Clearinghouse

Edited by Ingrid M. Johansen

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

Cases That Directly Affect North Carolina

Public schools may not classify students by race and make student assignments on basis of it (unless they are operating under court order to do so). Parents Involved in Community Schools v. Seattle School District, 127 S. Ct. 2738 (2007).

Facts: Although never judicially ordered to desegregate its schools, the Seattle (Wash.) School District (SSD) sought to remedy the effects of segregated housing patterns on school assignment by classifying students according to race and using race as a tiebreaker in placing students in particular schools. SSD's intent was to create a racial balance in each school that reflected the racial balance of the district as a whole. If assignment of a student to a particular school would make its student population vary by more than 10 percent from the district's white/nonwhite balance, the racial tiebreaker came into play.

Jefferson County (Louisville, Ky.) Public Schools (JCPS), which once operated under a court-ordered desegregation plan, was declared unitary—that is, nonsegregated—in 2001. At that time, it adopted a student-assignment plan using race to ensure that all nonmagnet district schools had a population of not less than 15 percent and not more than 50 percent black students.

Alhough the plans in Seattle and Jefferson County differed in detail, all the parents challenging them argued that the use of race in assignments was unconstitutional and that their children either had been, or in the future would be, prevented from going to the school of their choice because of their race. Forcing their children to compete for placement in a race-based system violated the Equal Protection Clause, these parents asserted.

The case reached the U.S. Supreme Court on this issue.

Holding: The U.S. Supreme Court found public primary schools' use of race in student assignments to be unconstitutional.

Under its current standards, the Court began, race-based classifications are viewed with "strict scrutiny,"meaning that they must be narrowly tailored to achieve a compelling governmental interest. In the context of race-based student assignment, the Court has recognized two compelling interests. One is to remedy the effects of intentional past discrimination. However, the Court noted, SSD was never segregated by law, and JCPS had been declared legally unitary. Thus the districts could not rely on their interest in remedying the past effects of discrimination: unless their racial imbalances were caused directly by the schools, they had no constitutional remedy. Racial imbalance that cannot be traced to school segregation—for example, imbalance caused by segregated residential patterns—is not unconstitutional, the Court said.

The second compelling interest is student-body diversity in higher education. In the case acknowledging this interest, however, racial or ethnic origin was but one in an array of qualifications that went into admitting a diverse student body. [See the digest of *Grutter v. Bollinger* in "Clearinghouse," *School Law Bulletin* 34 (Summer 2003): 21–22.] The core of that decision was that each student was considered and ranked as an individual, not simply as a member of a particular racial group; SSD and JCPS, on the other hand, used race as a decisive factor by itself. In addition, the Court noted, the environment of higher education, with its free exchange of ideas and speech, occupied a unique position not shared by primary schools.

Moreover, said the Court, the districts' arguments that their plans were supported by an interest in achieving the social and educational benefits that flow from a racially integrated environment, were unpersuasive. Neither party had presented any evidence of what those benefits might be in a primary school setting. Further, there was no evidence that the districts had attempted to use race only as much as necessary to create a student body that was sufficiently racially diverse to create those benefits. Instead, both plans employed specific percentages that were tied to the districts' overall demographic diversity, not to pedagogy. Allowing

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racial diversity to become a compelling interest justifying race-based student assignment, the Court stated, could lead to the indefinite continuation of practices like those of SSD and JCPS and mean that the United States would never achieve color-blindness.

Athletic association's enforcement of rule banning high school coaches from recruiting middle school athletes does not violate First Amendment. Tennessee Secondary School Athletic Association v. Brentwood Academy, 127 S. Ct. 2489 (2007).

Facts: Since 1950 the Tennessee Secondary School Athletic Association (TSSAA) has prohibited its member schools from using undue influence in recruiting middle school students for their athletic programs. The football coach at Brentwood Academy (one of about 345 high schools belonging to the association) violated this ban by sending letters to a group of eighth-grade boys, inviting them to attend spring practice sessions; the letters were signed "your coach." TSSAA sanctioned Brentwood, and Brentwood filed suit, alleging that the antirecruiting rule violated the free speech rights of TSSAA members.

Numerous hearings and appeals took place. [See, for example, "Clearinghouse," *School Law Bulletin* 32 (Spring 2001): 23–24.] The case then went to the U.S. Supreme Court.

Holding: The Court held that the antirecruiting rule did not violate the First Amendment's free speech provision, finding instead that the rule was a narrowly tailored regulation serving TSSAA's legitimate goals: (1) to prevent the exploitation of children, (2) to ensure that high school athletics remain secondary to academics, and (3) to promote fair competition among its members.

