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

Suspicionless drug testing of middle school and high school students who participate in extracurricular activities is constitutional. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 122 S. Ct. 2559 (2002).

Facts: High school students (and their parents) in the Tecumseh (Okla.) school district challenged the constitutionality of the district's "Student Activities Drug Testing Policy." The policy requires all middle and high school students who wish to participate in any extracurricular activity to consent to urinalysis drug tests. The policy, the plaintiffs argued, violates the Fourth Amendment's prohibition on unreasonable search and seizures. The U. S. Court of Appeals for the Tenth Circuit agreed, concluding that under the U.S. Supreme Court's *Vernonia* case [see digest in "Clearinghouse," *School Law Bulletin* 26 (Summer 1995): 27–29] the district was required to show that its schools had an identifiable drug problem and that the testing program would actually address the problem. The court of appeals found that the district had failed to make this showing.

The district appealed, and the U.S. Supreme Court granted review.

Holding: The Court held the district's policy constitutional.

Urinalysis drug tests constitute searches covered by the Fourth Amendment and therefore must be reasonable. In the school context, reasonableness does not depend on whether the searcher has a warrant or probable cause, as it does in the law enforcement context. Because a school has special tutelary and custodial responsibility for its students, a search is reasonable when it promotes legitimate governmental interests without unduly trampling on students' privacy rights. In such circumstances, a school need not suspect any individual student of drug use to justify a search.

In its last case dealing with student drug testing—the *Vernonia* case—the Court held that suspicionless drug testing of student athletes was constitutional. It concluded that student athletes already had a reduced expectation of privacy, because they voluntarily submitted to physical examinations, states of communal undress, and other rules and regulations common to athletic teams. The Court found that some of the clubs covered by the Tecumseh policy also involve off-campus travel and communal undress; even those that do not, subject participants to rules and regulations not applicable to the student body as a whole. Thus students participating in any extracurricular activity have a reduced expectation of privacy.

In *Vernonia* the Court also concluded that the nature of the intrusion caused by the urinalysis drug testing was minimal: a faculty monitor waited outside a closed restroom stall, listened for normal sounds of urination, and then sealed the student's sample into bottles that were sent for analysis. Results were released only to those with a "need to know." Tecumseh's testing policy is almost identical and creates a similarly negligible intrusion on privacy.

The issue of most concern in this case was the nature of the district's concern in enacting the policy and whether the policy effectively met that concern. Many people read the *Vernonia* case as requiring a district to make some showing of a drug problem before implementing suspicionless drug testing. In that case, the district had shown that it had a growing drug problem and that student athletes, as role models, were partially responsible for that growth. (In addition, the district had asserted special safety concerns for the well-being of students who were involved in contact sports while using drugs). In the Tecumseh case, the Court refused to second-guess the district's judgment that it was facing a drug crisis (despite frankly scanty evidence); it went even further, stating that a demonstrated drug problem is not a strictly necessary justification for a drug testing regime.

In conclusion, the Court found that the policy was a reasonably effective means of addressing the district's interest in preventing drug use.

Ingrid M. Johansen is a research fellow at the Institute of Government.

Revenues collected from penalties, fines, and supplemental school taxes are part of a school board's local current expense fund and must be shared on an equal basis between charter and noncharter public schools. Francine Delany New School for Children, Inc. v. Asheville City Board of Education, 150 N.C. App. 338, 563 S.E.2d 92 (2002).

Facts: The Francine Delany New School for Children is a charter school within the Asheville City Schools Administrative Unit. Under section 115C-238.29E(a) of the North Carolina General Statutes (hereinafter G.S.), charter schools are public schools and thus eligible for state and local funding. G.S. 115C-238.9H(b) provides that the local school administrative unit (LSAU) in which a child attending a charter school resides must transfer to the charter school an amount equal to that year's per pupil local current expense appropriation. A dispute arose between the New School and the Asheville City Board of Education concerning the sources of the charter school's per pupil appropriation.

Specifically, the New School contended that it was entitled not only to the per pupil share of Buncombe County's annual appropriation to the board but also to the per pupil share of supplemental school taxes, penal fines, and forfeitures that accrued to the board. The board contended that such revenues were not part of the per pupil funding for charter schools, even though they were included in the per pupil funding for noncharter public schools.

Holding: The North Carolina Court of Appeals ruled in favor of the New School, finding that it was entitled to share in all the supplemental school taxes, penal fines, and forfeitures received by the board.

