

# Clearinghouse

School Law Bulletin *looks at recent court decisions and attorney general's opinions*

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## Cases and Opinions That Affect North Carolina

### University orientation program, involving study of a book about the Islamic faith, was constitutional.

*Yacovelli v. Moeser*, 2004 WL 1144183, 2004 WL 1541594 (M.D.N.C. 2004).

**Facts:** Each fall the University of North Carolina at Chapel Hill (UNC) conducts an orientation program for incoming freshmen before classes begin. Its purpose is to (1) stimulate discussion and critical thinking around a current topic; (2) introduce students to academic life at UNC; (3) build a sense of community among students, faculty, and staff; and (4) provide a common experience for incoming students. For the 2002 orientation, UNC selected parts of Michael Sells's *Approaching the Qur'an: The Early Revelations*. Though initially all incoming students were required to read the selected passages and write a paper in response to them, protests from some students and parents caused UNC officials to allow students who had religious objections to substitute a paper addressing why they chose not to read the book.

The plaintiffs (unnamed students and a taxpayer who was dismissed for lack of standing) filed suit against UNC. They alleged that the orientation program (1) violated the Establishment Clause of the Constitution by using a book that painted a favorable picture of the Islamic faith, thereby endorsing it; and (2) violated the Free Exercise Clause by both forcing students to read a book endorsing Islam and requiring them to write about and share their personal religious beliefs.

UNC moved to dismiss the claims before trial.

**Holding:** The federal court for the Middle District of North Carolina granted UNC's motion.

An Establishment Clause claim will not be sustained if the government can show that the disputed conduct (1) had a secular purpose; (2) did not have the primary effect of advancing or inhibiting religion; and (3) did not excessively entangle government with religion. UNC's stated secular purpose for its orientation program satisfies the first requirement. The study of religious texts can be secular, and the chosen text in this case, according to its author, strove neither to promote nor to refute the Qur'anic message; rather, it sought to make one of the most influential texts in human history available to a diverse audience.

The plaintiffs' allegations also fail to establish that the reading promoted or advanced Islam. The reading, writing, and discussions in the orientation served as an anthropological, literary, and historical review of one of the world's most widespread and controversial religions. Plaintiffs' claim that they were coerced into participating in the orientation program was to no avail because when a school is not advancing religion, the susceptibility of its students to pressure—from peers or otherwise—is not relevant to Establishment Clause analysis.

Because the orientation activities did not endorse or advance religion, there was no improper entanglement between UNC officials and members of the Islamic faith. Thus, plaintiffs failed to show an Establishment Clause violation.

The plaintiffs' free exercise claim fared similarly. Even though the book was not a religious reading, UNC allowed students to decide against reading it if they wished. Therefore, the plaintiffs cannot complain that they were forced into the exercise of some practice that violated their religious beliefs. Their only remaining bases for complaint,

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then, are the writing exercise and the discussion group. But the court found that neither of these activities compelled affirmation of any particular religious belief, lent the university's power to a particular side in any religious controversy, imposed special burdens on the basis of religious views, or punished the expression of any religious doctrines. The plaintiffs' allegations thus provided no basis for concluding that UNC compelled affirmation of Islam or that it disfavored students who held any particular set of religious beliefs.

*Editor's Note: This digest combines two opinions from the federal district court. In addition, it omits discussion of certain arguably important issues as not germane to the heart of the matter—whether study of Approaching the Qur'an was a violation of the Establishment or Free Exercise clauses. One such omitted issue concerns "standing"; as the reader will note, it is an issue that gets unusually ample play in several of the digests below.*

**Student's noncustodial father does not have standing to challenge constitutionality of the Pledge of Allegiance's "under God" language or the school district policy requiring its daily recitation.** Elk Grove School District v. Newdow, 124 S. Ct. 2301 (2004).

**Facts:** Michael Newdow is the father of a child who attended school in the Elk Grove (Calif.) school district. As his child's "next friend" (one who represents an infant or other persons not able to represent themselves in court), Newdow filed suit seeking a declaration that a 1954 law inserting the words "under God" into the Pledge of Allegiance violated the Establishment and Free Exercise clauses of the U.S. Constitution. He also sought an injunction prohibiting the school district from requiring the daily recitation of the pledge. The Ninth Circuit Court of Appeals ruled that Newdow had standing as a parent to challenge the pledge on the basis that it interfered with his right to direct the religious education of his child; the court concluded that the 1954 law and the school district's policy violated the Establishment Clause.

After the Court of Appeals ruling, Sandra Banning, Newdow's ex-wife and the mother of the child, filed a motion in state court to intervene in the suit, arguing that as exclusive legal custodian of the child she (Banning) had determined that the suit was not in the child's best interests. She asked that the child not be included as an unnamed party in the suit and that Newdow not be allowed to proceed as her next friend. The court granted her request.