The Court reasoned that TSSAA's regulation did not prohibit its members from publicly disseminating truthful information about its athletic programs; it only prohibited direct personal contact with individual middle school students in a potentially coercive setting. A middle school student was likely to find a direct invitation to participate in a school's athletic program highly flattering. He or she might feel that failure to respond quickly to such an offer could affect future athletic opportunities, both in high school and in college. In such a situation, the speech in question, the direct solicitation, did not promote informed and reliable decision making (the core of the First Amendment's speech protection). Rather, by its use of one-sided presentation, it encouraged swift and uninformed decision making. The regulation did not raise any serious free speech concerns.

In addition, the antirecruiting rule targeted only the sort of activity that would undermine TSSAA's goals. There was no reason that Brentwood, as a voluntary member of the TSSAA, should be excused from following the rule.

School officials did not violate First Amendment by confiscating banner they deemed pro-drug and suspending student who had brought it to school-sponsored event. Morse v. Frederick, 127 S. Ct. 2618 (2007).

Facts: Deborah Morse, the principal of Juneau-Douglas High School (Alaska), allowed her students to watch the 2002 Olympic Torch Relay as it passed along the street in front of the school. Students watched from either side of the street, supervised by high school staff and teachers. Student Joseph Frederick was late for school that day, arriving as the relay was in progress. As the torchbearers passed, Frederick and his friends unfurled a fourteen-foot banner reading "Bong Hits 4 Jesus."

Morse immediately demanded that the students take the banner down. All but Frederick complied, and Morse confiscated the banner. She then suspended Frederick for ten days, explaining her belief that the banner promoted illegal drug use in violation of established school policy. The Juneau School District superintendent upheld the suspension on appeal, finding that Frederick had advocated the use of illegal drugs in the midst of his fellow students, during school hours, at a school-sponsored event. The superintendent also noted that the speech was neither political (e.g., advocating the legalization of marijuana) nor religious; it was a fairly silly message encouraging drug use. It not only violated explicit school policy concerning expression of pro-drug messages, but it also conflicted with the school's more general mission of educating students about the dangers of illegal drugs. Furthermore, it posed a significant potential for disrupting the school event.

The Ninth Circuit Court of Appeals ruled that Morse had violated Frederick's free speech rights because she punished him without showing that the banner was likely to give rise to a substantial disruption of school functions. Morse appealed.

Holding: The U.S. Supreme Court reversed the Ninth Circuit Court's ruling, finding that the lower court had misapplied relevant Supreme Court case law.

In its seminal case on students' rights to free speech, *Tinker v. Des Moines Independent Community School District*, the Court held that school officials could not suppress student expression (in this case, black armbands protesting the Vietnam War) unless they could reasonably conclude that it would materially or substantially disrupt the work and discipline of the school or invade the rights of others.[1] In *Tinker,* the speech at issue was clearly political, and the motive of school officials seemed merely a desire to avoid discomfort and controversy. Subsequent cases involved student speech that was not clearly political or religious and

1. *Tinker,* 393 U.S. 503 (1969).

did not pose a reasonable risk of disruption, but did occur under a school's sponsorship. In these cases, the Court did not apply *Tinker*'s disruption standard, instead finding that school officials had the right to exercise control over the style and content of student speech in school-sponsored activities as long as their actions were reasonably related to legitimate pedagogical concerns. Therefore, the U.S. Supreme Court reasoned, the Ninth Circuit Court's reliance solely on *Tinker*'s disruption standard was misplaced.

A core message of the Court's student speech cases is that although students do not shed their rights at the schoolhouse door, their rights while attending school are not coextensive with their rights while outside school. The truth of this proposition, the Court noted, is affirmed by the Court's recent Fourth Amendment cases involving students, which created looser standards for searches conducted by school officials than for searches conducted by public authorities outside the school context. More to the point, many of these cases recognized that deterring illegal drug use by schoolchildren is an important, perhaps compelling, interest—an interest, that is, that justifies some infringement of students' normal constitutional rights.

Given schools' particular interest in curbing illegal drug use by schoolchildren, and given that peer pressure is a major contributing factor to drug use, Morse's actions were constitutional, the Court concluded. Her interpretation of Frederick's banner as promoting drug use was reasonable, as was her determination that allowing its continued display would send a powerful message to her students that the school did not care about illegal drug use.

Teacher's claim, filed more than three years after he became eligible for career-teacher status, was time-barred. Hicks v. Wake County Board of Education, ___ N.C. App. ___, 653 S.E.2d 236 (2007).

Facts: Vonnie Hicks began teaching in the Wake County Public School System (WCPSS) in 1999. He attached his résumé to his employment application, showing that he had taught in various public and private schools in North Carolina and California. Although he had received career-teacher status in another North Carolina school system, he left blank the application space dedicated to determining whether, when, and where he had previously received tenure.

