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

Clearinghouse

edited by
Robert P. Joyce

Cases and Opinions That Directly Affect North Carolina

Full appeals court rules that the Charlotte-Mecklenburg school system is "unitary" (meaning legally integrated) but dissolves injunction prohibiting all consideration of race in future student assignments. Belk v. Charlotte-Mecklenburg Board of Education, 269 F.3d 305 (4th Cir. 2001), *reconsideration denied*, 274 F.3d 814 (2001), *petition for cert. filed* (Jan. 22, 2002).

Facts: Since 1965, the Charlotte-Mecklenburg Board of Education (CMBE) had been operating under federal court supervision because it, like all North Carolina jurisdictions, had maintained a system of "dual," or segregated, schools. In 1992, as an integration measure, CMBE created a magnet school program that employed racial enrollment quotas. Five years later, parents of Caucasian students (the plaintiffs) within the school district filed suit against CMBE, arguing that the quotas violated their children's right to equal consideration for admission to a magnet school.

In a 1999 ruling in the case, the federal court for the Western District of North Carolina held that the CMBE had achieved unitary racial status in its school system and that therefore the thirty-four-year-old desegregation order should be dissolved. It found the magnet school enrollment policy unconstitutional and prohibited the future use of initiatives that allocated educational benefits on the basis of race [see "Clearinghouse," *School Law Bulletin* 30 (Fall 1999): 21–22]. CMBE appealed.

A panel of the Fourth Circuit Court of Appeals reversed the district court order, finding that CMBE had not in fact achieved unitary status in all respects and that its race-based student assignments for magnet schools were constitutional [see "Clearinghouse," *School Law Bulletin* 32 (Winter 2001): 31].

The entire Fourth Circuit Court of Appeals then agreed to rehear the case *en banc*, which means that the full court would hear the matter anew, not bound by the ruling made by the panel.

Holding: The full Fourth Circuit Court of Appeals upheld the district court, finding that CMBE has achieved unitary status.

The court said that the most important factors to examine in determining whether a formerly segregated school system has achieved unitary status are (1) student assignment, (2) faculty assignment, (3) facilities and resources, (4) transportation, (5) staff assignments, (6) extracurricular activities, and (7) any additional factors relevant in the particular system.

Student assignment. The court noted with favor the finding of the district court that CMBE schools as a whole are much more integrated today than they were when the original desegregation orders went into effect. The fact that some schools are more racially imbalanced now than they were a few years ago does not reflect

The author is an Institute of Government faculty member and editor of *School Law Bulletin*.

school board segregative practices but major demographic changes. The district court found that CMBE had properly sited schools so as to foster integration, building schools in areas equally accessible by blacks and whites, and even underserving high-growth white areas in an effort to preserve racial balance.

Faculty assignment. The district court held that there was simply no evidence that CMBE assigns white teachers to predominantly white schools or black teachers to predominantly black schools. The appeals court concurred.

Facilities and resources. The district court found that disparities exist throughout the system with respect to the quality of facilities but that those disparities are functions of the age and location of facilities and do not reflect intentional race discrimination. The appeals court concurred.

Transportation. The appeals court found that, given the limitations of traffic and housing patterns, CMBE is doing about as well as it can do.

Staff assignments. The appeals court said that there is no particular controversy regarding staff assignments.

Extracurricular activities. The appeals court said that white and black students appear to participate in extracurricular activities at approximately equal rates and that differences of participation in particular activities appear to be unrelated to any racial discrimination by CMBE.

Other factors. The circuit court upheld the district court's findings that there were no indications of nonunitary status with respect to (1) teacher quality (though statistically teachers in identifiably black schools have a somewhat lower average level of experience than those in identifiably white schools); (2) student achievement (concluding that the achievement gap between white and black students reflects such demographic factors as income and family education levels rather than former segregation policies); or (3) student discipline (finding no evidence that the disproportionate amount of discipline received by black students is the result of race discrimination).

Good faith. Finally, the court upheld the finding that CMBE has acted in good faith to achieve desegregated status. It is ironic, the court said, that CMBE's tenacious defense of this lawsuit, and the attendant effort to hang on to policies for achieving racial balance, are further evidence of its good faith and the safety of ending court supervision.

