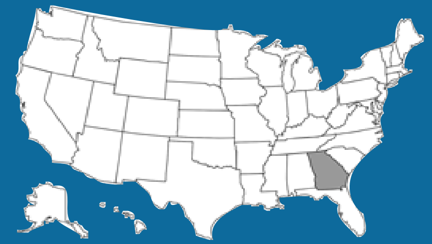
# AT ISSUE

## FEDERAL EDITION

2016 ● Volume 1 ● Issue 3



It is my privilege to present you with Volume 1, Issue 3 of the Federal Edition of *At Issue*.

In preparation for our upcoming 2017 Legislative Session, members of both chambers have been exploring ways to improve our K-12 educational system here in Georgia. At the national level, Congress has renewed legislation authorizing funding for education. This issue explores in detail the Every Student Succeeds Act (ESSA).

During its 2015 term, the United States Supreme Court dealt with a variety of highly contentious cases, five of which are identified and examined in this issue. The tragic loss of Justice Antonin Scalia created an even more challenging situation, which it appears the current eight Justices will continue to face without any replacement for Justice Scalia in the near future.

Finally, in this issue, we look at how rules adopted by the Judicial Conference of the United States will make it easier to pursue anonymous hackers and fight cybercrime.

I hope you find this edition of *At Issue* useful. I want to thank the staff of the Senate Press Office and Senate Research Office for their work in preparing it.

If you have topics to suggest for future publications, please do not hesitate to contact me.

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## Federal Funding

## A Look at the Every Student Succeeds Act (ESSA) in Georgia

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**Georgia Planning for Implementation of the Federal K-12 Education Policy Reauthorization**
In December 2015, Congress passed and the President signed into law the Every Student Succeeds Act (ESSA), the authorizing legislation for education policy funding for federal fiscal years (FFY) 2017-2020. While many aspects of previous federal education funding remain intact, ESSA made several changes since the lapse of the No Child Left Behind Act of 2001 authorization in FFY2007.

Of significance, the ESSA requires each State Education Agency – which is Georgia's Department of Education (GaDOE) – to submit a State Plan to the U.S. Department of Education (USEd) that provides assurance that the state has adopted and will implement challenging academic content standards and aligned academic achievement standards. Georgia's timeline to submit its State Plan to USEd is slated for March of 2017, with implementation in the 2017-2018 school year.

To assist in developing Georgia's State Plan draft, GaDOE created a State Advisory Committee (SAC), which held its first meeting on July 18, 2016. SAC is comprised of 40 members. It includes state agencies, organizations, students, parents, teachers, superintendents, and advocacy groups. In addition, six subcommittees have been formed – referred to as "working committees" – each with one of the following focus areas: accountability, assessment, federal programs to support school improvement, education of the whole child, education and leader development, and communications.

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*(A Look at the Every Student Succeeds Act (ESSA) in Georgia – continued from page 1)*

GaDOE and State Superintendent Richard Woods began holding public feedback sessions around the state on August 24, 2016 to hear comments through topical working groups on aspects of future implementation of ESSA in Georgia.

**ESSA Makes Program Changes, Creates New Block Grant**

In addition to eliminating many programs that were authorized but are currently unfunded, ESSA also authorized many new programs as competitive opportunities for states. Authorized at $1.65 billion in FFY2017 and $1.6 billion in FFYs2018-2020, the largest new program is a consolidation of several programs as a new block grant called Student Support and Academic Enrichment. This block grant aims to address well-rounded education, improving conditions for student learning, and improving the use of technology.

Georgia's estimated authorized share is $55.9 million in FFY2017, and requires most of the funding to be made by allocations to Local Education Agencies (LEAs). States must reserve not less than 95 percent of the allotment to make allocations to LEAs, reserve not more than 1 percent of the allotment for administrative costs, and utilize remaining funds for state activities. The minimum LEA allotment is $10,000, while LEAs receiving at least $30,000 must spend 20 percent on activities to support health and safety, 20 percent to support well-rounded educational opportunities, and an unspecified portion on effective use of technology.

