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

# Clearinghouse

edited by
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## Cases and Opinions That Directly Affect North Carolina

**District policy encouraging prayer at school football games violates the Establishment Clause.** Santa Fe Independent School District v. Doe, ___ U.S. ___, 120 S. Ct. 2266 (2000).

**Facts**: Before 1995, the Santa Fe (Tex.) High School student who occupied the elective office of student council chaplain delivered a prayer over the public address system before every varsity football game for the entire season. The mothers of two students in the district (who remained anonymous) challenged this and other religious practices in the district as violating the Establishment Clause of the United States Constitution. The federal district court entered an interim order addressing a number of different issues in the case, and in response, the district changed its policy concerning the offering of prayer before football games.

The new policy, actually entitled "Prayer at Football Games," provided, in effect, that the school district had chosen to permit the school's graduating senior class, with the advice and counsel of the principal, to choose by secret ballot whether to have an invocation and benediction as part of pregame ceremonies and, if so, to elect by secret ballot one student to deliver the invocation and benediction. Also, should the district be enjoined from enforcing the policy, another policy, one requiring that the invocation and benediction be "nonsectarian and nonproselytizing," would go into effect. Later the word "prayer" was deleted from the title of the policy. In line with the policy, the students elected a student to deliver prayer at varsity football games.

After several appeals, the case arrived before the United States Supreme Court on the issue of whether the district's policy of permitting student-led, student-initiated prayer (irrespective of whether it was required to be nonsectarian and nonproselytizing) at football games violated the Establishment Clause.

**Holding**: The Supreme Court concluded that the policy does violate the Establishment Clause, which provides that the government may not coerce anyone to support or to participate in religion or the exercise of religion or otherwise act in a way that establishes a state religion. The Court's opinion addressed three main district arguments.

*First district argument: the prayer constituted private student speech, not school-endorsed religious speech.* The district's first attempt to avoid invalidation of its policy consisted of the argument that the speech at issue was private student speech endorsing religion, not public school speech endorsing religion. The Court rejected this argument. The invocations were authorized by district policy and took place on district property at school-sponsored,

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school-related events. Had the policy simply allowed members of the student body in general to stand up before games and talk on a topic of their choice (within reasonable limits), the district might have had an argument, but its policy allowed only one student to speak for the entire year and only in order to deliver an invocation—commonly understood as an appeal for divine assistance. Under such circumstances, the Court found no indication that the district had created the kind of public forum that would make such speech public.

Even more important in the Court's view, however, was the fact that under the district's election process, minority views would never prevail and would never be heard. Majoritarian processes that determine which views will or will not receive school benefits depart from the viewpoint neutrality that the Constitution requires when a school is operating a public forum for speech. Fundamental rights—such as the right to free speech and to be free of governmentally established religion—cannot be submitted to a vote.

Furthermore, the district had done nothing to remove its imprimatur from the invocations. Rejecting the district's argument that by creating the election process it had adopted a hands-off approach, the Court found clear evidence that the district endorsed the practice. The terms of the policy specify that the election takes place only because the district "has chosen" to permit it; that the election occurs with the advice and direction of the high school principal; and that the content of the invocation or benediction must be consistent with the policy's goals of solemnizing the event.

The district's endorsement was apparent even beyond the text of the policy, however. The invocation is delivered to an audience gathered as part of a regularly scheduled, school-sponsored function on school property, using the school's public address system. All this occurs in an arena presumably strewn with school uniforms, school mascots, and banners and flags bearing the school's name. In addition, the history of the policy, evolving from the traditional office of "student chaplain" to the candidly titled "prayer at football games" policy, makes clear that the district viewed the new policy as a (poorly cloaked) continuation of the old policy.

*Second district argument: the prayer is permissible because it involves no coercion.* In *Lee v. Weisman* [505 U.S. 577 (1992); see "Clearinghouse," *School Law Bulletin* 23 (Summer 1992): 23], where the Court held unconstitutional the delivery of a nonsectarian invocation at a school graduation, the Court emphasized that there is coercion inherent in asking a student to make a choice between attending his or her graduation in order to protest a government-sponsored religious practice or attending the event and thereby participating in the practice. The district argued that its case was fundamentally different because the invocations were the product of student choice and because attendance at an extracurricular event is voluntary. The Court, citing the discussion above, quickly rejected the first part of this argument.

As to the second part, the Court began by noting that for some students, particularly cheerleaders, band members, and team members, these functions were not strictly voluntary. Furthermore, the Court found that the district inappropriately minimized the importance of such extracurricular events to a complete educational experience. Finally, the Court stressed—as it has in other opinions involving religious practices in the school—the inherent coerciveness of the school context, in which young students can be easily influenced by social pressure to acquiesce to religious practices.

*Third district argument: the challenge to the policy is premature.* The district's final argument was that because no student had yet delivered an invocation under the policy, there could be no certainty that the message would be religious, and thus the challenge was premature. The Court conceded the truth of this statement as a factual matter but rejected the legal argument. The Court was not only concerned about forced student participation in religious worship at school functions; it also was concerned about school activity that has the purpose, and creates the perception of, government establishment of religion. In addition, the Court noted that the election called for under the policy had already occurred, thereby subjecting the issue of prayer to a majoritarian vote. This too was of constitutional concern. As discussed above, the Court found no difficulty in determining that this policy and the election itself involved the unconstitutional purpose of establishing religion.

