Clearinghouse

Edited by Ingrid M. Johansen

The Clearinghouse digests recent state and federal opinions that affect North Carolina. The facts and legal conclusions contained in the digests are summaries of the facts and legal conclusions set forth in judicial opinions. Each digest includes a citation to the relevant judicial opinion, so interested readers may read the opinion's actual text. Neither the Clearinghouse editor nor the School of Government takes a position as to the truth of the facts as presented in the opinions or the merits of the legal conclusions reached by any court.

Cases That Affect North Carolina

Party seeking relief (most often parents) under Individuals with Disabilities Education Act bears burden of proof in due process hearings. Schaffer v. Weast, 126 S. Ct. 528 (2005).

Facts: Under the Individuals with Disabilities Education Act (IDEA) the parents of Brian Schaffer contested the appropriateness of the individualized education plan (IEP) created for him by the Montgomery County (Md.) school system and sought reimbursement for the expense of Brian's subsequent private education. The administrative law judge who heard the case found the evidence to be close but, placing the burden of proof on the parents, ruled for the district. *[Note:* burden of proof *is a legal term that designates which party loses in cases where the evidence is close.]* The Schaffers appealed this decision in federal district court and won a ruling that the district bore the burden of proof. In reviewing this ruling, the Fourth Circuit Court of Appeals ultimately concluded that the burden of proof remained with the parents: the court found that the Schaffers had offered no persuasive reason to depart from the normal rule, which allocates the burden of proof to the party seeking relief. [See digest in "Clearinghouse," *School Law Bulletin* 35 (Summer 2004): 15]. The Schaffers appealed to the U.S. Supreme Court.

Holding: The Supreme Court agreed with the Fourth Circuit.

Because the IDEA is silent about who bears the burden of proof in the due process hearings it authorizes, the Court began with the ordinary default rule that the party seeking relief bears the burden of proof. The Court found only one of the Schaffers's arguments for deviating from the default rule plausible: that is, that the default rule, based on considerations of fairness, should not require the party seeking relief to establish facts peculiarly within the knowledge of his or her adversary. School districts do, the Court agreed, have a natural advantage in terms of information and expertise, but Congress had addressed this imbalance in several IDEA provisions. For example, parents have the right to inspect all school records relating to their child. Parents also have the right to an independent educational evaluation of their child at public expense. In addition, 2004 amendments to the IDEA require districts to respond to a parent's complaint in writing, setting out the reasoning behind the disputed action, details about other options considered, and a description of all the information and factors the IEP team relied on in developing a child's educational program. These measures, the Court reasoned, mitigate the apparent unfairness of requiring parents to show that a school's proposed IEP is inappropriate.

Statute providing for daily voluntary recitation of the Pledge of Allegiance does not violate the Establishment Clause; nonattorney parent is not entitled to represent his children in action so alleging. Myers v. Loudon County Public Schools, 413 F.3d 395 (4th Cir. 2005).

Facts: Edward Myers, on behalf of himself and his children, claimed that a Virginia statute providing for the daily, voluntary recitation of the Pledge of Allegiance in the state's public schools violated the Establishment Clause of the U.S. Constitution. The federal court for the Eastern District of Virginia found the statute constitutional under the *Lemon* test, concluding that it did not have a religious purpose or effect and did not impermissibly entangle the government with religion. Myers appealed.

Holding: The Fourth Circuit Court of Appeals affirmed the lower court's judgment.

Before addressing the merits of his claim, the court noted that Myers, as a nonattorney, was not entitled to represent his children in this claim. The Federal Rules of Civil

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Procedure allow Myers to litigate his own claims and to raise his children's claims, but not to *litigate* his children's claims. Such a rule prevents damage to children's interests by well-meaning but legally untrained parents. Ordinarily, then, a court would remand such a case for rehearing once the children are represented by legal counsel. In this case, however, the court determined that remand was unnecessary because all parties were represented by counsel on appeal and because the determination of this issue was strictly legal and was unprejudiced by Myer's representation below.

The court determined that the daily, voluntary recitation of the pledge simply did not violate the Establishment Clause. The primary evil the Establishment Clause was drafted to prevent was government compulsion of its citizens to support a government-favored church. Courts have therefore interpreted it to allow religious practices that effectively create no danger of substantially involving the state in religious exercises. The paradigmatic example of such a ruling came in *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the U.S. Supreme Court affirmed the constitutionality of the practice of opening legislative sessions with prayer. This practice, found the Court, was in existence at the time of the Establishment Clause's creation and, far from establishing a government religion, simply acknowledged a widespread belief among the country's citizens.

Even if the Establishment Clause were interpreted to prohibit any and every governmental practice implicating religion, the Pledge of Allegiance does not constitute a religious exercise. The pledge is not a prayer, but a patriotic activity. While a prayer is a humble personal communication between an individual and his or her deity, the pledge is a public proclamation of loyalty to the U.S. flag and the country for which it stands.

Court grants new trial on damages for professor who showed that university breached his contract. Munn v. North Carolina State University, ___ N.C. App. ___, 617 S.E.2d 335 (2005).

