School Law Bulletin

Spring 2002

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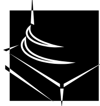

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Student Threats and the First Amendment

by Anne Dunton Lam

A 2001 survey of school shootings that have taken place in the United States since 1997 shows a disturbing truth: although most American schools are safe places for children, all too many have been sites of tragic and violent outbursts. And no geographic area, socioeconomic class, or age group has been spared. (*See* "Violence in American Schools, 1997–2001" at the end of this article.)

The nation's response to these mass shootings—particularly in the communities touched by these tragedies—has ranged from disbelief to denial to demands for safer schools. Yet, while it may seem that the nation's schools are constantly under attack, the *2000 Annual Report on School Safety* compiled by the U.S. Departments of Education and Justice points out that "[t]here were fewer school-associated homicides (students and nonstudents) in the 1998–1999 school year (38 total) than in the 1997–1998 school year (47 total)." The same study takes note, however, of a grim statistic: "Since the 1992–1993 school year, there has been at least one multiple-victim homicide event each year (except for the 1993–1994 school year). The number declined from six events in 1997–1998 to two events in 1998–1999."[1]

It is easy to understand why parents, educators, and politicians have called for better protection of America's schoolchildren. In the aftermath of each school shooting, there has been "an outcry for immediate response in the form of more stringent security precautions in schools or stricter laws aimed at school violence."[2] School boards and administrators have felt a heightened need to find ways to protect their students from such violence. In *The School Shooter: A Threat Assessment Perspective*, the Federal Bureau of Investigation (FBI) advises school officials that "when a student has shown signs of potential[ly] violent behavior, schools and other community institutions do have the capacity—and the responsibility—to keep that potential from turning real."[3]

Yet the proactive and preventative steps many school districts across the nation have taken to increase the security of their campuses also raise a legal concern: How do school districts—and the courts—balance their duty to protect students with their obligation to respect those students' constitutional rights? Specifically, when the issue is student speech that has the potential to lead to violence, when can school administrators act and when must they defer to their students' First Amendment rights?

This paper explores the current state of the law with respect to students' rights to free speech in the wake of school violence. It pays particular attention to court cases and school policies arising out of oral, written, artistic, and Internet speech. Finally, it discusses several effective early intervention and threat assessment policies.

What Columbine and Jonesboro Have Taught Us

Before considering the current legal landscape, it is useful to bear in mind what law enforcement has learned about school shooters. The FBI's threat assessment manual explains that "retracing an offender's past and identifying clues that in retrospect could have been signs of danger can yield significant, useful information." It also advises, however, that "clues that appear to help interpret past events should not be taken as predictors of similar events in the future." Profiling students via a catalogue or checklist of warning signs "can be shortsighted

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The author is a recent graduate of the University of North Carolina at Chapel Hill School of Law. She would like to thank Professors Laurie L. Mesibov and John C. Boger for their assistance during the writing of this article.

1. U.S. Departments of Education and Justice, *2000 Annual Report on School Safety*. Washington, D.C., 11, available at http://www.ed.gov/offices/OESE/SDFS/annrept00.pdf; or the U.S. Department of Justice Web site at http://www.usdoj.gov/youthviolence.htm with a link to *2000 Annual Report on School Safety* (sites last visited 4/8/02).

2. Mary Ellen O'Toole, *The School Shooter: A Threat Assessment Perspective* (Quantico, Va.: Federal Bureau of Investigation, 2000) 3, available at http://www.fbi.gov/publications/school/school2/pdf (last visited 4/2/02).

3. *Id.* at 4. For information on youth violence prevention, *see* the U.S Department of Justice Web site cited in note 1.

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[and] even dangerous," because many nonviolent students share some of these same personality traits.[4] Although the FBI views some personality traits and behavior as potentially dangerous, it cautions that the list is not a profile, that no one trait is more important than another, and that one bad day in a student's life should not lead to a determination that a student is at risk. A "totality of the circumstances" approach is therefore appropriate, but only after an identified student has made a threat. Moreover, profiling does not address the root causes of violence in families, communities, and schools.

That said, the FBI does recognize a number of important warning signs that educators and law enforcement should, and apparently do, take into account when assessing threats to students, personnel, and facilities. One behavioral cue often discussed and observed in cases of campus violence or threats, as well as in everyday school hallways, is *leakage*. Leakage occurs when

> a student intentionally or unintentionally reveals clues to feelings, thoughts, fantasies, attitudes, or intentions that may signal an impending violent act. These clues can take the form of subtle threats, boasts, innuendos [sic], predictions, or ultimatums. They may be spoken or conveyed in stories, diary entries, essays, poems, letters, songs, drawings, doodles, tattoos, or videos. . . . Leakage can be a cry for help, a sign of inner conflict, or boasts that may look empty but actually express a serious threat. Leakage is considered to be one of the most important clues that may precede an adolescent's violent act .[5]

Indeed, in Pearl, Mississippi; Jonesboro, Arkansas; West Paducah, Kentucky; Springfield, Oregon; and Littleton, Colorado, all the assailants or would-be assailants told someone about their plans or provided hints of some kind.

The legal significance of leakage is that students who were disciplined for violent speech and who later challenged their school districts' actions under the First Amendment had somehow leaked information that was interpreted, reasonably or unreasonably, as a potentially serious threat. Leakage thus raises the very question at issue here: As leakage may merely be speech, how should school administrators interpret that speech, and when may they act to preempt a perceived violent threat?

One of the challenges in this area of the law is that court opinions are often fact-extensive and fact-specific; that is, decisions include detailed factual summaries of the students' conduct, and the outcomes of the cases turn on the courts' interpretations of those facts. This makes it difficult to derive from any given opinion general principles that govern the outcome of cases arising from particular types of student speech or conduct. The cases discussed in this article are, therefore, offered as a survey of the types of issues courts across the nation have dealt with in recent years.

A Historical Perspective on Student Speech: *Tinker, Fraser*, and *Kuhlmeier*

This survey of the First Amendment rights of schoolchildren in the wake of school violence begins with a discussion of the Supreme Court's three key decisions relating to students' rights to free expression. Together, they provide "a framework for evaluating to what extent student speech should be protected."[6] The first case is the 1969 landmark decision, *Tinker v. Des Moines Independent Community School District*. This case arose out of the turbulence surrounding the Vietnam War when a group of high school students decided to publicize their opposition to the war by wearing black armbands to school. When the principals became aware of their plans, the school district adopted a policy prohibiting the wearing of armbands to school. Holding that the district's preemptive ban was an unconstitutional interference with the rights of schoolchildren, the Supreme Court found for the students, explaining that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."[7]

In rejecting the district's contention that the ban on the armbands was reasonable because it was based on a fear that they would lead to a disturbance on campus, the Court noted that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[8] The Court then offered what has become the seminal test of whether a student's private expression of opinion at school is protected speech.

> [C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[9]

Thus, students do have a constitutional right to freedom of speech and expression while at school as long as the speech does not materially disrupt the educational environment or substantially disorder or invade the rights of others. Clearly, *Tinker*'s admonition against acting out of "undifferentiated

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4. O'Toole, *School Shooter*, 3, 2.
5. *Id.* at 16. E-mail and Internet postings would presumably be included in this list of clues, which is apparently not meant to be exhaustive.
6. Lynda Hils, "Chalk Talk: 'Zero Tolerance' for Free Speech," *Journal of Law and Education* 30 (2001): 366.
7. *Tinker*, 393 U.S. 503, 506 (1969).
8. *Id.* at 508.
9. *Id.* at 513.

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fear or apprehension of a disturbance" must be kept in mind by today's school administrators as they struggle to assess and react to student threats before words turn into actions.

Two other key Supreme Court cases, *Bethel School District No. 403 v. Fraser* and *Hazelwood School District v. Kuhlmeier*, stand in contrast to *Tinker*, as both rein in students' speech at school. In *Fraser*, the Court, holding that a student's lewd speech at a school assembly was not constitutionally protected, noted that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[10] The Court stated:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.' The determination of what manner of speech in the classroom or in [a] school assembly is inappropriate properly rests with the school board.[11]

Thus, the Court reasoned, students' freedom of expression must be weighed against educators' need to teach "the essential lessons of civil, mature conduct."[12]

In *Kuhlmeier*, the Supreme Court addressed the issue of whether school officials could "exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum." The Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." The Court further explained that "the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."[13]

These three cases make it clear that students retain their rights within the special context of public schools but that those rights are not without qualifications. A school may limit lewd or vulgar speech that falls outside the educational mission of the schools, as well as private speech that may be reasonably perceived as bearing the imprimatur of the school.[14]

Oral, Written, Artistic, and Internet Speech

Oral Speech

With regard to oral threats, a recent Ninth Circuit case, *Lovell by and through Lovell v. Poway Unified School District*, illustrates both leakage and the court's reaction to it. Sarah Lovell, a fifteen-year-old tenth grader at Mt. Carmel High School in California, visited her guidance counselor to request a schedule change. After several hours of confusion relating to the rearrangement of Lovell's classes, the counselor told her that another administrator had placed her in overloaded classes. At that point, Lovell told the counselor, "If you don't give me this schedule change, I'm going to shoot you!" The counselor reported Lovell's conduct to an assistant principal and "told [him] that she felt threatened by the statement and was concerned about some future reprisal by Lovell."[15] The counselor then filled out a Student Referral Form and reported the threat as a disciplinary incident to another assistant principal.

Two days after the incident, at a meeting with the second assistant principal and the counselor, Lovell admitted making a similar, less direct, and meaningless statement. The counselor described Lovell as "angry, serious and emotionally out of control when the statement was made" and reiterated that she felt threatened by the girl.[16] After meeting with Lovell, her parents, and the counselor, the assistant principal suspended Lovell for three days. The Lovells subsequently sued the school district, the assistant principal, and the principal when the district refused to remove the Student Referral Form from Lovell's school records. The suit claimed, among other things, that Lovell's First Amendment right to free speech had been violated.

The Ninth Circuit Court of Appeals held that Lovell's conduct was not protected by the First Amendment, nor by any other federal or state law. The court noted that it need not consult the Supreme Court cases that govern students' on-campus free speech rights, for "threats such as Lovell's are not entitled to First Amendment protection in any forum. It therefore did not matter that the statement was made by a student in the school context." Its inquiry, the court explained, would focus on "whether [the district] could punish Sarah Lovell based on her statement, without violating her

10. *Fraser*, 478 U.S. 675, 682 (1986) (citing New Jersey v. T.L.O., 469 U.S. 325 [1985]).

11. *Id.* at 683 (citing *Tinker* at 508 and Ambach v. Norwick, 441 U.S. 68 [1979]).

12. *Id.*

13. *Kuhlmeier*, 484 U.S. 260, 262, 272–73 (1988).

14. *Id.* at 271.

15. *Lovell,* 90 F.3d 367 (9th Cir. 1996), available at LEXIS 17535, at *3, 5, *cert. denied*, 518 U.S. 1048 (1996). Lovell claimed that she said, "I'm so angry, I could just shoot someone" (at *4, note 1). Both Lovell and her counselor acknowledge that she apologized immediately for her "inappropriate behavior."

16. *Id.* at *5.