The Charter School Funding Statute, G.S. 115C-238.29H(b), uses the term "local current expense *appropriation*" to denote the revenues from which a board must derive the per pupil amount it gives to a charter school. The School Budget and Fiscal Control Act, G.S. 115C-426(e), uses the term "local current expense *fund*" to describe the revenues accruing to the board, which includes money from the board of county commissioners and supplemental school taxes as well as penal fines and forfeitures (in accordance with Article IX, Section 7 of the North Carolina constitution). The use of different terms for these two revenues, argued the board, meant that they were not identical. The court, however, found the distinction between *appropriation* and *fund* to be immaterial. Throughout Chapter 115C, the two terms are used interchangeably. In addition, the court held, the legislature clearly intended to treat charter schools as public schools subject to the same budget requirements as other public schools.

Student facing long-term suspension is entitled to have an attorney present, to confront and cross-examine witnesses, and to call his own witnesses before the hearing board. In the Matter of Nicholas R. Roberts, 150 N.C. App. 86, 563 S.E.2d 37 (2002).

Facts: Nicholas Roberts faced suspension from the A.C. Reynolds High School in Buncombe County (N.C.) for the remainder of the fall 1996 semester for allegedly grabbing his crotch in front of a seated female student and stating that he would put "deeze nuts" in her mouth. He contested this version of events and sought to have an attorney present at his hearing before the Reynolds District Hearing Board. Board policy, however, prohibited the presence of attorneys at such hearings. The board suspended Roberts for the remainder of the semester, and he appealed, contending that the suspension violated his due process rights.

Holding: The North Carolina Court of Appeals reversed the suspension.

The appeals court held that Roberts had a constitutionally protected property interest in avoiding improper exclusion from the educational process. Moreover, the hearing held before his suspension involved disputed issues of fact, and the cost to the board of allowing Roberts to have an attorney present was not prohibitive. The court believed, therefore, that due process required the board to allow Roberts an attorney who could examine and present witnesses in his defense.

State choice program that results in substantial aid to religious schools does not violate the Establishment Clause. Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002).

Facts: In 1995 the federal government, citing a large-scale educational crisis, placed the Cleveland City School District under state control. As part of its plan to address the crisis, the state of Ohio enacted its Pilot Project Scholarship program for students from low-income families. Students choosing to remain in a low-performing public school receive tutorial assistance, while those who wish to leave the school receive tuition aid to attend a participating public or private school of the parents' choice.

Parents choosing a private school receive tuition aid of as much as $2,250 and may be required to co-pay as much as $250. If a parent chooses a *community school* (an independent school funded under state law but run by its own school board), the state pays the school district $4,518. If a parent chooses a *magnet school*, the school district receives $4,167 from the state. As of 1999, fifty-six private schools, ten community schools, and twenty-three magnet schools were participating in the program. Of the fifty-six participating private schools, 82 percent had religious affiliations.

During the 1999–2000 program year, 96 percent of all the students enrolled in the program used their tuition aid to attend religious schools. Susan Tave Zelman and other Ohio taxpayers filed a suit to halt the program on the basis that it violated the Establishment Clause of the U.S. Constitution, which prohibits states from enacting laws that have the purpose or effect of advancing or inhibiting religion. The Court of Appeals for the Sixth Circuit found that the program had the primary effect of advancing religion and was therefore unconstitutional. The U.S. Supreme Court granted review.

Holding: The Court reversed the Sixth Circuit's ruling, finding the program constitutional.

The Court began by stating that the most important feature of Ohio's program is the way that government aid reaches religious schools: solely as a result of the genuinely independent choices of private individuals. The government does not provide aid directly to religious schools. The Court went on to discuss cases in which it found to be constitutional neutral government programs that provided aid directly to a broad class of individuals who, in turn, directed the aid to religious schools of their own choosing. In each case, the finding of constitutionality rested not on how many or how few recipients chose to direct their aid to religious schools but on whether the government allocated the benefits in a truly neutral manner and on whether the recipients' subsequent expenditure of the benefits was a matter of truly private choice. In programs where aid is provided on a neutral basis and private choices are independently made, the Court found, no reasonable observer could conclude that the state is endorsing or advancing religion.

Ohio's program is truly neutral. Aid goes to any parent of a school-aged child in the Cleveland City School District who meets income requirements. All schools within the district are eligible to participate. Although a disproportionate number of participating schools are religious, this results from a preponderance of religious schools in Cleveland—an historic fact not attributable to the program. In fact, continued the Court, the program creates disincentives for religious schools to participate: they receive significantly less aid than participating community or magnet schools. And, because parents can be required to co-pay tuition charges at private schools, the program creates a disincentive for them to choose religious schools. (These disincentives, the Court noted, are not essential to the program's constitutionality; they only further dispel the notion that the state is endorsing religion.) In short, the fact that 96 percent of parents receiving aid chose religious schools is irrelevant.