Facts: Harry Munn, a professor in North Carolina State University's (NCSU) Communications Department for twenty-eight years, agreed to enter into a phased retirement program. Under the program, he agreed to work part-time for three academic years at one-half the salary he had earned during his last nine- or twelve-month period of employment before entering the program. Munn and NCSU signed a contract to this effect specifying that Munn's duties would consist of teaching a certain number of semester hours over the period of the contract. After this contract was signed, several female students complained that Munn had made inappropriate comments to them. NCSU investigated the charges and then decided to remove Munn from the classroom.

NCSU offered Munn an alternative assignment (compiling information for an alumni database), which he declined. Although he did not teach or perform alternative duties, Munn did receive his salary for the first year of the contract. During the next year Munn moved to Florida, stating that he did not intend to return to North Carolina except to teach his classes. NCSU notified Munn that he would no longer receive his salary unless he accepted an alternative assignment.

Munn sued NCSU for breach of contract and at trial provided evidence of damages in the amount of $43,228, the sum he would have been paid during years two and three of the contract. The jury determined that NCSU did breach Munn's contract but awarded him only $1 in damages. Munn moved for a new trial or a judgment notwithstanding the verdict; that is, he asked the court to vacate the jury's ruling and impose one of its own. The court denied both motions, and Munn appealed.

Holding: The North Carolina Court of Appeals granted Munn's request for a new trial.

In order to grant a motion for a new trial on the issue of damages, a court must be persuaded that the ruling below probably amounted to a substantial miscarriage of justice. As a general rule, a plaintiff who shows breach of contract is entitled to be made whole—that is, placed in the same monetary position he or she would have occupied if the contract had been performed. Munn showed breach and presented specific evidence of the salary he would have received under years two and three of his contract with NCSU. Munn argues that this evidence was not contradicted and that he was therefore entitled to $43,228 in damages.

NCSU contends that Munn was entitled to only nominal damages because after his move to Florida he did not show that he was ready, willing, and able to perform the contract. The jury did not address this issue, found the court, so it is impossible to determine what amount of damages Munn was actually entitled to. Therefore a new trial on this issue must be held.

Court rejects wrestling coach's claim of qualified immunity in red-bellying case. Meeker v. Edmundson, 415 F.3d 317 (4th Cir. 2005).

Facts: The federal court for the Eastern District of North Carolina held that William Edmundson, a wrestling coach at Rosewood High School in Wayne County, was not entitled to qualified immunity in a case alleging that he instigated and encouraged the abuse of James Meeker by his fellow teammates on the wrestling squad. [See digest in "Clearinghouse," *School Law Bulletin* 35 (Fall 2004): 24]. According to Meeker's complaint, Edmundson frequently encouraged team members to restrain Meeker (who was only five feet, five inches tall and weighed 115 pounds) and

repeatedly beat his bare belly until it turned red. These beatings, or "red bellies" as they were called, occurred at least twenty-five times during the few months Meeker was a member of the team. Meeker alleged that Edmundson used these beatings as a way of forcing him to quit the team. As a result he suffered excruciating physical pain and severe emotional anguish and humiliation requiring professional care and medical treatment.

Meeker's parents filed suit on his behalf, alleging that Edmundson's actions deprived Meeker of his due process right to be free from the infliction of malicious corporal punishment by school officials. The court determined that this right was a constitutionally protected interest of which a reasonable person in Edmundson's position should have been aware, so Edmundson was not entitled to immunity. Edmundson appealed this ruling.

Holding: The Fourth Circuit Court of Appeals affirmed the ruling.

Twenty-five years ago, in the case of *Hall v. Tawney*, 621 F.2d 607, the Fourth Circuit held that a student could state a due process claim by alleging malicious corporal punishment by school officials. In so doing, the court relied on an earlier U.S. Supreme Court case, *Ingraham v. Wright*, 430 U.S. 651 (1977), which held that corporal punishment in public schools implicates a constitutionally protected liberty interest in being free from unjustified intrusions on personal security. To successfully state a due process claim for such an injury, a student must show that: (1) the force was disproportionate to the need presented; (2) it was inspired by malice or sadism; and (3) it inflicted severe injury. Meeker's claim clearly satisfies these requirements.

Edmundson did not dispute the gravity of the injury Meeker suffered, but argued, instead, that Meeker had no claim because Edmundson had no constitutional duty to protect Meeker from harm by third parties. Although it is true that the government has no constitutional duty to protect specific individuals from injury at the hands of others, this principle does not apply here. Meeker did not allege that Edmundson failed to come to his defense when his teammates beat him; he alleged that Edmundson initiated and encouraged those beatings: in effect, that Edmundson used the students as instruments to abuse Meeker. Furthermore, Edmundson could not escape liability merely because he did not administer the beatings himself; a school official can violate a student's substantive due process rights merely by *authorizing* the administration of malicious corporal punishment.

Based on the facts alleged in Meeker's complaint, Edmundson violated a constitutional right of which he should have been aware. Therefore he is not entitled to immunity from Meeker's suit.

Resource officer's search of student was lawful; evidence from search appropriately admitted at juvenile delinquency hearing. In the Matter of S.W., 171 N.C. App. 335, 614 S.E.2d 424 (2005).