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First Amendment free speech rights, regardless of whether the conduct occurred on or off campus."[17]

In analyzing that issue, the Ninth Circuit returned to the doctrine formulated by the U.S. Supreme Court to address threats in the First Amendment context. In 1959, in *Watts v. United States*, the Court distinguished between a "true threat" and mere political hyperbole. While political hyperbole and other "uninhibited, robust, and wide-open" debates on public issues are protected by the First Amendment, true threats are not. The issue, the Court explained, is how to distinguish a threat from constitutionally protected speech.[18]

The Ninth Circuit also looked to one of its own cases for guidance on whether threats can be protected speech. In 1990 in *United States v. Orozco-Santillan,* the court, taking note of the *Watts* true threat doctrine, referred to past cases that defined a threat as "an expression of an intention to inflict evil, injury, or damage on another." *Orozco-Santillan* also offers an "objective standard" for evaluating whether a statement constitutes a true threat and is thus unprotected by the First Amendment: "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." The court added that "[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and [the] reaction of the listeners."[19]

In *Lovell*, the Ninth Circuit held that Sarah Lovell's free speech rights were not violated when the school district suspended her for making a true threat to shoot her guidance counselor. The court also stated that Lovell "failed to prove that she did not utter the statement that directly and unambiguously threatened physical harm to her guidance counselor." By deciding that Lovell's statement was a true threat, the court avoided any discussion of Supreme Court precedents addressing the issue of students' right of free expression at school.[20]

Interestingly, throughout the *Lovell* decision, the Ninth Circuit specifically considered the context of Lovell's "true threat of physical violence": "[i]n light of the violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students."[21]

Written Speech

Cases involving students' written speech—in the form of threatening or potentially violent poems, notes, or Internet Web sites—have also made their way into the courts. One such case, *LaVine v. Blaine School District*, involved a California eleventh grader whose poem, "Last Words," led to his temporary, emergency expulsion. The Ninth Circuit began its analysis of James LaVine's case with an interesting discussion about the context in which the case was set. LaVine's claim, it noted,

> arises against a backdrop of tragic school shootings, occurring both before and after the events at issue here, and requires us to evaluate through a constitutional prism the actions school officials took to address what they perceived was the student's implied threat of violent harm to himself and others. Given the knowledge the shootings at Columbine, Thurston, and Santee high schools, among others, have imparted about the potential for school violence (as rare as these incidents may be when taken in context), we must take care when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment not to overreact in favor of either. Schools must be safe, but they are educational institutions after all, and speech—including creative writing and poetry—is an essential part of the educational fabric.[22]

In the poem, LaVine graphically describes himself bursting into his high school to kill twenty-eight classmates and then himself without feeling any remorse. A few months after he wrote the poem, LaVine showed it to his English teacher to get her reaction. She read it that night and became very concerned. The teacher "thought the poem might be 'James' way of letting somebody know that . . . maybe something's hurting him, maybe he's upset about something, maybe he's afraid.'" The next morning, a Saturday, she called LaVine's school counselor to inform her about the poem, and they set up a meeting with the vice-principal. At the meeting, the counselor, who knew that LaVine had recently had personal problems and had contemplated suicide in the past, shared that information with the others.[23]

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17. *Id.* at *12. Citing Watts v. United States, 394 U.S. 705 (1969) and the test the Ninth Circuit set out in United States v. Orozco-Santillan, 903 F.2d 1262 (9th Cir. 1990), the court determined that Lovell's threat was a "true threat" that did not warrant constitutional protection.

18. *Watts*, 394 U.S. at 707, 708.

19. *Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) (citing United States v. Mitchell, 812 F.2d 1250, 1255–1256 [9th Cir. 1987]; United States v. Merrill, 746 F.2d 458, 462 [9th Cir. 1984], *cert. denied*, 469 U.S. 1165 [1985]); and United States v. Gilbert, 884 F.2d 454 [9th Cir. 1989], *cert. denied*, 493 U.S. 1082 [1990] [citing *Mitchell*]).

20. *Lovell*, 1996 U.S. App. LEXIS 17535 at *16, 20–21. For the school speech issue, *see, e.g., Tinker*, 393 U.S. 503 (1969); *Fraser*, 478 U.S. 675 (1986); and *Kuhlmeier*, 484 U.S. 260 (1988), which are still the foundation for any analysis dealing with students' First Amendment rights at school. However, these cases are more relevant to students' written, artistic, and Internet speech than to oral speech threats in the context of school violence.

21. *Lovell*, 1996 U.S. App. LEXIS 17535, at *14, note 4 (referencing Justice Breyer's dissent in United States v. Lopez, 115 S. Ct. 1624 [1995], which lists sources "supporting the proposition that 'the problem of guns in and around schools is widespread and extremely serious'").

22. *LaVine*, 257 F.3d 981, 983 (9th Cir. 2001) LEXIS 16079, at *1–2, *petition for rehearing denied*, 279 F.3d 719 (9th Cir. 2002).

23. *Id.* at *5–6. The poem was written about a month after the school shooting in Springfield, Oregon, a town described by the Ninth Circuit as

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After consulting local law enforcement and mental health services and having LaVine interviewed by the police over the weekend, the school principal decided to "emergency expel" LaVine, effective Monday. After a seventeen-day absence, following a psychiatric evaluation and counseling at the district's expense, LaVine was allowed to return to school. Nonetheless, because of a dispute between the LaVine family and the school district regarding how their son's expulsion was characterized in his school file, the family sued, alleging violation of James LaVine's First Amendment rights.

After determining that LaVine's poem fell under the purview of *Tinker*, the Ninth Circuit employed a "totality of the relevant facts" analysis and ultimately ruled that the school district did not violate LaVine's First Amendment rights. The court explained that "[t]aken together and given the backdrop of actual school shootings, we hold that these circumstances were sufficient to have led school authorities reasonably to forecast substantial disruption of or material interference with school activities—specifically, that James was intending to inflict injury upon himself or others."[24]

D. G. v. Independent School District No. 11 of Tulsa Co., OK also involved a student who was disciplined for a violent piece of writing.[25] At issue was a poem written by an eleventh-grade student entitled "Killing Mrs. [Teacher]." The student claimed that it was never intended for her teacher's eyes and was not meant as a serious threat. One of the other teachers in the school found the poem, as well as a hangman-style drawing depicting D. G.'s teacher as a stick figure on the gallows as her students looked on. D. G. later admitted to the assistant principal that she had written the poem as a private expression of her emotions when she was feeling angry and frustrated with the teacher's class. Nonetheless, in accordance with the school's "zero tolerance" policy regarding threats, she was suspended from school for the remainder of the 1999–2000 school year and the first semester of the 2000–2001 school year. Following appeals to the principal, superintendent, and school board, the district decided to place her in an in-school alternative placement program rather than keeping her out of school on suspension.

D. G. sued the school district, alleging that the punishment violated her First Amendment right to free speech. In discussing D. G.'s motion for a preliminary injunction barring the district from suspending her pending the outcome of the case, the U.S. District Court for the Northern District of Oklahoma noted that it was "sympathetic with the difficulties faced by school districts in administering a school and in being responsible for the safety of its faculty and students."[26]

The court looked to both *Watts* and *Tinker* for guidance. After assessing the student's intent and the school district's response to the poem, it decided that, according to the *Tinker* test of "material disruption" or "substantial interference," the district had violated D. G.'s First Amendment rights. The court therefore granted D. G.'s motion for a preliminary injunction prohibiting the district from suspending her.

The court also weighed in on zero-tolerance policies, using both the *Watts* "true threat" doctrine and the *Tinker* standard as benchmarks for punishing student speech.

> It is impossible to have a "no tolerance" policy against "threats" if the threats involve speech. A student cannot be penalized for what they are thinking. If those thoughts are then expressed in speech, the ability of the school to censor or punish the speech will be determined by whether it was (1) a "true" or "genuine" threat, or (2) disruptive of the normal operation of the school. Neither of those circumstances exist in the case before the [c]ourt. In sum, the court finds that any commotion caused by the poem did not rise to the level of a substantial disruption required to justify a suspension of [Student]. In *Tinker*, the Supreme Court said that an "undifferentiated fear of apprehension of disturbance is not enough to overcome the right of freedom of expression" for public school students.[27]

Artistic Speech

In *Boman v. Bluestem Unified School District No. 205*, a student's written artistic expression led to her suspension and a First Amendment challenge. Sarah Boman was a seventeen-year-old Kansas high school senior when she created an unsigned poster that

> contained sentences written in circles spiraling outward from the center. . . . The narrative on the poster was a series of questions and statements, written in first person, asking about "who killed my dog?" and asking what do "you" know about it. It included statements that "I'll kill you if you don't tell me who killed my dog" and "I'll kill you all!"[28]

Boman hung the poster on a door in a school hallway; it was found by a school employee, who turned it in to the principal. The principal, believing that some of the phrases in

"nearby" LaVine's hometown. In addition to the suicidal thoughts he shared with his counselor, the personal problems referred to included a domestic disturbance with LaVine's father that forced LaVine to move out of his parents' house as a result of a no-contact order; absences from school due to legal proceedings; and a recent break-up with his girlfriend and his subsequent stalking of her.

24. *Id.* at *23. The court did, however, affirm the district court's injunction prohibiting the school from placing any type of negative documentation relating to the expulsion in LaVine's school file.

25. *D. G.*, 2000 U.S. Dist. LEXIS 12197 (N.D. Okla. 2000).

26. *Id.* at *18.

27. *Id.* at *15 (quoting *Tinker*, 393 U.S. at 508). In a footnote to this paragraph, the court noted a third basis for punishing speech that is "school sponsored" but asserted that this case did not involve school-sponsored speech. On this issue, *see Kuhlmeier*, 484 U.S. at 262. For a more thorough discussion of zero-tolerance speech policies, *see* Hils, "Chalk Talk," 365.

28. *Boman*, 2000 U.S. Dist. LEXIS 5389, at *1–2 (D. Kan. 2000).

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the spiral were threatening, investigated and found that Boman, an accomplished art student, had created the poster. The principal suspended her for five days and recommended a hearing to consider a long-term suspension. The school district ultimately suspended Boman for 81.5 days (the remainder of the school year). She appealed the decision to a hearing officer, who recommended that Boman be reinstated with no further action. The school board, instead, "approved a statement saying that in order to return to school, Ms. Boman would have to undergo a psychological evaluation and that when the Board received a psychological report indicating she was not a threat to students or staff, she would be reinstated."[29] Boman sued, alleging deprivation of her First Amendment right to free speech, and filed a motion to prevent the district from forcing her to undergo an evaluation.

Referencing *Kuhlmeier* and *Tinker* (but not *Watts*), the court stated that

> [c]learly, if [Boman] had intended this poster to convey a genuine threat, or even if she put the poster up with the intent of putting students in fear by making them think it was a genuine threat . . . the school district could appropriately punish her for violating the school's rule against intimidating behavior.[30]

The court explained that the school district would probably have been within its rights to suspend Boman on a short-term basis while the potential threat was investigated. However, because the poster was artwork and always intended as such, "[t]here really isn't any question but that Ms. Boman thought she was displaying something that had artistic merit." The court therefore granted her motion for a preliminary injunction, despite its belief that "[t]he concern for student safety is particularly high now in view of recent episodes of school violence" and that "[w]hen a school district learns of a potential threat by a student, it not only has a right but a duty to investigate the circumstances."[31] On the other hand, the court explained, once an investigation into the factual context of the poster was completed, there was no longer any reason to believe that it constituted a threat or that Boman was a threat to others. Thus, the school district was barred from forcing Boman to undergo a psychological evaluation and was ordered to reinstate her pending outcome of the case.

LaVine, *D. G.,* and *Boman* illustrate the different ways the courts in various parts of the nation have approached and decided cases involving student speech in the form of written or artistic threats. It appears that most jurisdictions look to both *Watts* and the Supreme Court's decisions in *Tinker* and *Kuhlmeier* for guidance in this area.

Internet Speech

The Internet is a particularly murky area, for educators and courts alike, when it comes to weighing students' First Amendment rights against the needs of educators to keep their schools safe. Only a few cases shed light on the current state of the law with regard to student speech in this off-campus forum. In *J. S. v. Bethlehem Area School District*, J. S., an eighth grader, posted a Web site entitled "Teacher Sux" from his home computer.[32] The Web site made offensive comments about his algebra teacher and principal, and used vulgar and profane language to describe them and their alleged activities. It also contained a section called "Why Should [the teacher] Die?" that featured a diagram of his teacher with her head cut off and blood dripping from her neck as well as a solicitation for $20.00 per viewer so that J. S. could hire a hit man to kill her.

An anonymous e-mail about the Web site was sent to a teacher at the school, who in turn alerted the principal to the site. The principal contacted local law enforcement and the FBI. After both agencies identified J. S. as the creator of the Web site, the district suspended him for three days; then, following a hearing, it changed the punishment to a ten-day suspension effective at the beginning of the 1998–1999 school year. The district also initiated expulsion hearings. J. S. and his parents challenged the decision in state courts.

