Clearinghouse

Edited by Ingrid M. Johansen

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

Cases That Affect North Carolina

The Individuals with Disabilities Education Act grants parents rights of their own, which they can pursue in court without the assistance of counsel. Winkelman v. Parma City School District, 127 S. Ct. 1994 (2007).

Facts: The Winkelmans, parents of a child with autism named Jacob, believed that the individualized education plan (IEP) created for their son by the Parma City (Ohio) School District did not provide him a free appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act (IDEA). After exhausting their administrative remedies without success, the Winkelmans filed a complaint in federal court—without the aid of an attorney.

The federal district court dismissed the complaint before trial, finding that the district had provided Jacob an FAPE. The Winkelmans appealed to the Sixth Circuit Court of Appeals, which entered an order dismissing the appeal unless the Winkelmans obtained an attorney to represent Jacob. The right to an FAPE provided by IDEA, the court found, belongs to the child alone; any right the parents may have is derivative. Because of a common law rule prohibiting nonlawyer parents from representing their minor child in court, the child must be represented by an attorney. Only an attorney, the reasoning goes, has the knowledge and skill necessary to successfully represent the child's interests in court. The Winkelmans sought review of this issue in the U.S. Supreme Court.

Holding: The U.S. Supreme Court ruled in favor of the Winkelmans.

IDEA grants specific rights to parents, as parents, in particular instances. For example, parents are entitled to certain procedural protections when contesting the adequacy of a child's IEP; they are also entitled to seek reimbursement for educational expenses incurred because of an inadequate IEP. But the Winkelmans contended that they are not merely guardians of Jacob's rights for all other purposes, they are also real parties in interest to the IDEA action. Looking at IDEA's statutory scheme, the Court agreed.

One of IDEA's purposes is to "ensure that the rights of children with disabilities and the *parents of such children* are protected."[1] The Court rejected the district's argument that this—and other IDEA provisions involving parents—are merely an accommodation to the fact of a child's incapacity. On the contrary, the Court said, parents have a recognized, well-established legal interest in the education and upbringing of their children. Furthermore, under IDEA, parents are granted the right to obtain a *free* appropriate public education for their children.

In conclusion, the Court noted that even when parents pursue IDEA cases without the assistance of counsel, their relative legal inexperience is counterbalanced by their interest in their child's education and by the benefits that increased parental participation bring to the education of children with disabilities more generally.

Court reinstates former soccer player's sexual harassment claims against her coach and the university. Jennings v. University of North Carolina at Chapel Hill, 482 F.3d 686 (4th Cir. 2007).

Facts: Melissa Jennings, formerly a player on the women's soccer team at the University of North Carolina at Chapel Hill's (UNC-CH), filed a hostile environment sexual harassment claim against (among others) Anson Dorrance, the team's coach, and Susan Ehringhaus, legal counsel for UNC-CH. Whenever he was with the team, Jennings claimed, Dorrance persistently initiated discussions about sexual matters, often singling out particular members for questions or comments about their sex lives, physical features, or sexual preferences. On some occasions he expressed specific sexual thoughts about individual team members.

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1. 20 U.S.C. 1400(d)(B) (emphasis added).

Jennings complained to the university about the hostile sexual environment she believed Dorrance created, but Ehringhaus sent Jennings away with the advice that she work it out with Dorrance. Ehringhaus took no further action on the complaint. Eventually Dorrance dismissed Jennings from the team for fitness and academic performance issues. University officials advised Jennings that, because of her complaint against the coach (which became known after she left the team), they could no longer guarantee her safety on campus. She finished her last year at another university but received her degree from UNC-CH.

The federal court for the Middle District of North Carolina granted judgment for the UNC-CH defendants before trial, and the Fourth Circuit Court of Appeals affirmed the judgment, with a divided panel. [For more details on the case and earlier legal proceedings, see digests in "Clearinghouse," *School Law Bulletin* 34 (Winter 2003): 21–22, 35 (Fall 2004):22–23, and 37 (Winter 2006): 36.] Thereafter, the entire Fourth Circuit bench agreed to rehear the matter.

Holding: On rehearing, the Fourth Circuit reinstated most of Jennings's claim.