The Court concluded by noting that it need not be blind to plain social facts. The Court refused to "pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer." The Court further refused to accept what "is obviously untrue: that these messages are necessary to 'solemnize' a football game and that this single-student, year-long position is essential to the protection of student-speech."

**Federal district court holds that county board of education is immune under the Eleventh Amendment from suit for overtime pay under the Fair Labor Standards Act.** Cash v. Granville County Board of Education, No. 5:99-CV-408-BR(3), ___ F. Supp. 2d ___ (E.D.N.C. Mar. 8, 2000).

**Facts:** Mary Cash, a secretary and bookkeeper at J.F. Webb High School in Granville County (N.C.), filed suit in federal court for overtime pay under the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201) for personal time she spent arranging for substitute teachers. The Granville County Board of Education asked the court to dismiss her claim before trial, asserting that it was immune from suit for monetary damages under the FLSA.

**Holding:** The federal court for the Eastern District of North Carolina granted the board's request. The Eleventh Amendment to the United States Constitution protects the state and state entities from suits for monetary relief in federal court. The question in this case was whether the board constitutes a state entity. Examining both the organizational and financial structure of local school boards, the court determined that the board is an arm of the state protected by the Eleventh Amendment. Local boards are created by virtue of state statute and are closely supervised by the State Board of Education; in addition, the ability of local boards to use their funds is constrained by the state. Thus the court concluded that any monetary award against the board would affect the state and dismissed Cash's suit.

**University's mandatory student activity fee, used in part to support student organizations engaging in political or ideological speech, does not violate the First Amendment to the United States Constitution so long as the funds are distributed in a viewpoint-neutral manner.** Board of Regents of the University of Wisconsin System v. Southworth, ___ U.S. ___, 120 S. Ct. 1346 (2000).

**Facts:** Past and present students of the University of Wisconsin (UW) filed suit against UW charging that a portion of its mandatory student activity fee policy violated their First Amendment rights to free speech, free association, and free exercise of religion. Specifically, the students challenged the allocation of 20 percent of the fee to support extracurricular activities sponsored by registered student organizations (hereinafter RSOs) whose speech the students disagreed with or found offensive.

To qualify as an RSO, students were required to organize as a not-for-profit group, limit membership primarily to students, and agree to undertake activities related to student life on campus. An RSO could thereafter obtain money in two ways. The first was by applying to the student government. The student government decided funding requests in a viewpoint-neutral manner, and rather than distribute lump sums, it reimbursed groups on the basis of receipts submitted. Guidelines identified which expenses were and were not appropriate for reimbursement. UW's student handbook also contained guidelines governing the conduct and activities of student organizations and provided processes for making and investigating student complaints concerning RSO activities. The second method of obtaining money was a student referendum process in which the student body could either approve or disapprove an assessment for a particular organization.

The federal court for the Western District of Wisconsin and the Seventh Circuit Court of Appeals found for the students, holding that UW could not compel them to contribute to organizations whose expressions conflicted with their own personal beliefs. In so holding, the courts relied on two earlier Supreme Court cases. The first, *Abood v. Detroit Board of Education* [431 U.S. 209 (1977)], held that nonunion teachers could not be compelled to pay a service fee equal in amount to union dues when the union used that fee to engage in political speech with which the teachers disagreed. The second, *Keller v. State Bar of California* [496 U.S. 1 (1990)], held that while the state could require lawyers to join the state bar association and fund activities "germane" to the association's mission, it could not compel these lawyers to fund the bar association's own political expression.

UW appealed to the United States Supreme Court.

**Holding:** The United States Supreme Court reversed the lower courts' rulings.

UW's purpose in imposing and allocating the student activity fee was to foster the free exchange of student ideas. This case thus differed from the *Abood* and *Keller* cases insofar as UW was not imposing fees to support its own speech and particular viewpoint. The Court recognized stimulating free speech and the exchange of ideas as an important function of a university. Attempting to apply the standard of "germane" speech in this context, said the Court, is both unworkable and inappropriate.

The Court continued, however, to say that UW does owe its students a duty to protect their First Amendment rights. The very vastness of the array of speech supported by the student activity fee makes it inevitable that some students will find some of that speech

objectionable and, if given the choice, would not support it. While UW could give students this option, it was acceptable also for UW to determine that the fee is necessary to support robust speech. In the latter case, so long as the allocation of the fee is governed by viewpoint neutrality—as both parties stipulated—the First Amendment rights of students are not violated. Therefore the mandatory fee and the method of distributing it used by the student government are constitutional.

The student referendum process, however, the Court found unconstitutional. The referendum process provided no protection for viewpoint neutrality and allowed the majority to silence speech by those with minority views. This process did not protect students' First Amendment rights.

**Chapter 2, a federal program that provides funds for the purchase of educational materials and equipment, does not violate the Establishment Clause by including religiously affiliated schools among its beneficiaries.** Mitchell v. Helms, ___ U.S. ___, 120 S. Ct. 2530 (2000).