In analyzing J. S.'s claims, the court turned to *Tinker*, *Fraser*, and *Lovell* as well as other cases dealing with the issue of whether students may be disciplined for conduct occurring off school premises. Concluding that "it is evident that the courts have allowed school officials to discipline students for conduct occurring off of school premises where it is established that the conduct materially and substantially interferes with the educational process," the court affirmed a lower court's decision that the school district did not violate J. S.'s rights by expelling him in response to his Web site.[33]

The court held that J. S.'s Web site had, in fact, materially disrupted and substantially interfered with both the business

29. *Id.* at *6–7.

30. *Id.* at *10.

31. *Id.* At the proceeding before the hearing officer, Boman presented her art teacher as a witness. The hearing officer found that Boman's exposure to certain types of art had probably contributed to the form of the poster and that the poster was made out in the open in a tutorial class. The district stipulated to the finding that Boman believed the poster was artwork.

32. *J. S.*, 757 A.2d 412 (Pa. Commw. 2000) LEXIS 402, *aff'd*, 794 A.2d 936 (Pa. Commw. 2002) LEXIS 83, at *13–14 (Feb. 15, 2002) (holding that the student was not denied the opportunity to fully and fairly litigate the issues surrounding his discipline, applying res judicata and collateral estoppel to bar further action by J. S. in a court of law).

33. *J. S.*, 2000 Pa. Commw. LEXIS 402, at *21–22. For discussion of whether school districts may discipline students for off-campus activities, *see* Donovan v. Ritchie, 68 F.3d 14 (1st Cir. 1995); Fenton v. Stear, 423 F.Supp. 767 (W.D. Pa. 1976); and Beussink v. Woodland R-IV School District, 30 F.Supp.2d 1175 (E.D. Mo. 1998).

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of the school and the rights of others, namely his teacher, his principal, and the students at the middle school. The court also stated that "in this day and age where school violence is becoming more commonplace, school officials are justified in taking very seriously threats against faculty and other students."[34] The content of the Web site was deemed to be very serious and threatening in nature because J. S. initially posted it anonymously and because it caused his teacher such severe anxiety problems that she had to take a year-long medical leave of absence. The court took all of these factors into account in affirming the lower court's decision in favor of the district. If such behavior were tolerated, the court said, regardless of whether it occurred on or off school premises, the result would be a debilitating loss of control and respect for school officials.[35]

The case of *Emmett v. Kent School District No. 415*, adds another dimension to the discussion surrounding students' freedom of speech and expression in the Internet context. Nick Emmett was a senior at Kentlake High School near Seattle when he posted a Web site from his home computer entitled the "Unofficial Kentlake High Home Page."[36] The Web site, which contained comments critical of the school administration and faculty and mock obituaries of at least two of Emmett's friends, carried a disclaimer stating that it was not sponsored by the school district. The obituaries, written in tongue-in-cheek style, were apparently inspired by a creative-writing class in which students were assigned to write their own obituaries. Emmett also allowed visitors to the site to vote on who should "die" next; that is, whose obituary should appear next.

Three days after Emmett posted the Web site, an evening news story characterized the site as featuring a "hit list" of people to be killed, although the term *hit list* did not appear on the site. Emmett deleted his Web site from the Internet that night but was summoned to the principal's office the following morning. He was placed on emergency expulsion for "intimidation, harassment, disruption to the educational process, and violation of [the] Kent School District copyright."[37] The expulsion was later amended to a short-term (five-day) suspension. Emmett then sued to prevent the school district from enforcing the suspension.

The court approached Emmett's case using the standards in *Tinker*, *Fraser*, and *Kuhlmeier* and ultimately enjoined the district from imposing the suspension. Reasoning that the "[p]laintiff's speech was not at a school assembly, as in *Fraser* . . . was not in a school-sponsored newspaper, as in [*Kuhlmeier*] . . . [or] produced in connection with any class or school project," the court explained that the Web site was outside the supervision and control of the school even though its "intended audience was undoubtedly connected to Kentlake High School." The court noted that the school district argued persuasively that "school administrators are in an acutely difficult position after recent school shootings in Colorado, Oregon, and other places" and also recognized that "[w]eb sites can be an early indication of a student's violent inclinations, and can spread those beliefs quickly to like-minded or susceptible people."[38]

Nonetheless, the district's lack of evidence that the obituaries or poll "were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever" indicated that Emmett had a substantial likelihood of success on the merits of his claim.[39] Thus, the district was enjoined from enforcing the suspension pending the outcome of a later hearing. The case was settled out of court in March 2000; the district paid Emmett $1.00 in damages and $6,000 in attorney fees and removed the suspension from his record.[40]

In 2001 the North Carolina Court of Appeals decided *State v. Mortimer*, a case involving a threat made on a public school computer. Shortly after the tragedy at Columbine High School in Littleton, Colorado, rumors began to circulate at a high school in New Hanover County that the school would be bombed on May 4, 1999. That morning, a student in a computer class found a screen saver saying, "The end is near." The school notified the police and investigators, who identified Joshua Mortimer as the creator of the screen saver. Though he denied that the phrase meant anything serious, Mortimer was charged and found guilty of communicating a threat under North Carolina law. The Court of Appeals ultimately held that there was insufficient evidence to convict Mortimer of the charge as "[t]he statement 'the end is near' does not indicate what, if anything, the speaker intend[ed] to do."[41] Although the court did not consider (or mention) whether Mortimer was disciplined by his high school, the case is still relevant insofar as it illustrates how a court in North

34. *J. S.*, 2000 Pa. Commw. LEXIS 402, at *24.
35. *Id.* at *19 (citing *Fenton*, 423 F.Supp. at 772).
36. *Emmett*, 92 F.Supp.2d 1088 (W.D. Wash. 2000) LEXIS 4995, at *1.
37. *Id.*

38. *Id.* at *5–6. Angie Cannon, "Why?" *U.S. News & World Report*, May 3, 1999, 16, states that one of the Columbine High School shooters "maintained a website, known to police, that proclaimed his violent leanings in no uncertain terms."
39. *Emmett,* 2000 U.S. Dist. LEXIS 4995, at *6.
40. Clay Calvert, "Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground," *Boston University Journal of Science and Technology L*aw 7 (2001): 260; *see also* David L. Hudson Jr., "Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine," *Detroit College of Law Review* (2000): 199–222.
41. 142 N.C. App. 321, 542 S.E.2d 330, 331 (2001). Mortimer was convicted under N.C. GEN. STAT. § 14-277.1 (1994) (amended 1999).

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Carolina may view anonymous, threatening speech in the context of school violence.

Common Threads: Tying It All Together

In an attempt to identify common threads between cases that involve oral, written, artistic, and Internet speech, it appears that the courts in all these cases employed some sort of explicit or implicit "totality of the circumstances" analysis. In *LaVine*, for example, the Ninth Circuit wrote that the court would look to "the totality of the relevant facts"—not only the student's actions but "all of the circumstances confronting the school officials that might reasonably portend disruption" to the educational environment or process.[42] In more subtle ways, the *Lovell*, *D. G.*, *Boman*, *J. S.*, and *Emmett* courts used a similar method of analysis. All looked into the background of the student, what the district knew about the threat and the student, when the educators became aware of the facts and circumstances surrounding both the threat and the student, or some combination of the three.

One of the "circumstances" that all courts took into account is the recent wave of school violence that has rippled through America. Without exception, every court mentioned, in almost identical terms, the rash of violent incidents that have taken place in schools across the nation, the challenges those incidents pose to school administrators, and the duty school districts have to protect their students from threats or potential threats. Many of the judges seemed to be aware that their words and decisions were relevant not only to the parties at hand but also to a larger audience.[43]

A common factor linking the cases in which the courts found for the students is the fact that by the time the school districts disciplined the students, they had enough information to all but dismiss the threats as less-than-serious expressions of anger. In *D.G.*, *Boman,* and *Emmett*, it seems clear that the districts already knew enough about the students and the threats to chalk them up to "poor taste" or "youthful indiscretions." In fact, both the *Boman* and *Emmett* courts wasted little time in characterizing the speech at issue in that way.

The educational contexts of these two cases were also relevant to the administrators' initial decisions to punish the students. In *Boman*, the principal and school board knew before they decided to suspend her for 81.5 days that Sarah Boman had completed the threatening poster under the supervision of one of the school's art teachers and that the poster was a "work of fiction."[44] Similarly, Nick Emmett's Web site featuring mock obituaries was apparently inspired by an assignment in a creative-writing class that "became a topic of discussion at the high school among students, faculty, and administrators."[45] Yet in spite of that knowledge, the school district decided to emergency expel Emmett.

Interestingly, the courts in both *Boman* and *Emmett* described the students as "accomplished" and intelligent teenagers who had no violent history or behavioral problems—essentially model students.[46] The student in *D. G.* also had "never been suspended from school . . . never been disciplined or reprimanded for any acts of violence, and had never communicated any threats of violence to faculty members or other students."[47] On the other hand, in *LaVine* the court laid considerable emphasis on the student's history of disciplinary and emotional problems.[48] Therefore, another unspoken factor for the courts seems to have been the desire not to tarnish the record or future of otherwise untroubled "good kids" who had exercised what was unarguably bad judgment.

Some of the opinions dealing with threats of violence also make reference to the long-standing view held by many courts that school administrators should be trusted in their assessments of how to handle student issues since they are the experts and the courts are not. The *J. S.* court noted that "local school boards have broad discretion in determining school disciplinary policies" and indicated that a student would have to meet a heavy burden to convince the court to disregard the experience and wisdom of professional educators. Similarly, the court hearing Sarah Lovell's claim repeatedly noted that school officials are the people actually in the trenches dealing with school violence and disgruntled teenagers and thus must take threats very seriously.[49] This deference to educators'

42. *LaVine*, 2001 U.S. App. LEXIS 16079, at *21 (citing Karp v. Becken, 477 F.2d 171, 174–75 [9th Cir. 1973]).

43. *See, e.g., J. S.*, 2000 Pa. Commw. LEXIS 402, at *15 (noting that "[n]ot surprisingly, there is little case law" addressing the issue of whether speech that occurred off of school premises which was communicated to others via the Internet is protected by the First Amendment).

44. *Boman*, 2000 U.S. Dist. LEXIS 5389, at *3–5, *6–7, *12.

45. *Emmett,* 2000 U.S. Dist. LEXIS 4995, at *2.

46. *See Boman*, at *2, *4, *11 (calling her "an accomplished art student" and referencing her exposure to advanced artistic methods); and *Emmett,* at *1 (noting that Emmett had a 3.95 G.P.A. and was co-captain of the high school's basketball team).

47. *D. G.*, 2000 U.S. Dist. LEXIS 12197, at *2.

48. *LaVine*, 2001 U.S. App. LEXIS 16079, at *22. *But see* Beussink v. Woodland R-IV School District, 30 F.Supp.2d 1175, 1184 (E.D. Mo. 1998) (in which the court preliminarily enjoined a school from disciplining a student for a vulgar but nonviolent Web site that was critical of the school, in spite of the student's past disciplinary record, which could have been relevant under other circumstances).

49. *J. S.*, 2000 Pa. Commw. LEXIS 402, at *10; *Lovell*, 1996 U.S. App. LEXIS 17535, at *19. *See also* Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978) (declining to ignore the historic judgment of educators and thereby formalize the academic dismissal process); Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) (noting that judicial review should be limited when reviewing the academic decisions of school officials); Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982) (Chief Justice Burger, dissenting, indicating that

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decisions may reflect the fact that the principals and superintendents who make the tough calls are also the ones who may have to pay the price if the "better safe than sorry" approach is not taken and students are not disciplined shortly after they make threats.

Three cases in particular shed light on the type of procedure the courts may favor in situations where administrators are confronted with threats of violence. In *LaVine*, the court all but commended the school administration for its handling of James LaVine after his violent poem was discovered; and in both *Boman* and *D. G.*, the courts seemed to suggest a course of action for other educators to take if a similar threat occurs at their schools. The *LaVine* court described in detail how the Blaine High School administration had proceeded after LaVine gave his poem to his teacher on a Friday afternoon. After the teacher read the poem and became concerned about LaVine and the safety of other students, she contacted a counselor as well as the vice-principal. The vice principal then took over and contacted the local police department for advice and investigative help; he also consulted Washington State's Child Protective Services, the Community Mental Health Crisis Line, and a psychiatrist. Then, due to the serious nature of the threat, the decision was made on Sunday night to emergency expel LaVine. However, the boy was "allowed to return to classes as soon as he was evaluated by a psychiatrist who determined in his professional opinion that James was not a threat to himself or others."[50] The court therefore determined that the emergency expulsion was reasonable under the totality of the circumstances and lauded the school district for readmitting LaVine as soon as it was safe to do so.