Facts: Eric Carpenter, a Durham County Sheriff's deputy, was assigned to full-time permanent duty as the Riverside High School resource officer. In December 2003, as S.W. passed Carpenter in the hall, Carpenter noticed the smell of marijuana wafting through the air. Carpenter asked S.W. to accompany him, along with two school administrators and two unidentified students, to the school's weight room. There S.W. consented to a search of his belongings and pockets. The search produced a plastic bag containing ten small bags of marijuana.

Over S.W.'s objections, the court admitted the evidence obtained from this search at his juvenile delinquency hearing. The trial court found S.W. delinquent and sentenced him to six months of supervised probation. S.W. appealed.

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

As a general rule, evidence from an illegal search is not admissible against a defendant in a criminal trial. S.W. argued that Carpenter's search of him was illegal. The court disagreed.

Warrantless student searches conducted by school officials are constitutional so long as they are both justified at their inception—by reasonable suspicion that the search will turn up evidence that the student has violated either the law or school rules—and reasonable in their scope. The court noted that in the recent case of *In re J.F.M. and T.J.B.*, 607 S.E.2d 304 (N.C. App. 2005), it held that the same standard governs warrantless student searches by resource officers working in conjunction with school officials—so long as the officers are primarily responsible to the school district and not the local police department. [See digest in "Clearinghouse," *School Law Bulletin* 34 (Fall 2004): 21].

Carpenter, though employed by the Durham County Sheriff's Department, served full time as the Riverside High School resource officer. This assignment was his permanent posting. In stopping and searching S.W., he was not acting at the behest of an outside law enforcement agency but was fulfilling his duty to maintain a drug-free educational environment. Given the strong marijuana smell emanating from S.W., Carpenter was reasonable in his suspicion that a search might turn up evidence that S.W. possessed marijuana. The search was reasonable in scope and not unnecessarily intrusive; in fact, it could have been performed without S.W.'s consent. Nonetheless, S.W.'s consent contributes to the reasonableness of the search.

Court affirms bus driver's negligence. Simmons v. Columbus County Board of Education, ___ N.C. App. ___, 615 S.E.2d 69 (2005).

Facts: After boarding the bus, student Ashleigh Simmons sat down four rows behind school bus driver Emma Ford-Williams. Before the bus left the school yard, Ashleigh informed Williams that a boy named Andre was standing up. Andre and Ashleigh exchanged words, and then Andre's older brother Jasper left his seat and began hitting Ashleigh. Jasper, an eighth grader, was more than six feet tall and weighed between 175 and 200 pounds; Ashleigh was eleven years old and four feet tall. The bus left the school grounds, and when Williams noticed the fight, she called out for the students to "stop what you're doing." As the fighting escalated, with Jasper knocking Ashleigh to the floor and kicking her repeatedly, Williams decided to turn the bus around and return to school. Back at the school, a teacher boarded the bus and stopped the attack. Ashleigh suffered a fractured clavicle, various head injuries, and nightmares.

The Industrial Commission found Williams negligent in failing to stop, or attempt to stop, the fight and held the Columbus County Board of Education liable as her employer. The commission awarded Simmons $8,500 in medical expenses and $34,000 for pain and suffering. The board appealed.

Holding: The North Carolina Court of Appeals affirmed the commission's ruling.

Rules promulgated by the North Carolina Department of Transportation provide standards for assessing the reasonableness of Williams's behavior. In cases of student misbehavior, the standards state, a "[school bus] driver should: (1) select a safe place to pull off the roadway; (2) restore order; and (3) report misbehavior to the principal, if necessary." The board argued that Williams's decision not to stop the bus, but instead to turn around and return to school, was reasonable given the lack of a safe stopping place and the bus's proximity to the school. However, noted the court, Williams testified that she would have acted in the same manner if the fight had occurred when the bus was ten miles from the school. In addition, the commission found evidence that there was a safe stopping place nearby at the time the fight occurred. Given these facts, the court held, the commission had appropriately found Williams negligent.

In conclusion, the court rejected the board's argument that Simmons was not entitled to damages because her negligence contributed to her injuries. Under North Carolina law, children between the ages of seven and fourteen are presumed to be incapable of contributory negligence. The presumption may be overcome by evidence that the child did not use the level of care a child of his or her age, capacity, knowledge and experience would have used in similar circumstances. The board presented no evidence that Simmons behaved other than as a normal eleven-year-old girl.

Courts dismiss suspended student's due process claims. Alexander v. Cumberland County Board of Education, No. 5:03-CV-834-BO (E.D.N.C. May 9, 2005) *and* No. COA04-1497 (N.C. App. July 19, 2005).

Facts: During physical education class at Cape Fear High School Samantha Alexander "shanked" Katie Moore: that is, Alexander approached Moore from behind and suddenly pulled her shorts and underwear down to her calves, exposing Moore's bare buttocks to all of her classmates. Alexander had been involved in other shanking incidents, as had several male football players, but these earlier shankings had involved only the exposure of undergarments, not genitalia.