Title IX requires a complainant to show (among other things) that she was subjected to harassment based on her sex that was sufficiently severe or pervasive to create a hostile environment. The court believed that Jennings had alleged facts sufficient to go to trial on this issue: that is, that Dorrance's persistent, sex-oriented discussions, both in team settings and in private, were degrading and humiliating to his players because they were women. His choice of language and the nature of the topics he chose to discuss show that he was targeting the young women because of their sex, and his behavior went far enough beyond simple teasing to qualify as sexual harassment.

Further, the court said, the harassment was sufficiently severe and pervasive to create a hostile environment. First, the disparity in power between Dorrance and his players was marked. Dorrance was not just any college soccer coach: he was the most successful women's soccer coach in U.S. college history, and as such had tremendous power over a player's soccer opportunities both in college and afterward. In addition, Dorrance was a forty-five-year-old man, while some of his players (including Jennings), were as young as seventeen. The constant sexually charged environment Dorrance created left players in fear of becoming a target of his banter and of having to play along with it if they did.

Finally, Jennings showed that the harassment was sufficiently severe to effectively deprive her of access to educational opportunities or benefits. Jennings asserted that Dorrance's harassment made her (and other team members) feel anxious, humiliated, and uncomfortable, which in turn negatively affected her athletic and academic performance. She supported this assertion with psychiatric testimony that the verbal sexual abuse caused her severe emotional distress.

To hold UNC-CH and its officials liable for Dorrance's harassment, Jennings had to present facts showing that they had knowledge of the harassment and had the authority to address it but either displayed deliberate indifference or failed to adequately respond. Jennings's report to Ehringhaus, and Ehringhaus's lack of response satisfies this requirement.

The court also reinstated Jennings's Section 1983 claim alleging that Dorrance and Ehringhaus (among others), acted under color of state law to deprive her of her equal protection right to be free from sexual harassment. As employees of a state university, both defendants qualify as state actors. What the court did not address was the defense claim that they were entitled to qualified immunity. Because this matter was inadequately addressed by the lower court, it was sent back for proper action.

School district failed to offer a free appropriate public education to student with disabilities when his individualized education plan did not identify a particular school placement. A.K. v. Alexandria City School Board, 484 F.3d 672 (4th Cir. 2007).

Facts: A.K., a child with multiple disabilities, received special education services in the Alexandria (Va.) City Schools (ASCB) until the seventh grade, when teasing and assaults by other students became unbearable. His parents could not find a suitable local private school placement for him. As a result, they placed him in an out-of-state residential school. ASCB agreed to provide reimbursement for the portion of tuition that was equivalent to the cost of a private day school.

In preparing A.K.'s individualized education plan (IEP) for the following school year, participants spent a great deal of time setting goals and objectives; but they ultimately failed to identify a specific placement for him, designating only a "Level II—Private Day school placement." School officials then sent applications on A.K.'s behalf to five different local schools—schools that A.K.'s parents had investigated and found inappropriate the previous year. His parents therefore returned him to his out-of-state placement and sought tuition reimbursement from ACSB, arguing that ACSB had failed to offer A.K. a free appropriate public education (FAPE) by not identifying a particular school in which A.K. could be educated.

Holding: The Fourth Circuit Court of Appeals agreed with A.K.'s parents.

The Individuals with Disabilities Education Act (IDEA) specifies that an IEP must state the date for beginning spe-

cial education services and the anticipated frequency, location, and duration of those services. The court pointed out that the location of the placement naturally affects decisions about how services will be provided and thus also affects judgments about the appropriateness of the IEP. Further, failing to specify the location leaves it to the student's parents to discover whether there is a satisfactory day school in their locality, whereas IDEA intended school officials to discuss the advantages and disadvantages of various programs that might serve the child and then utilize their expertise to recommend one of them.

The court noted that this opinion does not mean that an IEP's failure to identify the location of special education services will always result in denial of FAPE. For the purposes of this case, the court did not need to reach that question. The court also declined to determine whether A.K.'s parents were entitled to reimbursement; it sent this matter back to the lower court for findings of fact on whether A.K.'s out-of-state placement was appropriate.

Without evidence that the City of Richmond engaged in disability discrimination, it cannot be compelled to fund the retrofitting of its schools to meet accessibility requirements of the Americans with Disabilities Act. Bacon v. City of Richmond, 475 F.3d 633 (4th Cir. 2007).