Newdow then asserted that his own interest as noncustodial parent in objecting to unconstitutional government action affecting his child gave him standing to pursue his claim. The Court of Appeals found that Newdow did have standing to seek redress for alleged injury to his own parental interests,

notwithstanding the objection of Banning as the sole legal custodian. The school district appealed to the U.S. Supreme Court, which granted review.

**Holding:** The Supreme Court found that Newdow did not have standing.

*Standing* is a doctrine that prescribes the kinds of cases and controversies federal courts can hear. One branch of standing doctrine places prudential limits on federal court jurisdiction; for example, a litigant cannot raise another person's legal rights, assert a general grievance more appropriately addressed by the legislative branch, or bring a complaint that falls outside the zone of interests protected by the law invoked. Another long-observed prudential limitation on standing is that cases involving substantial domestic relations components are inappropriate for federal courts (because domestic relations are almost exclusively governed by state law).

Under California law, the Court found, Newdow does have a right to influence his child's religious upbringing. However, this right does not exist in isolation; it coexists with Banning's right as a parent generally and, specifically, as exclusive legal guardian, as well as with the interests of a young child involved in a highly public dispute over her custody and a highly contentious debate about the meaning of a national ritual. Although the child is the source of Newdow's standing claim, his interests in this case do not parallel hers. In addition, Newdow does not seek just to influence her religious upbringing; he also seeks to prevent her exposure to religious views that her mother endorses. In this situation, concluded the Court, it is inappropriate to exercise jurisdiction.

**State's exclusion of theology majors from class of recipients eligible for postsecondary school scholarships is constitutional.** Locke v. Davey, 124 S. Ct. 1307 (2004).

**Facts:** The State of Washington established the Promise Scholarship Program to help academically gifted students with postsecondary education expenses. To be eligible for a scholarship, students must graduate from a Washington high school, meet certain academic criteria, and have a family income of less than 135 percent of the state's median income. In addition, students must enroll in an eligible postsecondary institution within Washington and may not pursue a degree in theology. Private institutions, including religiously affiliated private institutions, qualify as eligible postsecondary institutions.

Joshua Davey planned to use his Promise Scholarship to attend Northwest College, a private Christian college in Washington. Only when he met with the financial aid officer at Northwest did he learn that he could not use the scholarship, as he had intended, to pursue a theology degree. Davey then filed suit against various state officials, charging that the theology-degree exclusion violated his right to free exercise of religion (among other constitutional provisions).

When his case reached the U.S. Supreme Court, the Ninth Circuit Court of Appeals had already ruled that the state had unconstitutionally singled out religion for unfavorable treatment and that its interest in avoiding Establishment Clause violations was not compelling.

**Holding:** The Supreme Court reversed the Ninth Circuit's ruling.

The First Amendment's religion clauses provide that government shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Establishment Clause and the Free Exercise Clause, however, are frequently in tension. The Court noted that while there are certain actions that the former *permits* the state to take, they are not necessarily *required* by the latter. Thus permitting Promise Scholarship recipients to pursue theology degrees is not inconsistent with the Establishment Clause—and Washington State does not contend otherwise. But does the Free Exercise Clause require the state to do so?

Davey argued that because the Promise Scholarship was a generally available benefit, its specific disfavoring of religion was unconstitutional. The Court disagreed, reasoning that training for a religious profession is distinctly different from training for a secular profession. There are few areas, continued the Court, where a state's anti-establishment interests come more into play: since our country's founding, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion. For this reason, many states formally prohibited the use of tax funds to support the ministry in their founding constitutions.

The state's exclusion of theology degrees from its program is thus not evidence of hostility toward religion (evidence that would be outweighed, in any event, by the program's inclusion of religious schools in the class of institutions whose students are eligible for the scholarships) but is a product of this distinction.

**Transfer of student with disability to new school did not violate stay-put provision because the overall educational environment remained substantially the same.** *A.W. v. Fairfax County School Board*, 372 F.3d 674 (4th Cir. 2004).

**Facts:** A.W. attended elementary school in the Fairfax County (Va.) public school system. There he was assigned to the "gifted and talented" program and received one hour per week of special education to address his emotional disability. The disability made it difficult for him to concentrate and complete academic tasks and led him to avoid many tasks. During sixth grade, A.W. began exhibiting new misbehaviors, including an incident in which he persuaded another student to place a threatening message in the computer file of a student A.W. disliked.

School officials suspended A.W. for two weeks and, as required by the Individuals with Disabilities Education Act (IDEA), held a "manifestation determination review" (MDR) to determine the extent to which A.W. could be disciplined. The MDR found both that A.W.'s individualized education plan (IEP) was appropriate and that his disability did not inhibit his capacity to appreciate the wrongfulness of his behavior. Therefore, officials were free to punish A.W. as they would any other student.

Officials directed that A.W. be transferred to the gifted and talented program at another Fairfax County public school, where he would continue to receive special education. Before the transfer, however, his parents instituted due process proceedings. At the due process hearing, the hearing officer affirmed the MDR's conclusion and the transfer, unpersuaded by evidence from A.W.'s psychologist that the boy suffered from attention deficit hyperactivity disorder (ADHD) and oppositional defiance disorder (ODD)—both of which significantly contributed to his misbehavior.