Upon hearing of the incident, Principal Jeff Jernigan investigated. He interviewed Moore and several student witnesses, whose recollections meshed with those recorded in their earlier written statements. The next day he met with Moore's parents, who conveyed her humiliation, and their own outrage, over the incident. Then Jernigan met with Alexander, informed her of the accusation against her and the corroboration of the events given by witnesses. Alexander admitted the shanking but denied pulling down Moore's underwear; she also admitted to two other shankings. She declined to name any witnesses in her defense.

Jernigan informed Alexander and her father that she would be immediately suspended for two days, pending a hearing on the matter. Two days later Jernigan met with Alexander and her parents. He reviewed the eyewitness statements and offered the Alexanders the opportunity to speak directly with the eyewitnesses, which they declined. He then interviewed a student who, Alexander thought, might support her version of events, but the witness testified that the event occurred as reported and, further, that Alexander was known for such behavior. After giving the Alexanders the opportunity to comment, Jernigan informed them of his decision to recommend their daughter for long-term suspension—for the rest of the school year—and notified them of their appeal rights.

The Alexanders appealed and were represented by an attorney at the administrative hearing held five days later. The hearing officer determined that Alexander's due process rights had not been violated and affirmed the recommendation for a long-term suspension but also recommended that Associate Superintendent Sara Piland review the length of the suspension. Piland agreed with the hearing officer's findings and reduced the suspension to fifteen days. The Alexanders then appealed this decision to the Cumberland County Board of Education, which, after seven hours of examination and cross-examination of witnesses, introduc-

tion of evidence and exhibits, and arguments by attorneys for both sides, affirmed the decision. The Cumberland County Superior Court halted implementation of the suspension while it heard and ruled on the case. But before the superior court could rule, the case was moved to federal court for hearing on the federal due process issues it raised.

The federal court stayed its own proceedings until after the superior court had ruled. Approximately a year after the incident, the superior court held that Alexander's due process rights were not violated and affirmed the board's decision. Thereafter the board made a motion in federal court to dismiss Alexander's claim because it had already been adjudicated in state court. The Alexanders appealed the superior court ruling to the North Carolina Court of Appeals.

Holding: The federal court for the Eastern District of North Carolina determined that the Alexanders had already fully and fairly litigated the issues raised in their federal complaint in state court, and that the state court had rendered a final judgment on the merits. Because the legal doctrine of collateral estoppel prevents the relitigation of such issues, the court dismissed the Alexander's claims.

The court first noted that the Alexanders had no right to appeal, and the superior court no jurisdiction to review, the two-day suspension. The court went on to determine that Alexander was afforded notice, an opportunity to be heard, and the opportunity to examine and cross-examine witnesses in her defense—in short, that she had been afforded due process.

The court also concluded that the board's decision to suspend Alexander for fifteen days was supported by the evidence. Alexander was charged with disruptive behavior, disorderly conduct, and hazing. The evidence showed that after the shanking at least one student in the class shouted "do it again" and that many students discussed the incident during the school's exam period. It is quite possible that Alexander's presence in the aftermath of the shanking would have contributed to the hubbub around the event and distracted students from their exams, as well as encouraged similar behavior by other students. Nor did the court find the board's suspension arbitrary and capricious merely because other students involved in earlier shankings had received only short-term suspensions: in none of the earlier shankings were genitalia exposed.

Court addresses timeliness of former professor's discrimination complaints. Memory v. Fayetteville State University, No. 5:04-CV-9433-BR(3) (E.D.N.C. April 29, 2005).

Facts: John Memory taught at Fayetteville State University (FSU) on a fixed-term contract for the 2002–2003 academic year. In January of 2003 he applied for a tenure track position, but learned on April 24, 2003, that he was not selected for the position. Memory asserts that he then notified FSU that he wanted to be considered for a non–tenure track position, but FSU did not offer him such a position. Memory left FSU at the end of his contract term in August 2003. On October 24, 2003, he filed a race and age discrimination complaint against FSU with the Equal Employment Opportunity Commission (EEOC); the EEOC issued a right-to-sue letter, and Memory filed his suit in the federal court for the Eastern District of North Carolina.

FSU moved to have Memory's complaint dismissed, arguing that he failed to file his charge with the EEOC within 180 days of the alleged discrimination, as required by law.

Holding: The federal court for the Eastern District of North Carolina ruled in favor of FSU on one count of Memory's complaint, for Memory on the other.

Memory learned that FSU denied him the tenure track position on April 24, 2003, 182 days before he filed his EEOC charge. Therefore this complaint must be dismissed as untimely filed. However, taking the facts as alleged in Memory's complaint, he did not learn of his nonselection for the non–tenure track position until August 2003. As he filed his EEOC charge in October 2003, this element of his claim still stands.

Court addresses student golfer's disability discrimination claims. [redacted] v. University of North Carolina at Greensboro, 394 F. Supp. 2d 752 (M.D.N.C. 2005).