Facts: Students with disabilities and their families (the plaintiffs) sued the City of Richmond (Va.) and its school board under the Americans with Disabilities Act (ADA), alleging inadequate access to school facilities. The board settled with plaintiffs, agreeing to execute an ADA remediation plan retrofitting fifty-six of the city's sixty schools at a cost of approximately $23 million over five years. The federal court for the Eastern District of Virginia then entered judgment before trial for the plaintiffs and ordered the city to fund and oversee compliance with the board's remediation plan. The city appealed.

Holding: The Fourth Circuit Court of Appeals reversed the lower court ruling.

It is a bedrock rule of law that an entity may not be forced to pay damages without a finding that it is responsible for the harm in question. In the lower court proceedings, there was no finding that the City of Richmond had discriminated against students with disabilities in any way; in fact, the court acknowledged that the school board was responsible for the physical maintenance of school facilities and that the school board was the entity that had breached its duties under ADA. Nonetheless, because the city provided funding to the board, the lower court believed the city could be ordered to pay for the remediation.

This reasoning, said the appeals court, presents several significant difficulties. First, the city, by virtue of state law, has no operational control over city school buildings, services, or activities; these responsibilities all rest with the school board. And, although the city is charged with appropriating funds for the schools, it has no right to specify how those funds may be spent. In effect, the lower court ordered the city to perform a function that state law forbids. In the educational context, this transgression is especially problematic because of long-standing national principles holding that (1) states should have almost total authority to allocate responsibilities among their subdivisions, and (2) local agencies should have autonomy to run their own educational systems.

Further, the city is not the only source of funding for the Richmond City Schools. The federal and state governments also provide support. To hold the city alone responsible for ADA compliance belies the potential breadth of the lower court's remedy. ADA simply does not contemplate holding funding entities responsible for the actions of the programs they fund.

Finally, imposing liability based on funding creates inequitable litigation incentives. That is, it encourages sweetheart settlement agreements for which someone else will pay. This is not the arms-length negotiation upon which the legal system depends.

The court also rejected plaintiffs' contention that the city could fairly be held responsible because it was the owner of the school facilities and sometimes used them for recreational programs and civic events. Under state law, the school board, not the city, is vested with *exclusive* control of all school property. The city is only the nominal owner. In addition, the city's recreational use of these facilities was not at issue in the plaintiffs' case: the plaintiffs did not allege that they were qualified to participate in the city's programs but were excluded on the basis of their disabilities.

Teacher's postings on his in-class bulletin board were curricular in nature and thus not protected by the First Amendment. Lee v. York County School Division, 484 F.3d 687 (4th Cir. 2007).

Facts: William Lee, a high school Spanish teacher in York County (Va.), charged that the school board violated his right to free speech by removing several articles he posted on his in-class bulletin board. In response to a parent's complaint that the materials were overly religious for a public school classroom, Tabb High School Principal Crispin Zanca reviewed the materials himself, reached the same conclusion, and removed the materials. The five removed items were (1) a 2001 National Day of Prayer poster featuring George Washington kneeling in prayer; (2) a news article outlining religious and philosophical differences between President Bush and John Kerry; (3) a news article describing how then-attorney general John

Ashcroft led staffers in voluntary Bible study sessions; (4) a news article detailing the missionary activities of a former Virginia high school student whose plane had been shot down in South America; and (5) a Peninsula Rescue Mission newsletter highlighting the missionary work of the dead student.

After the school board rejected Lee's request to be allowed to repost the items, he retained an attorney. In the course of his pretrial deposition, Lee explained that he had posted the items not because they were related to his Spanish curriculum, but because in addition to being responsible for his students' education, he also felt responsible for their moral welfare. The articles, he continued, were posted to uplift students and to encourage them not to be ashamed of their faith.

Agreeing that there was no dispute as to the facts of the case, both Lee and the board made motions for the court to grant them judgment before trial. In reviewing the parties' submissions, the court determined that the postings were not protected by the First Amendment because they were curricular in nature and granted judgment for the board. Lee appealed.

