** NSBA filed an *amicus* brief in support of the school district that set out three arguments:

(1) A public school teacher’s curricular speech is *per se* not speech on a matter of public concern and therefore is not protected by the First Amendment.

(2) Based on the holding in *Garcetti*, a teacher’s classroom speech is part of his or her official job duties and therefore is not protected by the First Amendment.

(3) The Supreme Court articulated no exception to *Garcetti* based on academic freedom in the K-12 public school context.

**Ruling:** In a unanimous panel decision in favor of the school district, the U.S. Court of Appeals for the 7th Circuit ruled that a public elementary school teacher’s free speech rights were not violated when she was prohibited from expressing her opinion of the war in Iraq during instructional time.

The appeals court assumed for purposes of the appeal that the teacher’s claim that she was fired for her political expression was true. So the court framed the issue as whether teachers in primary and secondary schools have a constitutional right to determine what they say in class. This, the court noted, was “not a novel question in this circuit.” In *Webster v. New Lenox School District No. 122*, the court had rejected a teacher’s assertion that he had a constitutional right to teach that the earth is much younger than the textbook maintained.

The court stated that “those authorities charged by state law with curriculum development [may] require the obedience of subordinate employees, including the classroom teacher.” This is so, the court observed, “because the school system does not ‘regulate’ teachers’ speech as much as it hires that speech.”

Beyond the fact that teachers must provide the service for which employers are willing to pay—a fact the court found already made this case easier than *Garcetti*—students are a “captive audience” under compulsory education laws, and “[c]hildren who attend school because they must ought not be subject to teachers’ idiosyncratic perspectives.”

Even if majority rule has the potential under elected school boards to turn into indoctrination, the court continued, “the power should be reposed in someone the

people can vote out of office, rather than tenured teachers. At least the board’s views can be debated openly, and the people may choose to elect persons committed to neutrality on contentious issues.”

*Garcetti* applied to this case because the teacher’s remarks were within the scope of her instructional duties, the court concluded, and the First Amendment “does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.”

**Current status:** An opinion was issued in favor of the school district. On April 12, the court declined a request to reconsider its decision.

**Bottom line:** Teachers must abide by curricular requirements of a school district. The First Amendment does not protect a teacher from deviating from an established curriculum in the classroom to express a personal point of view.

## ATHLETICS

### **Tennessee Secondary School Athletic Association v. Brentwood Academy**

**What it’s all about:** This case is about the ability of public school districts and other schools, through school athletic associations, to enforce voluntary agreements regulating athletics by sanctioning member schools that do not adhere to the standards of the voluntary membership agreement.

**Background:** The Tennessee Secondary School Athletic Association (TSSAA) is a voluntary, nonprofit association that regulates interscholastic athletics in Tennessee for its members. Public schools make up 84 percent of its membership, and private schools comprise the remaining 16 percent.

Like many secondary school athletic associations, TSSAA has a rule prohibiting its member schools from recruiting athletes from other member schools. Among other reasons, the rule is intended to deter the professionalization of high school athletes. TSSAA sanctioned Brentwood Academy, a private school, for violating the prohibition against recruiting.

Brentwood filed suit under Section 1983, a federal civil rights law, alleging TSSAA violated the First and 14th Amendments by enforcing the recruiting rule.

**Lower court decisions:** The U.S. Court of Appeals for the 6th Circuit ruled that TSSAA had violated Brentwood’s free speech rights by imposing sanctions on the school. TSSAA appealed to the Supreme Court.

**NSBA’s argument:** NSBA filed an *amicus* brief in support of TSSAA. The brief argues: “When private parties who agree to contractual conditions in return for a discretionary government benefit later challenge those conditions under the First Amendment, this Court has applied a deferential standard of review to the government’s actions.”

It continues: “Because the relationship between the [TSSAA] and Brentwood Academy fits squarely within this court’s First Amendment contract jurisprudence, this Court should uphold TSSAA’s enforcement of the recruiting rule as reasonable.”

The brief also contends the 6th Circuit committed three key errors:

(1) The court of appeals improperly characterized the recruiting rule as a regulatory ordinance, rather than a contractual term, and applied the far more searching First Amendment test applicable to unilateral government regulation, rather than

the more properly deferential test that applies when the government acts as a contracting party.