Facts: [redacted] a scholarship player on the University of North Carolina at Greensboro (UNCG) golf team, was diagnosed with obsessive-compulsive disorder (OCD) at the beginning of his sophomore year. He told his coach, Terrance Stewart, of his diagnosis and his need for a once-weekly visit with a psychologist. Stewart approved the proposed appointment times but nonetheless refused to allow [redacted] to make up a qualifying round missed because of an appointment. Throughout the year Stewart made negative comments to [redacted] and his teammates about his OCD. Stewart also reported, falsely, to the office of student affairs that [redacted] had made suicidal and homicidal threats. After [redacted] met with UNCG officials to discuss this report and Stewart's treatment of him generally, Stewart's behavior toward him worsened. At the end of the year Stewart dismissed [redacted] from the team for missed practices—practices he had missed for approved doctor appointments.

[redacted] filed suit against UNCG, alleging violations of Title III of the Americans with Disabilities Act (ADA), the Due Process and Equal Protection clauses of the U.S. Constitution (brought under 42 U.S.C. 1983), and Section 504 of the Rehabilitation Act. His complaint also contained a claim for punitive damages.

UNCG moved to dismiss [redacted] complaint before trial.

Holding: The federal court for the Middle District of North Carolina dismissed all but one of [redacted] claims.

Title III of the ADA prohibits disability discrimination in places of public accommodation. The court dismissed this claim because UNCG is not a place of public accommodation as defined in the ADA: the term applies only to private entities providing public accommodations, not to public entities. The court also denied [redacted] request to amend his complaint to add a charge under Title II of the ADA, which prohibits discrimination in the provision of public services. Although leave to amend is liberally granted, an exception to this rule applies to cases in which the proposed amendment would be futile. The requested amendment, the court held, is such a case: the Fourth Circuit Court had already ruled, in *Wessel v. Glendening,* 306 F.3d 203 (2002), that states and their alter egos are immune from suits seeking money damages under Title II.

Section 1983 creates a cause of action for rights violations committed by persons acting under the color of law. Under existing case law, neither the state nor its officials acting in their official capacities are "persons" under Section 1983. Therefore UNCG cannot be sued under this statute.

[redacted] Rehabilitation Act claim survived the court's scrutiny. The Rehabilitation Act provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." UNCG argued that [redacted] had failed to allege that he was otherwise qualified to play golf for UNCG. The court rejected this argument. [redacted] scholarship to play golf for UNCG showed him to be clearly qualified for the team before his OCD diagnosis; and after his diagnosis, Stewart overcame his initial concern over the diagnosis and determined that [redacted] was fit to play. Only after missed practices did Stewart dismiss [redacted] from the team. Under the facts as alleged, [redacted] showed himself to be qualified for the team. This claim stands.

Because the Rehabilitation Act does not allow claims for punitive damages, the court also dismissed this element of [redacted] complaint.

Student's disability discrimination claims largely survive university's motion to dismiss; his motion to add an inadvertently omitted party to his complaint is denied. Alexander v. University of North Carolina at Charlotte, 2005 WL 1994520 (W.D.N.C. 2005).

Facts: Curtis Alexander, a student at the University of North Carolina at Charlotte (UNCC), suffers from cerebral palsy. He uses a wheelchair and has an attendant who helps him with his daily activities, including dressing and bathing. During his freshman year, Alexander lived on the first floor of the Oak Hall dormitory in a room that was accessible to him; it had a bathroom sufficiently large to allow him and his attendant to take care of his personal needs. After enrolling for the summer session, Alexander learned that he was to move to Martin Village.

Upon inspection, Martin Village turned out to be an inappropriate residence for Alexander: the path leading to the entrance had broken and uneven pavement, the desks inside were unusable, and the bathrooms were too small to fit Alexander and his attendant at the same time. Alexander raised his concerns with UNCC officials on several occasions, but the university moved his belongings to Martin Village nonetheless. After further discussion, UNCC offered to let Alexander return to Oak Hall, but only if he signed a waiver of liability. Alexander refused to sign the waiver and ended up living with his parents for the first and second sessions of the summer term.

Alexander filed claims against UNCC under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. UNCC moved to dismiss his claims before trial. Alexander requested permission to add an inadvertently omitted party to his complaint.

Holding: The federal court for the Western District of North Carolina denied UNCC's motion to dismiss as well as Alexander's request to add a name to his complaint.

In the recent case of *Constantine v. Rectors and Visitors of George Mason University,* 2005 WL 1384373 [see digest in "Clearinghouse," *School Law Bulletin* 36 (Spring 2005): 21–22], the Fourth Circuit Court of Appeals ruled that the Eleventh Amendment does not bar Title II suits alleging disability discrimination in access to higher education. Therefore, the court concluded, UNCC's claim of Eleventh Amendment immunity fails and its motion to dismiss Alexander's Title II claim is denied.

The court also refused to dismiss the Section 504 claim. Though conceding that Alexander is disabled, UNCC argued that he had failed to make out the other elements required for a prima facie case under Section 504 of the Rehabilitation Act. To succeed on a Section 504 claim, a complainant must show that he or she (1) is disabled; (2) is otherwise qualified; (3) was excluded from participation in, or was denied the benefits of, a program or activity; and (4) that the program or activity received federal financial assistance. The court found that Alexander sufficiently pled that he met the essential eligibility requirements for attending UNCC: he had already been enrolled at the university for an entire academic year. The court also concluded that the facts as alleged in the complaint adequately made out a claim that Alexander was denied the benefit of campus housing on the basis of his disability. The court accepted as true Alexander's statement that the university received federal funds.