State's removal of a lawsuit from state to federal court waives its immunity. Lapides v. Board of Regents of the University System of Georgia, 122 S. Ct. 1640 (2002).

Facts: Paul Lapides sued the University of Georgia, among others, alleging that it had placed allegations of sexual harassment in his personnel file in violation of Georgia law (and of federal civil rights law, although that claim did not pertain to the core of the opinion). He filed suit in a Georgia state court, but the university removed the case to federal district court. While conceding that the Georgia statute under which Lapides filed his suit made the state subject to suit in the state courts, the university argued that the Eleventh Amendment to the U.S. Constitution gave it immunity from suit in federal court. The district court disagreed, reasoning that the university, by voluntarily removing the case to federal court, had waived its Eleventh Amendment immunity.

The university appealed, and the Eleventh Circuit Court of Appeals reversed, finding that Georgia law was unclear about whether the state attorney general possesses the authority to waive the state's immunity (in other words, whether the attorney general's act of removing the case estopped the state from asserting its immunity). The U.S. Supreme Court granted review of the question.

Holding: The U.S. Supreme Court found that the state's voluntary removal of the case to federal court did constitute a waiver of its sovereign immunity.

The Eleventh Amendment provides that the "judicial power of the United States"—that is, the jurisdiction of the federal courts—shall not extend to any suit against a state brought by citizens of another state and (as interpreted) by its own citizens. A state may, however, waive this immunity and consent to suit in federal court. The Court concluded that the state could not both invoke federal court jurisdiction by removing a case from state court and deny federal court jurisdiction on the basis of Eleventh Amendment immunity. The act of removal expresses a clear and voluntary waiver of immunity.

Student who assaulted principal while being physically prevented from leaving the school building did not have right to self-defense. In the Matter of Eric Edwin Pope, 151 N.C. App. 117, 564 S.E.2d 610 (2002).

Facts: Eric Pope, a nine-year-old student at Lead Mine Elementary School, was reported as missing from class. Principal Gregory Decker found him in the hallway outside his office. Pope ignored both of Decker's requests to accompany him to his (Decker's) office and began walking toward the exit door. Decker warned Pope that if he continued his attempt to leave the building, he (Decker) would physically

restrain him, which is what happened. As Decker carried Pope toward his office, Pope pounded Decker on the back, scratched his hand, and grabbed the doorpost to prevent Decker from entering his office.

A trial court declared Pope delinquent for assault on a government employee. Pope appealed.

Holding: The North Carolina Court of Appeals affirmed Pope's delinquency. The boy asserted that his assault on Decker was justified by the need for self-defense. The law of self-defense excuses an assault when the defender is without fault; that is, when he or she has not provoked or continued a difficulty with the other person and is seeking to protect himself or herself from offensive physical contact. Pope's failure to heed Decker's warning about leaving the building, however, "continued a difficulty" that required Decker to engage in some show of force. Pope's self-defense claim must therefore fail.

Talking during a test, slamming a door, and crying in protest of punishment do not constitute a public disturbance at school. In the Matter of Christopher Brown, 150 N.C. App. 127, 562 S.E.2d 583 (2002).

Facts: Christopher Brown, a thirteen-year-old student at Myrtle Grove (N.C.) Middle School, was convicted under G.S. 14-288.4(a)(6) of disorderly conduct at school. The conduct in question began when Brown was moved to a separate classroom after talking during an algebra quiz. When Brown's teacher, Katie Carbone, went to retrieve Brown and his test, she found him talking to another student outside the classroom. Carbone told Brown she might give him a zero on the quiz for talking, and he told her to do so. He preceded her back to the classroom, slamming the door in her face. Carbone called him back into the hallway and began writing a referral slip to send Brown to the principal's office. At this point, Brown began to cry and attempted to prevent her from going to the principal's office by standing in front of her and grabbing her arm.

The trial court found that this behavior was sufficiently disruptive to violate G.S. 14-288.4(a)(6). Brown appealed his conviction.

Holding: The North Carolina Court of Appeals reversed Brown's conviction. *Disruptive conduct*, used in the school context, means that a person of ordinary intelligence must find that the conduct in question caused a substantial interference with the operation of the school and its program of instruction. Behaviors from past cases found to be disruptive include students picketing a high school and students barricading themselves in the principal's office. Conduct from other past cases not found to be disruptive includes talking out loud and banging on a radiator during class. Brown's conduct, the court said, fits more appropriately into the latter category. While some students may have been briefly distracted, the conduct did not cause a substantial disruption of the school program.