The *Boman* and *D. G.* courts, using almost identical language, explained that following a threat school districts are justified in taking some time to determine whether it poses a potential hazard to school safety. Thus, short-term suspensions can be warranted. But once the school district has "gathered the facts . . . and the context of the [threat becomes] clear," if there is no danger—and if the speech is not covered by *Kuhlmeier*, *Fraser*, or *Tinker*—then it is protected by the First Amendment and further discipline of the student is unwarranted.[51] Taken together, *LaVine*, *Boman*, and *D. G.* provide insight into what at least three courts view as appropriate behavior by school officials.

Reclaiming Schools as Safe Havens

These cases and common threads offer several insights into recent interpretations of the law as applied to the First Amendment and threatening student speech. They also offer suggestions of steps school officials faced with student threats can take immediately to ensure student and campus safety.

The FBI recommends that school districts have in place crisis management plans they can turn to in the event of such an emergency.[52] Furthermore, many educators advocate making programs in violence prevention and early intervention an integral part of every school's basic curriculum. Conflict resolution programs starting in the early grades as well as access to mediation services can help students develop skills in "critical thinking, problem solving, communications, impulse control, empathy and peer pressure resistance." Such programs can improve students' abilities to "define . . . problem[s] and generate solutions, anticipate consequences of behavior, improve self-control and form and retain friendships."[53]

Perhaps most relevant to school administrators who find themselves addressing student threats are the guidelines set forth in the FBI's manual, *The School Shooter: A Threat Assessment Perspective.*[54] In it, the author defines a threat, explains the different types of threats, and discusses the main factors to consider in assessing student threats. The manual then presents the three risk levels of threats and offers a four-pronged assessment model for evaluating students who make threats and the likelihood that they will carry them out. Readers can learn more about threat assessment models and violence prevention by visiting the Federal Bureau of Investigation Web site, which includes the full text of the threat assessment manual.[55]

In addition to implementing a threat assessment model such as the one developed by the FBI, school districts should develop threat management programs that take all threats seriously, investigate them, and respond to them appropriately. While noting that "[s]chool disciplinary policies and appropriate treatment approaches should be determined by

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schools should be administered by local school boards and officials and not by federal judges).

50. *LaVine*, U.S. App. 2001 LEXIS 16079, at *24.

51. *D. G.*, 2000 U.S. Dist. LEXIS 12197, at *18. *See also Boman*, 2000 U.S. Dist. LEXIS 5389, at *12–13 (using very similar language). Although the language in *D.G.* is essentially identical to that of the *Boman* decision, the *D. G.* court does not cite *Boman*, which was decided approximately seven months before.

52. *See* Stephen R. Band and Joseph A. Harpold, "School Violence Lessons Learned," Federal Bureau of Investigation, *Law Enforcement Bulletin* (September 1, 1999), 9–11.

53. "Key Violence Prevention Elements," *School Violence Alert*, Oct. 6, 1999 (Newton, Mass.: Educational Development Center Inc., 1999) (accessed through LexisNexis November 27, 2001).

54. *The School Shooter* discusses in some detail the key elements of the FBI's threat assessment model. The short description of the model in this article is not intended as a substitute for threat assessment training but is offered as an example of a threat assessment method one law enforcement group (the FBI) endorses for use in public schools.

55. The FBI's Web site is http://www.fbi.gov/publications/school/school2/pdf (last visited 4/2/02).

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school administrators and counseling staff, mental health professionals, and other specialists," the FBI emphasizes that a "clear, consistent, rational, and well-structured system for dealing with threats is vitally important" in today's schools.[56] It recommends that school districts notify students and parents of all school policies pertaining to threat assessment and response, designate a threat assessment coordinator, and consider forming multidisciplinary teams of school faculty and staff as well as mental health professionals and law enforcement representatives.

The goal of the FBI threat study and the resulting threat assessment model is to empower school districts to "identify and deal with the high-risk threats that are the major concern, and respond to less serious threats in a measured way."[57] The result of adopting an assessment and intervention model would be better-trained school officials who have in place documented policies and procedures for handling student threats and making their schools safer places. Another result of adopting such policies could be clear, straightforward explanations for judges of the procedure and reasoning school officials employed in addressing a particular situation in which they perceived a student threat.[58]

In Search of Balance on the Scales of Justice

Parents and the community expect the schools to keep students and employees safe, to investigate all threats to their safety, and to deal appropriately with students who pose a danger to the people around them. At the same time, administrators are required to respect students' constitutional rights. They can find themselves between a rock and a hard place when confronted with a student threat: if they do not respond aggressively, the security of the campus and lives could be at risk; if they respond too aggressively, students' First Amendment rights may be compromised. Regardless of which approach administrators take, lawsuits loom on the horizon—by victims' families if a threat is not taken seriously enough and turns out to be lethal, or by the students who make threats if overzealous school authorities tread upon their rights.[59]

It appears that in the wake of Columbine, we have learned a great deal about student threats and what schools must do to prevent new tragedies from occurring. In fact, on April 20, 2002, the day before the third anniversary of that school shooting, two Columbine High School students were suspended indefinitely for leaving a hit list of students and staff in the park that serves as a memorial to the victims.[60] Drawing on their experience and training, law enforcement officials were able to identify the students and determine that they did not actually intend to harm anyone. Nonetheless, we still have much to learn if we are to strike a better balance on the scales of justice between respecting students' First Amendment rights and recognizing educators' duty to protect them from danger. ■

56. O'Toole, *School Shooter*, 25.
57. *Id*. at 33.
58. For North Carolina's response to concerns about school safety and threats by students, *see School Law Bulletin* 28 (Fall 1997): 5–8; *id*. 32 (Fall 2001): 2, 4–5; and "Relevant North Carolina General Statutes," at the end of this article.
59. *See*, *e.g.*, Jennifer Hamilton,"Columbine Families Want Lawsuits Reconsidered," *News & Observer* (Raleigh), Dec. 7, 2001, 11A.
60. *See* Nancy Mitchell and Brian D. Crecente, "'Hit List' Leads to Suspensions: Two Columbine Boys Could Face Expulsion after Leaving Message on Clement Park Pillar," *Rocky Mountain News*, April 19, 2002.

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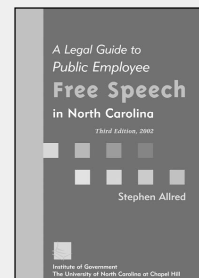

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Violence in American Schools: Selected Examples, 1997–2001

- February 19, 1997—A sixteen-year-old boy in Bethel, Alaska, uses a shotgun to kill his principal and another student. He also wounds two other students.
- October 1, 1997—In Pearl, Mississippi, a sixteen-year-old boy fatally shoots two students and wounds seven others after killing his mother earlier that day.
- December 1, 1997—A fourteen-year-old boy kills three students and injures five others in West Paducah, Kentucky.
- March 24, 1998—In Jonesboro, Arkansas, two students, aged eleven and thirteen, pull a fire alarm and kill four students and a teacher fleeing from the school. Ten other students are wounded.
- April 24, 1998—A teacher is killed and two students are wounded when a fourteen-year-old boy opens fire at an eighth-grade dance in Edinboro, Pennsylvania.
- May 19, 1998—In Fayetteville, Tennessee, an eighteen-year-old high school senior kills a classmate in his high school parking lot.
- May 21, 1998—A fifteen year old kills his parents and, later, two students at his high school in Springfield, Oregon.
- April 16, 1999—A high school sophomore in Notus, Idaho, fires shotgun blasts inside his school but injures no one.
- April 20, 1999—Two Columbine High School students, seventeen and eighteen years old, go on a rampage in Littleton, Colorado, with an arsenal that includes pipe bombs and handguns. They kill twelve students and one teacher before taking their own lives.
- May 20, 1999—A Conyers, Georgia, fifteen year old wounds six students with a handgun and rifle when he opens fire at his high school.
- November 19, 1999—A twelve-year-old boy kills a thirteen-year-old girl in Deming, New Mexico.
- December 6, 1999—In Fort Gibson, Oklahoma, a thirteen-year-old boy fires a semiautomatic pistol into a crowd at school, wounding five students.
- February 29, 2000—A six-year-old boy shoots and kills a first-grade classmate in Mount Morris Township, Michigan.
- May 26, 2000—A thirteen-year-old seventh-grader in Lake Worth, Florida, kills a teacher.
- January 10, 2001—A seventeen-year-old high school boy takes a teenage girl hostage in Oxnard, California, and is fatally shot by a SWAT team.
- March 5, 2001—In Santee, California, a fifteen-year-old freshman kills two students and injures thirteen others.
- December 5, 2001—In Springfield, Massachusetts, a seventeen-year-old student kills a guidance counselor by stabbing her at least six times.

Sources: Maloy Moore, "Santee School Shootings; Past School Shootings for the Record," *Los Angeles Times*, March 6, 2001, 17A; "Outbreaks of Violence at U.S. and Canadian Schools," *Canadian Press Newswire*, March 5, 2001; Bill Gaines, NBC-17 (Raleigh), *11:00 P.M. News Broadcast*, December 5, 2001.

Relevant North Carolina Laws

N.C.G.S. § 115C-105.47 (1999). Local Safe School Plans. Every local board of education is directed to develop a safe school plan "to provide that every school in the local school administrative unit is safe, secure, and orderly." The statute also explains the required fifteen components of a safe school plan.

N.C.G.S. § 115C-391 (2001). Corporal Punishment, Suspension, or Expulsion of Pupils. Local boards of education are instructed to adopt discipline policies and procedures for the suspension and expulsion of students. Those older than fourteen years of age may be expelled if their "behavior indicates that the student's continued presence in the school constitutes a clear threat to the safety of other students or employees." Additionally, students who bring or possess weapons on educational property or at school-sponsored curricular or extracurricular activities occurring off-campus may be suspended for 365 calendar days.

N.C.G.S. § 14-277.1 (1999). Communicating a Threat. A person is guilty of communicating a threat if without lawful authority, he willfully threatens to injure another person or his family, or willfully threatens to damage a person's property. The statute explains the four elements of this crime.

School Violence Prevention Resources for Educators and Parents

- U.S. Department of Justice Web site, featuring research, statistics, and other information on youth violence in America
  http://www.usdoj.gov/youthviolence.htm
- U.S. Department of Education Web site
  http://www.ed.gov/index.jsp
- National Youth Violence Prevention Resource Center
  http://www.safeyouth.org/home.htm
- North Carolina Department of Public Instruction
  http://www.dpi.state.nc.us/
- Center for the Prevention of School Violence at North Carolina State University
  http://www.ncsu.edu/cpsv/
- National School Safety Center
  http://www.nssc1.org/
- Safe and Responsive Schools Project, sponsored by the Indiana Education Policy Center and funded by the U.S. Department of Education
  http://www.indiana.edu/~safeschl/

An Essay on Successful Multicampus Governance: The North Carolina Model

by John L. Sanders

For much of the period since the end of World War II, public higher education has been one of the strong growth sectors of the American economy. A number of changes have fueled this growth, including: the rapidly expanding college-age population, the increasing recognition of the need to reeducate continually much of our workforce, the introduction of new technologies that facilitate distant and continuing education, the willingness of state governments to finance the establishment and enlargement of institutions of higher education, and the readiness of the federal government to finance student assistance programs and large-scale research endeavors.

As states have enlarged their higher education responsibilities, they have become more concerned about how best to manage their educational institutions to get the highest return for their citizens from the large investments they make in those institutions. For several decades, the trend was to move from separate state institutions—each with its own direct relations with the state legislature and governor—to systems of public institutions governed by central state authority. This trend found its roots in earlier decades. Georgia established the first statewide university system in 1931, followed closely by North Carolina in the same year. Georgia's plan embraced all public degree-granting institutions; that of North Carolina brought together only the three principal public institutions maintained by the state.

