

## **Federal School Law Update:**

**Activity in Courts, Congress,  
and the Executive Branch  
Affecting Public Schools**

South Carolina School Boards  
Association August 2017

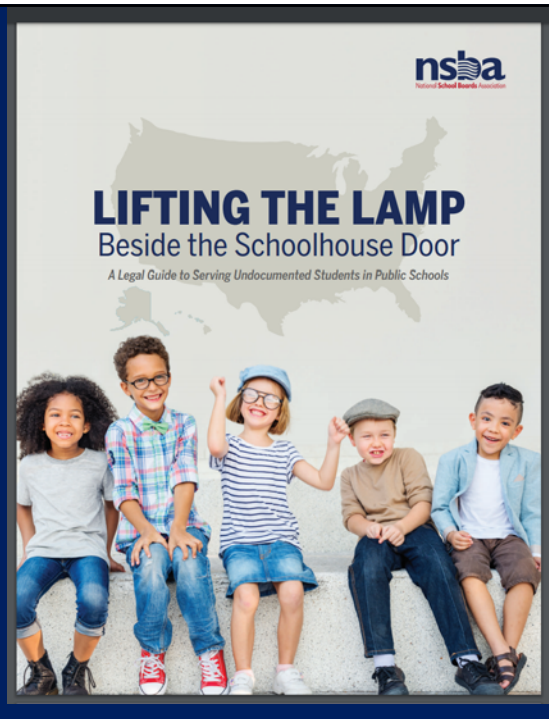
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**NEW!  
NSBA  
Resource**

<https://www.nsba.org>

Search “undocumented students.”



Congress

Supreme  
Court

Cases to  
Watch

Executive  
Branch and  
Agencies

# Congress

## Healthcare Reform

- May 4, 2017 House passed House Bill 1628, which would have repealed and replaced the Affordable Care Act.
  - Bill would have changed the way that states received their Medicaid funding: imposing a per capita allotment funding structure. Schools would have to compete for Medicaid funding.
- 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.
- Senate unsuccessful in its attempts to repeal/replace ACA.
- No change to ACA for now.

## **Every Student Succeeds Act**

- Signed into law December 2015
- More collaborative framework from its predecessor, No Child Left Behind; details re: education of students left to states and local school boards.
- Department of Education was tasked with issuing regulations, which it developed by November 2016.
- 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.

## **Every Student Succeeds Act**

- 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 Regulations

- Department of Education, Accountability and State Plans.
  - ~~Final rule published November 29, 2016; Effective date January 30, 2017. = DELAYED / REPEALED~~
- Department of Education Academic Assessments.
  - Final rule published on December 8, 2016; Effective January 9, 2017. = **IN EFFECT**
- ~~Improving the Academic Achievement of the Disadvantaged—Supplement Not Supplant.~~
  - ~~Public comment period concluded on November 7, 2016. = **WITHDRAWN**~~

## ESSA State Plans

- 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](http://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.

## Child Nutrition Services

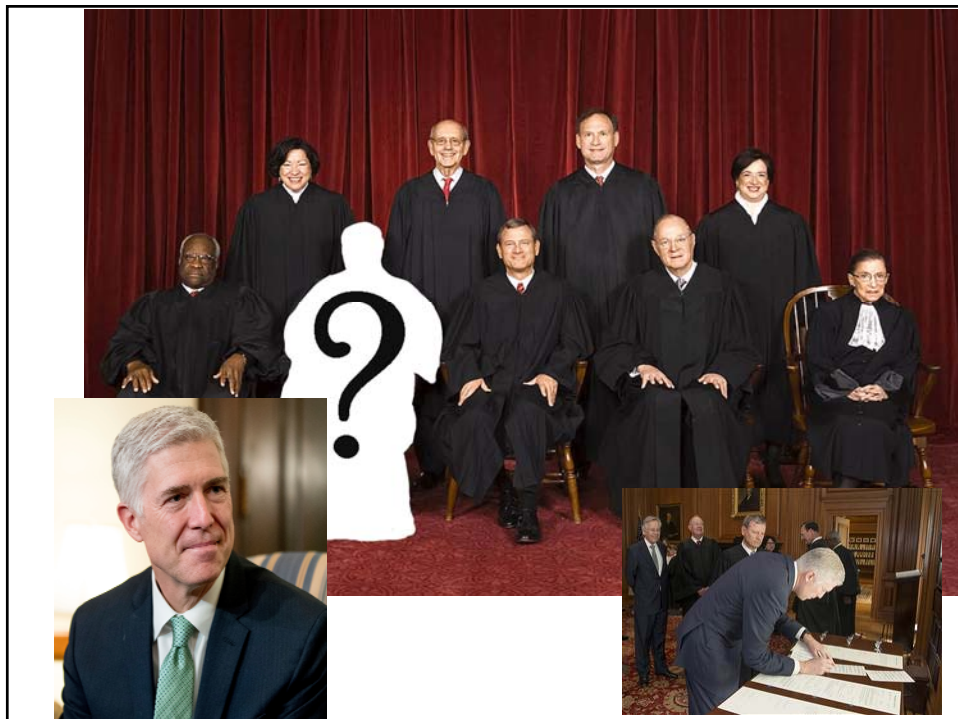
- Schools have long complained about waste of food and other challenges that they faced as they attempted to implement new federal regulations with regard to school meals.
- On May 17, 2017, the U.S. Secretary of Agriculture, Sonny Perdue, signed a proclamation indicating that the USDA will provide greater 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