Court refuses to dismiss discrimination claim of employee who failed to file his claim with the appropriate state agency. Westry v. North Carolina A & T, 2002 WL 1602451 (M.D.N.C. June 10, 2002).

Facts: Terence Westry, an African American man, filed a Title VII race discrimination claim against North Carolina A & T University, alleging that the university gave preference to Caucasian employees in promotions and pay rates. He also alleged that the university retaliated against him for filing his claim. Westry, allegedly relying on advice from a university employee and from the university's written harassment prevention plan, filed his claims with the Equal Employment Opportunity Commission (EEOC) instead of the state's Office of Administrative Hearings (OAH).

The EEOC dismissed Westry's claims but issued him a right-to-sue letter. Westry then filed his claim in federal court for the Middle District of North Carolina. The university sought to have his claims dismissed before trial for failing to file with the appropriate administrative agency and for omitting his retaliation claim from his EEOC complaint.

Holding: The court partially granted the university's motion to dismiss.

Title VII states that a federal court may not assume jurisdiction of a race discrimination claim until an employee has exhausted his or her state's administrative procedures. General Statute 126-36 allows a state employee who suffers discrimination to seek relief through the OAH. Westry failed to pursue this course of relief, reportedly because of misinformation he received through the university. The EEOC failed to refer his discrimination complaint to the OAH, as its own regulations require. Therefore, the court found it appropriate to use its equitable powers to allow Westry additional time to file his claim with the OAH.

The court did, however, dismiss Westry's retaliation claim without prejudice (meaning that he may file it again after satisfying procedural requirements). Westry's EEOC complaint did not contain the allegation that the university retaliated against him by reclassifying his position after he filed the complaint. Therefore, the university argued, he failed to exhaust his administrative remedies on this claim and the court could not hear it. Although Title VII allows a claimant to allege retaliation for the first time in federal court if the retaliation occurred during the EEOC's handling of a discrimination claim, Westry's claim did not qualify for this exception to the administrative review rule. As the EEOC dismissed

Westry's complaint and issued him a right-to-sue letter almost a week before the university reclassified his position, the alleged retaliation did not occur while his EEOC claim was pending.

Expelled university students were not deprived of constitutional rights. Tigrett v. Rector and Visitors of the University of Virginia, 290 F.3d 620 (4th Cir. 2002).

Facts: Alexander Kory was attacked by fellow University of Virginia students Harrison Tigrett and Bradley Kintz, among others. Kory initiated a student disciplinary complaint against them under the procedures of the University Judiciary Committee (UJC). The UJC is a student-operated body with responsibility for investigating and hearing complaints about student misconduct. Trials are conducted before seven-member UJC panels. All UJC decisions are automatically subject to review by the university's vice president for student affairs. If the vice president concludes that a UJC decision is inappropriate, he or she may remand it to the UJC or refer it to an independent body called the Judicial Review Board (JRB), which is composed of faculty, administrators, and students. The JRB may remand the matter to the UJC for a new trial or reverse or modify the UJC decision.

Kory's initial UJC complaint accused Tigrett and Kintz of assault; before the trial, he added a charge of disorderly conduct. Tigrett and Kintz were notified of the added charge. The day before trial, they met with Vice President Harmon to discuss their concerns about the trial. They left the meeting with the impression that the trial would not go forward the next day. However, later that evening, the UJC rejected a motion that the trial be postponed and notified them that the trial would be held as scheduled. Nonetheless, believing that any trial held without their presence would be invalid, they did not attend. The UJC found them guilty of all charges and recommended expulsion.

Four days later, Harmon refused to finalize the UJC's recommendation. Citing what he perceived as procedural irregularities, he referred the matter to the JRB. The JRB set aside the expulsion recommendation and remanded the case to the UJC. After determining that it lacked sufficient membership to form another panel for trial, the UJC relinquished control of the case to Harmon. Harmon created a review panel and informed Tigrett and Kintz that the panel would hold a trial and that its decision would be submitted to the university's president of student affairs. They would be entitled to appeal the president's decision to the JRB, but the JRB's decision would be final absent written permission from the Board of Visitors to appeal it.

After a thirteen-hour trial at which witnesses were examined and evidence presented, the panel found Tigrett and Kintz guilty of assault and disorderly conduct and recommended to President Casteen that they be suspended for one semester and required to perform seventy-five hours of community service. Casteen, rejecting the plaintiffs' request to appear before him and argue their case, accepted the recommendation as it related to Kintz but suspended Tigrett for a full academic year.