**Facts:** Chapter 2 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. §§ 7301–73) provides federal funds to local education agencies (LEAs) for the acquisition of instructional and educational materials, computer software and hardware, and other curricular aids. Recipient LEAs must offer assistance to both public and private schools, and the amount of assistance is based on the number of children enrolled in each school. Chapter 2 funds may only supplement funds available from nonfederal sources. The services, materials, and equipment provided to schools with these funds must be secular, neutral, and nonideological, and any private school receiving such equipment may not acquire control over or title to it.

Taxpayers in Jefferson Parish, Louisiana (hereinafter the respondents), filed suit, alleging that Chapter 2 was an unconstitutional law creating an establishment of religion because many of the private schools that received Chapter 2 aid were religiously affiliated. The Fifth Circuit Court of Appeals held that Chapter 2 aid, except for that directed toward the purchase of textbooks, violated the Establishment Clause of the United States Constitution. Petitioners, including various officials of the state and federal departments of education, appealed the ruling to the United States Supreme Court.

**Holding**: A majority of the Court held that Chapter 2 does not violate the Establishment Clause, but it was not a majority opinion—only a plurality opinion and a concurrence. This means six of nine justices agreed that Chapter 2 is constitutional, but only four of the six agreed on the reasoning necessary to reach that conclusion. The two concurring justices reached the same conclusion but used different reasoning. While the four justices in the plurality and the two concurring justices together established the majority on this case, the two concurring justices might, in the next similar case, side with the dissent should the other four attempt to impose their reasoning. Therefore both the plurality opinion and the concurrence will be discussed.

Justice Clarence Thomas delivered the plurality opinion. He began by attempting to clarify the case law governing application of the Establishment Clause in the school context. The Court's opinion in *Agostini v. Felton* [521 U.S. 203 (1997) (holding that the Establishment Clause does not prohibit placing public school teachers in parochial schools to provide Title I services); see "Clearinghouse," *School Law Bulletin* 29 (Winter 1998): 28–29] provided a modified version of the *Lemon* test [403 U.S. 602 (1971)]: instead of assessing whether a statute (1) has a secular purpose, (2) has the primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, the Court now looks to only the first two factors.

Since the parties to this case did not dispute that Chapter 2 had a secular *purpose*, Thomas focused on the law's *effect* (the second prong of the *Lemon* test). Under *Agostini*, three considerations aid the effect determination: (1) Does the statute result in governmental indoctrination? (2) Does it define its recipients by reference to religion? and (3) Does it create an excessive entanglement between government and religion?

Thomas wrote that neutrality is the most important factor in determining whether governmental indoctrination results from a law. If the religious, irreligious, and a-religious are alike in their eligibility for government aid, no one can conclude that indoctrination by any recipient has been conducted at the behest of the government. Neutrality is best assured, Thomas continued, in cases where any government aid that goes to a religious institution does so as a result of genuinely independent, private choices of individuals. In this case, he found, the fact that Chapter 2 benefits are distributed on the basis of each school's per capita enrollment—the result of individual choice—assures neutrality on the part of government.

In so finding, Thomas rejected the respondents' argument that existing Supreme Court case law required the Court to invalidate Chapter 2 if it found that

it provided direct, nonincidental aid to the primary educational mission of religious schools. This indirect/direct aid distinction, Thomas wrote, is unworkable, unhelpful, and in past cases was used only as a proxy for determining whether aid had reached a religious school through private choice. The fact that equipment bought with Chapter 2 funds goes directly to schools rather than to students who then choose at which schools to use such equipment is a distinction without meaning. (That is, the independent choice that determines neutrality can be made before distribution of the aid.)

Thomas next addressed another argument posed by the respondents: that to be constitutional, government aid to religious schools must not be religious in nature and may not be divertible to religious uses. Thomas noted that the Court agreed with the first part of this argument but rejected the second part. So long as federal aid is neutral in content (as the language of the law requires) and neutrally distributed, any diversion of the aid to religious purposes cannot be attributed to the government and is of no constitutional concern.

It was this last point—that diversion of the aid to religious purposes cannot be attributed to the government and thus is of no constitutional concern—with which the concurring opinion of Justice Sandra Day O'Connor took strongest issue, although she also disagreed with the plurality's focus on "neutrality" as the axiom of future Establishment Clause challenges to government aid to schools.

Court case law provides no precedent—quite to the contrary—O'Connor wrote, for the proposition that the use of public funds to finance religious activity is constitutional. Furthermore, in those cases where a diversion has been found to be permissible—for example, where a government-funded, sign-language interpreter was allowed to interpret the content of classes to a deaf student at a parochial school [Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993); see "Clearinghouse," *School Law Bulletin* 24 (Spring 1993): 18]—aid was provided directly to the student who, in turn, made the choice of where to put that aid to use. This is a significant factual difference. A per capita school aid program is different from a true private choice program, said O'Connor. For one thing, in the latter case, the fact that aid flows to a religious school and is used for the advancement of religion is *wholly* dependent on the student's private decision. Also, the distinction between the two kinds of programs makes a difference in the public's perception of whether such aid is a government endorsement of religion. Nonetheless, on the facts of this case, O'Connor concurred with the plurality, finding that the petitioners had not established that a diversion had in fact occurred.