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

According to Fourth Circuit case law, curricular speech is, in effect, the carrying out of a teacher's duties; thus it is a matter of private interest between the school board, as employer, and the teacher, as employee. By definition, then, it is not the kind of public speech that is protected by the First Amendment. Also according to Fourth Circuit case law, "curricular" speech is broadly defined because of the recognition that public schools possess the right to regulate speech that occurs within a compulsory classroom setting and that a public school's power in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums. Curricular speech must constitute school-sponsored expression and bear the imprimatur of the school. It must also be supervised by faculty members and designed to impart particular knowledge to students.

In this case, the materials removed from Lee's bulletin board met these requirements. First, they were constantly present for review by students in a compulsory classroom setting. In addition, the items were posted on a school-owned bulletin board over which the school maintained control. Even though the materials were not related to Lee's Spanish curriculum, curriculum is not so narrowly defined as to exclude them. Curricular speech can be aimed at instructing and imparting knowledge that is not related to the particular curricular objectives a teacher must follow.

Because Lee's postings were curricular, the dispute over them amounts to an ordinary employment dispute, not a free speech issue.

Board did not waive immunity by purchase of insurance policy that would indemnify it for judgments greater than one million dollars, because coverage did not take effect until after the board paid the first million. Magana v. Charlotte-Mecklenburg Board of Education, ___ N.C. App. ___, 645 S.E.2d 91 (2007).

Facts: Angelica Magana sued the Charlotte-Mecklenburg Board of Education (CMBE) and one of its teachers, David Roberts, alleging numerous tort claims arising from Roberts's physical restraint of her son, Ivan. CMBE moved for judgment before trial, asserting the defense of governmental immunity. In response, Magana provided a statement to the effect that she was seeking damages totaling $125 million. CMBE then provided an affidavit from the school district's insurance administrator stating that CMBE had a liability policy covering damage claims of more than $1 million but not of less than $1 million. He also stated that CMBE had no insurance policy providing coverage for any amount equal to or less than $1 million. The trial court ruled in favor of CMBE. Magana appealed.

Holding: The North Carolina Court of Appeals affirmed the judgment for CMBE.

Section 115C-42 of the North Carolina General Statutes (hereinafter G.S.) provides the only means by which a board of education can waive its governmental immunity: the purchase of liability insurance to cover the negligence of their agents and employees acting in the scope of their authority and in the course of their employment. The statute goes on to provide that immunity is waived only to the extent of the policy's coverage.

In this case, CMBE is covered for losses amounting to more than $1 million. However, the policy provides that CMBE must pay the first $1 million itself. As CMBE has no insurance for such losses, it has not waived its immunity and cannot be held liable for the first $1 million of any damage award in a negligence case. Thus its policy will not indemnify it in negligence cases like Magana's. (However, the court did note that this reasoning does not render the policy meaningless; there are instances in which—because of state or federal statute—governmental immunity is not an available defense. For example, in the context of contracts, school boards have no immunity, and a liability policy like CMBE's could prevent a board from having to pay more than one million dollars in case of breach of contract.)

Court dismisses disability discrimination claim of former member of university golf team. Costello v. University of North Carolina at Greensboro, 2006 WL 3694579 (M.D.N.C.).

Facts: Shawn Costello attended the University of North Carolina at Greensboro (UNC Greensboro) on a partial golf scholarship. After he was diagnosed with obsessive-compulsive disorder (OCD), he continued to play on the team and to engage in other normal student activities. He did begin to

miss team practices because of appointments with doctors and psychologists. At the end of Costello's second year with the team, his coach dismissed him from the team because of these absences, and Costello lost his scholarship. Costello brought suit against the university, alleging various disability discrimination claims. All but one of his claims were dismissed earlier. [See "Clearinghouse," *School Law Bulletin* 36 (Summer 2005): 25–26, for the digest of those proceedings.] UNC Greensboro then moved to dismiss his remaining claim under Section 504 of the Rehabilitation Act.

Holding: The federal court for the Middle District of North Carolina dismissed the Section 504 claim. The most basic prerequisite of a successful Section 504 claim is evidence that the claimant meets the act's definition of *disabled*: he or she must either have a mental or physical impairment that substantially limits one or more major life activities or be regarded by others as having such an impairment. Costello failed to meet this requirement.