Tigrett and Kintz filed suit in federal court for the Western District of Virginia, alleging various due process violations surrounding their suspensions. When the court dismissed the claims, Tigrett and Kintz sought review by the Fourth Circuit Court of Appeals. They claimed that their due process rights were violated (1) by the first UJC trial conducted in their absence, (2) by Casteen's refusal to see them, and (3) by Casteen and Harmon's failure to properly train, supervise, and control the UJC panel.

Holding: The Fourth Circuit Court of Appeals dismissed Tigrett and Kintz's claims.

Tigrett and Kintz's first claim, that the UJC panel expelled them in violation of their due process rights, failed because the UJC did not, and did not have the power to expel them. Because they suffered the loss of no constitutionally protected right, the absence of any particular due process safeguards is not actionable. That Tigrett and Kintz *believed* they were expelled (as they argued) was of no moment.

Nor was Casteen, the ultimate decision maker, obligated by due process to see them before imposing sanctions. What matters, in terms of due process, is not whether they were afforded a hearing in front of the person having final authority to impose discipline but whether they were afforded a hearing that was *meaningful*. Their thirteen-hour trial more than satisfied this requirement.

The court also dismissed the final claim, that Harmon and Casteen failed to properly supervise the UJC, because Tigrett and Kintz failed to show a causal link between Harmon and Casteen's alleged inaction and some constitutionally recognized harm. As established above, the UJC inflicted no such harm, so there is no causal link.

Court dismisses some of demoted professor's discrimination claims. Dodd v. Pizzo, 2002 WL 1150727 (M.D.N.C. May 24, 2002).

Facts: Duke University hired Leslie Dodd as an assistant professor of pathology in 1993 and promoted her to division chief of cytology in 1996. Later in 1996 Dodd began a sexual relationship with a colleague, Sal Pizzo, who had been involved in her hiring. Dodd ended the relationship in the fall of 1997, though Pizzo wished to continue it. Dodd received tenure and became an associate professor in June 1998.

After receiving tenure, Dodd became involved in a dispute with other department members over the purchase of a piece

of laboratory equipment: She alleged that she did not authorize the purchase, but others said she knew about the purchase and helped prepare the budget resolution setting aside money for it. The dispute caused serious friction, and Dodd complained to the university's Office of Institutional Equity, alleging that she was being subjected to retaliatory treatment. At the end of 1998, Dodd was removed from her position as division chief of cytology and replaced with another female physician. It appears that her demotion was initiated before she brought her complaint to the Office of Institutional Equity.

Dodd sued Pizzo and Duke University, claiming, among other things, that they discriminated against her in violation of Title VII, Title IX, and North Carolina public policy. The defendants moved to have her claims dismissed before trial.

Holding: The federal court for the Middle District of North Carolina dismissed some of Dodd's claims but maintained others.

She alleged three claims under Title VII: sex discrimination and hostile work environment; retaliatory conduct; and quid pro quo sexual harassment. The court dismissed the first claim because Dodd failed to show that her demotion would not have occurred *but for* her gender. At most, she showed that her demotion would not have occurred but for her failed relationship with Pizzo. That another female doctor assumed her position supports the conclusion that her demotion was not based on gender.

The court also dismissed Dodd's retaliation claim. Title VII prohibits adverse employment action against a person who engages in activity protected under the statute—in this case, complaining of sexual discrimination. However, the facts as presented in court show that Dodd's demotion was initiated before she made her complaint. The failure to show a causal connection between the complaint and her demotion dooms this claim.

The court found reason, however, not to dismiss Dodd's final Title VII claim. Quid pro quo sexual harassment occurs when an employee is required to submit to unwelcome sexual conduct as a condition of employment (or suffers adverse employment action as a result of refusing such conduct). Dodd alleged that after she ended her relationship with Pizzo, she considered leaving the university but was dissuaded by Pizzo, who promised improved job conditions and also expressed his desire to resume their relationship. Dodd refused and was subsequently demoted. This statement of facts is sufficient to raise an issue for trial.

Title IX prohibits sex discrimination in educational programs that receive federal funds. The statute most often is used to address discriminatory behavior toward students but has more recently been used to address employment discrimination as well. The defendants argued that Dodd's Title IX claim should be dismissed for two reasons, both of which the court rejected. First, they argued that Title IX does not provide a monetary remedy in employment discrimination cases. The court refused to rule on this issue, reasoning that unless Dodd could prove her quid pro quo claim under Title VII (which provides the principles applicable to a Title IX claim), the issue would not need to be addressed at all.