A.W. was transferred and, after unsuccessful attempts to enroll him at the junior high school he would have attended if he had not been transferred, his parents sought judicial review of the transfer decision. They argued that the transfer violated A.W.'s right (under the IDEA) to stay in his then-current placement pending resolution of due process proceedings; they also challenged the MDR determination that his disability did not contribute to his misbehavior.

**Holding:** The Fourth Circuit Court of Appeals affirmed the rulings below.

The court first rejected A.W.'s claim that the IDEA's stay-put provision (school officials may not change a student's "then-current education placement" while due process proceedings are pending) required school officials to keep him in the specific gifted and talented classroom to which he was originally assigned. Because the IDEA does not define "education placement," the court sought a definition that comported with the statute's twin goals: providing all students with disabilities a free appropriate public education (FAPE) and providing it in the least-restrictive environment (LRE) possible. Considering these goals, the court concluded that the touchstone of educational placement is not a precise location but rather the environment in which educational services are provided. Because A.W.'s transfer replicates the educational program contemplated by his original assignment, is consistent with the LRE requirement, and provides him access to a FAPE, the IDEA's stay-put provision has not been violated.

The court next found the MDR committee's conclusion sound. A.W.'s evaluation for special education services concluded that his ADHD, which caused an inability to concentrate and hyperactivity, required educational modifications to help him thrive academically. The court noted the evaluation's

conclusion that although A.W.'s ODD could lead to interpersonal and emotional difficulties, outside counseling could address those issues. Thus, the court found, ADHD (not ODD) was the primary disability for which A.W. was receiving special education; it was therefore appropriate for the MDR to decide that his qualifying disability did not cause his misconduct.

**School district unconstitutionally denied evangelical organization access to its take-home flyer forum.** *Child Evangelism Fellowship v. Montgomery County*, 373 F.3d 589 (4th Cir. 2004).

**Facts:** The Montgomery County (Md.) Public School District permits certain governmental and nonprofit organizations to use its take-home flyer forum to distribute information for students and parents in district schools. The Child Evangelism Fellowship (CEF) of Maryland, which organizes Good News Clubs to evangelize young boys and girls (five to twelve years old), sought permission to use the take-home flyer system to distribute information about its clubs. The school district denied CEF access—although other religious groups had been granted access—because of its evangelical viewpoint. CEF filed suit, alleging that this denial was unconstitutional viewpoint discrimination in violation of its right to free speech. It asked the federal court for the district of Maryland for a preliminary injunction ordering the school officials to allow CEF access to the take-home flyer system. The district court denied the injunction, finding that CEF had not shown a high probability of success on the merits of its claim at trial. CEF appealed.

**Holding:** The Fourth Circuit Court of Appeals reversed the district court ruling and remanded the case for the entry of a preliminary injunction and further proceedings in accord with its opinion.

CEF correctly contended, and the school district appropriately conceded, that denial of access to the take-home flyer system constituted a free speech violation. The district allows widespread access to the system, including access to many other religious groups. To deny access to CEF because of its religious viewpoint—that is, a proselytizing and evangelical viewpoint—violates well-established Supreme Court precedent. The district countered that the viewpoint discrimination was justified by its compelling interest in avoiding an Establishment Clause violation.

The district was at no great risk of violating the Establishment Clause, found the court. Neutrality toward religion is a significant factor in finding that government programs do not constitute an establishment of religion. And, continued the court, when such neutrality is shown, the otherwise heightened impressionability of elementary school students is not relevant to the Establishment Clause issue. In any event,

the risk of students misperceiving CEF's inclusion in the take-home flyer system as an endorsement of religion is no greater than the risk that they would perceive its exclusion as hostility toward religion. School officials attempted to distinguish this situation from cases in which government is simply neutral to religion. In this case, they explained, there was the potential for perceived endorsement, coercion, and entanglement because (1) the flyer distribution would occur during school hours, (2) the flyers sought parental permission to attend Good News meetings, and (3) teachers and staff would be involved in distributing the flyers. The court was not persuaded. Flyer distribution, it noted, would occur during non-instructional time, and there was no suggestion that the flyer content would become part of the curriculum. Requiring students to carry home, among other items, a flyer containing an invitation to participate in religious activity does not coerce religious activity. Finally, the court reasoned, the participation of teachers and staff would be merely administrative.

Because the district's concern about an Establishment Clause was unlikely to trump CEF's free speech rights, the district court had inappropriately denied the preliminary injunction.

**Release of student records for the purpose of civil rights prosecution by the federal government is authorized under the Family Educational Rights and Privacy Act.** *United States v. Bertie County Board of Education*, 319 F. Supp. 2d 669 (E.D.N.C. 2004).