O'Connor did not object to the plurality's analysis of a program's neutrality as *one* part in determining its effect, but she concluded that existing case law required the analysis of other factors as well. For example, O'Connor considered several factors relevant to her finding in this case that Chapter 2 did not involve the government in indoctrination: (1) Chapter 2, by its terms, requires that its aid supplement and not supplant funds from nonfederal sources; (2) no Chapter 2 funds ever reach the coffers of a religious school; (3) no private school gains title to the equipment it uses under Chapter 2, thus ensuring that religious schools reap no financial gain by virtue of Chapter 2; and (4) Chapter 2 materials and equipment must be secular, neutral, and nonideological.

**Fourth Circuit narrowly defines *academic freedom*; holds that law regulating state employees' access to sexually explicit material on computers owned or leased by the state does not violate the First Amendment.** Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).

**Facts:** Six professors (hereinafter the plaintiffs) employed by public colleges and universities in Virginia brought suit against the governor of Virginia, James Gilmore, alleging that a state law restricting state employees from accessing sexually explicit material on computers owned or leased by the state violated the right to free speech of all state employees and violated the plaintiffs' own right to academic freedom. The federal court for the Eastern District of Virginia found that the law was unconstitutional. On appeal, a three-member panel of the Fourth Circuit Court of Appeals reversed that decision, finding that the law was constitutional because it regulated only employee speech in their capacity as employees as opposed to speech in their capacity as private citizens addressing matters of public concern. [See "Clearinghouse," *School Law Bulletin* 30 (Spring 1999): 19.]

Thereafter, the majority of the judges on the Fourth Circuit voted to vacate the panel's decision and rehear the matter en banc (that is, with a full panel of twelve judges).

**Holding:** The full panel found the law constitutional, as the three-member panel had.

As to the first claim, that the law violated the First Amendment free speech rights of state employees generally, the full panel ruled along the same lines as the three-member panel.

The full panel's discussion of the academic freedom claim was much more detailed, however. The plaintiffs contended that state university and college professors have the constitutional right to determine for themselves, without input from the state, the subjects of their research, writing, and teaching. The court began by noting that the concept of academic freedom is much bandied about but little explained in the federal courts. The United States Supreme Court has never invalidated a statute on the basis of academic freedom, and in those cases where the concept is discussed, it seems clear that academic freedom adheres to the university itself, not to the professors. For example, one Supreme Court discussion of the issue cited "the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Nowhere has a court recognized the right of individual professors to determine the content of their scholarship and research.

As the professors have no individual right to academic freedom, and as the statute does not unconstitutionally infringe on the free speech rights of public employees generally, the statute is constitutional.

**Board is immune from suit by student who was hit by a car while crossing the road to reach her bus stop.** Herring v. Winston-Salem/Forsyth County Board of Education, ___ N.C. App. ___, 529 S.E.2d 458 (2000).

**Facts:** Ronald Liner, the assistant principal of Lewisville Elementary School, moved Loryn Herring's bus stop after she complained of an attack by several boys at the first location. Several months later Herring was hit by a car while crossing the road to get to her new bus stop; she suffered permanent and severe brain damage. She sued both the Winston-Salem/Forsyth County (N.C.) Board of Education and Liner, alleging that the board's failure to discipline the boys who attacked her was negligence, breaching its duty of care to her. The board and Liner asserted sovereign immunity.

**Holding:** The North Carolina Court of Appeals found that the board and Liner were protected from suit by sovereign immunity and dismissed Herring's claim.

Sovereign immunity protects county entities and their officials (sued in their official capacities) from suit resulting from the performance of a governmental function. Governmental functions (as opposed to proprietary functions) are those that only a governmental agency could undertake, the hallmarks of such functions being the weighing of political, legislative, and social factors in decisions or actions taken for the good of the public. The meting out of discipline in this case took place in the context of a school transportation program, a function conferred on the board by statute and accepted by the courts as governmental in nature. Thus the board and Liner's actions are protected by sovereign immunity.

Nor did the board waive immunity through the purchase of liability insurance. Although Section 115C-42 of the North Carolina General Statutes (hereinafter G.S.) provides that a board may waive immunity through such a purchase, immunity is waived only to the extent of the policy's coverage. The policy in this case excluded coverage for bodily injuries arising from the operation, use, loading, or unloading of an automobile, including a school bus.

**Student who left school because of attacks by fellow students failed to state a claim for deprivation of the right to attend public school.** Stevenson v. Martin County Board of Education, 93 F. Supp. 2d 644 (E.D.N.C. 1999).

**Facts:** Alex Stevenson was a sixth grader at Williamston Middle School in Martin County (N.C.) until, in the wake of several attacks by fellow students, he began attending private school. While still at Williamston, Stevenson told Harry Respass, the principal, that Charles McEachern was instigating fights with him. Respass assured Stevenson that he would be removed from McEachern's class. Respass did not remove Stevenson, however, and McEachern continued to harass Stevenson, until the day of the penultimate attack.

On that day, McEachern punched Stevenson in the head during class; when Stevenson asked the teacher for help, she said there was nothing she could do and that he probably had asked for it. Stevenson then left class to go to the principal's office for help, but McEachern and one of his friends followed him. In an attempt to get help, Stevenson knocked on the door of a nearby classroom. The teacher inside tried to help Stevenson, but by that time McEachern and his cohort were kicking and stomping Stevenson on the head, chest, throat, arms, and legs, and the teacher was unable to stop them. This attack continued for ten minutes until other students stopped it.