Under G.S. 115C-325, a teacher who has obtained career-teacher status in any North Carolina school system cannot be required to serve a probationary period of more than two years in any new North Carolina school system in which he or she obtains a job. Therefore, by 2001, Hicks was entitled to a vote by the WCPSS Board of Education on whether he would receive career-teacher status there. Nonetheless, in at least two instances when he received information indicating that the school administration believed 2003 to be his tenure-decision year, he did not affirmatively share his knowledge to the contrary. In May 2003 the board notified Hicks that it had granted him tenure.

In June 2005, Hicks filed a motion seeking a judicial declaration of his tenure rights and a judgment against the board for breach of contract. The court dismissed his claims before trial as time-barred and equitably estopped (that is, even if his claims had not been time-barred, they were filed unjustifiably late, given when they accrued, and would have caused undue prejudice to the board). Hicks appealed.

Holding: The North Carolina Court of Appeals affirmed the lower court's judgment for the board.

Hicks conceded that the lower court correctly dismissed his breach-of-contract claim under the two-year statute of limitations made applicable to contract actions against school boards by G.S. 1-53(1). He argued, however, that the two-year time limitation was the incorrect standard for his declaratory judgment action. The court agreed, finding that the action was based on a liability created by a statute (that is, G.S. 115C-325's career-teacher status provisions) and thus subject to a three-year statute of limitations. Nevertheless, the court stated, because the event giving rise to the claim—the passing of Hicks's second year in the WCPSS—occurred in 2001, the declaratory judgment claim was still time-barred.

Court declines to dismiss special education student's constitutional claim against teacher who forcefully taped his mouth shut. W.E.T. v. Mitchell, 2008 WL 151282 (M.D.N.C.).

Facts: W.E.T., a ten-year-old student with severe asthma, partial blindness, and cerebral palsy, brought claims against his special education teacher, Jill Mitchell. The claims arose from an incident in which Mitchell forcefully taped W.E.T.'s mouth shut and later abruptly tore the tape from his mouth. Earlier court proceedings eliminated all of W.E.T.'s claims against the school board and its other employees. [See "Clearinghouse," *School Law Bulletin* 38 (Winter 2007): 18–19.] Mitchell asked the court to dismiss W.E.T.'s claims against her as well.

Holding: The federal court for the Middle District of North Carolina granted Mitchell's motion in part and denied it in part.

W.E.T. brought constitutional claims against Mitchell in both her official and her individual capacity. Because the court had earlier dismissed all claims against the school board, and any successful claim against Mitchell in her professional capacity would essentially result in a judgment against the board, the court dismissed this element of W.E.T.'s claim.

As to W.E.T.'s claim that Mitchell, in her individual capacity, had violated his right to be free from unreasonable

restraint and mistreatment, the court declined to dismiss the motion. Mitchell argued that she was immune from suit because the law she was accused of violating was not clearly established at the time she allegedly violated it. The court disagreed. To determine whether a constitutional right is clearly established for purposes of qualified immunity, the court looks at whether, according to the facts as set out in the complaint, a constitutional violation did occur and, if so, whether a reasonable educator would have known that the conduct was illegal. In its earlier proceedings, the court had already determined that forcefully taping shut the mouth of a severely asthmatic student with disabilities to prevent him from communicating was a constitutional violation.

The court agreed with Mitchell's contention that as of 2005, the year in which the incident occurred, there was no North Carolina law prohibiting the disciplinary measure of taping a student's mouth shut. However, the court found that this description of the claim was unduly vague. Rather, Mitchell maliciously and forcefully taped shut the mouth of a physically and mentally disabled student. For Mitchell to be reasonably aware that this kind of activity was illegal, she need not have known of a specific legal precedent barring it. Some kinds of behavior so patently violate constitutional standards that little judicial guidance is required. For more than thirty years, the law has provided that students have a liberty interest in freedom from unreasonable restraint and mistreatment. For almost as long, the Fourth Circuit Court (the federal judicial region with jurisdiction over North Carolina) has held that students have the substantive due process right to be free from excessive force that is inspired by malice or sadism, is disproportionate to the need presented, and inflicts severe injury.

Because, at this stage in the proceedings, a court must interpret the facts of the case in a light most favorable to the party not seeking dismissal—in this case, W.E.T.—the court found that a reasonable educator in Mitchell's position would have been aware that her actions were illegal. Nonetheless, the court noted that, during discovery and trial, Mitchell might be able to present evidence showing that this conclusion was untrue.