**Facts:** In an ongoing desegregation case against the Bertie County Board of Education (initiated in 1968), the federal government sought an order compelling the board to provide two items: (1) the name and race of each student who had requested a transfer to or from the school system; and (2) for each student in the Bertie county school system, name, student identification number, address, grade, school, home-room number, birth date, race, sex, telephone number, any special education designations, and whether the student had transferred to the school. The board responded that it was happy to provide the requested information but did not believe it had the authority to do so under the Family Educational Rights and Privacy Act (FERPA), which prohibits release of a student's personal information without parental consent. Under FERPA, the federal government may cut off funding to a school system that does not comply with the act.

**Holding:** The federal court for the Eastern District of North Carolina ordered the board to release the records.

The court found that FERPA allows release of personally identifiable student information without parental consent to an authorized representative of the U.S. attorney general for law enforcement purposes. Neither the statute nor case law provides a definition of *law enforcement* in this context.

Nonetheless, cases interpreting the term in other statutory contexts indicate that it applies to enforcement of non-criminal as well as criminal laws. Thus, as the United States was attempting to enforce the Civil Rights Act of 1964, the court determined that this use constituted a law enforcement purpose.

**Court dismisses transportation company and trade association challenge to the validity of county board of education's contracting requirements.** *North Carolina Motorcoach Association v. Guilford County Board of Education*, 315 F. Supp. 2d 784 (M.D.N.C. 2004).

**Facts:** The Guilford County Board of Education supplemented the state's recommended guidelines on the hiring and chartering of motor coaches to transport public school students with a "Request for Information" (RFI) form. The RFI provided that in order to qualify for the board's list of approved providers, carriers were required to submit an extensive list of documentation and information, including certification of at least \$10 million in liability insurance. In addition, the RFI made carriers subject to the board's inspection of its motor coaches and review of confidential information about their operators. Carolina American Tours and the North Carolina Motorcoach Association (hereinafter the plaintiffs) filed suit against the board. They charged that the RFI—which had the effect of favoring in-state carriers over out-of-state carriers—violated both the Supremacy and Commerce clauses of the U.S. Constitution and constituted tortious interference with contract. The board moved to dismiss the claims before trial.

**Holding:** The federal court for the Middle District of North Carolina granted the board's request.

The Supremacy Clause of the Constitution provides that federal laws preempt conflicting state laws. The court rejected the plaintiffs' several arguments for why the Federal Motor Carrier Safety Act (FMCSA) preempted the RFI. First of all, said the court, the FMCSA does not expressly preempt the RFI, because only the federal secretary of transportation can make such a determination, and the secretary has never so determined with respect to the RFI. Nor do the plaintiffs present any support for their contention that in enacting the FMCSA Congress intended to occupy the entire field of motor-carrier safety to the exclusion of the states. Finally, the RFI is not preempted by any direct conflict with the FMCSA. The plaintiffs contended that the RFI's inspection requirement would reduce highway safety in violation of the FMCSA. But, the court ruled, the RFI would only be preempted if compliance with the RFI inspection would make compliance with federal inspections impossible—a state of affairs plaintiffs have failed to show. Therefore the RFI can coexist in peace with the FMCSA.

The Commerce Clause prohibits state action that places an undue burden on interstate commerce. The board, however, argued that its activity fell under an exception to the Commerce Clause known as the "market participant exception." Under this exception, when the state is acting in its proprietary capacity as a purchaser or seller, it may favor its own citizens over others. The plaintiffs disputed this claim, arguing that in adopting the RFI the board was acting as a regulator rather than a market participant by preventing the plaintiffs from entering into contracts with individual public schools in Guilford County. The court found this argument without merit, because under state law schools in Guilford County are able to enter into contracts only to the extent that the board delegates to them its authority to do so. In effect, individual schools are without a separate legal existence from the board. Therefore, in adopting the RFI, the board did not regulate the conduct of others but only informed prospective carriers about the terms on which it would participate in the motor carrier market. The court ruled that the market participant exception to the Commerce Clause applies in this situation.

Having found both of the plaintiffs' federal claims without merit, the court concluded that the same was true of the state law interference-with-contract claim. Such a claim requires a showing that the defendant (here the board) induced a third party to abstain from performing or entering into a contract with the plaintiff. This argument, like the Commerce Clause claim, rests on the contention that the individual schools within Guilford County are empowered to make their own contracts and that the board was exerting deleterious influence. As the court found that the board itself was the only party empowered to make contracts, there was no third party to be involved in the contractual transaction.

**In an unpublished decision, court affirms (1) that transportation company and its trade association lacked standing to challenge North Carolina Board of Education recommendations for hiring motor coaches; and (2) that the board's transportation director did not defame them.** *North Carolina Motorcoach Association v. North Carolina State Board of Education*, 103 Fed. App. 481 (4th Cir. 2004).

**Facts:** The plaintiffs in the above case also sued the State Board of Education, again contending that the recommended guidelines on hiring motor coaches (from which Guilford County developed its RFI) violated the Supremacy and Commerce clauses of the Constitution. They also alleged that the board's director of transportation, Derek Graham, defamed them. The federal court for the Eastern District of North Carolina dismissed these claims, and the plaintiffs appealed.