Constitutionality of the race-conscious magnet school program. The current phase of this long litigation began when a white student was denied admission to a magnet school because of an admissions procedure designed to achieve racial balance. That procedure, which maintained separate admissions lists for certain magnet schools by race, was challenged under the Equal Protection Clause of the Fourteenth Amendment. Such a use of race must pass strict scrutiny; that is, in order to be constitutional, it must serve a compelling governmental interest and be narrowly tailored to serve that interest. The district court held that the magnet system could not withstand such strict scrutiny and was therefore unconstitutional. The appeals court held, however, that because the board was operating the magnet system in ways its members believed were consistent with the court-ordered desegregation orders, it was immune from a finding of unconstitutionality. Now, however, because the system has been found to be unitary, future use of race-conscious methods will be judged by strict scrutiny without the protection of that immunity.

Injunction against use of race. The district court enjoined CMBE "from any further use of race-based lotteries, preferences, and set-asides in student assignments." The appeals court vacated the injunction, saying that the overall outcome of this litigation is to free CMBE from court orders and that it would not be a good idea to shackle it with this one. CMBE thus now has a fresh start as a declared unitary system.

Appeals court upholds constitutionality of a mandatory minute of silence in classrooms. Brown v. Gilmore, 258 F.3d 265 (4th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 465 (2001).

Facts: In 1976, the Virginia legislature enacted a statute authorizing local school administrative units to establish a minute of silence in their classrooms for the expressly stated purpose of allowing students to pray, meditate, or engage in any other silent, nondisruptive activity. In 1994, the Virginia Board of Education adopted guidelines saying that teachers should not indicate their views on whether students should pray or not during the minute and should not themselves pray aloud or allow others to pray aloud.

In 2000, the legislature amended the 1976 statute to make the minute of silence mandatory for all Virginia school systems. After the statute was enacted, but before it went into effect, it was challenged by a number of parents on the grounds that it violated the Establishment Clause of the First Amendment to the U.S. Constitution. The federal district court held that it did not, and the parents appealed.

Holding: The federal Fourth Circuit Court of Appeals held that the minute of silence legislation does not, on its face, violate the Establishment Clause.

The court said that Establishment Clause prohibits government sponsorship, financial support, and active involvement in religious activity, but it does not require total separation of church and state. Government may, in fact, accommodate religion, so long as it does not cross the line from accommodation to establishment. A test for determining whether the line has been crossed is the three-prong *Lemon* test, named after the Supreme Court decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under that test, to withstand an Establishment Clause challenge, a statute must meet three conditions: (1) it must have a secular legislative purpose; (2) its principal effect must neither advance nor inhibit religion; and (3) it must not foster an excessive governmental entanglement with religion.

Secular legislative purpose. In respect to the first prong, the court said that the minute of silence has at least two purposes. First, it provides students an opportunity to pray in school. That purpose is clearly an accommodation to religion. The other purpose of the minute of silence is to permit nonreligious meditation, a secular purpose. "A statute having dual legitimate purposes—one clearly secular and one the accommodation of religion—cannot run afoul of the first *Lemon* prong, which requires only that there be a secular purpose," the court said.

Neither advance nor inhibit religion. In respect to the second prong requiring that the statute's principal effect must neither advance nor inhibit religion, the court found the statute clearly neutral between religious and nonreligious activity. The fears of the parents who brought the suit that schoolchildren would feel pressured to pray during the moment of silence are merely speculative, the court said, and cannot support a finding that the effect of the statute is to advance religion.

Excessive entanglement. The third prong requires that the statute not foster an excessive governmental entanglement with religion. This requirement is satisfied here, the court said. For teachers merely to inform students that the time may be used for prayer (or for other purposes) does not amount to an entanglement. In fact, for the teacher to say nothing and wait for children to ask whether it would be acceptable for them to pray would increase "the potential for interactions between teachers and religiously motivated students."

School board did not violate the Open Meetings Act when it went into closed session to confer with its attorneys. Sigma Construction Co., Inc. v. Guilford County Board of Education, 144 N.C. App. 376 (2001), *review dismissed*, 354 N.C. 366 (2001).

Facts: Sigma Construction had a contract with the Guilford (N.C.) County Board of Education to build an elementary school building. During the construction, disputes arose between Sigma and the school board concerning scheduling, completion dates, and certain milestones. At an open meeting in February 2000, the school board went into closed session to consult with its attorneys. When the board returned to open session, a motion was made to terminate Sigma's work on the project, and, without discussion, the board voted to approve the motion. Sigma asked for a copy of the minutes of the closed session, and the board refused to provide them.