Court dismisses emotional distress claim, but refuses to dismiss discrimination claim, of unwed pregnant teacher who was transferred. Zampogna v. Gaston County Schools Board of Education, 2007 WL 4570869 (W.D.N.C.).

Facts: Heather Zampogna, a career teacher in the Gaston County School System (GCSS), was twice voted teacher of the year. She was also selected to mentor new teachers, for which she received additional compensation. While working as a third-grade teacher at Tryon Elementary School, Zampogna began mentoring Douglas Doorley, a newly hired teacher.

In the course of the mentoring, Zampogna and Doorley became romantically involved, and Zampogna became pregnant. On learning of her pregnancy, Zampogna and Doorley went to the principal of Tryon Elementary, Terry Usery, to inform him that they had a relationship and that they did not plan to marry. Usery assured them that they had done no wrong and that their situation would not be a problem. GCSS superintendent Reeves McGlohon disagreed, however, stating that he refused to condone unwed pregnancy to elementary school students in a Baptist community.

Less than a month later, Zampogna received a phone call from a colleague while she was at a doctor's appointment. The colleague informed her that Usery was at that moment introducing a new teacher to the staff as Zampogna's replacement. When she contacted Usery about her job status, he told her that GCSS was allowing her to transfer to a tutor position working with at-risk children at Rhyne Elementary School, the lowest-performing elementary school in GCSS. He asked Zampogna to go quietly and to distribute a letter from him to the parents of students in her class explaining her departure. She refused to do so because she believed that the letter contained falsehoods. When Usery circulated an e-mail to staff about Zampogna's departure, it stated that she was leaving for a "lead teacher" position at Rhyne Elementary. GCSS did not reduce her salary. Doorley was neither demoted nor transferred.

Zampogna filed suit, alleging discrimination in violation of Title VII and negligent infliction of emotional distress. GCSS filed a motion to dismiss the claims.

Holding: The federal court for the Western District of North Carolina refused to dismiss the discrimination claim, but did dismiss the emotional distress claim.

Title VII prohibits discrimination in employment. A claimant must show that he or she suffered a discriminatory "adverse employment action." GCSS argued that because Zampogna's salary and official job classification remained the same, she had not suffered an adverse employment action. Zampogna countered that she was effectively demoted from lead teacher of third-grade children to tutor of fifth-grade students, a much-less-prestigious position. In addition, because she was no longer a lead teacher, she had to withdraw her application for certification by the National Board for Professional Teaching Standards, a certification that could have entitled her to increased compensation. Her duties at Rhyne Elementary were much more limited and much less significant than those she had previously performed, requiring no curricular planning, no leadership roles, and no student evaluation. She worked from a trailer that had no restroom, no running water, and no telephone; she shared this workspace with three other tutors.

These facts, found the court, adequately stated a claim of adverse employment action and entitled Zampogna to move forward with her discrimination claim. Her claim for neg-

ligent infliction of emotional distress could not stand, however, because all her allegations against GCSS concerned intentional actions, and a negligence claim necessarily concerns nonintentional actions.

Board had legitimate, nondiscriminatory reasons for termination of bus driver. Roach v. Rockingham County Board of Education, 2007 WL 4570337 (M.D.N.C.).

Facts: Warren Roach, an African American, worked as a bus driver at the Rockingham County Middle School for about four years. At the beginning of his third year, he met with the school's principal and assistant principal to discuss complaints about his giving gifts to students. Shortly after this meeting, the school received complaints from a parent about gifts he had given to another student. Thereafter he received a written directive not to give gifts to students; to do so, he was told, would constitute insubordination and grounds for termination.

About a year later, Roach gave a letter and self-help materials to a white female middle school student. A teacher saw the materials, took them, and reported the incident. To circumvent the school's investigation, Roach approached the student's mother at her workplace and asked her to try to get the papers back from the school. The mother complained to the school about this visit, as well as repeated calls from Roach to her workplace in continued efforts to persuade her to retrieve the papers.

Further investigation revealed that the letter Roach sent to the student along with the self-help materials was laden with profanity and touched on inappropriate subjects. Further investigation also revealed that Roach had engaged in inappropriate e-mailing, letter writing, and text messaging with other students. Further, he had continued giving gifts, including an illegally burned music CD containing explicit sexual references as well as references to drinking and getting high. He gave a copy of the CD to all the students on his bus.

Rockingham County Superintendent Walter Bromenschenkel sent Roach a letter stating that he was recommending Roach's immediate termination and outlining the reasons for doing so: illegal burning and distribution of the CD containing inappropriate language; the profanity-laden letter to the student; and the visit to the student's mother's workplace. Roach did not accept Bromenschenkel's invitation to respond to the allegations or to appeal the board's approval of Bromenschenkel's recommendation of termination.