The USDA proclamation says:

- 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>.

# SCOTUS





## “...the first and last partisan filibuster of the Supreme Court...”

- **April 6** -- Senate Republicans changed the rules to lower the vote threshold for Supreme Court nominees from 60 votes to a simple majority in order to advance Neil Gorsuch to a confirmation vote.
- **April 7** – Senate voted 54-45 to confirm. 3 Democrats voted YES.
- **April 10** -- Gorsuch was sworn in.
- **April 17** – Gorsuch participated in oral argument.



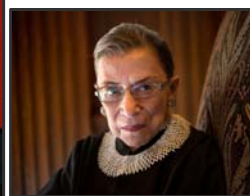
**Gorsuch**

**Kennedy**



## **Gorsuch and SCOTUS**

- Thus far, has joined conservative block with Thomas and Alito.
- Will there be another vacancy during this administration?



## October 2016 Term: Key Cases for Public Schools

- *Fry v. Napoleon Comm. Sch.*, 137 S.Ct. 743 (2017)
- *Endrew F. v. Douglas Cnty. Dist. Re-I*, 137 S.Ct. 988 (2017)
- *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017)

## Two Special Education Cases In One Year

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



### ***Fry v. Napoleon Community Schools,*** **137 S.Ct. 743 (Feb. 22, 2017)**

- **Question:** May parents of a student with a disability bypass the Individuals with Disabilities Education Act (IDEA) procedures and sue a school district directly for alleged violation of the Americans with Disabilities Act and the Rehabilitation Act as damages are not available under the IDEA?
- **Facts:** Parents alleged harm from school district's refusal to allow service dog to accompany elementary school child with cerebral palsy. School maintained student was adequately served by aid.
- **Importance to schools:** NSBA argued in amicus brief that a direct route to litigation discourages collaboration through the IDEA process.

### ***Fry v. Napoleon Community Schools,*** **137 S.Ct. 743 (Feb. 22, 2017)**

#### **SCOTUS decided:**

- Exhaustion of administrative remedies under IDEA is not necessary when the gravamen (main idea) of the plaintiff's complaint is something other than the denial of a Free Appropriate Public Education (FAPE), because relief for denial of FAPE is the *only* relief IDEA makes available.

#### **In other words:**

- A student with disabilities who receives services from a school district under IDEA does not have to go through the IDEA procedures (due process hearing) before filing suit in court, *if* the suit claims harm like emotional distress, and is based on rights provided by a law other than IDEA. These suits usually ask for money damages.

## ***Fry v. Napoleon Community Schools,*** **137 S.Ct. 743 (Feb. 22, 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.
- Consult your COSA attorney and your state school boards association.



## ***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 student with autism whose parents unilaterally placed him in a private school and requested tuition reimbursement, claiming the district had failed to provide FAPE. Their main argument was that the public school’s IEP did not offer a program reasonably calculated to enable Endrew to receive educational benefits. There was little progress in his years with the program proposed by the district.
- Parents petitioned SCOTUS to hear the case, noting a split among federal appellate courts about whether the substantive prong of the FAPE test laid out in *Rowley* 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)**

- Rowley said substantive prong of FAPE means an educational program “reasonably calculated to enable the child to receive educational benefits.”
- Courts applying *Rowley* generally have referred to this as the “some benefit” or “more than merely *de minimis*” standard.
- Roberts: “It says ‘some benefit,’ but you’re -- you’re reading it as saying ‘some benefit,’ and the other side is reading it as saying ‘some *benefit*,’ .... And it makes a difference.”
- SCOTUS seemed open to clarifying that standard, especially in “close” cases and/or cases where the child’s progress cannot easily be measured against grade level standards.