**Development of the Plan Underway**

The GaDOE is currently hard at work developing and drafting a compliant State Plan. The stakeholder feedback sessions ended very recently; and, presently, the several working committees are busy drafting language for the plan. January 2017 is scheduled for the public comment period, as well as review opportunities for the Governor, State Board of Education, and the State School Superintendent. Presentations will also occur in January to the House and Senate Education Committees. If necessary, working committees will reconvene in February of 2017 for revisions, in order to make the final submission to USEd in March of 2017. *- MD*

For more information about the State Advisory Committee, please see:
http://www.gadoe.org/External-Affairs-and-Policy/communications/Pages/ESSA.aspx

To read the ESSA in its entirety, please see:
https://www.congress.gov/114/plaws/publ95/PLAW-114publ95.pdf

## Federal Regulations and Policy

# U.S. Supreme Court 2015 Term

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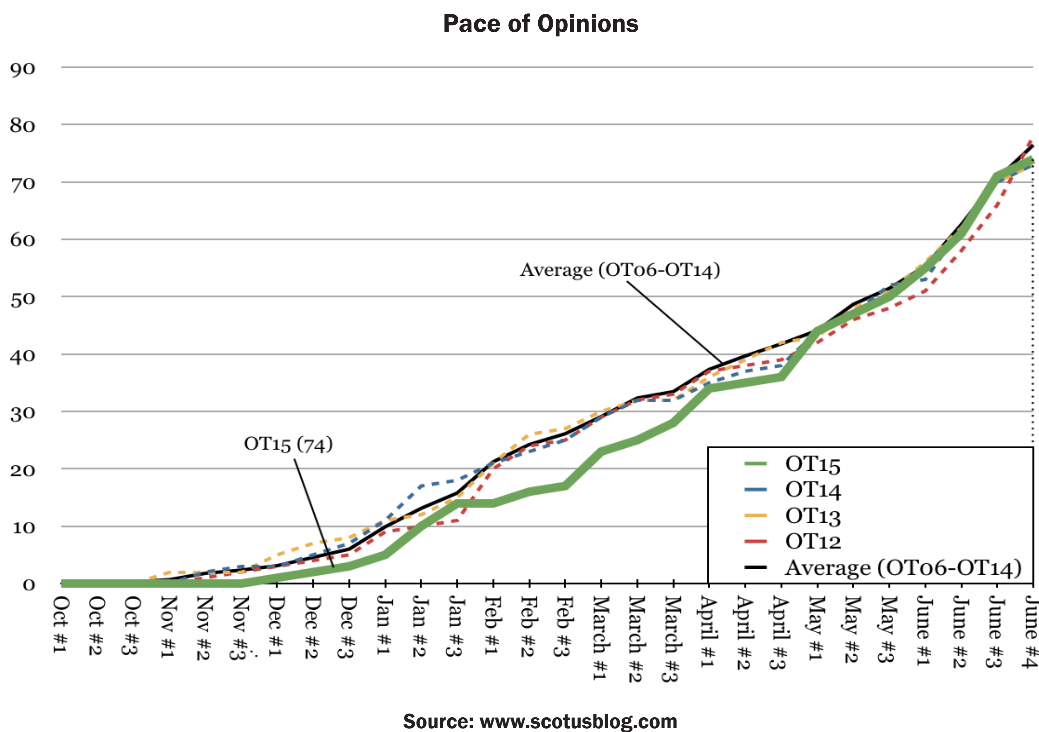
**An Overview of the Court**

Article III, Section I of the U.S. Constitution establishes the Supreme Court of the United States and vests the power with Congress to determine much of its jurisdiction. Presently, that jurisdiction includes: final appellate review over all federal courts; review over state cases involving issues of federal law; and original jurisdiction over a select number of cases.

A party to a cause of action may submit a petition of certiorari to the Court in order to have their case heard and decided. Astoundingly, the Court receives over 7,000 petitions annually. The Court typically grants a writ of certiorari to 80 cases per year and decides each by majority vote. Terms begin on the first Monday of each October and continue until either June or July of the following year. Each term consists of two week intervals of sittings, during which the justices hear cases and deliver rulings. Each term also consists of recesses, during which time the justice's deliberate on cases and author opinions.