Four days later, McEachern's friends told Stevenson that they were going to jump him. Despite promised help from Respass, Stevenson was attacked. He then withdrew from the school. Stevenson filed suit al-

leging that the Martin County Board of Education and several of its officials, including Respass (hereinafter the defendants), deprived him of the right to attend public school without due process of law and that they showed deliberate indifference to a known duty under the Safe and Drug-Free Schools Act (Safe Schools Act). The defendants moved to dismiss Stevenson's claims before trial.

**Holding**: The federal court for the Eastern District of North Carolina granted the defendant's motion, finding that Stevenson failed to state a claim for relief.

The court began by stating that Stevenson had not been deprived of a constitutionally protected liberty interest. Courts have uniformly held that a student is not constitutionally entitled to affirmative protection from the actions of third parties, unless school personnel have acted so as to render the student unable to care for himself or herself. And while courts have recognized a constitutionally protected property interest in receiving a public education, and the corresponding right to due process before deprivation of that right, that right has never been found in circumstances other than a school dismissing or disciplining a student. Stevenson left school voluntarily, so he stated no claim here.

Stevenson's claim under the Safe Schools Act similarly was doomed. The law is merely a grant program, the Department of Education has promulgated no regulations explaining students' rights under it, and no federal court has relied on it for any purpose. In order for a state to be held liable under a federal-funding statute, the statute must give unequivocal notice of the kinds of actions and occurrences for which the state will be held liable. The Safe Schools Act provided no such notice.

**Board's counterclaim in special education dispute was timely filed.** Kirkpatrick v. Lenoir County Board of Education, 216 F.3d 380 (4th Cir. 2000).

**Facts**: Meridith Kirkpatrick, a student with a disability who filed an administrative claim against the Lenoir County Board of Education, was awarded $3,388 in reimbursement for independent educational evaluations she had obtained, but she was denied reimbursement for private school tuition payments. Thereafter Kirkpatrick filed a civil action in federal court reasserting the tuition claim. She filed this action within thirty days of the administrative decision. The board did not file its own action, instead filing an answer to Kirkpatrick's complaint asserting its own counterclaim. Kirkpatrick argued that the counterclaim should be dismissed because the board failed to file it within the thirty-day limitation period provided by state (G.S. 115C-116) and federal (20 U.S.C. § 1415) law.

The federal court for the Eastern District of North Carolina rejected Kirkpatrick's argument, finding that the board's counterclaim was compulsory under the Federal Rules of Civil Procedure insofar as it arose from the same administrative decision, involved the same child and the same facts, and evoked consideration of the same law as Kirkpatrick's claim. This finding depended on the court's characterization of an action filed in federal court pursuant to the Individuals with Disabilities Education Act (IDEA) as an original civil action instead of as an appeal from an administrative hearing. Kirkpatrick appealed.

**Holding**: The Fourth Circuit Court of Appeals affirmed the lower court's ruling. The lower court was correct in finding that if a federal court action filed under the IDEA constituted an appeal, it would be governed by the thirty-day limitation period but that if it was an original civil action, it would be governed by the Federal Rules of Civil Procedure. The lower court was correct also in its determination that the action was original and not an appeal because (1) the IDEA, in providing that a party aggrieved by a state administrative agency's decision can bring an action in state or federal court, speaks in terms of "civil actions," not "appeals," and (2) evidence heard by, and remedies available to, a federal court in these IDEA claims are more akin to an original civil action because if the matter was an appeal, the court would be limited to reviewing the record developed in the lower court and could only affirm, reverse, or vacate the prior decision. In IDEA cases, the court is allowed to hear additional evidence and can grant such relief as it deems appropriate.

**Student loan recipient whose prospective school closed and failed to refund his loan was nonetheless required to repay the loan.** Green v. United States of America, No. 1:99CV53C, ___ F. Supp. 2d ___ (W.D.N.C. Feb. 9, 2000).

**Facts**: Poor Eugene Green, Jr. He applied for and received a federal education loan in the amount of $2,625 to attend a truck-driving program at Blanton's Junior College. Green subsequently canceled his application to Blanton's, and Blanton's told him that his loan application also would be canceled. Two years later, upon receiving notice of default on the loan from the Department of Education, Green spoke with personnel at Blanton's who told him that the error

would be corrected. Thereafter Blanton's closed its doors and did nothing to resolve Green's claim.

Green then filed suit against the federal government, seeking to prevent it from collecting past-due loan payments from him for an education he never received. The government moved to dismiss his case before trial.

**Holding**: The federal court for the Western District of North Carolina granted the motion to dismiss.

The court cited two reasons for dismissing Green's claims. First, the Higher Education Act of 1965, which governs student loans, forbids injunctions (that is, claims seeking to compel or prevent a certain action) against the secretary of education. In addition, the court found that Green could not assert what the government called a "school-related grievance" in defense of his default. Blanton's and the government had no contract between them as to Green's loan and shared no similarity of interests in the resolution of his claim: Thus there was, using the legal term, no *privity* between Blanton's and the government, and without privity the government had no claim against Blanton's.

The court did, however, note that Congress has made some attempt to address the problem of fly-by-night or insolvent schools inappropriately keeping student loan funds. This remedy, however, is administrative and not judicial. Thus, although Green can be forced to pay the government the amount of his default, he also can seek an administrative refund from the secretary of education.