**Importance for Schools:** NSBA argued in its amicus brief that creating a new, broad standard would unduly burden schools, encourage litigation, and add be unworkable in practice. Schools already provide much more than “more than merely *de minimis*” benefit.

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

**SCOTUS Decided (8-0):**

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

**In other words:** For students with disabilities whose progress cannot easily measured against grade level standards, the FAPE obligation requires schools to design an “appropriately ambitious,” and “reasonable” program.

***Endrew F. v. Douglas Cnty. Dist. Re-1,***  
**2017 WL 1066260 (March 22, 2017)**

**What the decision means for schools:**

- 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.”
- Consult with your COSA attorney and state school boards association.

**“A LITTLE CASE ABOUT TIRE  
SCRAPS AND  
PLAYGROUNDS...”**

***Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (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 (1<sup>st</sup> 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, HOLDING***

**SCOTUS Decided (7-2):**

- Missouri's policy of expressly denying a qualified religious entity this public benefit solely because of its religious character "goes too far." The state's interest in "skating as far as possible from religious establishment concerns" is not enough to survive the Court's strict scrutiny of this penalty imposed on the free exercise of religion.

**In other words:**

- To deny a religious institution this public safety benefit based only on its religious character violates the Free Exercise Clause. In this case, at least, fear of an Establishment Clause violation is not enough to justify the restriction on religious freedom.



## The Dissent

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.”

### ***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.

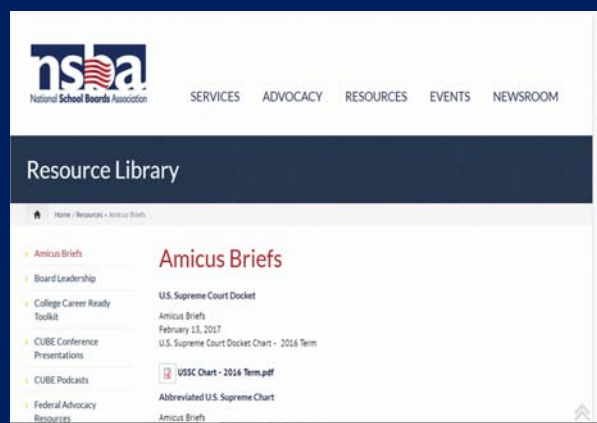
## ***Trinity Lutheran and public schools***

- 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



## **NSBA Resource**

### **NSBA Amicus Briefs**



<http://www.nsba.org/amicusbriefs>

## NSBA Resource

### Supreme Court Charts

| U.S. SUPREME COURT DOCKET CHART<br>2017 TERM<br>August 6 – August 12                                       |  |            |          |
|--|--|------------|----------|
| <div>Amicus cases = yellow highlight</div> <div>Petitions scheduled for conference – green highlight</div> |  |            |          |
| MOST RECENT PETITIONS FOR CERT. FILED  |  |            |          |
| CASE/DOCKET NO./LOWER COURT CITATION   | ISSUE  | DATE FILED | COMMENTS |
| <i>Harrow v. Kroger LP I</i> , 17-93, unpublished (5th Cir.)   | Employment & Labor: (1) Does <i>Staub v. Proctor Hospital</i> , 562 U.S. 411, 413 (2011), apply to claims for hostile work environment/sexual harassment; (2) Are Mississippi state common law causes of action for workers against co-workers and supervisors for intentional interference with employment preempted by the Labor Management Relations Act, such that those common law causes of action are unavailable to those who work for employers who have entered contracts with a labor union | 7/17/17    |          |

<https://www.nsba.org/us-supreme-court-docket>

<https://www.nsba.org/abbreviated-us-supreme-chart>

Cases to  
Watch

### **School Choice Cases Sent Back to State Supreme Court After *Trinity Lutheran***

- *New Mexico Ass'n of Non-public Schools v. Moses*,
- *Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ.*; *Douglas Cty. Sch. Dist. v. Taxpayers for Pub. Educ.*; *Doyle v. Taxpayers for Pub. Educ.*
- State Supreme Courts found textbook purchasing and lending program and school district based voucher program violated state constitutional restrictions on aid to religious institutions.
- Now they must reconsider in light of *Trinity Lutheran*.