The defendants' second argument was that Dodd failed to allege that the university had acted with deliberate indifference to Pizzo's behavior toward her. The court found first that Dodd's complaint did contain allegations sufficient to raise such an inference. More importantly, however, the court expressed uncertainty about whether the deliberate-indifference standard should apply in Title IX employment discrimination cases. [See digest of *Gebser v. Lago Vista Independent School District* in "Clearinghouse," *School Law Bulletin* 29 (Fall 1998): 21–22, in which the U.S. Supreme Court held that a school district could not be held liable for sexual harassment of a *student* unless a person with authority to stop the harassment acted with deliberate indifference to the harassing behavior.]

Finally, the court dismissed Dodd's complaint that she was discriminated against in violation of North Carolina's public policy against wrongful discharge: The university did not discharge Dodd, and the court refused to create a new cause of action for any other kind of wrongful adverse employment action in violation of public policy.

Board's allocation of teaching hours was not discriminatory. Dugan v. Albemarle County School Board, 293 F.3d 716 (4th Cir. 2002).

Facts: Virginia law required Gerald Terrell, the black male principal of Cale School, to reduce the number of teaching positions available for physical education (PE) from three to two-and-a-half. Before the reduction, Cale had three full-time PE teachers: a tenured teacher, Edwin Hudgins, and two probationary teachers, Linda Dugan, a fifty-three-year-old white female, and Steve Ivory, a thirty-four-year-old black male. After the reduction, Hudgins maintained his full-time position, and both Dugan and Ivory received three-quarter-time positions. Ivory, with Terrell's assistance, obtained sufficient additional work at another high school to give him full-time status; the other high school was also run by a black principal.

Dugan contended that because she had seniority over Ivory, Terrell was obligated to follow reduction-in-force rules, which would have given her a full-time position and Ivory a half-time position. That Terrell did not follow these rules, Dugan argued, was evidence of race, age, and gender discrimination. Terrell and the school board countered that they could not schedule a half-time PE teacher because a scheduling conflict made it necessary to teach a PE class at 11:15 A.M.

When Dugan filed suit in the federal court for the Western District of Virginia, the board moved to dismiss her suit for failure to state a claim on which the court could grant her relief. The court granted the board's motion, and Dugan appealed.

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

The court began with the assumption that Dugan made out a satisfactory initial case: she was a white female, fifty-three-years old, performing her job to her employer's satisfaction, and she was selected for demotion in circumstances giving rise to an inference that as an older white woman she was not treated neutrally. On the other hand, the board asserted a legitimate, nondiscriminatory reason for her demotion, leaving Dugan with the burden of showing that this reason was merely a pretext for discrimination.

Dugan failed to meet this burden. Even if the board misapplied the reduction-in-force policy—whether accidentally or purposefully—it is not evidence of discrimination. Nor is the fact that Terrell and Ivory were personal friends evidence of discrimination. While it is true that Terrell helped Ivory find additional employment, he also made efforts, ultimately unsuccessful, to find Dugan additional employment. Dugan simply failed to show that the scheduling restrictions were not the real reason for the allocation of teaching hours.

Deceased, who worked in asbestos-laden building, died of a compensable occupational disease contracted while working for the board of education. Robbins v. Wake County Board of Education, 151 N.C. App. 518, 566 S.E.2d 139 (2002).

Facts: Gayle Robbins worked for the Wake County Board of Education in its Devereaux Street building from 1978 to 1981. During this period, the facility was almost continually under renovation and the air was filled with dust. In 1988 a survey found that the building contained a substantial amount of asbestos in a damaged and friable (free floating) condition. In 1993 Robbins was diagnosed with mesothelioma, a cancer most often associated with asbestos exposure. She died in 1995 at the age of 41.

Robbins's husband pursued her Industrial Commission claim against the board, seeking workers' compensation for the occupational disease of mesothelioma. The full Commission granted benefits, finding (1) that as a result of her employment Robbins had been exposed to more than normal amounts of asbestos and (2) that mesothelioma is not an ordinary disease of life to which the public is equally exposed. The board appealed.

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

The Commission's findings of fact were supported by competent evidence, and the facts supported the award. Although the *nature* of Robbins's employment did not expose her to a greater risk of mesothelioma than the public generally, her employment in the Devereaux Street building did. Mesothelioma is very rare among the general population, and the medical community regards the association between it and asbestos exposure as extremely strong. The court rejected the board's argument that expert testimony before the Commission about the level of Robbins's exposure levels should be disregarded as too speculative, noting that the causal connection between an employee's disease and occupation must necessarily be based on circumstantial (that is, indirect) evidence.

Board's liability insurance policy presumed sufficient, for purposes of motion to dismiss, to cover damage award. Padgett v. Pro Sports, Inc., No. COA01-663 (unpublished, N.C. App., May 7, 2002).