**Holding:** The Fourth Circuit Court of Appeals affirmed the dismissal in an unpublished opinion.

The plaintiffs lacked standing to pursue their constitutional claims against the board. Because the board's guidelines were only recommended, not required, the plaintiffs failed to show that the publication of the guidelines actually caused their alleged injury (decreased ability to contract with North Carolina schools). This conclusion is buttressed by the fact that several school districts declined to adopt the guidelines. Without being able to show that the guidelines caused their injury, the plaintiffs cannot show that rescission of the guidelines would redress their injury.

The defamation claim concerned a statement, made by Graham in a transportation report, to the effect that motor coaches do not meet all the safety standards required of school buses and are not necessarily as safe as such vehicles. These statements, found the court, did not directly impugn the plaintiffs' professional reputations. Further, the statements Graham made were substantiated by various provisions of the Federal Motor Vehicle Safety Standards.

**Coach was neither dismissed nor demoted from his position.** *Winbush v. Winston-Salem University*, \_\_\_ N.C. App. \_\_\_, 598 S.E.2d 619 (2004).

**Facts:** In 1994 Winston-Salem University (WSU) hired Michael Winbush in a "Recreation Worker II" capacity to coach football and women's softball. In April 2000 WSU commended Winbush for his coaching performance and promised him a 10 percent raise effective July 1, 2000. However, in June 2000, a dispute arose when Winbush scheduled a football camp without seeking prior approval from his supervisor. Thereafter he was removed from his coaching duties and did not receive the 10 percent raise. He began serving as intramural coordinator without change to his pay grade or Recreation Worker II status.

Winbush filed a contested case hearing in the Office of Administrative Hearings (OAH), charging that he had been wrongly discharged or demoted from his coaching duties without just cause. The OAH found that it had jurisdiction to hear his claim and recommended a ruling in his favor. On review, the State Personnel Commission (SPC) rejected these findings, holding that the State Personnel Act (SPA, G.S. 126-34.1) did not grant OAH jurisdiction over Winbush's claim. On appeal the trial court reversed the SPC decision, finding both jurisdiction and unjust demotion. WSU appealed.

**Holding:** The North Carolina Court of Appeals affirmed the trial court's ruling in part and reversed it in part.

The trial court correctly found that the SPA did grant jurisdiction over Winbush's claim: G.S. 126-34.1 and 126-35 give a state employee the right to challenge a discharge or demotion for disciplinary reasons, except for just cause.

Winbush's complaint alleged that without just cause he was relieved of his athletic duties and privileges effective June 30, 2000. Under the liberal rules of construction for allegations raised in a party's complaint, Winbush successfully *alleged* a claim for unjust discharge or demotion, and this claim was appropriately heard by the OAH.

However, Winbush failed to *prove* his claim. WSU changed neither his pay grade nor his job classification, and as the promised raise had not yet come into effect at the time of his reassignment, WSU did not demote him. State employees do not have a right to possess or retain a particular job or to perform specific duties.

#### **Court affirms immunity findings in wiretapping case.**

*Huber v. North Carolina State University*, \_\_\_ N.C. App. \_\_\_, 594 S.E.2d 402 (2004).

**Facts:** In 1997 Ginger Huber became personal assistant to Ralph Harper at North Carolina State University's (NCSU) Department of Public Safety. Two months after her hiring, fellow employees informed Huber that Harper used a digital audiotape to record the conversations of a certain employee. When she confronted Harper with this allegation, he assured her that her phone was not tapped. In November 1998, Harper issued a departmental policy memo stating that the only personnel granted access to the digital audiotape recorder were the computer support technician and the telecommunications center supervisor.

Nonetheless, in May 1999, Harper hired Audio Data Systems to install computer software that allowed him to listen to his employees' phone calls. According to Huber, Harper did this in order to prevent employees from revealing his improper activities, including unauthorized expenditure of departmental funds, misuse of departmental computer systems, inappropriate personal relationships with female employees, and retaliation against employees who interfered with his conduct. In 2000, Huber became aware that her phone conversations were being recorded and had been recorded since the year before. In June of 2000, a local newspaper published an article about Harper's improper conduct—including his wiretapping—and NCSU told him to retire.

Thereafter, Huber filed suit against Harper, NCSU, and various NCSU officials, alleging violations of federal and state wiretapping laws and of federal constitutional privacy rights. The defendants moved for dismissal of the claims based on immunity, which the trial court granted in part and denied in part. The defendants appealed.

**Holding:** The North Carolina Court of Appeals affirmed the trial court ruling.

Although as a general matter, NCSU (and its officers in their official capacity) is entitled to sovereign immunity, Congress clearly, and in a proper manner, abrogated the

states' sovereign immunity in cases brought under the Electronic Communications Privacy Act of 1986 (governing wiretapping violations).

The defendants also contended that they were entitled to qualified immunity against Huber's federal privacy right claim, because Harper could not have known that his actions violated her privacy rights and the recordings were made for law enforcement purposes and in the ordinary course of business. Whether the recordings were in fact made pursuant to departmental policy or otherwise is a matter of factual dispute between the parties and is an inappropriate issue for dismissal before the dispute has been fully aired.