### ***G.G. v. Gloucester Cty. Sch. Bd.* – Transgender student claim against VA school district based on bathroom policy**

- Supreme Court granted cert. October 28, 2016 and the case was set for oral argument in late March.
- On February 22, the Trump administration withdrew the guidance issued by the Obama administration on which the appellate court's decision granting the student's emergency injunction had been based.
- On March 6, the Supreme Court sent the case back to the appellate court for further consideration in light of the new guidance.
- On Aug. 2, the appellate court sent the case back to the trial court to decide whether GG's claim is moot because he graduated.

***Whitaker v. Kenosha Unif. Sch. Dist.*  
No. 1, 858 F.3d 1034 (7<sup>th</sup> Cir. 2017) –  
Transgender student claim against WI  
school district based on bathroom policy**

- Appellate panel (3 judges) decided trial court properly ruled for a transgender student, granting a preliminary injunction allowing use of restrooms according to gender identity.
- The student was likely to succeed on the merits of his claim under both Title IX and the Equal Protection clause.

***Whitaker v. Kenosha Unif. Sch. Dist.*  
No. 1, 858 F.3d 1034 (7<sup>th</sup> Cir. 2017) –  
Transgender student claim against WI  
school district based on bathroom policy**

- “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender-nonconformance, which in turn violated Title IX.”
- District’s argument that the policy was necessary to protect privacy interests of all student based on “sheer conjecture and abstraction,” so insufficient to establish an “exceedingly persuasive” justification.

***Whitaker v. Kenosha Unif. Sch. Dist. No. 1, 858 F.3d 1034 (7<sup>th</sup> Cir. 2017)***

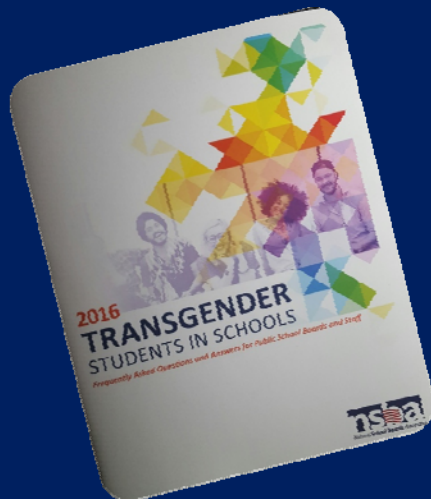
- “This policy does nothing to protect the privacy rights of each individual student vis a vis student who share similar anatomy and it ignores the practical reality of how [Whitaker], as a transgender boy, uses the bathroom: by entering a stall and closing the door.”

**NSBA Resource**

**Transgender Students  
in Schools:**  
Frequently Asked  
Questions and Answers  
for Public School Boards  
and Staff

[www.nsba.org](http://www.nsba.org)

Search “transgender  
students.”



***Hively v. Ivy Tech. Community College of Indiana*, 853 F.3d 339 (7<sup>th</sup> Cir. 2017) – sexual orientation claim in employment**

- For the first time, a federal appellate court decided (8-3) that an employee may bring a claim of sexual orientation discrimination against an employer under Title VII.
- "The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line..."

***Pollack v. Regional School Unit 75 et al.*, No. 2:13-cv-109-NT (D. Maine April 28, 2017)**

- Parents requested recording device for son, who is nonverbal, as accommodation under ADA Title II/Section 504, claiming it is necessary to give him equal opportunity to participate in and benefit from the school's programs.
- District court decided for the school district on these claims at the summary judgment stage (before trial).
  - The decision by DPHO that the device is not necessary for FAPE, and may even hinder the child's education preclude plaintiffs from establishing essential elements of their claim
- On appeal to 1<sup>st</sup> Circuit

# Executive Branch and Agency Activity

## Civil Rights Enforcement in Schools – Obama Administration

- Robust enforcement
- Many guidance documents
- Increased requirements under Civil Rights Data Collection
- Key areas:
  - Disparities in school discipline
  - Treatment of students with disabilities (restraint; bullying; disparities in identification; academic goals; effective communication; service animals)
  - Treatment of LGBT students (bullying; transgender student records, facilities use, participation in sports)
  - Equity in funding and resources, including teachers
  - Sexual harassment and violence
  - Website accessibility



| Agency Guidance  | NSBA Comment  |
|--|---|
| October 2010 Dear Colleague Letter on bullying and harassment issued by ED Office for Civil Rights                       | (Letter to ED) Enforcement standard goes beyond the law; please clarify so schools can work with agency to keep students safe   |
| November 2014 Dear Colleague Letter on Effective Communication for students with hearing, vision, or speech disabilities | (Letter to ED) Requiring schools to conduct IDEA and ADA analysis for effective communication needs misstates the law and bypasses IDEA process. Will lead to unnecessary burdens on schools and will disrupt services. |
| May 2016 Dear colleague Letter on accommodating transgender students   | (Statement) The guidance expresses an interpretation of Title IX that is unsettled law. A dispute about the intent of the federal law must ultimately be resolved by the courts and the Congress.                       |