Alexander sought leave to add James Woodward, Chancellor of UNCC, to his complaint. Parties may be added to complaints when (1) the claim against the omitted party arises out of the same conduct complained of in the original complaint; (2) the omitted party received notice of the action when it was filed and will not be prejudiced in preparing a defense; and (3) the omitted party knew, or should have known, that but for a mistake, the action would have been brought against him or her. In this case, Alexander failed to show that Woodward's connection with UNCC was such that he received notice—either formal or informal—of the claims against it, or that he was aware of or participated in the alleged disability discrimination. Therefore the motion to add an omitted party is denied.

[Editor's Note: The courts in the [redacted] *and* Alexander *digests above reach contrary conclusions about whether the Eleventh Amendment protects states and their alter egos (including universities) from suits brought under Title II of the ADA. The* [redacted] *court says it does; the* Alexander *court says it does not.*

Two weeks before the [redacted] *court issued its opinion, the Fourth Circuit Court of Appeals, in* Constantine v. Rectors and Visitors of George Mason University*, ruled that states and their alter egos are nor immune from Title II suits. [See digest in "Clearinghouse,"* School Law Bulletin *36 (Spring 2005): 23–24.] The Fourth Circuit has jurisdiction over, and its rulings are binding on, North Carolina's state and federal courts—including the* [redacted] *and* Alexander *courts.*

However, the [redacted] *court did not reference the* Constantine *opinion in reaching its conclusion about immunity under Title II. Possibly the court was not aware of it. In any event, the* Alexander *court appears to have the better of the argument.]*

University's regulation of outdoor speech by members of the general public is constitutional. American Civil Liberties Union v. Mote, 423 F.3d 438 (4th Cir. 2005).

Facts: Michael Reeves, a campaign worker, brought suit against the President of the University of Maryland at College Park, C.D. Mote, charging that the university's policy on outdoor speech by members of the general public violated the First Amendment. The policy restricted outsiders who were not sponsored by a member of the university community to an amphitheater for public speaking and to a sidewalk outside the student union for distribution of literature. The only requirement for outsiders to use these spaces was that they make a reservation. Under the policy, reservations were approved on a space-available basis, with priority going to members of the university community. The only acceptable reason to deny a permit was lack of available space.

The federal court for the District of Maryland granted Mote's motion to dismiss Reeves's claim before trial. Reeves appealed.

Holding: The Fourth Circuit Court of Appeals affirmed the dismissal.

Both parties agreed that the speech in which Reeves attempted to engage was protected by the First Amendment. The next question then, said the court, is the nature of the forum in which he attempted to speak. In traditional public forums such as parks, streets, and sidewalks, government can only impose content-neutral time, place, and manner restrictions on speech. These must be narrowly drawn to serve a compelling state interest and leave open ample channels of communication for the regulated information. In nonpublic forums, government may impose speech restrictions so long as they are content-neutral and reasonable in light of the purpose of the forum and the surrounding circumstances. A limited public forum is one that is not traditionally public but that the government has purposely opened to the public, or some segment of the public, for expressive activity.

The College Park campus is a limited forum, concluded the court. It is not akin to a public street or park; it is an institution of higher learning existing for the purpose of public education. It necessarily focuses its resources on students and other members of the university community. Therefore the distinction the policy makes between speech by members of the community and speech by outsiders is rational—even when the content of each group's speech might be similar. And the terms of the policy are both reasonable and viewpoint neutral: reasonable in that the only requirement to gain access to the most trafficked spaces on the campus is a reservation; viewpoint neutral insofar as the only reason for denying an outsider access to the designated forums is lack of space.

Court affirms dismissal of former principal's breach of contract action. Nicholson v. Jackson County Board of Education, 614 S.E.2d 319 (N.C. App. 2005).

Facts: After allegations of sexual harassment, the Jackson County Board of Education suspended Kenneth Nicholson with pay from his position as principal of Smoky Mountain High School. Upon further investigation, the superintendent, C.E. McCary, determined the allegations to be true and on July 30, 2003, sent Nicholson a letter stating that he would recommend that the board dismiss him. The letter also informed Nicholson that under G.S. 115C-325(h), he could have McCary's decision reviewed by a case manager if he requested a hearing within fourteen days.

On August 18, Nicholson requested a hearing. In light of his failure to make a timely request for a hearing, the board followed McCary's recommendation and dismissed

Nicholson. Nicholson appealed this dismissal, arguing that the board's refusal to give him a hearing violated his due process rights. In a December 22, 2003, order, the trial court dismissed his claim, finding that the board had appropriately denied his hearing request as untimely. Nicholson then filed breach of contract and wrongful termination claims, which the board moved to dismiss on the basis that these issues had already been litigated in the court proceedings leading up to the December order. The trial court granted the motion to dismiss, and Nicholson appealed.

Holding: The North Carolina Court of Appeals affirmed the dismissal.