Since 1869, the Court has operated with one chief justice and eight associate justices, all appointed by the President and confirmed by the Senate. Justices enjoy life tenure unless they elect to resign, retire, or are convicted upon impeachment. Since the unexpected death of Justice Antonin Scalia in February of 2016, the Court has functioned with eight sitting justices. As a consequence, several "4-4 split" votes have occurred. Under a 4-4 split vote, the lower court's ruling on the case is automatically upheld. However, a Court's split decision cannot be considered as binding precedent.

Hoping to fill the ninth spot, President Obama nominated Merrick Garland, Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, but the Senate has yet to have taken a vote on Judge Garland's nomination.

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**The "Famed Five": Five Decisions Worth Highlighting**
The Court's 2015 term marked what was perhaps its most trying term in recent history, a point which was only exacerbated by the loss of Justice Scalia. Five of the most controversial cases are summarized below.

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## *Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016)*

Since the adoption of our fundamental rights jurisprudence, the Court's often – and often imprudent – foray into policy-making has had the opposite effect of settling debate. See, for example, the reemergence of the abortion issue late last term in *Whole Woman's Health v. Hellerstedt*, where two provisions of a Texas House Bill were challenged as unconstitutional. The first provision required physicians performing abortions to have active admitting privileges at a hospital located within 30 miles of wherever an abortion was to be performed. The second provision mandated that the "minimum standards for an abortion facility must be equivalent to the minimum standards adopted under the Texas Health and Safety Code section for ambulatory surgical centers."

Arguing that the two provisions violated the Fourteenth Amendment, a group of abortion providers filed suit in Federal District Court. Relying primarily on *Planned Parenthood v. Casey* the Court applied its "undue burden test," which provides that a burden is undue "and therefore renders a provision of law invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Casey's loom, 25 years later, is far reaching, as the Court struck down both Texas provisions, arguing that their burdens were far greater than any benefit that could be bestowed on society.

In reference to the admitting-privileges requirement, the Court specifically noted that the purpose of the provision provided no health benefit to women. The Court looked to several factual findings and determined that risks of complications during the first trimester are low; the quality of care that women receive is not affected by whether the abortion provider has admitting privileges; the abortion itself almost always occurs after the patient has left the facility; and women in need of medical attention subsequent to the procedure often seek hospitals closest to where they live.

In its 5-3 holding that the surgical-center requirement likewise provided no health benefit to women, the Court noted that mandating such requirements of abortion facilities would be too costly, was unnecessary, and found that women would not obtain an enhanced quality of care at an ambulatory surgical center as opposed to a previously licensed facility.

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(U.S. Supreme Court 2015 Term - continued from page 3)

## *United States v. Texas, 136 S. Ct. 2271 (2016)*

In July of 2012, the Department of Homeland Security (DHS) created the Deferred Action for Childhood Arrivals (DACA) program. DACA is an immigration program that allows various undocumented aliens present within the United States, and who entered the country prior to their sixteenth birthday, to receive a renewable two-year work permit, thereby exempting them from deportation. Following the creation of DACA, DHS proposed a similar immigration program expanding DACA to grant deferred action to illegal aliens who were parents of either a U.S. citizen or a "lawfully present resident" and met five additional criteria. The expansion program was formally known as Deferred Action for Parents of Americans (DAPA). If implemented, DAPA would have made 4.3 million people eligible for "lawful presence" status, thus allowing those individuals to receive federal, state, and local benefits.

Unhappy with the potential consequences of DAPA, the policy was challenged by 26 states, including Texas, which had a disproportionally large stake in the debate. The States sued in Federal District Court asking the court to prevent DAPA's implementation. They argued that DAPA violated federal statute, DHS lacked the authority to implement the program, and that DAPA would violate the Take Care Clause vested in Article II of the U.S. Constitution.

The District Court ruled in favor of the States. The federal government appealed. Affirming the District Court's ruling, the Court in a 4-4 split decision held that DAPA was unconstitutional. The Court emphasized that the States would suffer enormous injury if DAPA were implemented. It urged that if permitted to go into effect, DAPA would enable at least 50,000 illegal aliens in Texas alone to satisfy the "lawful presence" requirement for employment authorization. This in turn would allow beneficiaries to apply for state benefits such as state-issued drivers licenses. Because state law already in effect subsidizes licenses for aliens, states would lose a tremendous amount of revenue and would be forced to change their law to escape DAPA's consequences.