## Civil Rights Enforcement in Schools – Trump Administration

### Transgender guidance withdrawal and Instructions to the Field

- February 22, 2017 -- DOJ and ED withdrew the joint guidance issued May, 2016 and issued a brief guidance letter.
- June 6, 2017 – ED OCR said field offices can no longer rely on May 2016 DCL or the predecessor 2015 private letter concerning transgender students' rights under Title IX as a basis for resolving a complaint. Apply Title IX and regulations as interpreted by federal courts. OCR has continuing jurisdiction over many types of claims including different treatment based on sex stereotyping.

### OCR Instructions to the Field re: Scope of Complaints

- June 15, 2017 -- Applies to current and new complaints. No single "type" of complaint will be automatically treated differently in terms of scope, type or amount of data needed, or type or amount of review required by HQ No longer follow rule of requiring last 3 years of data/complaints previously in place for certain claims. Investigations to be considered case-by-case, using existing law and guidance, based on allegations in the complaint.

## NSBA Resource

### NSBA's "Key Federal Agency Guidance 2008-2017"

<https://www.nsba.org/key-federal-agency-guidance-2008-2016>



#### Key Federal Agency Guidance 2008-2017

##### (ED) HIPAA and FERPA FAQs on Student Records November 2008

Joint guidance from the U.S. Departments of Health & Human Services (HHS) and Education (ED) on the application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to student health records.  
<http://www2.ed.gov/policy/gen/guid/hipco/doc/ferpahipaguidance.pdf>

##### (ED) Individuals with Disabilities Education Act Implementation June 2009

Guidance in the form of FAQs regarding key aspects of the implementation of the Individuals with Disabilities Education Act (IDEA):

- [Discipline Procedures](#) - provides guidance on discipline policies enacted for school-age students to personnel in state educational agencies (SEAs) and local educational agencies (LEAs), and families.
- [Disproportionality](#) - provides information regarding the IDEA requirements relating to disproportionality determinations.
- [IEPs, Evaluations, and Reevaluations](#) (rev. Sept. 2011) - provides information to States, SEAs, and LEAs regarding the IDEA requirements related to the various steps and processes in the development and implementation of IEPs, evaluations, and reevaluations.
- [Procedural Safeguards](#) - lists questions and answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities issued in January 2007.
- [Monitoring, Technical Assistance, and Enforcement](#) - provides information on IDEA requirements relating to monitoring, technical assistance, and enforcement.
- [Secondary Transition](#) (rev. Sept. 2011) - lists questions and answers regarding transition services for special education students.

##### (ED) Flexibility and Waivers for SEAs, LEAs, Postsecondary Institutions, and Other Grantee and Program Participants in Responding to Pandemic Influenza (H1N1 Virus)

## Executive Orders on Regulatory Reform

- 13771 (1/30/17) For every one new regulation issued, at least two prior regulations must be identified for elimination, and the cost of planned regulations must be prudently managed and controlled through a budgeting process.
- 13777 (2/24/17) Requires all agencies (except those receiving waivers) to designate a Regulatory Reform Officer and Task Force to oversee and make recommendations to agency head regarding repeal, replacement, modification of existing regulations.

## **ED Notice Requesting Identification of Regulations for Review**

- Notice published late June requests stakeholders to identify for review regulations and guidance that are "unduly costly" and "unnecessarily burdensome." Comments to the Department are due Aug. 21, 2017.

## **Executive Order on Enforcing Statutory Prohibitions on Federal Control of Education**

- April 26, 2017
- Policy of the executive branch: to protect and preserve state and local control of education
- Directs Secretary of Ed. to review all ED regulations and guidance documents relating to specific federal statutes to examine whether they comply with federal laws prohibiting ED from exercising any direction, supervision, or control over areas subject to State and local control; and
- Rescind/revise any regulations or guidance inconsistent with statutory prohibitions within 300 days.

## **Executive Order on Enforcing Statutory Prohibitions on Federal Control of Education**

- Areas identified as subject to state and local control:
  - (i) the curriculum or program of instruction of any elementary and secondary school and school system;
  - (ii) school administration and personnel; and
  - (iii) selection and content of library resources, textbooks, and instructional materials.



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

**[www.nsba.org](http://www.nsba.org)**