At a meeting the next month, the board again went into closed session to consult with its attorney. When it returned to open session, the board voted to hire another particular contractor as a replacement for Sigma.

Sigma filed a lawsuit, alleging that the board had violated the North Carolina Open Meetings Act (specifically, G.S. 143-318.9) and asking the court to nullify the actions taken in violation of that statute.

The trial court found that the board went into closed session to consult with its attorney and to protect the attorney-client privilege, and that it did, in fact, consult with its attorney in the closed session and engaged in no discussion that was not subject to attorney-client privilege. Therefore, the court ruled for the school board.

Sigma appealed. On appeal, Sigma argued (1) that the closed session was improper, and (2) that it violated the Open Meetings Law for the board to come out of closed session and vote on a motion without any public discussion or debate.

Holding: The North Carolina Court of Appeals held for the school board. It found, first, that a public body may, under G.S. 143-318.11(a)(3), go into closed session to "consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body." That is what happened here. Second, the court found that the Open Meetings Law does not require a public body to engage in formal discussion or debate before voting on a motion or to solicit public comment before doing so.

Multiple-personality university student is not disabled under the Americans with Disabilities Act. Davis v. University of North Carolina at Wilmington, 263 F.3d 95 (4th Cir. 2001).

Facts: Pam Davis enrolled in a teachers' certification program at the University of North Carolina at Wilmington (UNC-W) to satisfy a prerequisite for a masters degree program in which she hoped to enroll. While she was in the certification program, a professor learned that Davis had engaged in plagiarism and passed around a business card indicating that she already had the masters degree, even though she was in fact not yet even enrolled in the degree program. She also lied about the distribution of the cards, acted aggressively and inappropriately toward professors and fellow students, and, on one occasion, asserted that she could not take an examination without "Michael." It turned out that Davis suffered from dissociative identity disorder (DID), also known as multiple personality disorder, and that Michael was one of her seventeen distinct personalities.

UNC-W removed Davis from the certification program, finding that she had violated the college's standards of behavior relating to nonacademic matters, standards that govern "professional demeanor; professional interactions with university students, faculty, staff, and administrators . . . and adherence to school rules and ethical standards." UNC-W may also have been concerned that it would not be safe to allow Davis to conduct the one-on-one sessions with young children that the teacher certification program required.

UNC-W offered to waive the certification prerequisite and allow Davis to apply to the masters program. She never did so. Instead, she sued the university under Title II of the Americans with Disabilities Act (ADA), alleging that she was removed from the certification program because of her DID. The trial court held for the university, and Davis appealed.

Holding: The federal Fourth Circuit Court of Appeals ruled for the university. It found that Davis did not suffer from a disability within the meaning of the ADA.

An individual is disabled within the meaning of the ADA if (1) she has a mental or physical impairment that substantially limits a major life activity, (2) she has a record of such an impairment, or (3) she is regarded as having such an impairment. Davis argued that UNC-W regarded her as disabled, but the appeals court disagreed. At the most, the court said, UNC-W could be said to have regarded her as unable to perform as a teacher because she was unfit to be in charge of young children. That is not, the court said, enough for a finding that the university regarded her as substantially limited in a major life activity (i.e., work); it shows, at most, that it saw her as unsuited for one particular job, which is not enough to find that it regarded her as disabled. Therefore, she had failed to provide evidence upon which to base a finding that she is disabled and so cannot prevail in an ADA claim.

School system not liable for constitutional violations when student is repeatedly assaulted at school. Stevenson v. Martin County Board of Education, 3 Fed. Appx. 25 (4th Cir 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 54 (2001).

Facts: Alex Stevenson was a sixth-grade student at a Martin County (N.C.) middle school. In his lawsuit, Alex alleged that he began to be abused by several classmates at the beginning of the school year. On one occasion, Classmate A robbed and assaulted him. On numerous other occasions, Classmate A and others punched and kicked Alex. In one class, Classmate A punched him in the head; when Alex brought the matter to the attention of Ms. Chance, the teacher, she merely said, "There isn't anything I can do" and "You probably deserved it anyway." On another occasion, Classmate A chased Alex down the hall, knocked him to the floor, and for ten minutes punched and kicked him. On yet another occasion, Classmate A and others threatened Alex during a class. Alex reported the threats to the principal, but the students assaulted Alex again the next day at lunch. One day, away from school at a music festival, Alex and his father were harassed by Classmate A and several others, and the police escorted Classmate A away.