Roach filed suit, contending that his termination was motivated by race discrimination in violation of Title VII. The Rockingham County Board of Education (RCBE) moved to dismiss his complaint before trial.

Holding: The federal court for the Middle District of North Carolina dismissed Roach's suit.

The court ruled that Roach had failed to show that his termination was motivated by racial discrimination rather than legitimate employment concerns. Roach conceded that he had done the things revealed by RCBE's investigation, but insisted that these actions were not the true cause for his termination. In support of this claim, Roach provided information about a teacher who had become less friendly once she discovered that his wife was white, and a couple of racially loaded statements that he had heard from other school personnel. Finding that Roach presented no evidence linking these isolated events to his ultimate termination, the court concluded that he had not rebutted RCBE's explanation of the legitimate grounds for his dismissal.

Board filed claim against contractor in time. Charlotte-Mecklenburg Board of Education v. M.B. White Contracting, 2007 WL 3046361 (W.D.N.C.).

Facts: In 1999, M.B. White Contracting (MBW) entered into a contract with the Charlotte-Mecklenburg Board of Education (CMBE) to perform construction work on a school. Under the terms of the manual governing the project, claims by either party were required to be made within twenty-one days of the occurrence of the event giving rise to the claim, or within twenty-one days of recognizing the condition that gave rise to the claim, whichever was later.

By August 2001, MBW had substantially finished its work. At some point thereafter—just when was a matter of material dispute—sinkholes and tension cracks were noted in part of a track that MBW had constructed. In any event, in early May 2003, surveyors identified a collapsed storm pipe under the relevant part of the track. On May 22, 2003, CMBE notified MBW of the claim. Receiving no satisfaction from MBW, CMBE filed suit, asserting breach of contract, express warranty, and implied warranty.

MBW moved to dismiss the suit, arguing that CMBE was aware of the condition giving rise to its claim as early as a year before it notified MBW, thus violating the twenty-one-day provision of the contract.

Holding: The federal court for the Western District of North Carolina denied MBW's motion to dismiss.

Because the date of the condition's discovery was under dispute, and because CMBE put forth specific facts in support of its contention that the condition was not discovered until May 2003, the court reasoned that more discovery, or a trial, was necessary to determine the merits of MBW's claim.

Court dismisses claim of prolific filer concerning revocation of his teaching certificate. Richardson v. Williams, 2007 WL 2934867 (W.D.N.C.).

Facts: In 1994 Charlie Richardson, a teacher in the Cabarrus County Schools, filed suit, alleging that he received an unfavorable performance evaluation and did not receive a

promotion because of his race. During this action, the court found that Richardson had intimidated a witness, and it dismissed his complaint. The State Board of Education subsequently revoked his teaching license on the same grounds. Thereafter, Richardson filed numerous claims against various parties concerning the revocation of his teaching certificate. In each case, his claims were dismissed before trial.

In this case, Richardson named the State Board of Education and its attorney, Harry Wilson, as defendants in a Title VII suit. The defendants moved to dismiss the complaint before trial.

Holding: The federal court for the Western District of North Carolina dismissed Richardson's claim.

The court found that Richardson had failed to write in his complaint that he had received a right-to-sue letter from the Equal Employment Opportunity Commission, a jurisdictional prerequisite to any court review of a Title VII claim. The court then noted that because Richardson had now received a final judgment on his claims arising from the loss of his teaching certificate, he was barred by the legal doctrine of res judicata from bringing any other claims related to this situation.

Court should have accorded greater deference to state administrative officer's findings in special education case. J.P. v. County School Board of Hanover County, 516 F.3d 254 (4th Cir. 2008).

Facts: Through his parents, J.P., a student with autism in the Hanover County (Va.) Public Schools, challenged the sufficiency of the individualized education plan (IEP) that school personnel had developed for him. A state hearing officer ruled that the IEP was adequate, and J.P. appealed that ruling to the federal court for the Eastern District of Virginia. The court found that the state hearing officer's factual findings were irregular and entitled to no deference. The court went on to find the IEP to be inadequate and ordered the school board to reimburse J.P.'s parents for the costs of the private school he attended during the dispute. The court also awarded J.P.'s parents attorney fees and costs of more than $180,000 as prevailing parties in the action. The school board appealed these rulings.

Holding: The Fourth Circuit Court of Appeals vacated the lower court rulings and remanded the case for rehearing.

The court began by saying that factual findings made during state administrative proceedings (concerning special education matters) are entitled to a presumption of correctness as long as they are regularly made. The district court had found the findings from J.P.'s state administrative hearing not to have been regularly made because they did not sufficiently explain how the hearing officer assessed witness credibility and did not give an adequately detailed analysis of how he resolved the legal and factual issues in the case.