The forms of consolidation vary widely and change often over time, for in this area the creative ingenuity of state legislatures seems infinite. Today, multicampus public higher education systems exist in at least three-quarters of the states, embrace two-thirds of the nation's public colleges and universities, and serve about 80 percent of public institutions' students. Typically, those systems consist of one or two state-level governing boards that directly govern all or a subset of the state's degree-granting public institutions. Those institutions do not have their own local governing boards (though some may have local boards of visitors or the like with only advisory powers).

In recent years, however, a countertrend has become evident. Several states—notably New Jersey, West Virginia, and Florida—have effectively devolved much of the power formerly vested in their central higher education governing boards to newly established campus governing boards. Other states are contemplating similar moves. The justification is that with their own boards, institutions are better able to respond to local program needs and pressures for broader or improved service (and, cynics might observe, to realize institutional ambitions).

Where does North Carolina stand in the controversy over central versus local board authority?

North Carolina successfully dealt with this issue thirty years ago.

Each of North Carolina's sixteen public, degree-granting universities already has its own board of trustees that exercises extensive powers delegated to it by the central governing body, the Board of Governors. This blended model permits both oversight from a statewide perspective and accommodation to local initiatives. (Only Utah has had a similar structure for years, with both a statewide governing board and institutional boards with significant power.)

In 1971 North Carolina maintained sixteen public, degree-granting institutions of higher education. Six were campuses of The University of North Carolina, which was governed by one, one-hundred-member board of trustees and one president. A chancellor headed each of the six constituent institutions. The multicampus "University of North Carolina" was created in 1931 by the legislative consolidation of three institutions—the University of North Carolina (Chapel Hill), North Carolina State College of Agriculture and Engineering (Raleigh), and the North Carolina College for Women (Greensboro), as they were then known. In the 1960s the legislature added three previously separate public institutions (at Charlotte, Asheville, and Wilmington). Chancellors of the

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constituent institutions then reported only to the University president; there were no institutional boards of trustees.

At the time, the state also maintained ten other public institutions, each with its own board of trustees of thirteen members and a president chosen by that board. The University's board of trustees was elected by the state legislature; the other ten institutional boards of trustees were appointed by the governor. (There was also a large system of public, two-year community colleges, then under the same governing board as the public school system; that set of institutions will not be treated further in this article.)

In 1971, at the insistence of Governor Robert W. Scott, the state legislature "restructured" all of public higher education in North Carolina, effective in 1972. It merged the ten previously separate public institutions into The University of North Carolina, which henceforth encompassed all sixteen public campuses. The aim was to achieve better returns on the state's investment in higher education through central planning and coordination, program authorization and allocation, resource distribution, and advocacy of the state's higher education needs—as well as to curb unsubstantiated institutional aspirations.

The board of trustees of the multicampus University was continued as a legal entity but was renamed the Board of Governors of The University of North Carolina; it was reduced from a hundred to thirty-two members, all of whom continued to be elected by the legislature. The goal, as reflected in the 1971 legislation, was a responsible governing body that could view comprehensively the higher education needs of the whole state and lead all the state's universities in responding comprehensively to those needs. Each of the sixteen institutions was given its own board of trustees of thirteen members—eight elected by the Board of Governors, four appointed by the governor, and the student body president. (Thus the new structure gave each of the six institutions that had previously made up the multicampus University its own board of trustees, which the original three campuses had not had for forty years.)

Complete governing authority over the University was vested in the Board of Governors, which was empowered to delegate to the boards of trustees and the chancellors such powers as it saw fit; such delegations of authority were not required to be uniform among all the campuses. During legislative consideration of the restructuring plan, proposals for the statutory assignment of powers to institutional boards of trustees—put forward by friends of the ten then-separate institutions—were rejected in favor of leaving the delegation of such powers to the discretion of the Board of Governors.

A major objective of the restructuring was to extend further the benefits of the successful, unified, multicampus University of North Carolina as it had operated for forty years. In 1971 its six institutions enrolled 56 percent of the students at the state's public degree-granting institutions and had faculties and facilities that were proportionately even larger than those of the ten institutions about to join the University.

The General Assembly in 1971 sought to create in the UNC Board of Governors an informed body with the authority to respond definitively—whether positively or negatively—to regional and institutional ambitions for new programs and other ventures in higher education, and thus to shield the legislature from those pressures. Over the past three decades, the legislature has supported the Board of Governors whenever the board has made and accepted responsibility for such decisions.

The one specific role of great importance the 1971 statute confers on the institutional boards of trustees is that of controlling the choice of a new chancellor. The president must select from a list of two or more names recommended by the institution's board of trustees the one person to be nominated to the Board of Governors for election. Thus the institutional boards have a major voice in the selection of their chancellors.

From the beginning, the Board of Governors recognized the value of local discretion in meeting institutional needs. Thus, at its organizational meeting in July 1972, the board delegated to each of the sixteen boards of trustees and sixteen chancellors extensive powers to govern their respective institutions, reserving to the Board of Governors and the president only those powers essential to the exercise of their systemwide responsibilities. Those reserved powers are

1. the definition of institutional missions and the allocation of degree-granting and other major academic programs to constituent institutions;
2. establishment of enrollment levels for each institution;
3. election of the president and—on the president's nomination—of the chancellors and the president's own principal staff;
4. election of the principal administrative officers and tenured faculty of the sixteen institutions, from nominations by the institutions' boards of trustees;
5. preparation of the comprehensive University budget and its advocacy before the governor and the General Assembly; and
6. determination of tuition and fees charged by the institutions.

All the Board of Governors' actions, particularly those affecting individual institutions, are heavily influenced by the recommendations and advice of the institutions themselves.

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The boards of trustees and the chancellors of the sixteen constituent institutions have final authority over myriad aspects of institutional life and operations that necessarily differ among institutions ranging in enrollment from 700 to 27,000 students and in degree offerings from bachelor's degrees only to the wide array appropriate to major research universities. Left for local decision are such potentially vexatious subjects as those concerning athletics, student admission and graduation standards, student services, student discipline, all personnel decisions (except formal election of senior campus administrators and conferral of faculty tenure, both of which are based on recommendations from the institutions' boards of trustees), campus physical planning and development, fund-raising, honorary degrees and awards, alumni relations, and the countless other issues that can complicate relations between institutions and their many constituencies. In limited instances, an institutional decision may be appealed by an aggrieved faculty member or student to the president and the Board of Governors. Administration of budgets, personnel systems, and purchasing are carried on directly between the institutions and the relevant agencies in Raleigh.

The Board of Governors' initial delegations of power to the institutions' boards have, with minor changes, survived intact for thirty years. Nearly all these delegations have been uniform for all sixteen institutions, any differences being due chiefly to variations in institutional size and administrative structure.

These early and generous delegations of power reflect the fact that by 1971 the president (William Friday) and half of the initial members of the Board of Governors had had many years of experience governing the University in its six-campus form; they thus understood thoroughly the vital differences between governing a single-campus institution and governing a multicampus university. They knew which powers it was essential to retain at the center and which could and should be delegated to the individual institutions.

The statute says that the president "shall be the chief administrative officer of the University." The chancellors are administratively responsible to the president, and through the president to the Board of Governors. The chancellors are also responsible to their individual boards of trustees as the executors of the policies and directives those boards adopt pursuant to their delegated power.

The governor and the General Assembly are well served by having one president and one Board of Governors they can hold accountable for those aspects of University operations that are of greatest concern to them—program prioritization and authorization, effective resource allocation and use, upper-level staffing, and comprehensive planning and advice to the governor and the legislature on how best to meet the higher education requirements of the state as a whole.

The Board of Governors, with the cooperation of the boards of trustees, has been able to gain sufficient resources to fulfill much of the state's ambition to educate an ever-enlarging share of our high school graduates, to provide the economy with a well- and currently trained workforce, and to meet the institutions' needs for renewed and expanded physical plants.

The scope for University-wide initiative is extensive. The president's office is leading a coordinated program to engage all the constituent institutions in meeting more effectively the needs of the state public school system for more and better-prepared administrators and teachers. (The state will need eighty thousand new teachers by 2010.) A bond issue of $2.5 billion for University facilities, approved in the fall 2000 elections by 73 percent of the voters, could never have been gained by a decentralized set of institutions, each pleading its own case with the state legislature and the public.

Multicampus governance enables the University to conduct more coordinated lobbying of the legislature and executive agencies. The development of information technology is being achieved more efficiently and economically with central guidance. Program proliferation is controlled. Even where the institutions' boards have full delegated power over a function (such as student recruitment or fund-raising), the president's office can provide technical help and obtain financial support for staff development.

In recent years the General Assembly and the governor have delegated to the constituent institutions substantial discretion and flexibility (with consequent economies) in budgeting, purchasing, and personnel management, replacing systems that were closely controlled by state administrative agencies in Raleigh. These measures of heightened institutional flexibility are strongly advocated by the president and the Board of Governors.

All sixteen institutions have gained much and lost little by being integral parts of a multicampus university that is organized and operated to achieve unity in essentials while permitting institutional differentiation in all else. ■

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Clearinghouse

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

edited by Ingrid M. Johansen

Cases and Opinions That Directly Affect North Carolina

Peer-graded classroom work and assignments are not education records protected by the Family Education Rights and Privacy Act. Owasso Independent School District No. I-011 v. Falvo, 534 U.S. 426 (2002).

Facts: Kristja Falvo's three children were students in the Owasso (Okla.) Independent School District. Her children's teachers used peer grading: students exchanged papers and scored them as the teacher gave the correct answers. Falvo opposed peer grading because it embarrassed her children, but the school district refused to eliminate it. Falvo filed a class action against the school district, alleging that the practice of peer grading violated the Family Education Rights and Privacy Act (FERPA). FERPA prohibits schools that receive federal funds from disclosing certain student information in educational records without parental consent.

The federal court for the Northern District of Oklahoma granted the district's motion to dismiss Falvo's claim before trial. The court held that grades put on paper by students are not educational records protected by FERPA. The Court of Appeals for the Tenth Circuit reversed this ruling. In doing so, the appeals court addressed an issue not raised by the lower court: Does FERPA, which conditions the granting of federal school funds on compliance with certain requirements, confer a private right of action on aggrieved students and parents? The court found that it did. (Had the court ruled otherwise, the only mechanism available for FERPA enforcement would be termination of federal funding, a not-uncommon, though seldom used, remedy in federal spending statutes.) The court went on to conclude that grades marked by students on each others' work were education records protected by FERPA. The school district appealed.

Holding: The U.S. Supreme Court reversed the court of appeals.

Before ruling on the merits of the case, the Court noted that the question of whether FERPA provides private parties with a cause of action to enforce its protections remains open. (This question was recently decided by the Court in *Gonzaga University v. Doe*, 122 S. Ct. 2268 [2002]. See digest below.)

FERPA defines *educational records* as records, files, documents, and other materials containing information directly related to a student and maintained by an educational institution or by a person acting for the institution. The term *maintain* in this context suggests storage in filing cabinets, secure databases, or some other sort of permanent arrangement. The Court found that classwork and assignments graded by other students are not maintained in ways that fit within the meaning of this definition. Furthermore, a student grader is not a *person acting for* an educational institution. That phrase connotes someone who is an agent of the school, such as an administrator, teacher, and other staff member.

The Court found other reasons to conclude that peer grading does not violate FERPA. Treating peer-graded classwork as educational records, it pointed out, could have unbounded consequences. For instance, because FERPA grants parents a hearing at which they may contest the accuracy of their child's educational records, the court of appeals' interpretation would permit parents to contest the accuracy of the grade on every spelling test or math project the student completes. Surely such a result was not what Congress intended when enacting FERPA. In addition, if teachers were forced to grade each and every piece of classwork themselves, they would use valuable time better spent in class preparation.

Family Educational Rights and Privacy Act (FERPA) does not create private cause of action. Gonzaga University v. Doe, 122 S. Ct. 2268 (2002).