(2) The court of appeals failed to recognize TSSAA’s significant education-related interests in ensuring competitive equity.

(3) Finally, the court of appeals improperly elevated the speech at issue to a matter of public concern by confusing that inquiry with the entirely distinct inquiry into whether the government’s restriction of speech serves a public purpose.

**Current status:** Oral arguments were heard on April 18.

**Bottom line:** At issue is the ability of state athletic associations to enforce among their members the association’s own rules and standards, such as a non-recruitment rule. An ancillary concern is the implication of a ruling limiting the ability of school districts to require vendors to enter into voluntary agreements that require them to comport with certain district policies. Such policies may include prohibitions on discrimination on the basis of certain categories, such as sexual orien-

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The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA’s mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai’i, and the U.S. Virgin Islands.

### About the National Affiliate Program

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The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

tation, that may not be fully defined under the law as protected classes.

## SPECIAL EDUCATION

### **Winkelman v. Parma City School District**

**What it's all about:** This case is about whether non-lawyer parents of special education students can represent their child in federal court, not on behalf of a child as a next friend, but as the child's legal representative or *de facto* lawyer (attorney-in-fact).

**Background:** Jeff and Sandee Winkelman, the parents of Jacob, a student in special education, filed suit in an Ohio federal district court against the school district after an administrative hearing officer rejected their claim that Jacob's individualized education program (IEP) failed to provide him with a free appropriate public education as required by Individuals with Disabilities Education Act (IDEA). The Winkelmans proceeded in federal court *pro se*, *i.e.*, representing themselves and their son without an attorney.

**Lower court decisions:** The district court ruled in the school district's favor, and the parents appealed to the U.S. Court of Appeals for the 6th Circuit. Relying on its previous decision in a case called *Cavanaugh v. Cardinal Local School District*, the 6th Circuit ruled that parents who are not lawyers do not have the right to represent their child with disabilities, or themselves, in federal court under IDEA. The parents appealed to the Supreme Court.

The issue of parent representation has led to a three-way split among U.S. Circuit Courts of Appeal. While the 1st Circuit has ruled there are no limitations on the parents' ability to act on their children or their own behalf in court under IDEA, the 2nd, 3rd, 7th, and 11th Circuits have ruled that parents can only prosecute on their own behalf. The 6th Circuit has said parents cannot represent themselves or their children in court.

**NSBA's argument:** NSBA filed an *amicus* brief in support of the school district. The brief presents two arguments:

(1) Parents do not have a private cause of action to appeal a due process decision to federal court because the plain reading of the statute does not support a cause of action for parents, parents have alternative avenues to pursue any rights they may have under IDEA, and an alternative reading would lead to absurd results that do not support the purpose of IDEA.

(2) Lay parents may not represent their child *pro se* in their child's court appeal under IDEA because the common law rule prohibiting parent *pro se* representation applies in IDEA cases, and the purpose of IDEA is served if children have legal representation.

**Current status:** Oral arguments were heard Feb. 27.

**Bottom line:** The nuances and complexities of federal litigation today, especially in a highly specialized area like special education, virtually demand the skills of legal professionals on both sides to help the court reach the best decision. IDEA provides parents other ways to advocate for their children if they disagree with their children's education plan, including requesting a records hearing, bringing a state complaint, or seeking mediation. Even though parents use these kinds of remedies frequently with positive results, a decision in favor of the parents in this case would discourage collaboration and encourage litigation.

Francisco M. Negrón Jr. is NSBA's general counsel and associate executive director.

# With a little a lot of help from our friends...

NSBA's small legal team could not be nearly as active and effective in its advocacy on behalf of public education were it not for the wide expertise it leverages and the tremendous support it receives from members of the NSBA Council of School Attorneys (COSA), from the state school boards associations, and from other attorneys who contribute their services *pro bono*, or free of charge.

NSBA also is grateful for the support and assistance of its fellow friends-of-the-court who frequently join NSBA on its briefs and sometimes submit their own briefs to the courts. Many times the contributions NSBA receives are less formal than legal writing or formal participation in the brief. School lawyers and others also serve as invaluable sources of information and sounding boards as NBSA frames its legal arguments and as reviewers while the briefs go through the various stages of drafting and editing. They also participate in moot courts NSBA helps organize for attorneys who will be arguing these cases.