## *Foster v. Chatman, 136 S. Ct. 1737 (2016)*

In 1986, Georgia law enforcement found a white woman dead in her burglarized home. Shortly thereafter, Timothy Foster, a black male, confessed to killing the woman and was charged with murder and burglary. During Foster's trial, both Foster and the prosecution had the opportunity to exercise peremptory strikes against the qualified jurors during jury selection. Peremptory strikes allow either party to reject potential jurors without stating a reason. Exercising their peremptory strikes, the prosecution struck all four black prospective jurors from the jury pool, creating an all-white jury.

Found guilty of murder and sentenced to death, Foster challenged the strikes arguing that they were racially motivated and in violation of the rule laid out in *Batson v. Kentucky*. Batson held that excluding jurors on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment. Eventually procuring the prosecution's notes written during trial through the Georgia Open Records Act, Foster discovered that the notes possessed discriminatory intent. The notes included the highlighting in green of the black qualified jurors on the jury voir dire list. Foster also found a handwritten document entitled "definite NO's" listing the names of every potential black juror, and questionnaires completed by several of the prospective black jurors in which their race had been circled on each form.

Upon the denial of the Georgia Supreme Court to hear his case, Foster petitioned the Court and was granted certiorari. In a 7-1 decision, the Court held that based on a three-part test established in Batson, the prosecution failed to prove that there was a race-neutral basis for striking the potential jurors and that the documents procured indicated "purposeful discrimination." Moreover, the Court held that "[T]he focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury" and that Foster's right to a fair trial by an impartial jury had been violated. The conviction was reversed and remanded to the lower court.

## *Fisher v. Univ. of Tex., S. Ct. 2198 (2016)*

In *Fisher*, the Court was tasked with determining whether the race-conscious admissions process instituted by the University of Texas violated the Equal Protection Clause of the Fourteenth Amendment. Pursuant to a Texas House Bill which passed in 1997, Texas students who ranked in the top 10 percent of their high school class were guaranteed admission to any public university within the state. As a consequence, up to 75 percent of the University's incoming class was filled simply by applying Texas law. The remaining 25 percent of the University's applicants were admitted based on a myriad of factors, including a Personal Achievement Score, which took into account an applicant's race. Denied admission to the University, white female Abigail Fisher sued the flagship institution.

Fisher alleged that the University's consideration of race as part of its holistic admissions process disadvantaged her, violating the Equal Protection Clause. In a 4-3 decision (Justice Kagan abstained), the Court held that the University's consideration of race in admitting students was necessary to achieve its purpose of maintaining diversity within the student body. The Court emphasized that "enrolling a diverse student body promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races."

### *Evenwell v. Abbott, 136 S. Ct. 1120 (2016)*

In a unanimous 8-0 decision, the Court held that based on deeply rooted constitutional history and longstanding practice, states may draw its legislative districts based on total population rather than voter eligibility. Essentially, the Court ruled that states may continue to count those who lack the right to vote in their legislative district makeup. The "total population" method does not take into account a resident's legal status.

Texas voters challenged Texas' uniform method of drawing its legislative districts on the basis of total population, insisting that the method was in violation of the Equal Protection Clause. The Texas voters urged that the method should instead be based on voter eligibility, as the current method produces unequal districts when measured by a voter-eligible population.

Defending the Equal Protection Clause and building upon the "one-person, one vote" principle established 54 years ago in *Baker v. Carr*, the Court reiterated their ruling in *Wesberry v. Sanders*, in which it invalidated Georgia's malapportioned congressional map because "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. [J]urisdictions must design both congressional and state-legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment."

Resting primarily on historical precedent and defending the argument that the "total population" method ignores a resident's legal status, the Court noted, "As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote".