Facts: The Family Educational Rights and Privacy Act (FERPA) prohibits federal funds from going to educational

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agencies that have a policy or practice of releasing educational records to unauthorized persons.

In this case, John Doe, a former undergraduate of the School of Education at Gonzaga University (Wash.), sued the university under FERPA for releasing personal information about him to the state agency responsible for certifying teachers. A jury awarded Doe $450,000 on his FERPA claim.

The Washington Court of Appeals reversed the award, finding that FERPA did not create individual rights that can be enforced in a federal lawsuit. The Washington Supreme Court reversed this ruling, and the U.S. Supreme Court granted review.

Holding: The Court ruled that FERPA creates no personal rights enforceable through federal lawsuits.

In FERPA, Congress conditioned the receipt of federal funds on the requirement that educational agencies not permit the release of education records or personally identifiable information contained therein without the written consent of a student's parents. FERPA directs the Secretary of Education to establish a review board within the Department of Education to investigate and adjudicate FERPA violations. The Secretary may terminate funding only if a recipient institution fails to comply substantially with any of FERPA's requirements and if compliance cannot be secured by voluntary means.

The Court began by stating that FERPA lacks the language necessary to show that Congress intended to create federally enforceable rights for persons covered by its provisions. FERPA is directed at educational agencies. Contrast FERPA's language, for instance, with the individually focused language of Title VI or Title IX: "no person shall be subjected to discrimination . . . ." Further, FERPA's language speaks only in terms of "policies and practices" that permit release of student information, not individual instances of such release. Also, FERPA provides that funding cannot be terminated so long as agencies "comply substantially," lending additional support to the conclusion that individual instances of release do not create a private right of action. Finally, Congress's direction to the Secretary to establish a review board for FERPA violations provides an individual with a federal review mechanism, which further counsels against finding that FERPA creates individual rights enforceable through private causes of action.

Judge issues final ruling in *Leandro*: The state is responsible for ensuring that at-risk children receive the opportunity for a sound basic education and must report on its progress toward meeting that mandate every ninety days. Hoke County Board of Education v. State of North Carolina, in the Wake County Superior Court, No. 95 CVS 1158 (April 4, 2002).

Facts: In 1997 the North Carolina Supreme Court held that the state constitution guarantees every child the opportunity to receive a "sound basic education." [See *School Law Bulletin* 28 (Fall 1997): 35–36.] In so ruling, it reinstated the *Leandro* case, in which poor rural and wealthy urban school districts charged that the state's educational finance system denied their students a constitutionally adequate education. The supreme court sent the case back to the trial court to receive evidence on whether the state's funding system allows students to meet the sound basic education standard.

The Wake County Superior Court issued three rulings in 2000 and 2001, the basic import of which was as follows: (1) the state funding system is constitutionally adequate to meet students' needs (although at present it does not do so); (2) the minimum standard for a sound basic education is academic performance at or above grade level; (3) the state is constitutionally required to provide preschool programs for at-risk children; (4) students across the state are not receiving a constitutionally adequate education; (5) quality teachers and principals are essential to higher student performance; and (6) local education agencies must allocate resources first in a way that provides all children with an equal opportunity to receive a sound basic education. [For a detailed discussion of these rulings, see Ann McColl, "*Leandro:* Constitutional Adequacy in Education and Standards-Based Reforms," *School Law Bulletin* 32 (Summer 2001): 1–21.]

In April 2002, the court issued its final ruling in the case, incorporating by reference the first three rulings.

Holding: The court squarely stated that the responsibility for making sure that the children of North Carolina receive the opportunity for a sound basic education rests with the state. Local education agencies (LEAs), continued the court, are instruments created by the state for its own convenience in administering education and cannot be blamed for the failure to provide what *Leandro* requires.

The state, therefore, must (1) make sure that every classroom has a competent, certified, well-trained teacher; (2) make sure that every school is led by a well-trained, competent principal with leadership skills and the ability to hire qualified teachers; and (3) provide every school with the resources necessary to support an instructional program that gives all students the equal opportunity to obtain a sound basic education. How the state achieves these requirements, said the court, is up to the General Assembly and the State Board of Education. Satisfying these mandates may or may not require additional funds. In any event, the state must report to the court on its progress every ninety days.

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North Carolina Supreme Court affirms ruling concerning school board review in teacher termination hearing; finds that teacher was not deprived of due process. Farris v. Burke County Board of Education, 355 N.C. 225, 559 S.E.2d 774 (2002).

Facts: Linda Farris, a special education teacher in the Burke County school system for twenty-eight years, protested her termination by Superintendent Tony Stewart. The case manager who heard Farris's case excluded evidence that Stewart attempted to introduce without having shown it to Farris. The case manager determined that, based on the admissible evidence, Stewart had failed to substantiate his grounds for terminating Farris. On review, the Burke County school board considered the excluded evidence and created additional findings of fact that, the board found, substantiated Stewart's decision to dismiss Farris.

The North Carolina Court of Appeals found that the board's consideration of the excluded evidence and its creation of additional findings of fact violated the procedure for review of a case manager's report set out in G.S. 115C-325(j). [See digest in "Clearinghouse," *School Law Bulletin* 32 (Summer 2001): 31.] The court sent the case back to the board for a review based only on the case manager's findings of fact. The board appealed.

Holding: The North Carolina Supreme Court affirmed the court of appeals ruling, with one modification. In sending the case back to the board, the court noted that the case manager was empowered only to make findings of fact and issue a recommendation based on them. Three of the items labeled "findings of fact" in the case manager's report—that Farris was not willfully insubordinate, that her teaching performance was not inadequate, and that she did not neglect her duty—were in fact conclusions of law that were not binding on the board in its reconsideration.

The court also addressed an issue raised by Farris: that the decision to terminate her was not made by an unbiased and impartial decision maker. An attorney named Ballew had represented Superintendent Stewart before the case manager and before the school board; the same lawyer also represented the board before the court of appeals. Moreover, the board's own findings of fact on Farris's termination were exactly the same as those Ballew had earlier submitted to the case manager (but which the case manager had declined to use). These identical findings of fact led Farris to contend that there had been improper communications between Ballew and the board before her hearing, thus tainting the process and depriving her of due process. While the court acknowledged the appearance of some impropriety, it noted that in such cases there is a presumption that the board acted correctly. As Farris failed to present evidence that Ballew submitted the findings of fact to the board before the hearing, the presumption was not rebutted.

Title VII regulation allowing an otherwise timely filer to verify an employment discrimination claim after the time for filing has expired is valid. Edelman v. Lynchburg College, 122 S. Ct. 1145 (2002).

Facts: Leonard Edelman was denied tenure at Lynchburg (Va.) College on June 6, 1997. On November 14, 1997, he sent a letter to the Equal Employment Opportunity Commission (EEOC) alleging that the college had discriminated against him on the basis of gender, national origin, and religion. Edelman and his attorney believed that this letter constituted a charge of discrimination as required under Title VII, even though it was not signed. Edelman signed a charge drafted by the EEOC on April 15, 1998, 313 days after the date of his tenure denial.

Lynchburg College argued that his claim was barred by the 300-day statute of limitations in such actions, and the Fourth Circuit Court of Appeals agreed. [See digest in "Clearinghouse," *School Law Bulletin* 32 (Winter 2001): 36–37.] The court refused to adhere to EEOC regulations that allowed a charge to be verified (signed) after the time for filing the charge had passed. It found that these regulations were inconsistent with Title VII's clear statement of a 300-day limitations period. Edelman appealed and the U.S. Supreme Court granted review.

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

Title VII requires discrimination charges to "be in writing under oath or affirmation." In enacting this requirement, the Court found, Congress did not intend to thwart the nature of Title VII as a statute under which laypersons, rather than lawyers, are expected to initiate the process. Construing Title VII to allow a later oath is consistent with this goal. Further, this practice was already well established under Title VII on the numerous occasions when Congress amended the Act. That Congress never questioned the practice supports its validity. Finally, there is a substantial history in courts of law for allowing *later* signatures. To require more of an administrative agency than of a court of law seems strange, said the Court.

Although the Court concluded that Edelman's tardy signature did not put his letter beyond the 300-day filing period, the Court did note that there appeared to be some factual support for the circuit court's finding that his letter was not, in fact, a charge—with or without a signature. The argument for this view was that when the EEOC received the

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letter, it did not give notice to Lynchburg College within ten days, as Title VII requires. This issue, said the Court, should be addressed on remand.

Female place-kicker prevails on Title IX claim against Duke University and receives attorney fees. Mercer v. Duke University, 181 F. Supp. 2d 525 (M.D.N.C. 2001).

Facts: A jury awarded Heather Sue Mercer $2 million in punitive damages on her claim that Duke University discriminated against her on the basis of gender, in violation of Title IX, by denying her a position as place-kicker on its football team. [For earlier proceedings in this case, see *School Law Bulletin* 30 (Spring 1999): 20 and (Fall 1999): 24.] After the trial, Duke asked the judge to set aside the verdict as contrary to the evidence or, alternatively, to grant a new trial. Mercer asked the court to award her attorney fees.

Holding: The federal court for the Middle District of North Carolina denied Duke's motion and granted Mercer's.

The court rebuffed arguments by Duke that the evidence showed a legitimate, nondiscriminatory reason for denying Mercer a place on the football team—that is, that she was not good enough to play. This contention was belied by direct evidence from team members and the team coach that Mercer's skills were superior to those of other male place-kickers who were allowed to be on the team. In combination with evidence of numerous gender-related statements made by the coach to Mercer, the jury could reasonably conclude that Duke had discriminated against her because of her sex.

The jury also could reasonably conclude that the university was liable under Title IX because it had actual knowledge of the discrimination but deliberately failed to take adequate measures to stop it. Although Mercer did not complain directly to any official at Duke, both Duke's president and its athletic director admitted that they were aware of her situation. Both officials opted to do nothing, believing that the coach would take care of the situation. Not until two years after they became aware of the situation did they undertake a limited investigation. Title IX requires a prompt, timely, and reasonable response to sexual discrimination.

The court next addressed Duke's claim that punitive damages are not available as a remedy under Title IX and the alternative claim that the jury's award was unreasonable. The court enunciated the general rule that, unless Congress indicates otherwise, a federal statutory violation may be remedied by *any* appropriate relief. The court found no such contrary indication in Title IX and reasoned that the same evidence that led the jury to find that Duke reacted to Mercer's plight with deliberate indifference supported the punitive damages award.

As to the amount of the award, the court noted that under Title IX, the federal government is entitled to terminate funding to an educational entity that engages in sex discrimination. Duke University as a whole received $200 million in federal funds for the 1997–98 school year. Although Mercer did not present evidence detailing the percentage of this amount the athletic department received, the court found it likely that Duke expended a significant amount of the federal money on athletics. Therefore, the $2 million punitive damage award, while substantial, was not excessive when compared to the amount Duke could have lost as a result of its discriminatory conduct.

Based on the above findings, the court denied Duke's request for a new trial. As Duke had stipulated that the time and expense records submitted by Mercer's attorneys were reasonable and that it would not oppose the motion for fees if the court determined that Mercer was the prevailing party, the court awarded Mercer $388,799.83.

College did not breach contract with student. Humphrey v. Saint Augustine's College, No. 5:00-CV-532-BO(3) (E.D.N.C. March 25, 2002).

Facts: Lonnie Humphrey was a student and a ROTC member at Saint Augustine's College. Several female ROTC cadets complained to Humphrey that Colonel Dmitri Belmont, a college employee, had harassed them. Humphrey reported their complaints to Belmont, who placed Humphrey on leave of absence from the ROTC program when he refused to reveal the complainants' names. Thereafter, Humphrey alleged, Belmont and other college employees retaliated against him by failing to grade his exams, refusing to allow him to take one exam, and denying him permission to take a summer course to make up for a failed class.

Humphrey filed suit against the college, Belmont, and others (the defendants), charging breach of contract and tortious interference with contract. The defendants moved to have his claims dismissed before trial.

Holding: The federal court for the Eastern District of North Carolina granted the defendants' motion.