The cases discussed in these pages provide plenty of good examples. What appears below is more than a polite list of acknowledgements. It's a critical part of the story of effective legal advocacy—and one strong sign of how much is at stake in these cases.

### **Winkelman v. Parma City School District:**

The Ohio School Boards Association (OSBA) generously retained the services of COSA members Julie Carleton Martin and Kate V. Davis of the law firm of Scott, Scriven & Wahoff LLP in Columbus, Ohio, as lead authors on the brief. The American Association of School Administrators (AASA) joined the brief, as did a range of Ohio education groups: OSBA, of course, as well as the Buckeye Association of School Administrators, the Ohio Association of School Business Officials, and the Greater Cleveland School Superintendents' Association.

### **Tennessee Secondary School Athletic Association v. Brentwood Academy:**

For this brief NSBA was fortunate to have the *pro bono* services of a particularly deep bench of experienced Supreme Court advocates. Lead authors were Pamela S. Karlan and Jeffrey L. Fisher of Stanford Law School's Supreme Court Litigation Clinic, along with their students and colleagues. Other contributors included Amy Howe and Kevin K. Russell of the Washington, D.C., firm of Howe and Russell PC, as well as Thomas C. Goldstein of Akin Gump Strauss Hauer & Feld LLC, also in Washington, D.C.

### **Mayer v. Monroe County Community School Corporation:**

Joining this brief to the 7th U.S. Circuit Court of Appeals were the state school boards associations from all three of the states that comprise the 7th Circuit: the Indiana School Boards Association, the Illinois Association of School Boards, and the Wisconsin Association of School Boards. AASA also stepped up and joined the brief.

One more bit of inside baseball: Arguing the school district's case to the 7th Circuit was Thomas Wheeler of Locke Reynolds LLP in Indianapolis, a member of the COSA board of directors. Readers of *Leadership Insider* will recognize Wheeler as an expert we draw on for the National Affiliate Center's "You Asked!" sessions at the NSBA Annual Conference and the resulting "You Asked!" issues of *Insider*.

### **Morse v. Frederick:**

The lead authors on both of NSBA's briefs in this case were a member of COSA's board of directors, Michael E. Smith, as well as Cathleen C. Hall, both of the Fresno offices of the California school law firm of Lozano Smith. Their services on both briefs were *pro bono*. Not surprisingly in such an important case involving the personal liability of school administrators, AASA and the National Association of Secondary School Principals (NASSP)

both signed onto the brief as well. Key reviewers included COSA members Heidi A. Katz of the Chicago firm of Robbins, Schwartz, Nicholas, Lifton & Taylor Ltd., and Maree Sneed, John W. Borkowski, and Audrey Anderson of the Washington, D.C., and Indianapolis offices of Hogan & Hartson LLP.

### **BCI Coca-Cola Bottling of Los Angeles v. EEOC**

Of particular assistance to NSBA in this case were COSA members Lisa Brown of Bracewell & Giuliani LLP in Houston and James B. Gessford of Perry, Guthery, Haase & Gessford PC, in Lincoln, Neb.

### **McFarland v. Jefferson County Public Schools & Parents Involved in Community Public Schools v. Seattle School District No. 1**

By far, the cases this term that brought together the most impressive educational coalition on a Supreme Court brief were the two diversity cases. Along with NSBA, this coalition included the National Association of State Boards of Education (NASBE), AASA, NASSP, the National Association of Elementary School Principals (NAESP), the Association of School Business Officials International (ASBO), the Horace Mann League of the United States of America, and Phi Delta Kappa International.

Lead *pro bono* authors on this brief were Thomas C. Goldstein and Michael C. Small of the Washington, D.C., and Los Angeles office, respectively, of Akin Gump Strauss Hauer & Feld LLP.

Of course, even this array of talent doesn't mean NSBA and its allies win every time. Many school law cases are uphill battles from the outset. But for those in public education, an uphill battle is not an unfamiliar situation. A cause is no less important for being difficult. Concerted efforts like these can help even the odds.

- Thomas Hutton, Editor

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