As to witness credibility, the hearing officer's opinion stated that he had found all witnesses credible. The district court believed that such a view was impossible, given that the witnesses held largely divergent beliefs about the case. The court of appeals, however, had no problem with the hearing officer's statement, interpreting it to mean that all the witnesses believed what they told him, not that he believed everything he was told. That the hearing officer ultimately came down on the school board's side of the case implicitly showed that he found its view of the issues more persuasive than J.P.'s. Implicit credibility assessments were as entitled to judicial deference as explicit ones, ruled the court.

The court went on to hold that, although the hearing officer's opinion was bare-boned, it satisfied all legal requirements. Under Virginia law, lawyers are appointed to be state hearing officers and given a tight time frame in which to issue opinions. In such circumstances, it would be neither reasonable nor pragmatic to require opinions with the level of detail and analysis expected of a district judge.

Because the hearing officer's opinion was not legally deficient or irregularly crafted, the district court should have given it due weight, the court found. The district court's opinion, arrived at without such consideration, must therefore be vacated. Without a judgment in their favor, J.P.'s parents were not the prevailing party, the court concluded, so it vacated their fee award as well. On remand, the district court must reconsider the case under the due deference standard.

Full Industrial Commission ruling on workers' compensation claim stands. Matthews v. Wake Forest University, ___ N.C. App. ___, 653 S.E.2d 557 (2007).

Facts: Karen Matthews, a buyer's assistant at Wake Forest University, suffered depression starting in the 1980s. In 2000 her depression increased after two compensable work injuries and in the midst of her son's wedding preparations and her trouble adapting to a new computer program at work. Two-and-a-half years later, Matthews's doctor concluded that she had reached maximum medical improvement but refused to release her to return to work because of her depression.

At a hearing on whether her compensable work injuries aggravated her pre-existing mental illness, a deputy commissioner on the North Carolina Industrial Commission rejected the claim, attributing her increased depression to her son's wedding and her difficulty in learning the new computer program. The deputy commissioner also found that the testimony from Matthews's psychiatric experts was not credible because they had been instructed by her attorney to cite chronic pain as the source of her depression.

On review, the full commission wholly disregarded the deputy commissioner's opinion and found that Matthews's psychological problems were aggravated by her compensable injuries and were therefore also compensable.

Wake Forest appealed this ruling.

Holding: The North Carolina Court of Appeals upheld the full commission's ruling, noting that its own role in reviewing the commission's decision was limited to determining whether any competent evidence supported the finding of facts and, if so, whether these facts supported the conclusions of law. If any competent evidence supported the commission's decision, the court must affirm the findings of fact without change.

In the hearing before the deputy commissioner, two experts testified that Matthews had been unable to work in any employment since June 2000. Thus the commission's finding to this effect was supported by evidence. That the experts in question were Matthews's, and allegedly had been tampered with, did not matter: under state law the commission is the ultimate fact-finder and credibility-decider, even when the commission's review is based only on the record, not on live testimony.

North Carolina Supreme Court clarifies appropriate construction of standard of review for state agency decisions. Rainey v. North Carolina Department of Public Instruction, 361 N.C. 679, 652 S.E.2d 251 (2007).

Facts: The North Carolina Court of Appeals reversed a trial court's judgment concerning a teacher's entitlement to a 12 percent salary increase under North Carolina's National Board for Professional Teaching Standards program. [See "Clearinghouse," *School Law Bulletin* 37 (Fall 2006): 18–19.] In so doing, the court found that the trial court had inappropriately construed the standard for reviewing decisions by state agencies—in this case, the State Department of Public Instruction (DPI). DPI appealed.

Holding: The North Carolina Supreme Court agreed with DPI and sent the case back to the trial court for rehearing. Under G.S. 150B-51(c), a court can look at an agency's decisions and interpretations of a given law in the agency's past cases that involved the same issues as the case that the court is currently reviewing. However, the court may not give deference to the decision that the agency made in the current case.

Board's method of apportioning funds between public and charter schools was inappropriate. Sugar Creek Charter School v. Charlotte-Mecklenburg Board of Education, ___ N.C. App. ___, 655 S.E.2d 850 (2008).