Finally, Harper contended that he was entitled to public official immunity from Huber's claims against him for violation of the North Carolina wiretapping law. Although public official immunity protects public officials from individual liability for negligence in the performance of their governmental duties, it does not protect them from liability based on corrupt or malicious actions. As stated above, whether Harper's motivations were corrupt or outside the scope of his duties is a matter to be determined at trial; therefore the trial court appropriately denied the motion to dismiss this claim before trial.

**Parents' protest of board's assignment decision is moot.** *Sullivan v. Wake County Board of Education*, \_\_\_ N.C. App. \_\_\_, 598 S.E.2d 634 (2004).

**Facts:** For the 2002–2003 school year, the parents of John Sullivan, a student with disabilities, sought to have him reassigned from his base school, Dillard Elementary, to the only year-round magnet school for which he was eligible, Oak Grove Elementary. Their request was based on recommendations from four educational and psychological professionals and from the Wake County School System's Project Enlightenment. Oak Grove's administrator reviewed the Sullivans' request and denied it. At the time of the denial, Dillard was one of five schools in Wake County that had been "red flagged" as significantly underenrolled; the red flag was apparently a significant factor in the administrator's decision to deny the Sullivans' request.

The Sullivans appealed the decision to a two-member panel of the Wake County Board of Education. After a full hearing, the panel recommended to the full board that it deny the transfer request, and the full board did so. The board apparently was not aware of the red flag system, and the system did not enter into its decision. A trial court review of the decision found that substantial evidence supported the board's decision, and the Sullivans appealed again.

**Holding:** The North Carolina Court of Appeals found that the appeal was moot and dismissed it.

The Sullivans filed their appellate brief with the court in July 2003, after the school year had ended. Because John

could apply for a transfer each year, and because the board had ordered the abolition of the red flag system, the issue of the 2002–2003 assignment and the basis for it were moot.

**Injured student did not properly amend his request for monetary relief; his claim was properly dismissed.** *Meekins v. Public Schools of Robeson County*, \_\_\_ N.C. App. \_\_\_, 595 S.E.2d 239 (unpublished 2004).

**Facts:** Gilbert Meekins filed a negligence suit against the Robeson County Public Schools, seeking monetary relief for injuries he sustained while attending school there. Although Rule 8 of the North Carolina Rules of Civil Procedure (NCRCP) provides that in all negligence actions where the sum of damages is greater than \$10,000, there is no need to state an amount more specific than "in excess of \$10,000," Meekins served the system with a request for relief in the amount of \$30,000. Thereafter Robeson County moved to dismiss Meekins's claim on the basis that it was immune from suit for claims of less than \$100,000.

On the day of the hearing for the school system's motion, Meekins filed an amended answer, seeking damages in the amount of \$150,000. The trial court disregarded this amendment and ruled in favor of the system. Meekins appealed.

**Holding:** The North Carolina Court of Appeals affirmed the trial court ruling.

Rule 15 of the NCRCP provides that a party may amend a pleading any time before the other party files a responsive pleading or, if no responsive pleading is required, within thirty days of serving the other party with the pleading. Thereafter, the party may only amend the pleading by leave of the court or by written consent from the other party. Because no responsive pleading is required to a request for monetary relief, Meekins had thirty days after service to change his request. As he failed to do so, he was required to obtain approval to amend from the court or the school system. This he failed to do. Therefore his amendment was ineffective and the system was immune from his suit for \$30,000.

**Assistant principal is protected from suit by vehicle usage exclusion to insurance policy.** *Herring v. Liner*, 163 N.C. App. 534, 594 S.E.2d 117 (2004).

**Facts:** The parents of Loryn Herring brought a negligence suit against the Winston-Salem/Forsyth County (WSFC) school board and Ronald Liner, an assistant principal at Lewisville Elementary, concerning a car accident in which Loryn sustained serious and permanent brain injuries.

When Loryn was eight years old, she was violently beaten by three male students who were riding the school bus with her. The Herrings complained to Liner the next morning, and although he refused to expel or suspend the boys suspected in the attack, he did change Loryn's bus stop. (The parties

dispute whether Liner or the Herrings instigated this change.) The new stop required Loryn to cross a heavily traveled street. Six months later, she was hit by a car as she crossed to the bus stop. Liner was not present at the bus stop at the time of the accident.

Before trial, the court granted judgment for WSFC and Liner, finding that they were protected from suit by sovereign immunity. The Herrings then moved to set aside the judgment in favor of Liner, based on the existence of an insurance policy covering him that had not been before the court at the time of trial. The court set aside the initial judgment in favor of Liner but entered another before trial on evidence that Liner's alleged negligence vis-à-vis the bus stop change was excluded from the policy's coverage by a vehicle usage provision. (Liner was therefore still immune from suit.)