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**What to Expect From the Court**

The Court's 2016 term is now in session. With no replacement in sight for the late Justice Scalia, the Court will continue to hear cases with eight sitting justices. Most would agree that such a dynamic has impacted which cases the Court has decided to hear. Though the current term is expected to be much less controversial, some cases are still marquee. *Samsung Electronics Co. v. Apple* exposes a deeply contentious patent battle; *Fry v. Napoleon Community Schools* questions whether a Michigan school receiving federal funding violates the ADA by failing to allow a severely disabled child to bring her service dog to school; *In Star Athletica, LLC v. Varsity Brands, Inc.* asks whether particular pieces of clothing can be copyrighted; and *Bethune-Hill v. Virginia State Board of Elections* deals with racial gerrymandering. - *KR & KL*

# Federal Rule

## Federal Courts Relax Venue Requirements to Pursue Anonymous Hackers

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After wrapping up a long day of work, John returns home, tosses his keys on the counter, and opens his laptop. He rolls his eyes at the dozens of spam emails clogging his inbox and fires off a couple of notes to his employees. Reaching the last email, John reads an alert from his local bank informing him of new security features to his account and encourages him to sign up for added protection. He clicks the link, fills out his information, and logs off for the evening. A week later, John reviews his checking account online. Mortified, he finds several failed six-digit wire transfers and immediately dials his bank to freeze his account.

Following an extensive FBI investigation, agents discover a hacker gained unauthorized access to John's email account and created a replica, differing by only one letter, in breaching his bank account and attempting the failed transfer. While the agents know what happened, a more pressing question lingers: Who did this? The hacker employed software masking his actual whereabouts (known as a proxy), so the Government faces a chicken-and-egg situation. To determine the computer's location, a warrant is needed because secret software would need to be installed on the hacker's computer revealing its address; yet, in order to properly request the warrant, the federal government must demonstrate that the computer falls within the territorial limits of the court—the court's venue. If venue cannot be satisfied as required by Rule 41 of the Federal Rules of Criminal Procedure, the court cannot hear the case.

This hypothetical closely mirrors the case of *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013). Because the federal government failed to show that the person or property could be found within the district of the court, the warrant could not issue. Magistrate Judge Stephen Smith wrote, "there may well be a good reason to update the territorial limits of [the rule of venue] in light of advancing computer search technology. But the extremely intrusive nature of such a search requires careful adherence to the stricture of Rule 41 as currently written . . . ."

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*(Federal Courts Relax Venue Requirements to Pursue Anonymous Hackers – continued from page 5)*

Five months after Judge Smith's order, the Judicial Conference, the national policy-making body for the federal courts, considered a change to Rule 41 to permit out-of-district searches when the location of a computer is unknown.

For example, persons sending fraudulent emails to victims (such as the example above) or child abusers sharing pornography often use proxy services that hide their internet protocol address. Proxy services function as intermediaries for internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. As a result, investigators have no means of confirming the location of the computer. Under the current Rule, even if the New York Stock Exchange were hacked tomorrow using anonymizing software, the federal government would have no venue to pursue a charge.

Another scenario occurs when multiple computers become infected with software and form a "botnet"—a collection of compromised computers that operate under remote command. Because these botnets can range from several computers to millions, without a change to Rule 41, warrant applications must be coordinated across many federal judicial districts, or possibly all 94.

With these possibilities in mind, the Judicial Conference proposed an amendment to Rule 41(b) that reads:

**Rule 41. Search and Seizure**

* * * * *

**(b) ~~Authority to Issue a Warrant~~Venue for a Warrant Application.** At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

**(6)** a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

The Judicial Conference added a Committee note stating the revision is not substantive—that this language only provides a venue to consider an application for a warrant, but the constitutional requirements for the issuance of a warrant must still be met.

This language was necessary if only to appease the blowback received from many members of the personal privacy community who worry the amendment will relax or undercut protections guaranteed by the Fourth Amendment. Others argued warrant applications of this type should fall under requirements similar to those found in the Wiretap Act, 18 U.S.C. § 2518, or that the searches, even if authorized domestically, would run afoul of international law and state sovereignty. Lastly, some argued that the "procedural amendment" is tantamount to a substantive change of law, exceeding the authority granted by the Rules Enabling Act, 28 U.S.C. § 2072.

The Judicial Conference approved the amendment, waving away the foregoing objections as misunderstandings of the differences between procedure and substance and reassuring those who would disagree that judges will address constitutional concerns on a case-by-case basis. The amended Rule 41 took effect December 1, 2016, with no objections from Congress.

The evolving threat of terrorism, espionage, and cybercrime and the government's response to each will continue to clash against the civil liberties protected by the Constitution. The question remains as to how courts will strike the proper balance between these protections and the seeming invisibility of virtual crime. - *DE*

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