Alex's father met with the school's principal early in the sequence of abuse, and the principal indicated that he would put Alex and Classmate A in separate classes, but he never did so. The school system suspended Classmate A after two of the assault incidents and also suspended other students who were involved in assaulting Alex. After a time, Alex's father removed him from school and enrolled him in a private school. Alex suffered physical and emotional problems as a result of the harassment and assaults.

Alex and his family sued the school board. The district court dismissed their claims, and they appealed to the federal Fourth Circuit Court of Appeals.

The federal appeals court, for purposes of considering the claims, took the allegations as true and said

that the lawsuit rested on three claims. First, Alex claimed that he was deprived of a property right to a public education by being forced to withdraw from the school. Second, he claimed that the school officials had violated his liberty interest in bodily integrity. And third, he claimed that the school board had contributed to the violence by failing to have in place adequate plans and training to ensure students' safety.

Holding: The appeals court dismissed all three of Alex's claims.

Deprivation of a property right to a public education. Because Alex voluntarily withdrew from the Martin County schools, it could not be said that he was deprived of the right to a public education. However, Alex claimed that he had suffered a "constructive expulsion." The court noted that the claim was a novel one and that no court had accepted the notion of constructive expulsion. Yet, a directly analogous notion in employment law, "constructive discharge," is commonly accepted. Under the law of employment, if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced to resign, the resignation is seen as the equivalent of a dismissal. Alex claimed that his withdrawal from school was the equivalent of an expulsion. The court disagreed, saying that he had not alleged that the school officials *deliberately* forced him out. On the contrary, the officials took steps, albeit ineffectual ones, to help him—for example, by suspending Classmate A and other students.

Violation of liberty interest in bodily integrity. School officials did not attack Alex and injure him; at the most they simply stood by while others did. Can they be held liable for a constitutional violation of Alex's liberty interest in bodily integrity in such a case? No, the appeals court said. Government officials are responsible for the acts of private individuals in only two circumstances. First, government officials are responsible if the government has a special relationship with the injured person that imposes an affirmative duty to protect that person from harm. For instance, the government has such a relationship with a person in jail. As a prisoner is unable to care for himself, the government has a duty to look out for him. Is school like jail? No, the court said, because Alex's parents retained the ability to provide for his basic needs and he remained free to seek their help and protection. A school does not have the kind of relationship with its students that imposes an affirmative duty to protect them. Second, government officials are responsible if the government itself creates the danger. In this case, school officials did not create the assaults on Alex. At the most, they stood by while he was assaulted, which does not rise to the level of creating a danger.

Failure to have in place plans and training to deal with school violence. A school board can be liable for constitutional violations of its employees, the court said, if the violations are carried out pursuant to school board policy or custom or are the result of the board's failure to train. For such liability to fall to the school board, however, there must be an underlying constitutional violation; here, the court had already found that there was no deprivation of a property right to a public education or violation of the liberty interest in bodily integrity. Without such an underlying constitutional violation, no liability can be imputed to the board.

Teacher fails to state claim for unlawful employment discrimination. Suarez v. Charlotte-Mecklenburg Schools, 123 F. Supp.2d 883 (W.D.N.C. 2000).

Facts: Enrique Suarez, a native of Peru, taught Spanish in a Charlotte-Mecklenburg (N.C.) middle school from 1996 until his resignation in 1998. After he resigned, he filed with the Equal Employment Opportunity Commission (EEOC) a charge of discrimination on the basis of national origin and retaliation. EEOC issued a right-to-sue letter, and Suarez brought his lawsuit, representing himself without an attorney. He alleged that the school system had discriminated against him on account of his national origin and on the basis of his sex (through the sexual harassment of his male supervisor), had retaliated against him because of his opposition to unlawful discrimination, and had defamed him.

Holding: The United States magistrate judge granted the school system's motion to dismiss all the claims.

On the claim of national origin discrimination, the judge found that Suarez's mere allegation that he was Peruvian and that bad things happened to him did not sustain the claim. Moreover, Suarez did not present sufficient allegations that the adverse employment consequences he allegedly suffered were in any way related to his national origin. After all, he was a Peruvian when he was hired just two years before.