**The United States cannot pursue repayment of an alleged student loan default that occurred twenty-six years ago.** U.S. v. Charles, 1:98CV00177, ___ F. Supp. 2d ___ (M.D.N.C. Apr. 11, 2000).

**Facts:** In 1970, Lorinda Charles borrowed $2,050 under a federal loan program to attend the University of Tampa. She graduated in 1972, and in 1973, she contended, she repaid the loan in full by a check payable to the university's financial aid office. The United States, however, claimed that Charles was in default on the loan as of November 2, 1974. Nonetheless, no one contacted Charles about the loan until 1988, when a collection agency called. She informed the agency that she had paid the loan in full but found that she was unable to document this claim because of the age of the matter: The university's financial aid office kept records for seven years only, and the bank through which the loan had been made was no longer in business.

From 1988 until 1997, Charles received approximately one call a year from a new collection agency (and hundreds of letters demanding payment), and she always informed them that she had paid the loan in full. In 1998, the United States filed suit seeking more than $3,000 in principal, interest, and fees. Charles sought to have the suit dismissed on the basis that it was not timely filed.

**Holding**: The federal court for the Middle District of North Carolina granted Charles's motion. Although currently there is no statute of limitations on government actions seeking repayment of defaulted loans, until 1992 there was a six-year statute of limitations on such actions, meaning that the claim against Charles expired in 1980. The 1992 law that abolished the statute of limitations, however, also revived, or made actionable, debts—such as Charles's—on which the statute had already expired.

Nonetheless, case law allows for a due process exception to the revival of such suits when a defendant can show special hardships. In this case, because the alleged default occurred twenty-six years ago, Charles could not locate the records that would have substantiated her claim. Had the action been brought within the six-year statute of limitations that existed at the time of her alleged default, she probably would still have had the records, and had she been aware that the government could sue her at any time, she might have kept the records indefinitely. However, Charles believed that she had paid the debt and did not maintain the records, and the United States offered no explanation for the prejudicial delay in this case. These facts, the court concluded, constituted special hardships.

**Claimant who established that the Teachers' and State Employees' Retirement system improperly denied her retirement benefits is entitled to attorney fees.** Wiebenson v. Board of Trustees Teachers' and State Employees' Retirement System, No. COA99-842, 2000 WL 780316 (N.C. App. June 20, 2000).

**Facts:** Molly Wiebenson won a court order against the Teachers' and State Employees' Retirement System reinstating her retirement benefits. Wiebenson and another woman at the Black Mountain Alcohol Rehabilitation Center (ARC) had shared a job for eight years until Wiebenson's retirement in 1992. Before accepting the job-sharing arrangement, Wiebenson sought and received assurances that her eligibility for retirement benefits under the system would not be affected.

Throughout the job-sharing arrangement, Wiebenson was classified as a permanent, full-time employee who took annual leaves of absence of approximately six-month durations. Also during this period, the system provided her with annual statements of her accumulating benefits and accepted her contributions to the system.

In 1991, in response to her inquiries about retirement, the system informed Wiebenson that she was not eligible for benefits and had not been eligible since she began job sharing because she was then no longer a full-time employee. The North Carolina Supreme Court found that the retirement system misread the relevant statute [G.S. 135-1(10)] and that Wiebenson's regular approved leaves of absence did not cause her to become a part-time employee.

After the reinstatement of her benefits, Wiebenson sought attorney fees from the retirement system for its improper denial of her benefits. G.S. 6-19.1, the statute under which Wiebenson sought attorney fees, provides for such an award when an agency acts without substantial justification in defending against a petitioner's claim and no special circumstances exist that would make the award unjust.

**Holding**: The North Carolina Court of Appeals granted attorney fees to Wiebenson.

The retirement system did not act with substantial justification in defending against Wiebenson's claim, the court found. Although, as the system argued, the lower court and the court of appeals itself agreed with the retirement system's interpretation of G.S. 135-1(10) [the court of appeals reinstated Wiebenson's benefits on other grounds; see "Clearinghouse," *School Law Bulletin* 27 (Fall 1996): 30], their agreement did not establish substantial justification. In addition, the system ignored the fact that both the court of appeals and the state supreme court found that Wiebenson was entitled to retirement benefits. [See "Clearinghouse," *School Law Bulletin* 28 (Summer 1997): 25.] Further, the record provides ample evidence that the retirement system was aware of Wiebenson's job sharing arrangement throughout its duration, that it made representations to her that she was still a full-time employee eligible for the system, and that it continued to accept her contributions. This conduct by the system, found the court, deprived the system of substantial justification. Since there were no special circumstances that would make the award unjust, Wiebenson was entitled to attorney fees.

**North Carolina Supreme Court affirms that punitive damage award against university need not be limited to the amount of punitive damages awarded against its employee.** Watson v. Dixon, No. 103A99, 2000 WL 964524 (N.C. July 13, 2000).

**Facts**: Sarah Watson and Bobby Dixon were co-employees at Duke University. Watson reported to proper authorities at Duke that Dixon was harassing her, but Duke allowed the harassment to continue without taking action for several months. When Watson filed suit against Dixon and Duke, the jury awarded her compensatory damages as well as a $5,000 punitive damage award against Dixon and a $500,000 punitive damage award against Duke.