Facts: The Iredell–Statesville Board of Education asked the North Carolina Court of Appeals to dismiss a suit brought against it by a student who suffered an eye injury when a fellow student lost control of an allegedly unsafe Wiffle-ball bat provided by the board. The board contended that the complaint failed to adequately allege that it had waived its sovereign immunity through the purchase of liability insurance. The complaint alleged that the board had a liability insurance policy that covered employee negligence but did not allege the amount of coverage or that the policy was sufficient to cover the amount of damages sought.

Holding: In an unpublished opinion, the North Carolina Court of Appeals refused to dismiss the complaint. Rules of pleading only require the complainant to give enough information to make out a legally recognized claim; further, at this stage of the proceedings, the court construes allegations in a complaint liberally. Therefore the student's complaint is sufficient.

Dismissal of sleeping dormitory attendant was appropriate. Ratcliff v. N.C. Department of Health and Human Services, No. COA01-331 (unpublished, N.C. App., May 7, 2002).

Facts: Anthony Ratcliff, a hearing-impaired man, was employed as a dormitory attendant at the Western North Carolina School for the Deaf from 1993 until 1998. In 1998, based on testimony from a coworker, he was dismissed for sleeping on the job. He appealed his dismissal through the school's grievance procedure, but it was upheld. An administrative law judge also upheld his dismissal, as did the trial

court to which Ratcliff subsequently appealed. Ratcliff appealed again.

Holding: In an unpublished opinion (having no binding authority), the North Carolina Court of Appeals affirmed the dismissal.

Ratcliff proffered three reasons for reversing the trial court's ruling. First, he argued that there was insufficient evidence to support his dismissal. The court found this argument unpersuasive.

Second, Ratcliff argued that as a hearing-impaired person, he was entitled to due process safeguards that did not extend to other state employees. Because the loss of his job would affect him more severely than it would affect nondisabled employees, he argued, he should not have been required to show that his dismissal was unjustified; instead, the school should have been required to prove that it *was* justified. The court disagreed. It found that Ratcliff's hearing impairment did not differentiate him from other state employees sufficiently to require a change in the burden of proof: Like other state employees, he presumably had other resources to help him find gainful employment, including savings, friends and family, and government benefits, as well as the skills and experience acquired in his job at the school.

Finally, Ratcliff argued, the administrative law judge erred in allowing the school to introduce evidence of earlier instances of his sleeping on the job. The court first noted that the administrative law judge was not bound by rules of evidence that apply in court proceedings. In any event, continued the court, even under the rules of evidence, which prohibit the introduction of prior bad acts to show a propensity for bad behavior, prior bad acts are admissible if they show intent or plan. The earlier sleeping incidences were appropriate because they showed that Ratcliff planned to use the staff lounge for sleeping on the night he was seen sleeping.

Court denies reimbursement for costs and tuition associated with child's stay at a private psychiatric facility and boarding school. K.J. v. Fairfax County School Board (unpublished, 4th Cir., July 16, 2002).

Facts: K.J., a tenth-grade student in the Fairfax County (Va.) Public Schools (FCPS), was diagnosed as eligible for special education services in April 1997. In September 1997 K.J.'s parents placed K.J. at the Hyde School, a private boarding school that specializes in students with behavioral problems but offers no programs in special education. The parents did not notify FCPS of the placement until November, when they sought reimbursement of the $25,000 annual tuition at the Hyde School. In response, FCPS convened a meeting to create an individualized education plan (IEP) for K.J. The meeting resulted in an IEP proposing that K.J. be placed at a private day school but did not include a representative from any specific day school, although an FCPS official specializing in such placements did attend. The parents rejected the IEP.

One year later, the parents again sought reimbursement for the Hyde School tuition. They alleged that FCPS's failure to identify a specific day school and to include a representative from that school in the IEP meeting deprived K.J. of a free appropriate public education (FAPE). A state hearing officer disagreed but nonetheless concluded that FCPS should reimburse them in an amount equal to the costs of tuition at a suitable local private day school.

While both parties were appealing this ruling, they learned that K.J. would not graduate on time. Over the parents' objections, FCPS held another IEP meeting, which recommended that K.J. be placed at the Woodson Center, a program that provides college-track classes along with special education classes and clinical personnel. A representative of the center attended the meeting. The parents rejected the placement and sent K.J. to the Hyde School for a third year, adding to their appeal a request for reimbursement of the third year's tuition.

On appeal, the hearing officer rejected K.J.'s parents' newest request for tuition reimbursement, finding that FCPS had recommended an appropriate placement. The hearing officer also reversed the earlier reimbursement order, because the parents had failed to notify FCPS before placing K.J. at the Hyde School. K.J.'s parents appealed this order, and the federal court for the Eastern District of Virginia affirmed it. They appealed again.