On the claim of sexual harassment, Suarez merely alleged that he had been sexually harassed; he did not provide factual specifics that would allow the court to conclude that any conduct that might otherwise qualify as sexual harassment was "sufficiently severe or pervasive to alter [his] conditions of employment or to create an abusive work environment."

On the claim of retaliation, Suarez did not allege specifics from which the court could conclude that anything bad that happened to him was in any way connected to any opposition he may have voiced to discrimination.

On the defamation claim, Suarez failed to allege facts from which the court could infer the content of the allegedly defamatory statements, whether they were published to others, or, indeed, that they defamed Suarez. In addition, Suarez failed to allege that the school system had purchased liability insurance to cover the tort of defamation. Without that allegation, the school system is entitled to a dismissal order on the grounds of governmental immunity.

State university instructor cannot bring contested case challenging discriminatory discharge under the State Personnel Act. Hillis v. Winston-Salem State University, 144 N.C. App. 441 (2001).

Facts: Michael Hillis, a white male, was employed by Winston-Salem State University (WSSU) as a part-time lecturer and temporary coordinator of WSSU's new Occupational Therapy Program (OTP). In 1998, WSSU offered the OTP position on a full-time basis to a black female and informed Hillis that his employment would end March 31. Hillis brought a contested case under the State Personnel Act, alleging that he did not get the full-time OTP position because of discrimination against him on account of his sex and race, in violation of G.S. 126-16, the portion of the State Personnel Act that requires nondiscrimination in state employment.

The contested case came before an administrative law judge in the Office of Administrative Hearings, who held that that office did not have jurisdiction to hear the case and dismissed it.

G.S. 126-34.1 is the part of the State Personnel Act that gives covered state employees the authority to bring contested cases to challenge violations of G.S. 126-16. The problem for Hillis (an instructional staff employee) is that another portion of the State Personnel Act specifically exempts the instructional and research staff of the University of North Carolina (of which WSSU is a part) from all the provisions of the act, except Articles 6 and 7. Article 6 contains G.S. 126-16, but neither Article 6 nor Article 7 contains G.S. 126-34.1. Therefore, the administrative law judge held that although the nondiscrimination provision applies to Hillis, the provision permitting an employee to bring a contested case does not. Therefore, Hillis's case was dismissed. Hillis appealed.

Holding: The North Carolina Court of Appeals upheld the dismissal of Hillis's contested case. As a member of the instructional staff, he had no right to bring a contested case of discrimination under the State Personnel Act.

University police officer's claims of wrongful discharge, violation of free speech, and retaliation as a whistleblower fail. Swain v. Efland, 145 N.C. App. 383 (2001), *cert. denied*, 354 N.C. 228 (2001).

Facts: Edwin Swain was employed as a police officer by the University of North Carolina at Chapel Hill. On the day of a football game in 1997, he issued a citation for unlawful consumption of beer to a young woman who turned out to be the daughter of a university trustee. The trustee protested the citation to university officials. Swain subsequently became unhappy with the police department's handling of the citation and filed a grievance, which was denied.

Some time later, Swain paid a two-hour visit to the local newspaper offices while on duty. The police chief learned of the visit and waited until Swain turned in his time card to see whether he would account for the two hours as personal leave time. When the chief saw that Swain did not do so, he gave him the opportunity to amend his time card, but Swain refused and would not discuss his purpose in visiting the newspaper office. The chief then fired Swain. The dismissal was later reduced to a one-week suspension without pay.

At this point, Swain started two legal proceedings. First, he filed a petition for a contested case in the Office of Administrative Hearings under the State Personnel Act, alleging that his suspension was without cause and the result of race discrimination and retaliation. The administrative law judge in the contested case held for the university, finding just cause for Swain's suspension. The State Personnel Commission upheld the finding, and Swain did not appeal.

He also filed a lawsuit, in which he claimed: (1) violation by the university of the North Carolina "Whistleblower Statute," G.S. 126-85, (2) wrongful discharge, (3) violation of his rights to free speech under the state constitution, and (4) a conspiracy among university officials to dismiss him unlawfully. In the lawsuit, the trial court granted summary judgment to the university on all counts, and Swain appealed. The appeal came before the North Carolina Court of Appeals.

Holding: The Court of Appeals upheld the grant of summary judgment for the university on all counts.