The Herrings appealed the ruling, arguing that Liner's conduct was covered by an exception to the vehicle usage exclusion that covered an insured who supervised students entering or exiting a school bus.

**Holding:** The North Carolina Court of Appeals affirmed the ruling in favor of Liner.

North Carolina General Statute 115C-42 provides that a board of education may waive its (and its agents) sovereign immunity through the purchase of liability insurance, but only to the extent that the policy actually indemnifies the board and its employees. The Herrings argued that the bus supervision provision indemnified Liner and thus waived his immunity. The court found that this argument stretched the definition of the term *supervision* beyond its ordinary meaning; the Herrings argued that *supervision*, as used in the policy, meant having general oversight over the loading and unloading of students who rode the bus. The court found the more persuasive meaning to be directing or inspecting the performance of the loading and unloading. Merely changing Loryn's stop was insufficient to satisfy the exception for supervising students entering or exiting the bus.

#### **University did not breach settlement agreement.**

McGlynn v. Duke University, \_\_\_ N.C. App. \_\_\_, 598 S.E.2d 424 (2004).

**Facts:** Lauren McGlynn, a discharged employee of Duke University, signed a settlement agreement with Duke that reinstated her and placed her on unpaid leave for one year. Duke also agreed to pay McGlynn a lump sum equivalent to six months of her current salary as full settlement for any and all claims. This dispute arose when Duke told McGlynn to pick up her check from the payroll department, with deductions made for FICA, state, and federal income taxes. She countered that according to the terms of the settlement agreement the payment was for personal injury, not taxable wages. The trial court ruled for Duke before trial, and McGlynn appealed.

**Holding:** The North Carolina Court of Appeals affirmed the trial court's ruling.

As the settlement agreement was silent regarding the purpose for which Duke paid McGlynn, the court, following established case law, looked to Duke's intent in making the payment. From the beginning, Duke intended the payment as a settlement of McGlynn's employment relationship with Duke. McGlynn had never sought reimbursement for medical expenses or personal injury, only back pay. Additionally, the amount paid to McGlynn is precisely equivalent to six months of her current monthly base salary. Therefore the payment was appropriately subject to withholding for taxes.

**In an unpublished opinion, court reverses and vacates judgment that City of High Point is entitled to proceeds of its red-light camera program.** Shavitz v. Guilford County Board of Education, 100 Fed. Appx. 146 (4th Cir. 2004).

**Facts:** Henry Shavitz, red-light law violator, challenged the constitutionality of High Point's (N.C.) red-light camera program and, in the alternative, argued that even if the program was constitutional, the Guilford County Board of Education, not the City of High Point, was entitled to the proceeds of the program. The board joined the challenge with a cross-claim for the proceeds. The federal court for the Middle District of North Carolina found the program constitutional and then held that the board was not entitled to its proceeds. [See digest in "Clearinghouse," *School Law Bulletin* 34 (Fall 2003): 36.] The board appealed.

**Holding:** In an unpublished opinion, the Fourth Circuit Court of Appeals reversed and vacated the lower court's ruling on the proceeds. That court did not have jurisdiction to hear a claim based entirely on state law (N.C. CONST. art. IX, § 7) between two citizens of the same state.

**Court reinstates student's Title IX claim.** Litman v. Greco, 92 Fed. Appx. 41 (4th Cir. 2004).

**Facts:** The federal court for the Eastern District of Virginia dismissed Annette Litman's Title IX retaliation claim against George Mason University, finding that Title IX did not provide a private right of action for retaliation. Litman appealed.

**Holding:** In an unpublished opinion, the Fourth Circuit Court of Appeals reinstated Litman's Title IX retaliation claim. After the district court's dismissal of Litman's Title IX claim, the Fourth Circuit Court of Appeals ruled that Title VI allowed a private right of action for retaliation. Because, under Supreme Court precedent, Title VI and Title IX are to be interpreted in the same manner, the Fourth Circuit's decision mandated that a private right of action for retaliation also be allowed under Title IX.

**Complainant fails to state Title VII claim.** *Clement v. Munson*, 2004 WL 444567 (M.D.N.C. 2004).

**Facts:** Gary Clement, an employee of the University of North Carolina Health Care System, filed a Title VII complaint alleging race and sex discrimination and sexual harassment. Eric Munson, chief executive officer of UNC Hospitals, moved to have the claim dismissed before trial.

**Holding:** The federal court for the Middle District of North Carolina granted Munson's motion.

Clement failed to file a timely charge with the Equal Employment Opportunity Commission (EEOC) before initiating court action. Although the complaint Clement filed with the court stated that his EEOC charge was filed on October 25, 2001, the actual EEOC charge is clearly dated April 22, 2002. The time limitation for filing an EEOC charge is within 180 days of the allegedly discriminatory conduct. Clement alleged only that the following occurred within 180 days of April 22, 2002: "I have been harassed by the Registered Nurses. . . . According to the Nurses, I have been harassed because they feel that I am not good at my job." Title VII, the court said, does not protect employees from harsh treatment, and being perceived as not good at one's job is not an impermissible consideration under the statute. Therefore Clement failed to allege a Title VII violation occurring within 180 days of his EEOC filing.