Facts: Sugar Creek and other charter schools brought suit against the Charlotte-Mecklenburg Board of Education (CMBE), alleging that the way CMBE apportioned funds appropriated for public education was inappropriate and resulted in underfunding of charter schools. The claim concerned two specific programs, Bright Beginnings, to assist at-risk four-year-olds; and the High School Challenge, to assist three low-performing schools. CMBE did not apportion any funds from these programs to the charter schools. The claim also concerned CMBE's method of funding per pupil expenditures for the charter schools, which differed from (and was less desirable than) the method used for public schools. Specifically, at the beginning of each school year, CMBE estimated the total student enrollment for the school system and divided the local current expense fund (minus Bright Beginnings and High School Challenge monies) by that number to come up with a per pupil expenditure figure. Charter schools were thereafter required to report monthly on actual attendance numbers, and, at some unspecified time during the month, CMBE would send the operating expenses. Public schools did not have to submit monthly reports, being allowed instead to use estimated attendance figures. Also, funds not transferred from the charter schools' local current expense fund to the charter schools were used for the public schools.

The trial court ruled that CMBE did not have to apportion Bright Beginnings funds among the charter schools, because it was a special program, but did have to apportion High School Challenge funds. Also, it had to use the same local-current-expense apportionment process for charter schools and public schools, whatever that process might be. Both parties appealed.

Holding: The North Carolina Court of Appeals held that Bright Beginnings funds were part of the local current expense funds required to be apportioned among the charter schools and the public schools and let the rest of the ruling stand.

The court noted that G.S. 115C-426 requires boards of education to follow a uniform budget format, with separate funds for state public school monies, local current expenses, capital outlays, and other special programs. Any monies in the local current expense fund must be distributed equally among public and charter schools on the basis of per-pupil-attendance figures. Although Bright Beginnings and the High School Challenge might have been intended as special programs (for which no statutory definition is given), the monies for these programs were placed in the local current expense fund. Therefore, they were not special program funds; if they were, they would have to be in a separate special program fund. The charter schools were entitled to their allotment of the monies from both programs.

As to funding of per pupil expenditures, CMBE gave charter schools their local current expense monies on the basis of actual monthly student attendance numbers but distributed operating expenses to the public schools on the basis of projected attendance numbers from the beginning of the year. Because attendance numbers in both the charter and the public schools dropped during the year, this method of apportionment resulted in the public schools receiving more money per pupil than they were entitled to, and more per pupil than the charter schools received. The imbalance violated G.S. 115C-238.29H(b), which requires

that per pupil expenditures in the charter and the public schools be equal. The court did not mandate a particular calculation method for CMBE to follow, as long as the same one was used for both types of schools.

Court grants preliminary injunction to college about to lose its accreditation. St. Andrews Presbyterian College v. Southern Association of Colleges and Schools, 2007 WL 4219402 (M.D.N.C.).

Facts: The Southern Association of Colleges and Schools (SACS) is the regional accrediting body for institutions of higher learning in eleven states, including North Carolina. St. Andrews Presbyterian College is a private college located in Laurinburg (N.C.). For it to be eligible for federal Department of Education (DOE) grants, and for its students to receive student loans guaranteed by DOE, St. Andrews must maintain its accreditation. Without it, the college would probably have to close its doors.

Several years ago, SACS began to be concerned about St. Andrews's financial stability and its ability to satisfy SACS accreditation provisions governing financial resources. From 2005 through 2007, SACS placed St. Andrews on probation for noncompliance with these accreditation standards; and in each year a special committee from SACS visited St. Andrews and prepared reports on its financial stability. After review of these reports and supplementary testimony, SACS voted to withdraw St. Andrews's accreditation. St. Andrews appealed. Two months later SACS denied St. Andrews's appeal, exhausting SACS's administrative review process. St. Andrews then filed suit in the federal court for the Middle District of North Carolina, seeking an injunction to reinstate its accreditation, among other things.

Holding: The court granted St. Andrews's request for a preliminary injunction.

A *preliminary injunction* is an order made before trial of an issue to preserve a state of affairs necessary to avoid seriously harming one of the parties. Courts use four factors to determine whether to issue such an injunction: (1) the likelihood of irreparable harm if the injunction is denied; (2) the likelihood of harm to the other party if the injunction is granted; (3) the likelihood that the party seeking the injunction will prevail on the merits; and (4) the public interest. Factors 1 and 2 weigh most heavily in the analysis.

St. Andrews, the court found, faced the possibility of immediate irreparable harm without the injunction. Sixty-seven percent of its students received federal financial aid, which would be rescinded if St. Andrews lost its accreditation. Faced with such a prospect, the college would be forced to close. On the other hand, the court found, the likelihood of harm to SACS was minimal. Given that the weight of the first two factors lay with St. Andrews, the college needed only to show that its claims raised serious questions about the process used by SACS to revoke its accreditation.