Wrongful discharge claim. The court held that the only competent evidence that was forecast for the case showed that Swain was dismissed (later, suspended) because of the discrepancies on his time card and his refusal to change his time card or explain his conduct. In the absence of evidence of an improper motive on the part of the university, Swain could not make out a claim of wrongful discharge.

Whistleblower claim. The court held that a state employee who wishes to pursue a whistleblower claim has two choices: (1) to bring a contested case in the Office of Administrative Hearings under the State Personnel Act, or (2) to bring a lawsuit in court. But the employee must choose. He cannot do both, because of the possibility of inconsistent outcomes and the waste of judicial resources. In this case, the whistleblower claim was litigated in Swain's contested case, from which he did not appeal. He therefore cannot pursue the same claim in a lawsuit.

Violation of free speech claim. Similarly, the court held that Swain's claim of a violation of his free speech right under the state constitution was fully litigated in the contested case and could not be reopened in this lawsuit.

Claim of conspiracy. The court held that because there is no finding of unlawful discharge, there can be no finding of a conspiracy to commit an unlawful discharge.

Church-related college eligible for state grants. Columbia Union College v. Oliver, 254 F.3d 496 (4th Cir. 2001).

Facts: The state of Maryland, through its Sellinger Program, provides state grants to private colleges. To qualify, a college must meet six criteria related to accreditation, degrees awarded, appropriate notice of new degree programs, and other similar matters. The college may not use Sellinger funds for any sectarian purpose. Columbia Union College, which is affiliated with the Seventh-Day Adventist Church, applied for a Sellinger grant and was turned down because the Maryland Higher Education Commission found that the college was a "pervasively sectarian institution" and that giving it a state grant would amount to a violation of the Establishment Clause of the U.S. Constitution.

The college sued, and the trial court upheld the commission's finding. The college appealed to the Fourth Circuit Court of Appeals, and that court sent the matter back to the trial court to determine whether in fact the college is "pervasively sectarian." On remand, the trial court this time found that the college is *not* pervasively sectarian, and the state of Maryland appealed.

The college urged the appeals court to rule in its favor on two separate grounds. First, it argued that the "pervasively sectarian" standard is no longer allowable under new Supreme Court precedent. Alternatively, it urged the court to uphold the trial court's second finding that the college is not pervasively sectarian.

Holding: The federal Fourth Circuit Court of Appeals affirmed the judgment of the trial court, upholding the right of the college to receive the grant.

First, the court agreed that the Supreme Court has abandoned the "pervasively sectarian" standard. In earlier cases, it was a violation of the Establishment Clause for an institution that could be characterized in that way to receive public funds. But, the appeals court held, the Supreme Court has more recently said that determination of an Establishment Clause violation rests on three issues: (1) whether eligibility for state money is determined on the basis of neutral criteria, (2) whether there is any actual diversion of government money to religious purposes, and (3) the findings of an examination of the individual circumstances of each case. In this regard, the court found that (1) the six factors for determining eligibility for the grants are clearly neutral, (2) the Sellinger Program itself specifically prohibits the use of Sellinger funds for religious purposes, and (3) the fact that Columbia Union is a *college* (not a religious *secondary school*) allows the program greater latitude.

Second, the court held that even if the pervasively sectarian standard were still applied, the trial court's finding that Columbia Union is *not* pervasively sectarian is not clearly erroneous and stands.

Other Opinions

Editor's Note: When schools and colleges use race as a factor in making admissions decisions, that use is subject to challenge as unlawful under the Equal Protection Clause of the Fourteenth Amendment. In considering such a challenge, courts apply strict scrutiny, meaning that the use of race must be justified by a compelling governmental interest and, if it is justified, must be the most narrowly tailored use available to serve that compelling interest.