**Another discrimination complaint is dismissed for failure to file an EEOC charge within 180 days of the allegedly discriminatory conduct.** *Benson v. Vance County Board of Education*, No. 5:03-CV-531-BR(3), \_\_\_ F. Supp. 2d \_\_\_ (E.D.N.C. 2004).

**Facts:** Bryan Benson charged the Vance County Board of Education with race and sex discrimination in violation of Title VII for failing to interview or hire him for certain positions. The board moved to dismiss the complaint before trial for failure to file a timely EEOC charge.

**Holding:** The federal court for the Eastern District of North Carolina granted the board's motion and dismissed Benson's complaint. The discriminatory conduct Benson complained of occurred in August 2002, but he did not file his EEOC charge until March 4, 2003. The time limitation for the EEOC charge is within 180 days of the alleged discriminatory conduct.

**Court dismisses former employee's sex and disability discrimination claims.** *Smith v. North Carolina State University*, No. 5:02-CV-829-BO, \_\_\_ F. Supp. 2d \_\_\_ (E.D.N.C. 2004).

**Facts:** Shirley Smith worked as housekeeping supervisor at North Carolina State University (NCSU) from 1996 to 2002. In September 2001 she filed a complaint with the EEOC alleging disability discrimination. After receiving her right-to-sue

letter she filed her action in the federal court for the Eastern District of North Carolina, alleging sex discrimination in violation of Title VII and disability discrimination in violation of the Americans with Disabilities Act (ADA). NCSU moved to dismiss her claims.

**Holding:** The court granted NCSU's motion.

Only discrimination claims stated in the initial EEOC charge, those reasonably related to the original charge, and those developed by reasonable investigation of the original charge may be maintained in a subsequent Title VII lawsuit. Because Smith alleged only disability discrimination in her EEOC charge, the court dismissed her Title VII sex discrimination claims.

The court also dismissed her ADA claims as barred by the Eleventh Amendment, which protects states from suit by private individuals in federal court. Case law has established that neither Title I (barring disability discrimination in employment) nor Title II of the ADA (barring disability discrimination in the provision of public services) validly abrogates the state's immunity.

## Other Cases

**Wrestling association's challenge to the Department of Education's Title IX policy interpretation is unsuccessful.** *National Wrestling Coaches Association v. Department of Education*, 366 F.3d 930 (D.C. Cir. 2004).

**Facts:** The National Wrestling Coaches Association and other membership organizations representing the interests of collegiate men's wrestling constituents (the plaintiffs) brought suit against the U.S. Department of Education (DOE), alleging that a 1979 DOE policy interpretation and its 1996 clarification had directly injured them by causing the elimination of men's varsity wrestling programs at several universities.

The 1979 policy interpretation enunciated a three-part test to be used in assessing whether an educational institution's athletic program met Title IX requirements: (1) Does the institution provide opportunities for male and female students in numbers proportionate to their respective enrollments? (2) If the members of one sex are substantially underrepresented among athletes, can the institution show a history and continuing practice of program expansion that is responsive to the developing interests and abilities of the members of that sex? (3) If members of one sex are underrepresented and the institution cannot show a practice of program expansion, can it demonstrate that the interests and abilities of the underrepresented sex have been fully and effectively accommodated by the current program? In 1996 the DOE issued a clarification letter concerning this three-part test, stating that eliminating

or capping men's teams was one possible way to comply with the first element of the test.

The plaintiffs alleged that these two interpretive provisions violated their constitutional right to equal protection of the laws. They did not, however, challenge the validity of Title IX itself, or any of its implementing regulations. The DOE moved to dismiss the claims based on lack of standing.

**Holding:** The federal court for the District of Columbia held that the plaintiffs lacked standing.

The plaintiffs failed to show that the challenged DOE action was the cause of their alleged injury. They alleged that DOE's interpretive rules harmed their members by causing educational institutions to eliminate or reduce the size of men's wrestling teams and pointed to several universities that have cited Title IX's proportionality requirement in eliminating these teams. However, the injury of which the plaintiffs complain was caused by the actions of a third party—the educational institutions—not the DOE. In addition, the

plaintiffs failed to show that elimination of the policy interpretations would cause these third parties to reinstate their wrestling teams. As the 1996 clarification provided, nothing in the three-part test *requires* a school to eliminate or cap men's wrestling (or other team). And this is consistent with the fact that many of the educational institutions the plaintiffs cite in support of their case kept their wrestling programs for decades after the three-part test was adopted.

Courts have found that a party has standing to challenge government action that authorizes third-party conduct that would be illegal in the absence of the government's action. However, this line of cases would only support plaintiffs' assertion of standing if they argued that the gender-conscious elimination of men's sport teams would be illegal in the absence of the challenged interpretive provisions. But they did not and, in fact, embraced Title IX and its regulations, implicitly conceding that schools may make gender-conscious decisions in order to equally accommodate both sexes. ■