SACS was no stranger to complaints about its due process, the court observed: DOE had recommended that SACS address concerns about (1) the time it afforded accreditation applicants to comply with requests for information, (2) the cost of appeal, and (3) the limited nature of the appeal process. These concerns were amply demonstrated in St. Andrews's case, the court noted. SACS had a rule that it must receive all written material a respondent wished to present at a hearing no later than ten days before the hearing. On June 4, 2007, St. Andrews received an e-mailed copy of the SACS report recommending revocation of its accreditation; SACS's president informed St. Andrews that any written reponse was due by June 5, 2007. Because St. Andrews had virtually no opportunity to respond, it was unable to correct mistakes in the SACS record, which was based on draft financial numbers that were considerably less favorable to St. Andrews than the actual numbers. Furthermore, during the three-day biannual meeting at which the St. Andrews matter was heard, SACS heard between seventy-five and a hundred other matters. St. Andrews was given ten minutes for opening remarks and spent the remaining thirty minutes answering questions from the committee; it had no time to correct errors in the report or raise issues of importance to St. Andrews.

Given these circumstances, the court concluded, St. Andrews raised subtantial questions about the sufficiency of SACS's review process. In combination with the specter of immediate and irreparable damage, St. Andrews established its case for a preliminary injunction.

School bus driver's average weekly wage was not fairly calculated using fifty-two weeks. Conyers v. New Hanover County Schools, ___ N.C. App. ___, 654 S.E.2d 745 (2008).

Facts: Debra Conyers, a school bus driver for the New Hanover County Schools, suffered a compensable disabling injury. Before the injury, Conyers worked forty-two weeks a year at $436 per week, for $17,609 annually. In the North Carolina Industrial Commission, confusion arose about the appropriate method of calculating Conyers's wages for determining workers' compensation benefits: in short, should her annual wage be divided by fifty-two weeks or forty-two weeks to determine her average weekly wage?

Holding: The North Carolina Court of Appeals ruled that Conyers's average weekly wage should be determined using the amount of money she earned during the forty-two weeks over which she actually worked.

North Carolina statutes set out five methods for determining average weekly wages. The first, third, and fifth were relevant in this case, the court stated. The first method divides annual wages by fifty-two weeks but is applicable

only if the employee works a full-year job. Under this method, Conyers's average weekly wage worked out to $339. The third method applies to cases in which the employee has worked less than fifty-two weeks and provides for dividing annual wages by the number of weeks actually worked, provided that the outcome is fair to both parties. Under this method, Conyers's average weekly wage worked out to $434. Method 5 is a catchall allowing any sort of calculation that will most nearly approximate the amount the employee would have been earning if still working. Again, the concern is fairness to both parties.

The court found that method 1 did not apply in Conyers's case. It also found that method 3 would result in unfairness to the school system because it increased Conyers's annual wages to $22,572, or approximately $4,963 more than she made in the last year of her employment. It therefore concluded that method 5 must be used. However, the court reasoned, because Conyers's salary, once paid out over forty-two weeks, would now be paid out in benefits over fifty-two weeks, it was fair and just to divide her annual salary (earned in forty-two weeks) by fifty-two weeks.

Chatham County Board of Education may continue to charge $500 tuition to out-of-county public school students attending Chatham County Schools. Brown v. Chatham County Board of Education, ___ N.C. App. ___, 652 S.E.2d 737 (2007).

Facts: From 1931 until quite recently, the Chatham County Schools allowed Randolph County students living in an area called the Bennett Attendance Zone to attend the Bennett School, which is physically located in Chatham County but is contiguous to the Bennett Attendance Zone in Randolph County, for little or no charge. The practice arose from a 1931 agreement between the counties creating a consolidated school district in the area of the Bennett Attendance Zone.

In 2005 the Chatham County Board of Education voted to charge out-of-county students attending Chatham County Schools $500 per year to continue attending. Parents of students attending or planning to attend the Bennett School filed suit, charging that the Bennett Attendance Zone was still in existence and that Chatham County thus could not charge Randolph County students attending the Bennett School.

The trial court granted summary judgment for the Chatham County Board of Education, and the parents appealed.

Holding: The North Carolina Court of Appeals affirmed the trial court's grant of summary judgment.

In 1933 the General Assembly passed legislation abolishing all then-existing school districts. In 1943 it enacted legislation allowing consolidated school districts, but only with the approval of the State Board of Education and only when a pro rata part of the public school money due for teaching the children residing in one county is apportioned by the county board of education of that county and paid to the treasurer of the county in which the schoolhouse is located. The court noted that the parents had provided no evidence of an agreement that reaffirmed the 1931 agreement subsequent to either of these statutes. In fact, the only evidence of the Bennett Attendance Zone's continued existence was the customary practice of the two school boards until 2005. This arrangement was contrary to the clear intent of North Carolina law, the court concluded, so the trial court had appropriately dismissed the parents' case. ■