The court assumed, for the sake of argument, that Humphrey did have an educational contract with the college but found that the defendants had not breached it. Humphrey failed to present any evidence to counter the affidavits introduced by the defendants in support of their motion to dismiss. In those affidavits, the defendants stated that Humphrey's failures were due to poor attendance, disinterest in his classes, and general poor performance; that no professor failed to grade his exams; and that no one at the college had retaliated against him in any way for his dispute with the ROTC program. Humphrey was removed from the ROTC program because he showed disrespect for an officer, the defendants said. Without any evidence other than Humphrey's conclusory statements, the court was forced to

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conclude that the defendants had not breached a contract with Humphrey. Because there was no breach, the defendants could not be held liable for tortious interference with contract.

Professor's nonrenewal was in accordance with university standards, as were subsequent reviews of it. Zimmerman v. Appalachian State University, ___ N.C. App. ___, 560 S.E.2d 374 (2002).

Facts: Ward Zimmerman served as an administrator at Appalachian State University (ASU) until 1994, when the new chancellor asked him to resign his position and move to a teaching position. Zimmerman received an appointment as an untenured faculty member in the College of Education. In 1995 the dean of the College of Education recommended to the provost that Zimmerman be reappointed for a three-year term. The provost expressed his disagreement with this recommendation to the chancellor and then notified Zimmerman that he would not be reappointed.

Zimmerman appealed his nonrenewal to ASU's Faculty Grievance Hearing Committee (FGHC), arguing, among many other things, that the provost did not have the authority to override a dean's recommendation of reappointment for a faculty member. The FGHC disagreed but nevertheless recommended that he be reinstated—because of additional findings it had made on issues he had not raised. Primarily, the FGHC had found that a tenure-track faculty member who had demonstrated professional competence and a potential for future contributions, but was not reappointed, could make a prima facie (initially satisfactory) case for wrongful nonreappointment. In such circumstances, the FGHC believed, the provost would need to make a clear showing that institutional needs sufficiently outweighed the faculty member's demonstrated competence and future potential. Until the FGHC received guidance on how to judge the validity of institutional need, it recommended that Zimmerman be reinstated.

The chancellor accepted the FGHC's finding that the provost could override the dean's recommendation but rejected the additional findings and affirmed the denial of reappointment. Zimmerman appealed that decision to ASU's Board of Trustees, arguing that the nature of his nonrenewal raised an inference of bias that the provost had not rebutted. The board found no evidence of bias and no basis for overturning the chancellor's decision.

The University of North Carolina's Board of Governors agreed with the trustees' conclusion and declined further review. Zimmerman then brought the case to court, arguing, among other things, that the Board of Governors' refusal to review his case was arbitrary and capricious. On this point, and in his argument that the provost did not have authority to override a dean's reappointment recommendation, the trial court agreed with Zimmerman and ordered him reinstated. ASU appealed.

Holding: The North Carolina Court of Appeals reversed the trial court.

The FGHC, the chancellor, the trustees, and the Board of Governors all agreed that the provost had acted within his authority in deciding not to reappoint Zimmerman. Only the trial court disagreed with this proposition. ASU regulations contain two provisions relevant to this case: (1) Section 3.6.3, entitled "Reappointment, Promotion, and Tenure," states that if a "personnel action involves reappointment and the Provost concurs with the recommendation, a notice of reappointment shall be sent"; and (2) Section 3.6.4, entitled "Nonreappointment of Faculty Members," provides that the "decision not to reappoint shall be made by the dean of the appropriate college. . . . This decision is final . . . [and] shall be communicated for information to the Provost." Clearly Section 3.6.3's language—"and the Provost concurs with the recommendation"—contemplates that a provost may override a dean's appointment decision. A dean's decision is final only in cases of nonreappointment.

ASU regulations also provide that denial of reappointment may be based on any factor relevant to institutional interests but may not be based on a faculty member's exercise of free speech rights, or on illegal discrimination or personal malice. None of the decision makers in Zimmerman's case found evidence of personal malice in his nonreappointment, and he did not allege infringement of his free speech rights or illegal discrimination. The FGHC was therefore incorrect in concluding that Zimmerman had established a prima facie case of wrongful nonreappointment. According to the whole record, the Board of Governors' decision not to review Zimmerman's case, and to let the nonreappointment stand, was appropriate.

Former employee's disability discrimination claim barred by the statute of limitations. Kelly v. Carteret County Board of Education, ___ N.C. App. ___, 560 S.E.2d 390 (2002).

Facts: Tina Kelly was terminated from her assistant teaching position in the Carteret County school system after she informed her employer that, because of a seizure disorder, she could no longer safely drive a school bus. She filed an action against the school board, claiming that her termination violated North Carolina public policies prohibiting discrimination on the basis of disability and favoring the protection of persons and property on or near the public highways.

The trial court granted the board's motion to dismiss, finding that the fundamental part of Kelly's complaint fell within the scope of North Carolina's Persons with Disabilities Protection Act, which has a 180-day statute of limitations. Kelly appealed.

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

Although Kelly argued that her complaint contained a claim for relief based on the public policy on highway safety, the court of appeals agreed with the trial court that the material part of her complaint was based on her disabling condition. Kelly did not, after all, allege that the board wanted her to drive a school bus after learning of her seizure disorder, nor that the board had given her the choice of driving the bus or being terminated. Thus her complaint was that she was terminated because of her disability, not because she refused to violate public policy.

Former employee's state law claims not substantially similar to her federal law claims. Gibbs v. Guilford Technical Community College, No. COA01-328, Unpublished (N.C. App. April 16, 2002).

Facts: Patricia Gibbs, who was born with cerebral palsy, taught adults with developmental disabilities for Guilford Technical Community College in 1996 and 1997. She received a notice of nonrenewal in April 1997. In 1998 she filed an Americans with Disabilities Act (ADA) claim in federal court. In 2000 she filed claims for wrongful termination, breach of contract, and infliction of emotional distress in state court. The college moved to have her state court claims dismissed because they were substantially similar to her existing federal court action (a move known as a motion to dismiss for *prior action pending*). The trial court denied the motion and the college appealed.

Holding: The North Carolina Court of Appeals affirmed the trial court's judgment in an unpublished opinion.

The federal and state court actions are not substantially similar, found the court. The federal claim revolves around whether Gibbs's termination violated the ADA and its reasonable accommodations provision. The state claims concern whether that termination violated North Carolina public policy, breached a contract, and inflicted emotional distress. Although Gibbs's disability played a central role in both the ADA and the public policy claim, the state court public policy claim alleged not that her termination violated public policy enunciated under North Carolina's companion to the ADA—the North Carolina Persons with Disabilities Protection Act—but public policy enunciated in North Carolina's Equal Employment Practices Act.

Failure of two school boards to provide adequate notice of when right to contested case hearing began did not entitle parents of autistic children to reimbursement for educational expenses. M.E. v. Board of Education for Buncombe County, 186 F. Supp. 2d 630 (W.D.N.C. 2002); C.M. v. Board of Public Education of Henderson County, 184 F. Supp. 2d 466 (W.D.N.C. 2002).

Facts: In 2001 the Fourth Circuit Court of Appeals ruled in two cases that North Carolina's sixty-day limitations period on filing a request for a contested case hearing under the Individuals with Disabilities Education Act (IDEA) was acceptable so long as the party seeking the hearing received the required statutory notice. [See digest of *C.M. v. Board of Education of Henderson County*, in "Clearinghouse," *School Law Bulletin* 32 (Spring 2001): 22–23.] The court went on to rule that the parents had not received such notice. The court remanded the cases to the federal court for the Western District of North Carolina to determine whether this failure to provide notice entitled the parents to reimbursement of their private educational expenses.

Holding: The district court determined that the parents were not entitled to reimbursement. Under the IDEA, an isolated violation of the statute's procedural requirements does not, in itself, entitle parents to reimbursement: the parents must either show a pattern of procedural violations or demonstrate that the procedural violation caused their child a loss of educational opportunity. Neither of these cases involved repeated violations.

In the Buncombe County case, the court found that there had been no loss of educational opportunity. The board of education had offered several individualized education plans (IEPs) for C.E., an autistic child, but his parents refused them all. In their contested case hearing, C.E.'s parents admitted that they would have objected to any IEP that did not incorporate Lovaas therapy. None of the IEPs the county offered incorporated this therapy but were based on the TEACCH method. Focused as they were on the absence of Lovaas therapy, C.E.'s parents failed to present any evidence that the board's proffered IEPs would not provide C.E. with a free, appropriate public education (FAPE). Because they failed to show that C.E. had suffered educational detriment, they were not entitled to reimbursement for the expense of providing him with private Lovaas therapy.

The Henderson County case was somewhat similar. C.M. is also autistic. The board prepared an IEP for her that included the TEACCH program, and C.M. spent three months in that program. At that point, however, her parents removed her from the program to try Lovaas therapy. They had no quarrel with C.M.'s IEP but wanted to try a new therapy. C.M. continued to receive speech therapy from the board in accordance with the county's IEP. C.M.'s parents asked the board to reimburse them for the Lovaas expenses, which the board declined to do. The parents had raised no objection to the IEP for the first two years, during which C.M. received Lovaas therapy at home and speech therapy through the

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board. In reference to those two years, the court found that C.M.'s parents could not complain about lack of notice, because the board was not required to give notice to parents who were not aggrieved.

As to the year following, when C.M.'s parents did not consent to her IEP, the court found that the board had offered their child an FAPE. As in the Buncombe County case, the parents presented no evidence that the proffered IEP was inappropriate. This failing, coupled with their unilateral withdrawal of C.M. from the TEACCH program without giving any indication of dissatisfaction, doomed their request for reimbursement.

Court dismisses former assistant principal's racial discrimination, free speech, equal protection, and due process claims. Love-Lane v. Martin, 201 F. Supp. 2d 566 (M.D.N.C. 2002).

Facts: Decoma Love-Lane, an African American woman, was an assistant principal in the Winston-Salem Forsyth County school system. During the 1996–97 school year, she became very vocal in her criticism of what she believed to be the overrepresentation of poor and minority students in the school's Time-out Room. Her outspokenness at staff meetings and in other school settings caused teachers to complain that she questioned their professionalism and caused conflict with the principal, Brenda Blanchfield.

District superintendent Donald Martin began meeting with Love-Lane and Blanchfield in an effort to improve their relations. He observed that Love-Lane was disrespectful to Blanchfield and refused to follow her instructions. Blanchfield's year-end rating of Love-Lane noted that her communication skills needed improvement. Love-Lane disputed the assessment, threatened to file a grievance, and asked for a transfer, believing the assessment to be in retaliation for her outspokenness on racial issues. Her transfer request was denied. During the course of her employment as assistant principal, Love-Lane also applied for several principal positions, none of which she obtained.

Near the end of the 1996–97 school year, Love-Lane was involved in a profanity-laced confrontation with a teacher in the hallway. Three investigations of the incident (by Blanchfield, the assistant superintendent, and the human resources manager) concluded that both Love-Lane and the teacher deserved reprimands. Love-Lane appealed the reprimand, and a fourth investigation determined that it was proper.

In the fall of 1997, Martin met with Blanchfield and Love-Lane again, to review his expectations for the school year. He warned Love-Lane that unless she met these expectations, she could no longer serve as an administrator within the school district. Love-Lane's relationships with Blanchfield and other employees only worsened during the school year, and her end-of-the-year evaluations were low. For the remainder of her contract, Martin reassigned her to a teaching position at another school, at her assistant principal's salary. Love-Lane appealed the reassignment to a three-member panel of the school board, which affirmed the decision, and to the full board, which also affirmed it. She was represented by counsel during both hearings.

Love-Lane filed suit against the school board and Martin, alleging that they had discriminated against her on the basis of race and violated her rights to free speech, equal protection, and due process. The board and Martin filed a motion for summary judgment, asking the court to dismiss Love-Lane's claims before trial.

Holding: The federal court for the Middle District of North Carolina dismissed Love-Lane's claims.

Title VII Claim

Love-Lane alleged that the denial of her applications for principal positions, the denial of her transfer request, the failure to renew her administrator contract, and her reassignment to a teaching position all violated Title VII of the Civil Rights Act of 1964. The court began its analysis of this claim by noting that the charge against Martin could not stand because Title VII does not allow suit against individual supervisors.