Duke appealed the punitive damage award, arguing that it could not be required to pay more than Dixon because of court precedent holding that in cases of vicarious liability, a punitive damage award against an employer (who, in this situation, merely ratified its employee's conduct) cannot exceed that of the employee. The North Carolina Court of Appeals affirmed the punitive damage award against Duke, finding that by ratifying Dixon's behavior through inaction, Duke took on responsibility for some part of the wrongdoing in this case. [See "Clearinghouse," *School Law Bulletin* 30 (Spring 1999): 22.] Duke appealed again.

**Holding**: The North Carolina Supreme Court affirmed the ruling against Duke, though it based its opinion on different reasoning from that used by the court of appeals.

The cases cited by Duke in support of its argument that its punitive damages cannot exceed those of Dixon are not on point, began the court. Those cases involved the issue of compensatory damages and make clear that in cases of vicarious liability, the employer's liability for compensatory damages cannot exceed that of the employee. This rule makes sense given that the purpose of compensatory damages is to make the victim whole and that the harm suffered by the victim is the same regardless of whether the employer ratified the employee's conduct. The purpose of punitive damages, however, is to punish *and* deter the defendant (and others) from engaging in similar behavior. Furthermore, in determining the amount of a punitive damage award, it is proper for the court to consider the defendant's financial worth, whereas with compensatory damages, the focus is on the plaintiff's injury.

A punitive damage award against Duke of $5,000 would do little to deter or punish the university. Duke

should not be allowed to use Dixon's limited financial resources as a shield for its behavior. Nor, from now on, will any employer's liability for punitive damages be limited to the punitive damage liability of the employee when the employer has ratified the employee's tortious conduct.

**Court allows former university employee leave to amend some of her disability discrimination claims but denies leave to amend others.** Gibbs v. Guilford Technical Community College, No. 1:98CV00218, ___ F. Supp. 2d ___ (M.D.N.C. Nov. 24, 1999).

**Facts**: Patricia Ann Gibbs, who has cerebral palsy, worked at Guilford Technical Community College (GTCC) for fifteen years until she was terminated in April of 1997. After her termination she filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that GTCC and several of its employees had failed to make reasonable accommodations for her disability. The EEOC issued Gibbs a right-to-sue letter, and in March 1998 she filed suit in the federal court for the Middle District of North Carolina, claiming violations of the Rehabilitation Act and the Americans with Disabilities Act (ADA). According to the court, however, Gibbs neglected to explain in her complaint what GTCC actions formed the basis of her allegations. Gibbs then asked the court for permission to amend her complaint so that it would contain that information. GTCC opposed her motion.

**Holding**: The court granted Gibbs's request in part and denied it in part.

The court refused to allow Gibbs to add to her Rehabilitation Act claim because when brought in North Carolina courts, such claims have a 180-day statute of limitations. Gibbs did not file her suit until nearly a year after her termination, so any Rehabilitation Act claims were time-barred. The court also refused to allow her to add claims against individual employees of GTCC because neither the Rehabilitation Act nor the ADA allows such suits.

The court did, however, allow Gibbs to add ADA claims against GTCC. In Gibbs's case, the statute of limitations for filing with the EEOC was 300 days (longer than the usual 180-day limitation period because of state filing requirements not relevant to this discussion).

**Professor failed to state a claim for defamation against university employee and failed to state any claim against university's board of trustees.** Laud-Hammond v. Reger, No. 3:00CV18P, ___ F. Supp. 2d ___ (W.D.N.C. Mar. 16, 2000).

**Facts**: Archibald Laud-Hammond filed suit against Mark Reger, an employee of Johnson C. Smith University, alleging among other things that Reger's failure to list him in the Directory of American Philosophers constituted defamation. Laud-Hammond also attempted to sue the university's board of trustees for various civil rights violations under 42 U.S.C. § 1981.

Reger and the board moved to dismiss the defamation claim because Laud-Hammond failed to allege an essential element of that claim: publication. The board moved to have all claims against it dismissed because Laud-Hammond failed to properly name it as a defendant.

**Holding**: The federal court for the Western District of North Carolina granted both motions.

Defamation is a false communication by one person about a second person that tends to so harm the reputation of the second person as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her. A statement can only be defamatory if it is communicated. Since there was no writing about or picture of Laud-Hammond, the court found it clear that the defendants had published no defamatory information about him.

The caption of Laud-Hammond's complaint named as defendant "Mark Reger, individually and as employee of Johnson C. Smith University," and no other party. Laud-Hammond argued that the board was implicitly a defendant because of the doctrine of *respondeat superior*, which makes an employer accountable for the wrongful acts of its employee. The court found several flaws in this argument. First, *respondeat superior* liability requires that the employee have committed the act during the course and scope of employment. Laud-Hammond did not address this point in his complaint. Second, while the doctrine supports the imposition of liability on an employer for actions that an employee commits during the scope of employment, it does not provide that an entity that has not been named as a defendant in a lawsuit automatically becomes party to that suit. Finally, there is no *respondeat superior* liability under Section 1981, the federal statute under which Laud-Hammond sought to bring all his civil rights claims against the board.

**North Carolina Court of Appeals affirms Industrial Commission award to employee terminated for conduct related to a compensable injury.** East v. North Carolina State University, No. COA99-816, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2000).