Holding: In an unpublished opinion, the Fourth Circuit Court of Appeals affirmed.

In affirming the state hearing officer's judgment for FCPS, the district court found that any procedural violations made by FCPS in the first IEP meeting did not result in a loss of educational opportunity to K.J. or infringe the parents' right to participate in the IEP process. In addition, the parents' failure to notify FCPS of K.J.'s Hyde School placement deprived FCPS of a timely opportunity to develop an IEP for K.J. Once allowed this opportunity, FCPS developed an IEP that offered K.J. an FAPE. Based on these findings, the court of appeals refused to reverse the district court's ruling.

Note: The preceding summary of an unpublished case was altered in 2008, when the editor substituted the minor student's initials for the full name.

Other Cases

Publicly funded private school that improperly disciplined student was not a state actor subject to constitutional due process requirements; school district was not liable for failing to require private school to observe due process safeguards. Logiodice v. Trustees of Maine Central Institute, 296 F.3d 22 (1st Cir. 2002).

Facts: Instead of operating its own public high school, Maine School Administrative District No. 53 underwrote secondary education for its students through a contract with the Maine Central Institute (MCI), a privately operated school in the district. Zach Logiodice, an eleventh-grade student at MCI, was suspended for ten days after swearing at a teacher and the dean of students, John Marquis, and then refusing to leave a classroom. Marquis apprised Zach's parents of the suspension and, further, informed them that he would not allow Zach to return to school without a "safety evaluation" from a licensed psychologist.

Despite several attempts, the Logiodices were unable to obtain a safety evaluation. They asked MCI's headmaster, Douglas Cummings, to intercede on their behalf, but he refused to do so. They then asked the school district superintendent, Terrance McCannell, to assist them. McCannell wrote to Cummings expressing his concern that Zach's punishment violated his rights and also potentially violated MCI's contract with the district. Cummings then met with McCannell and the Logiodices; he agreed that Zach could return to school if a psychologist merely assured school officials that Zach would not pose a threat. Zach returned to school after an absence of seventeen days.

The Logiodices filed suit in federal court for the District of Maine, alleging that MCI, Cummings, and Marquis had violated Zach's due process rights by suspending him without a hearing. The suit also alleged that the school district was liable for delegating to MCI the power to discipline publicly funded students without applying proper safeguards. The district court dismissed these claims, and the Logiodices appealed.

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

The due process clause of the U.S. Constitution is made applicable to the states through the Fourteenth Amendment. The Fourteenth Amendment, however, protects individuals only against harm caused by state action. MCI, argued the Logiodices, was effectively a state actor. The court considered, but ultimately rejected, three arguments for why MCI should be found to be a state actor.

(1) MCI could be a state actor if it is performing a traditional public function reserved to the state. Classic examples of such functions include conducting elections and governing a "company town." But education is not, and never has been, a function reserved to the state, found the court. In Maine, and in many other states, schooling is regularly performed by private entities. The Logiodices' attempt to define the state function as the provision of *publicly funded* education does not change this conclusion. The court cited historical sources in support of the proposition that before public high schools became common, private schools were publicly funded and provided the only secondary education available.

(2) MCI could be a state actor if it is entwined with governmental policies, or if the government is entwined with MCI's management or control. The state, school district, and MCI are connected, the court found. Most (80 percent) of MCI's students are publicly funded; the district provides approximately half of MCI's budget; and MCI students are treated as public school students insofar as they receive public busing to extracurricular events, transfer of lower-school records, and registration assistance. Nonetheless, MCI is run by private officials, not public officials. Further, as pertains to student discipline, MCI stands alone. Its trustees have, by contract with the district, the sole right to promulgate, administer, and enforce all rules relating to student discipline.

(3) MCI could be a state actor if other normative considerations make such a judgment seem sensible. Maine has made education compulsory for all children under the age of seventeen and has provided public education to that end. For students in the Logiodices' district, MCI is the only regular education available for which the state will pay. The court found the threat of wrongful expulsion from the only free secondary school in town a tempting reason for holding MCI accountable as a state actor but determined that the threat was not sufficiently serious, widespread, or without means of redress to justify such a move. Zach did not suffer a terrible injury, there was no evidence that contract schools in Maine were disciplining students in an outrageous fashion, and state law provides protection against serious abuse.

The court found the Logiodices' argument about the school district's responsibility less sympathetic. Inaction by state actors, even when it permits others to cause harm, is generally not considered a due process violation. And, although state actors can be held responsible for the harmful actions of other state actors when they fail to supervise them adequately, MCI is not a state actor the district is obliged to supervise in the same way it would a subordinate governmental actor. ■