Over more than two decades, the debate has raged over what interests can qualify as compelling interests for this purpose. One interest is universally acknowledged as sufficiently compelling: overcoming the present effects of prior discrimination by the school or college itself. Nonetheless, this compelling interest is seldom adduced by schools or colleges to justify their use of race, because it would require an admission of prior discrimination and its current effects. A focus of the current debate is whether the quest for educational "diversity" can qualify as a compelling interest. In its famous decision, Regents of the University of California v. Bakke, *438 U.S. 265 (1978), the U. S. Supreme Court opened the door to the diversity debate. Below are three case summaries illustrative of the current state of the debate. The first, dealing with undergraduate admissions at the University of Michigan, holds that diversity is a compelling governmental interest. (It is reprinted here from the Winter 2001 issue of the* School Law Bulletin, *for ease of comparing these three closely related cases.) The second, dealing with law school admissions at the same university, holds that diversity is not a compelling interest. And the third, dealing with undergraduate admissions at the University of Georgia, sidesteps the diversity issue and decides the case against the use of race on the "narrow tailoring" issue.*

University of Michigan's consideration of race in undergraduate admissions is constitutional; "diversity" is a compelling governmental interest. Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *rehearing en banc granted*, 277 F.3d 803 (6th Cir. 2001).

Facts: Rejected white applicants (the plaintiffs) for admission to the University of Michigan filed a class action against the university and various university officials (the defendants), alleging that they had violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by considering race as a factor in admissions.

The plaintiffs challenged two different policies: (1) the 1995–98 admissions scheme, which reserved a specific number of seats for minorities and used separate scoring grids for minority and white applicants; and (2) the 1999–2000 scheme, which added points to the scores of underrepresented minority candidates and allowed admission counselors to "flag" for further consideration the files of certain students who would not otherwise have passed the first round of selection. Both the plaintiffs and the defendants moved to have the other party's claims dismissed before trial.

Holding: The federal court for the Eastern District of Michigan granted judgment for the plaintiffs on their claim concerning the 1995–98 admission scheme and for the defendants on the 1999–2000 scheme.

To justify the use of race-based distinctions, the court said, the university was required to show that they (1) served a compelling governmental interest, and (2) were narrowly tailored to serve that interest. The issue of primary dispute in this case (as in most other cases concerning the use of race in admissions) was whether achieving diversity constitutes a compelling governmental interest. The court found that in the context of higher education, diversity is a compelling interest that can justify the use of racial classifications. This holding is contrary to holdings by other federal courts, which have found that the only compelling interest justifying the use of racial classifications is remedying the effects of past discrimination. [See, for example, the digest of *Hopwood v. Texas* in "Clearinghouse," *School Law Bulletin* 27 (Summer 1996): 47–48.] This split of opinion will ultimately have to be addressed by the U. S. Supreme Court.

The court considered, and found convincing, evidence from educational institutions across the country showing that diversity created educational benefits for both minority and nonminority students. The plaintiffs presented no evidence to contradict this conclusion; instead they argued that diversity could not be a compelling interest because it was too amorphous, limitless, timeless, and scopeless. Because the diversity rationale has no logical stopping point, the plaintiffs argued, the racial classifications used to serve it can never be sufficiently narrowly tailored to satisfy constitutional scrutiny. In reference to the university's 1995–98 scheme, the court found this argument of the plaintiffs persuasive.

The 1995–98 scheme reserved a particular number of seats for minority applicants. These slots, therefore, were not available for competition by applicants from nonprotected groups; in other words, certain applicants from nonprotected groups were excluded from competing for these seats solely on the basis of their race. The court found this scheme to be overly broad.

But the 1999–2000 scheme did not suffer from this problem, according to the court. This policy considered race or ethnic background a "plus" factor but did not insulate any minority applicant from competition from any other applicant. The court noted that universities commonly give plus factors for all kinds of criteria, ranging from geographic factors, to alumni relations, to athletic

ability. Possessing any of these factors gives an applicant an advantage over other applicants who do not possess them. Plus factors accorded for race could not be isolated as pernicious in such a scheme.

The policy of allowing admission counselors to "flag" an applicant's file if the candidate possessed a quality important to the composition of the incoming class, including underrepresented-minority status, was also found to be sufficiently narrowly tailored. Counselors were not required to flag the file of every minority applicant; furthermore, applicants other than underrepresented-minority applicants could also be flagged. Such a system did not protect minorities at the expense of other groups.

The court accepted the defendants' evidence that other, race-neutral programs would not be successful in obtaining the diversity so important to the university's mission. Therefore, it found that the 1999–2000 program was tailored narrowly enough to survive constitutional review.

University of Michigan law school's consideration of race in admissions is unconstitutional; "diversity" is not a sufficient reason. Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001), *rehearing en banc granted*, 277 F.3d 803 (6th Cir. 2001).

Facts: The University of Michigan Law School was sued by a white applicant who was not admitted and who claimed that her application was rejected because the law school used race unconstitutionally as a predominant factor in making admissions decisions.