Nicholson argued that the December order did not constitute a judgment on the merits of his case. However, the court found that his breach of contract and wrongful termination claims were based entirely on his contention that he inappropriately was denied a hearing by the board. Because the proceedings on which the December order was based involved the same issues and the same parties, Nicholson is not entitled to relitigate them.

Court refuses to dismiss all of former professor's race discrimination claims pending further discovery. Googerdy v. North Carolina Agricultural and Technical University, 386 F. Supp. 2d 618 (M.D.N.C. 2005).

Facts: In August 2000 North Carolina Agricultural and Technical University (A&T) hired Ashgar Googerdy, a man of Iranian descent, as an adjunct professor of engineering. In October 2000, Googerdy received a letter signed by Joseph Monroe, Dean of the Engineering Department, making him an associate professor under a new four-year employment contract. Despite dramatically improving student performance in the department, in August 2002, Googerdy was terminated without explanation. After taking his case to A&T's chancellor, Googerdy received a letter from Monroe asserting that he did not sign or authorize his signature on the four-year appointment letter, and that Googerdy was always an adjunct professor on a series of nine-month contracts which A&T had decided not to renew.

Googerdy filed suit alleging, among other things: (1) a claim of racial and ethnic origin discrimination under Title VII and Section 1983; (2) wrongful discharge; (3) breach of contract; and (4) violation of his rights under the North Carolina Constitution. A&T moved to dismiss all but the Title VII claims, and for the Title VII claim sought to dismiss Googerdy's request for punitive damages.

Holding: The federal court for the Middle District of North Carolina granted in part and denied in part A&T's motion.

The court dismissed the Section 1983 claim and the Title VII punitive damages request. As the court noted above in the [redacted] digest, a Section 1983 claim creates a cause of action for rights violations committed by *persons* acting under the color of law. Under existing case law, neither the state nor its officials acting in their official capacities are "persons" under Section 1983. Therefore A&T cannot be sued under this statute. And Title VII explicitly provides that governmental agencies are immune from punitive damage claims.

The court also dismissed Googerdy's wrongful discharge claim: in North Carolina a claim of wrongful discharge in violation of public policy is available only to at-will employees. For employees who are employed for a definite term, the proper remedy is breach of contract. Under either Googerdy's or A&T's version of the facts, Googerdy was employed for a definite term.

As to the breach of contract claim, A&T argued that it should be dismissed because Googerdy failed to exhaust his administrative remedies before seeking judicial review. Under the North Carolina Administrative Procedure Act, a trial court does not have jurisdiction to hear claims by faculty members who have not exhausted this avenue of review. Googerdy conceded A&T's factual allegation, but countered that his failure to exhaust his administrative remedies was legally justified because to have done so would have been futile.

The court had some sympathy for this argument, noting that because A&T denied that he was ever an associate professor, Googerdy did not receive notice of his due process rights. Further, when Googerdy and his attorney sought reasons for his termination, they were told that Googerdy was not due any process and should feel free to pursue any legal avenues he liked. Despite these intimations of futility, however, the court noted that its determination of this claim's sufficiency necessarily rested in some part on facts concerning the appointment letter, facts which would only be revealed after further discovery by both parties. Therefore the court deferred judgment on this issue.

The court also deferred judgment on the motion to dismiss Googerdy's claim under the North Carolina Constitution. Under North Carolina law, a complainant may only bring a direct claim under the constitution if no other adequate state law remedy exists. Because there was no ruling on Googerdy's breach of contract claim, which could constitute an adequate remedy under state law, the court found it inappropriate to dismiss the constitutional claims at this point.

In an unpublished opinion, court affirms that probationary teachers must appeal the nonrenewal of their contracts within thirty days of notification. Gattis v. Scotland County Board of Education (unpublished, N.C. App.), 619 S.E.2d 594 (2005).

Facts: On June 4, 2003, the personnel director for Scotland County Schools notified Amy Gattis that the board would not renew her contract as a probationary teacher. On January 28, 2004, Gattis appealed her nonrenewal as arbitrary and capricious, in violation of G.S. 115C-325(m). The board moved to dismiss her complaint as untimely filed. The trial court granted the motion to dismiss and Gattis appealed.

Holding: The North Carolina Court of Appeals affirmed the dismissal. Under G.S. 115C-325(n) a probationary teacher whose contract is not renewed has thirty days from notification of the board's decision to appeal it. Gattis waited six months to file her appeal.

Other Cases

Distribution to elementary school students of a survey containing sex-related questions did not violate any parental constitutional rights; survey was rationally related to legitimate state educational interests. Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005).

Facts: Parents of elementary school students in Palmdale, California, brought an action against the school district and two of its officials when they learned that their children had participated in a survey that contained sex-related questions. They charged that the survey violated their right to privacy and their right to control the upbringing of their children. In the alternative, the parents argued that even if the survey did not violate any fundamental rights and require strict judicial scrutiny, it was unconstitutional because it bore no rational relation to a legitimate educational interest. The federal district court for the Central District of California dismissed the action for failure to state a claim on which relief could be based. The parents appealed the dismissal.

