



EDUCATIONAL UPDATE

Special Education and a Trump Presidency



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Dear Friends and Clients,

This month's update comes a little late, and many of you may already be closing for the Thanksgiving holiday. Enjoy the much-deserved break. The delay was largely the result of [a small thing that happened earlier this month](#) and my having to work on an article that will appear in the Spring. Here are a few brief updates, with more to come in a few weeks.

Best, Aaron

Thanksgiving Proclamation

By the President of the United States of America, a Proclamation.

Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor; and—Whereas both Houses of Congress have, by their joint committee, requested me “to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness:”

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favor, able interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

George Washington

Transgender issues take center stage again

The Supreme Court decided on Friday, October 28, that it would hear the *Gloucester County School Board v. G.G.* case that I've written about previously. The Court will consider two issues in the case: (1) If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?; and (2) With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?

So what does that mean? The *Auer v. Robbins* case mentioned in the question above addressed the issue of when a court should look to an agency for guidance in interpreting federal statutes and regulations. In other words, each agency is established in law and has regulations that direct its work. The agency heads are able, within certain parameters, to interpret those regulations and guide the agency based on their interpretation. The question for a court is whether an agency's interpretation of its own regulations has crossed a constitutional line or violated another federal law.

In *Gloucester*, the Supreme Court will decide whether the Department of Education's guidance regarding transgender students issued in May 2016 exceeds the agency's authority to interpret its own regulations. The Department interpreted Title IX's language that prohibits discrimination based on "sex" to include "transgender" students as well. In response to the second question, and whether or not the Court gives deference to the agency, the Court will decide whether Title IX's prohibition of "sex" discrimination includes discrimination against transgender students.

As with many Supreme Court cases, this one turns on the interpretation of a federal statute. It's a fairly technical case, even though the ramifications of a Supreme Court decision will have profound effects on schools and other institutions in relation to a very politically and emotionally charged issue.

In my mind, the biggest impact of a Trump presidency is that he will decide the future composition of the Supreme Court. There are a number of justices who are near or above 80 years old, in addition to one current vacancy. Mr. Trump may be able to fill up to four seats on the Supreme Court during four years in office. That is unprecedented, and if it happens, Mr. Trump will leave his mark on the Court for generations to come. This case is one that may be affected. It will not be argued until 2017, and a Trump nominee may be put forward and approved in time to hear the case. With a nine-member court, there could be a lasting and definitive ruling on the matter before June 2017.

Throughout the country, lower courts have ruled in different ways in cases involving transgender issues. A Texas district court issued a nationwide injunction



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preventing the Department of Education from enforcing its interpretation of Title IX in enforcement proceedings against schools. On the other hand, a federal Magistrate judge in Illinois [issued a report and recommendation](#) saying that non-transgendered students do not have a privacy right to avoid sharing restrooms and locker rooms with transgendered students. Such decisions by Magistrate judges are reviewed by District Court judges, so the report and recommendation may not be adopted. I'll keep you updated with any developments.

U.S. Supreme Court hears argument on SPED case

On October 31, the Supreme Court heard [oral argument in *Fry v. Napoleon Community Schools*](#), a case I highlighted in the September issue regarding whether parents were required to exhaust administrative remedies in an action involving overlapping provisions of the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act (ADA), and Section 504.

The justices seemed genuinely conflicted about whether parents should be forced to exhaust their administrative remedies—trying to balance the needs of parents and students against the school's interest in maintaining a structured and principled approach to the dispute process. The government attorney merely suggested that the lower court should be reversed and that the case should be sent back because there was really no longer any legal issue. The justices did not seem to accept that principle, and they want to make a decision that clarifies these processes for schools and parents alike.

If I had to predict, I would say the Supreme Court will decide in favor of the school district. The parents' position would create additional confusion in the courts and for the schools. Essentially, it would allow parents to proceed with IDEA proceedings with the school based on a student's IEP, but also pursue a lawsuit for violations of Section 504 and the ADA, if applicable. This two-track procedure would only confuse the process and potentially lead to inconsistent results. The surer path is to set bright-line rules for parents, schools, and courts to follow.



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I am a member of the Federal Bar Association, which offers a Civics program to schools. If you are interested in bringing a Civics program to your school as described below, I'd be happy to facilitate it. I've participated in these programs in the past and have found that students really benefit from them.



FBA Announces its National Civics Initiative

This year, the FBA—working in conjunction with the Administrative Office of the United States Courts ("A.O.")—will be undertaking a national civics initiative whereby the FBA will:

1. Encourage federal judges to go into schools to meet with middle and high school students—to tell them about the Federal Courts, how civil and criminal cases are decided, and explain what judges do every day;
2. Encourage middle and high school students to come to Federal Courthouses—to meet with federal judges in courtrooms—to talk with the judges and court personnel, and participate in mock criminal sentencing scenarios designed to educate the students about the workings of the Federal Courts;
3. Host a national civics essay contest for middle and high school students;
4. Honor civics teachers throughout the country; and

Trump's views on education are unclear

In [this article in yesterday's *New York Times*](#), one policy expert is quoted as saying that “[t]he fundamental issue is that nobody really knows what the Trump administration is about’ on education.” The article outlines a number of policy [stances](#) [Mr. Trump has taken on education issues](#), but we’ll ultimately have to wait and see. Mr. Trump is still vetting candidates for the Secretary of Education post. Previously, he had questioned the need for and future of the agency. The potential nominees for that position who have been mentioned in the news signal that Mr. Trump will push for more school choice and additional options for children.

5. Help celebrate the importance of Constitution Day & Citizenship Day every September 17.

We have made it easy for Judges to participate in this effort: The A.O. has graciously loaned the FBA a large number of civics materials, written just for judges, that make it easy for judges to meet with students, whether in classrooms or courtrooms. These materials can be found at www.fedbar.org/civics and are grouped by how much time a judge has to spend with students (from as little as 15 minutes to three hours).

Questions?

Comments?

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