The court next addressed Love-Lane's claims of failure to promote and failure to transfer. The court dismissed the failure-to-promote claim because Love-Lane did not show that only less-qualified persons who were not black were selected for these positions. In fact, the evidence showed that half of the positions for which she applied were filled with African American applicants. The court dismissed the failure-to-transfer claim as well, because it did not constitute an adverse employment action under Title VII.

In order to sustain her claim that the nonrenewal of her administrator contract and her reassignment were racially discriminatory, Love-Lane needed to show that she had been performing her assistant-principal duties satisfactorily at the time of the move. This she failed to do.

Constitutional Claims

The court addressed Love-Lane's claims against the board separately from those against Martin. Case law has established that the board can only be held liable for actions taken by a final policymaking authority—in this case, the board itself. Therefore the board could only be implicated in its approval of Martin's decision not to renew Love-Lane's contract and to reassign her for the remainder of her existing contract. Martin is entitled to qualified immunity, stated the court, and can be

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held liable only if he has violated clearly established constitutional rights of which a reasonable person would be aware.

Free Speech Claim. Love-Lane presented no evidence that the board's nonrenewal and reassignment decisions occurred because she had exercised her right to free speech. She failed to show that she voiced her concerns about the Time-out Room as a citizen rather than as an employee. Even if she had made this showing, the court found that the board's interest in the efficient operation of its schools outweighed Love-Lane's interest in speaking out about her concerns. The court found substantial evidence to support the conclusion that Love-Lane's speech about the Time-out Room caused significant disruption at her school.

Given that the court could not determine that Love-Lane's speech occurred in her capacity as a citizen, there was no reason to expect that Martin would be able to make this determination. Because Love-Lane's right to free speech was not clearly established, Martin cannot be held liable for violating it.

Equal Protection. The requirements for a successful equal protection claim are the same in Love-Lane's situation as they are for a Title VII claim. Because she failed to meet the requirements under the statute, this constitutional claim also failed.

Due Process. Love-Lane argued that she was deprived of her constitutional right to continued employment with the school district without due process of law. The court first noted that even if Love-Lane did have a property interest in continued employment with the school district, she did not have a property interest in any particular job. The property interest is satisfied, said the court, by payment of the full compensation due under her contract. In any event, continued the court, Love-Lane received the due process to which she was entitled.

University's extension of credit to student who subsequently filed for bankruptcy did not constitute a nondischargeable loan. *In re* Norris, 2002 WL 507118 (Bankr. W.D.N.C. March 19, 2002).

Facts: In January 1999 Alfred Norris, a law student at Loyola University (La.), owed the university $8,529. The university required him to sign a promissory note for that amount in order to enroll in classes for the next semester. Norris signed the note but never paid it. He later filed for bankruptcy, and the university asked the bankruptcy court to have the amount Norris owed it declared a nondischargeable loan. (The bankruptcy code allows debtors to discharge, or dissolve, most of their debts, but certain kinds of debts—including student loans—are not dischargeable.)

Holding: The bankruptcy court for the Western District of North Carolina declared that the university's extension of credit to Norris was not a nondischargeable student loan.

A loan, said the court, is an agreement in which both parties understand that the recipient is borrowing money on a given date and will not be expected to pay it back until a later date. In this case, the university advanced no money for Norris to continue his studies; it only allowed him to continue to attend classes while having an unpaid balance. Therefore the debt is dischargeable.

Depressed former employee qualified for unemployment benefits. Yehdego v. Johnson C. Smith University, No. COA01-575, Unpublished (N.C. App. April 16, 2002).

Facts: Aster Yehdego was transferred from her position as coordinator at Johnson C. Smith University's Math Resource Center to the position of counselor at the university's Upward Bound tutoring program. She was assigned an office under construction, received no key to the department, and was given clerical work. Upset about the job change, Yehdego lost weight, had insomnia, developed an ulcer, and experienced clinical depression.

Her psychologist recommended by letter that Yehdego take sick leave because of "major depression." Her supervisor signed a leave form granting her two weeks sick leave. When Yehdego returned, she discovered her office was scheduled for demolition, that she had no other office, and that her supervisor had taken a leave of absence. She resigned and applied for unemployment benefits.

An adjudicator with the Employment Security Commission found that Yehdego did not qualify for benefits because she failed to show that she had left her job for good cause attributable to her employer. Yehdego appealed the ruling and a trial court affirmed it. Yehdego appealed again.

Holding: In an unpublished opinion, the North Carolina Court of Appeals reversed the trial court ruling.

G.S. 96-14(1) governs disqualification for unemployment benefits. An individual who leaves work without good cause attributable to the employer is disqualified. An employee who suffers from a disability or a medical condition is excepted from this rule if he or she gives the employer reasonable notice and remains available for alternative work. Yehdego claimed that she resigned from the university because of severe depression; thus the Commission erred in failing to consider the medical condition exception, and the trial court erred in affirming that decision.

The court found that Yehdego qualified for unemployment benefits under the medical condition exception. Her uncontradicted testimony and two letters from her psychologist describing her symptoms and recommending medical leave caused the court to conclude that Yehdego had left her job because of work-related depression.

In addition, the evidence showed that Yehdego had correctly notified her employer of her depression. In fact, her supervisor

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had signed the leave form citing major depression as the reason. The evidence also showed that she had informed her employer that she wanted a transfer to another part of the university.

Court dismisses former employee's age discrimination and Fair Labor Standards Act claims. Kelly v. Saint Augustine's College, No. 5:01-CV-107-BO(2), ___ F. Supp. 2d ___ (E.D.N.C. January 18, 2002).

Facts: Willie Kelly worked at Saint Augustine's College on a series of year-to-year contracts until the college decided not to renew him in June 2000. Kelly filed a complaint in the federal court for the Eastern District of North Carolina, alleging that the college, and several of its employees (hereinafter the defendants), violated the Age Discrimination in Employment Act (ADEA), the Fair Labor Standards Act (FLSA), and committed various state law infractions. The defendants moved to have his claims dismissed before trial.

Holding: The court granted the defendants' motion to dismiss.

Kelly's ADEA claim was unsuccessful on two counts. First, the court dismissed his claims against individual college administrators, stating that well-established case law prohibits holding individuals liable under the ADEA. Second, the court found that Kelly failed to establish a fundamental element of his ADEA claim: he did not allege that his position remained open after his nonrenewal and that the college continued to accept applications from younger persons. Although he did claim that an existing employee in a similar job was moved to his position, he did not establish that this employee was outside the class protected by ADEA (that is, was under forty years of age).

The court also found Kelly's FLSA claim deficient. Even though FLSA governs federal overtime and minimum wage requirements, Kelly never contended that the defendants had violated either of these standards. At best, he appeared to be arguing that because he had voiced complaints about the manipulation of his evaluation reports, the defendants had illegally retaliated against him—a claim that did not touch on any of the matters regulated by FLSA.

Having dismissed Kelly's federal law claims, the court next dismissed his state law claims without prejudice, meaning that he can refile them in state court.

Teacher's resignation did not take place under duress. Sides v. Guilford County School Board, No. COA01-298, Unpublished (N.C. App. February 5, 2002).

Facts: Doris Sides taught in the Guilford County school system from 1987 to 1995. In 1995 the system performed a criminal background check and discovered that Sides had been convicted of fourteen counts of making false statements to obtain benefits from the Employment Security Commission. She had not revealed this conviction on her employment application. Sides alleged that the Superintendent Jerry Weast offered her two choices—resign or be dismissed without pay—and had threatened to have her teaching certificate revoked if she did not resign.

Sides resigned but filed suit, seeking reinstatement to her teaching position. Her resignation, she alleged, was due to unlawful duress. The trial court dismissed her claim before trial, finding it without merit. Sides appealed.

Holding: The North Carolina Court of Appeals, in an unpublished opinion, affirmed the dismissal. The court cited case law governing a claim of duress: "A threat to do what one has a legal right to do cannot constitute duress." Put another way, a claim of duress must rest on an illegality. If Sides had not resigned, Weast would have recommended her dismissal to the school board; and if the board had dismissed Sides, the dismissal would have been reported to the State Board of Education, which has the power to revoke her teaching certificate. Weast's statement was not, therefore, an illegal threat. Furthermore, Sides's resignation letter stated that she was fully aware of her rights and relinquished all claims against the school system. She signed this letter after consultation with an attorney.

Other Cases

University's disbanding of three men's athletic teams did not violate the Equal Protection Clause of the United States Constitution or Title IX. Miami University Wrestling Club v. Miami University, 195 F. Supp. 2d 1010 (S.D. Oh. January 24, 2001).

Facts: Members of the men's wrestling, soccer, and tennis teams filed suit against Miami University (Ohio) and several individual administrators, alleging that the elimination of their teams violated the Equal Protection Clause of the United States Constitution and Title IX. The university eliminated their teams in the face of statistics indicating (1) that although 55 percent of the university's student population was female, female students comprised only 42 percent of the student athletes, and (2) that the university spent proportionally more on recruiting and giving financial aid to male athletes than on female athletes.

Believing that Title IX required the university to create a balanced athletic system, and having no additional funds to devote to increasing the number of athletic opportunities for women, the university disbanded the teams. Thereafter, females constituted 55 percent of the student body and 53 percent of its student athletes, and the budget for financial aid to female athletes increased by $400,000.

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Holding: The federal court for the Southern District of Ohio dismissed the male athletes' claims.

Discrimination on the basis of gender is permissible when it is substantially related to an important governmental goal. The court found that elimination of sex discrimination in a publicly funded educational institution is an important governmental goal. Nonetheless, the institution must show that its initiative is justified by the existence of a disproportionate burden on the members of one sex and is reasonably related to redressing that burden. The court found that the statistics cited above satisfy these criteria.

Like the Equal Protection Clause, Title IX does not per se prohibit gender classifications. Rather, Title IX prohibits an educational institution that receives public funding from failing to provide equal athletic opportunities on the basis of gender. The male team members bringing the suit failed to assert that they were deprived of equal opportunities but instead claimed that the university's initiative was based on impermissible gender considerations. They therefore had no claim under Title IX.

School district's response to harassment of homosexual teacher did not deny him equal protection of the law. Schroeder v. Hamilton School District, 282 F.3d 946 (7th Cir. 2002).

Facts: After teaching in the Hamilton (Wis.) School District for fifteen years, Tommy Schroeder revealed that he was gay. When some students began taunting and harassing him, he reported their behavior to administrators several times. Perpetrators who could be identified were punished, but much of the harassment was anonymous. Schroeder therefore requested that the district conduct sensitivity training for students—to condemn discrimination against homosexuals as it had earlier done to condemn race and gender discrimination. Instead, Principal Patty Polczynski circulated a memo encouraging teachers to punish students who used inappropriate or offensive language. When the harassment continued, Polczynski told Schroeder he would have to ignore it.

Schroeder received a transfer to another school, but the harassment continued, though this time it was perpetrated mainly by parents. Schroeder suffered a mental breakdown as a result and resigned his position.

He then filed suit against the district and its administrators (the defendants), alleging that their failure to properly address the harassment against him denied him equal protection of the laws, resulting in his breakdown and job loss. The federal court for the Eastern District of Wisconsin granted the defendants' request to dismiss his claim before trial, and he appealed.

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

To succeed in his claim, Schroeder had to show that (1) the defendants treated him differently from others who were similarly situated; (2) they intentionally treated him differently because of his homosexuality; and (3) this difference in treatment was not rationally related to a legitimate government interest.

Schroeder failed to show that the defendants intentionally had discriminated against him on the basis of his homosexuality. His primary contention was that the defendants failed to handle his harassment as they had handled racial and gender harassment in the past—specifically, that they refused to conduct sensitivity training and only sent out a mild memo discouraging anti-gay language. The court found that these circumstances do not establish discrimination against homosexuals because the earlier sensitivity training and other measures directed toward preventing race and gender discrimination had been initiated to deal with the pervasive harassment of *students*. Thus Schroeder failed to show both that harassment claims by similarly situated *teachers* were handled differently and that the defendants did not have a rational basis for treating the harassment claims of teachers and students differently. ■

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