The law school based its admissions decisions largely on a combination of an applicant's undergraduate grade point average and score on the Law School Admissions Test. Admissions officials were granted, by the admissions policy, discretion to admit students who would otherwise not be admitted based solely on that combination if the admission "would help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." Especially, the policy said, the school has "a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans." According to the testimony of the director of admissions, the law school sought to admit enough minority students to achieve a "critical mass," and race had to be taken into account in order to achieve enough minority admissions.

In its decision, the court characterized the university's position as a claim that race was a factor in admissions but was one of many factors and not a "trump card." The court characterized the plaintiff's position as a claim that race is a "super factor" in admissions. The court concluded that "race is not, as defendants have argued, merely one factor which is considered among many others in the admissions process. Rather, the evidence indisputably demonstrates that the law school places a very heavy emphasis on an applicant's race in deciding whether to accept or reject."

The question, the court said, is whether the law school's use of race meets the requirements of strict scrutiny: that is, whether it serves a compelling governmental interest and is narrowly tailored to serve that interest. Here, the court said, the specific question is whether the achievement of racial diversity is a compelling state interest.

Holding: In direct contrast to the undergraduate admissions decision summarized above, the court held that diversity is not a compelling enough interest to support the constitutionality of the use of race in admissions decisions.

The law school does, the court said, have a legitimate interest in "viewpoint diversity." Experts have repeatedly noted that a diversity of viewpoints, experiences, interests, perspectives, and backgrounds creates the best educational atmosphere. But, the court said, "[t]he connection between race and viewpoint is tenuous, at best." Race cannot simply be used as a substitute for viewpoint.

Bonus points based on race not "narrowly tailored." Johnson v. Board of Regents of the University of Georgia, 263 F.3d 1234 (11th Cir. 2001).

Facts: Three white unsuccessful freshman applicants to the University of Georgia (hereinafter UGA) sued, alleging that the university's admission policy of awarding a fixed numerical bonus to nonwhite applicants violates the Equal Protection Clause of the Fourteenth Amendment.

Between 1990 and 1995, UGA maintained a dual-track admissions policy. To be eligible for admission, an applicant had to meet certain pre-set minimums with respect to the Scholastic Aptitude Test, grade point average, and a statistical construct of the two called an Academic Index. (All together these constituted the "numerical score.") The minimums for black applicants were lower than those for white applicants.

In 1995, UGA, concerned about the constitutionality of this policy, adopted a revised policy. The revised policy, which is the subject of the lawsuit, divided the admissions process into three stages. In the initial stage, the university admitted all applicants, regardless of race, whose numerical score was above a certain number. In the second stage, UGA grouped for further consideration all applicants with certain minimum numerical scores (and rejected everyone below that minimum). To the score of a student in this second group, UGA then added points for certain academic, extracurricular, demographic, and other factors—expressly including race. Again, all applicants above a certain score were admitted, all below a certain score were rejected, and those in between went on to the third stage.

At the third stage, everyone started at score zero and was individually reviewed by an admissions officer. Race was not designated as a factor at the third stage.

In 1999, the additional points available at the second stage totaled 2.75. Of these, 0.5 points were awarded, on the basis of race, to African Americans and certain other minorities.

The applicants suing UGA all survived to the second stage, and all failed at that stage; none of them got the 0.5 points for race at that stage. The federal district court held that UGA's policy was unconstitutional, on the grounds that diversity is not a compelling interest sufficient to support the constitutional use of race in admissions. The university appealed.

Holding: The Eleventh Circuit Court of Appeals held that UGA's admissions policy is unconstitutional.

In so doing, the appeals court held that whether diversity can be a compelling interest to support the constitutionality of the use of race in admissions is unclear, but that this court would not decide the question. Rather, it held that even if diversity were found to be a compelling reason, UGA's policy would not be sufficiently "narrowly tailored" to the service of that interest.

In identifying the characteristics of a policy that would be sufficiently narrowly tailored, the court said that such a policy "must use race in a way that does not give an arbitrary or disproportionate benefit to members of the favored racial groups, and thereby unduly disadvantage applicants from outside the favored groups who may well add more to the overall diversity of the student body." In this case, the court found, the 0.5 point bonus awarded on the basis of race is the kind of mechanical application of advantage that is not "narrowly tailored." ■