**Facts**: Rayvon East was awarded workers' compensation benefits after the full Industrial Commission found that his employer, North Carolina State University (NCSU), terminated him for conduct related to a compensable injury. [See "Clearinghouse," *School Law Bulletin* 30 (Summer 1999): 33–34.] NCSU appealed the commission's ruling.

**Holding**: The North Carolina Court of Appeals affirmed the commission's ruling, finding sufficient evidence in the record to conclude that NCSU had terminated East for conduct related to his compensable injury—conduct for which a nondisabled employee ordinarily would not have been terminated. NCSU argued that in the wake of his admittedly compensable injury, East refused to accept suitable employment. The record showed, however, that NCSU failed to offer East suitable employment. Several times NCSU offered East employment that violated his injury-related work restrictions and refused to address his complaints of pain in the assignments he did attempt to perform. Therefore East was justified in refusing to perform the proffered employment.

**Earlier suit bars former community college employee's claim of retaliation.** Page v. Trustees of Sandhills Community College, 1:98CV010038, ___ F. Supp. 2d ___ (M.D.N.C. May 1, 2000).

**Facts**: Carol Page was an employee of the Sandhills Community College from 1979 until her termination in 1997. In 1994 she filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination. The EEOC issued a right-to-sue letter, and Page filed suit in federal court, alleging that the college had discriminated against her on the basis of race and had retaliated against her for filing the EEOC complaint. In 1997 Page engaged in settlement negotiations with the college that ultimately were unsuccessful. The college thereafter refused to renew her contract, allegedly in retaliation for Page's refusal to accept the settlement offer. Page then filed a new complaint with the EEOC concerning the retaliatory discharge.

Although Page's court complaint contained only allegations concerning the initial racial discrimination and retaliation for filing the EEOC complaint, and although she had not received a right-to-sue letter from the EEOC concerning the retaliatory discharge, Page argued both retaliation claims to the jury at trial. The jury found against Page on the discrimination claim but for her on the retaliation claim. [See "Clearinghouse," *School Law Bulletin* 31 (Winter 2000): 36–37.] In 1998, Page filed a new suit in federal court concerning the retaliatory discharge. The college sought to have the claim dismissed on the basis of *res judicata*, a legal doctrine that prevents a party from litigating essentially the same claim twice.

**Holding**: The federal court for the Middle District of North Carolina found that Page's new claim was barred by *res judicata*.

To prevail on a *res judicata* defense, the college had to establish all of the following: that (1) Page had a final judgment on the merits of her prior suit; (2) that the cause of action in the prior and present suit arose out of the same transaction or series of transactions; and (3) that the parties in the two suits were the same or shared sufficiently similar interests to be legally considered the same. Neither party disputed the existence of factors one and three, but Page asserted that her cause of action in this suit was different from the cause in her first suit. The court disagreed, finding indisputable evidence that Page argued the retaliatory discharge claim to the jury. In addition, the court's judgment, which included $32,810 in front pay in recognition of her having been terminated, further demonstrated that she had argued this claim at the earlier trial.

## Other Cases and Opinions

**Court temporarily enjoins school from suspending student for creating a Web page from his home without using school time or resources.** Emmett v. Kent School District, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

**Facts**: Nick Emmett, a senior at Kentlake High School (Wash.) and co-captain of the basketball team, was suspended for five days and prohibited from participating in school sports because of his "Unofficial Kentlake High Home Page," which he created from home without using school time or resources. The site included a disclaimer warning visitors that it was not sponsored by the school and that it was for entertainment purposes only. Two features of the site caused school administrators to suspend him. First, he wrote

mock obituaries about two of his friends (apparently stemming from an earlier creative writing class assignment in which students were to write their own obituaries). Second, he allowed visitors to vote on who would die next—in other words, who would be the subject of the next obituary.

An evening television news story characterized Nick's Web site as containing a "hit list" of people to be killed at the high school, although the site contained no reference to a hit list. The next day, school administrators, believing that some students felt threatened by the site (which Nick removed from the Internet the night of the news story), suspended Nick. Nick challenged the suspension, charging that it violated his right to free speech under the First Amendment to the United States Constitution. He also sought a preliminary injunction to halt the suspension until the court ruled on the merits of his claim.

**Holding**: The federal court for the Western District of Washington granted Nick's request for a preliminary injunction, finding that the likelihood that he would succeed on the merits of his claim was high and that missing four additional days of school and a playoff basketball game constituted a sufficient showing of irreparable injury.

Nick's chances of prevailing on his free speech claim were good, found the court. Although a student's First Amendment rights within the school setting are constrained to the extent that his or her speech or conduct might materially and substantially interfere with the operation of the school, this same rule does not apply if the speech or conduct takes place outside of the school setting, as Nick's did. Although undoubtedly the site's intended audience was the Kentlake High School student body, Nick's speech occurred entirely outside the supervision and control of the school. In any event, the school presented no evidence that any student felt intimidated, threatened, or harassed by the Web page.

The court went on to note with sympathy, however, the difficult situation in which such a case places school administrators. In the wake of school shootings in Colorado, Oregon, and other states, administrators must be on the lookout for violent inclinations in their students. But in this case, Nick showed no violent tendencies and did not actually threaten anyone. These facts, in combination with the fact that the speech occurred outside the school gates, made it highly likely that Nick would succeed on the merits of his claim. ■