Holding: The Ninth Circuit Court of Appeals affirmed the lower court ruling.

Before addressing the substantive issues in the case, the court stated that it was not its place to rule on the wisdom of the school district's actions in this case.

As to the merits, the court first addressed the parents' claim that the administration of the survey violated their right to control the upbringing of their children by introducing them to sexual matters in accordance with their personal and religious values. No court has ever held that there is a freestanding fundamental right for parents to control the flow of sexual information to their children. If such a right exists, it must be encompassed within some broader constitutional right; the parents invoke the due process clause as protecting their liberty interest in directing their children's upbringing.

The two cases primarily responsible for establishing this right—*Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)—held that the state cannot prevent parents from choosing a specific educational program for their children (in those cases, foreign language instruction and religious instruction at a private school).

This right, concluded the court, does not include a parental right to dictate the curriculum at the public school to which they have chosen to send their children. The first right involves the state preventing parents from educating their children, while the second involves parents directing what the state shall teach their children. If every parent had the latter right, the machinery of public education would grind to a halt. Although the parents in this case were legitimately concerned with the subject of sexuality, the court found no basis for distinguishing this concern from any other moral, religious, political or personal concerns parents might have about other school district decisions. In short, concluded the court, once parents exercise their fundamental right to direct the upbringing of their children by choosing to place them in a public school, their rights substantially diminish.

The court also determined that the administration of the survey infringed no parental privacy right. The U.S. Supreme Court has identified two types of protected privacy interests: (1) the right to control the disclosure of sensitive personal information, and (2) the right to independence when making certain kinds of important decisions. The parents' claim concerned only the second type of privacy interest. The survey did not infringe on the parents' constitutional right to make intimate decisions concerning their children; the right to control the flow of sexual information from the state to their children does not rise to the kind of fundamental right covered by the privacy precedents.

Governmental actions that infringe fundamental rights receive strict judicial scrutiny and must be narrowly tailored to serve a compelling governmental interest. Actions that do not involve fundamental rights or involve suspect classifications (e.g., race or gender) need only be rationally related to a legitimate state interest. In this case, the district asserted—and the court found no reason not to believe—that the survey was undertaken to gauge students' exposure to early trauma and to assist in developing an intervention program to reduce barriers to students' ability to learn. This explanation of the survey's purpose satisfies the requirements of the rational relation test, concluded the court. [For a related discussion of the legal and constitutional issues that may arise when students or their education records are used as research subjects, see "Students as

Research Subjects: The Privacy Rights of Students and Their Families" by Robyn Rone in *School Law Bulletin* 36 (Winter 2005): 8.]

Texas court affirms that students do not possess a constitutionally protected interest in their participation in extracurricular activities; concludes that disqualified student athlete was not deprived of protected liberty interests in her reputation and future financial opportunities. National Collegiate Athletic Association v. Yeo, 171 S.W.3d 863 (Tex. 2005).

Facts: When Joscelin Yeo enrolled at the University of California at Berkeley, she had already achieved fame in her country (Singapore) as a swimmer. At Berkeley she won numerous swimming awards. She then transferred, following her coach, to the University of Texas at Austin (UT). Pursuant to National College Athletic Association (NCAA) rules, Yeo was not permitted to participate in intercollegiate athletic competitions for one year following her transfer. Because of a misunderstanding about how the year was calculated, UT allowed Yeo to participate in events she should have sat out. UT confessed its error, without informing Yeo, and held her out of the first four events of the next season, as the NCAA ordered. Another miscalculation led to Yeo participating in other prohibited events, which led the NCAA to bar her from three more events, one of which was the 2002 NCAA women's swimming and diving championship.

Yeo successfully petitioned for an injunction preventing UT from keeping her out of the championship, and she did participate in it. She also sued UT, arguing that it had denied her due process before attempting to disqualify her, thus depriving her of protected liberty and property interests in her reputation and future financial opportunities. The trial court agreed, permanently enjoining UT from declaring Yeo ineligible in the future without due process and from punishing her for participating in past competitions. On appeal, the court of appeals affirmed, and UT appealed to the Texas Supreme Court.

Holding: The Texas Supreme Court reversed the lower court ruling.

Yeo accepted the proposition that the Texas Constitution's due process clause does not protect a student's interest in participating in extracurricular activities. She argued, however, that because of her unique reputation and earning potential, she was entitled to a meaningful hearing before NCAA rules were applied to her. While acknowledging that the U.S. Supreme Court has held that reputation alone is not a protected liberty or property interest, she contended that it was the degree of her interests, not merely their character, which entitled them to constitutional protection. The trial court and court of appeals agreed with Yeo, finding that she had already established a reputation as a world-class athlete before coming to UT and had thus created a protected interest in her reputation before coming to this country.

The Texas Supreme Court rejected this reasoning, citing the U.S. Supreme Court for its statement that whether an interest is protected by due process depends not on its weight but on its nature. A less talented athlete's loss of reputation may be as substantial to that athlete as Yeo's was to her. Therefore her claim to due process must be dismissed. Before signing off, however, the court reminded the lower courts that judicial intervention in student athletic disputes often does more harm than good. ■