By the time Costello was dismissed from the golf team, the doctor who treated him noted that the OCD had improved by 90 percent; although daily living activities took extra effort, Costello was still able to do all the things people without disabilities do during a normal day. The court noted that in the few cases in which courts have found OCD to be a disability, the claimant's symptoms were far more severe than Costello's. Therefore, Costello failed to show that he was substantially limited in any major life activity.

Nor could Costello show that UNC Greensboro officials considered him disabled. After the golf coach learned more about OCD, he allowed Costello to remain on the team, and even selected him to play in the first tournament of the 2002–2003 school year. Officials at the university counseling center—after learning more about OCD—determined that Costello didn't need any accommodation or adjustments to participate fully in university life. Even when Costello's psychologist wrote to request that they help him with the missed practice situation, UNC Greensboro officials determined that they did not need to make any accommodations for events that Costello missed because of a mere scheduling conflict.

Former school administrator failed to show that school board retaliated against him and made it impossible for him to find other employment. Cooper v. Charlotte-Mecklenburg Board of Education, 2007 WL 604724 (W.D.N.C.).

Facts: Wendell Cooper served as an assistant principal in the Charlotte-Mecklenburg school system (CMBE) for two years, until the CMBE decided not to renew his contract. Cooper filed suit, charging that the nonrenewal was discriminatory and retaliatory. The court dismissed these claims, finding that Cooper's unsatisfactory performance was the reason for the nonrenewal. [See digest in "Clearinghouse," *School Law Bulletin* 37 (Spring 2006): 19.]

Thereafter Cooper unsuccessfully sought other positions in North and South Carolina. After one failed application, Cooper asked for feedback about why he was not hired; the hiring officer told him that it was because no one at CMBE would discuss the nonrenewal of his contract, which was seen as a bad sign. Cooper felt that CMBE's refusal to give him a reference was retaliatory and prevented him from finding other employment. He filed another Title VII suit, alleging that CMBE was punishing him for his earlier discrimination complaints.

Holding: The federal court for the Western District of North Carolina dismissed Cooper's claim. Cooper failed to show that CMBE took any adverse employment action against him. Failing to give a reference, when that is the employer's usual practice, is not an adverse employment action. CMBE presented affidavits demonstrating that school system policy does not allow comment on former administrators' job performance or the reasons they left their position.

Terminated employee's claim under the Family and Medical Leave Act survives university's motion to dismiss, but his Americans with Disabilities Act claim is dismissed. Gladden v. Winston-Salem State University, 2007 WL 1385656 (M.D.N.C. 2007).

Facts: On January 4, 2005, Willie Gladden, the director of student activities at Winston-Salem State University (WSSU), began using accrued leave time because of health problems. On or around February 11, 2005, Gladden received a request from WSSU that he complete and return an application under the Family and Medical Leave Act (FMLA). WSSU received the FMLA application on March 10, 2005, and learned that Gladden planned to stay on leave until May 2, 2005.

On March 17 WSSU informed Gladden that his FMLA leave period would end on March 30 and that he was expected back at work on April 1. Gladden told WSSU that he could not return to work as requested because of continuing medical problems; he then filed a charge of disability discrimination against WSSU, alleging that the university violated the Americans with Disabilities Act (ADA) by denying him the reasonable accommodation of more leave time in which to recover.

On May 2 WSSU received a letter from Gladden enclosing two medical opinions stating that he was unable to return to work because of additional health problems. On May 5 Gladden received a letter informing him that he had been terminated on the basis of job abandonment. Gladden supplemented his initial discrimination claim against

WSSU, adding the charge that his termination was in retaliation for his initial disability discrimination complaint.

WSSU filed a motion to dismiss Gladden's claim for legal insufficiency—that is, for failure to state a claim that entitles him to relief under the FMLA or the ADA.

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

When considering a motion to dismiss for failure to state a claim, courts interpret the facts alleged in the light most favorable to the party who has not brought the motion. If the facts alleged in the complaint could, if proven at trial, support the complainant's legal claim, the court will not dismiss it.

The court first addressed Gladden's FMLA claim. The FMLA entitles eligible employees to take as much as twelve weeks of unpaid leave in any year for medical or family reasons and requires employers to restore such employees to the same or an equivalent position when they return. WSSU contended that as Gladden's leave began on January 4, 2005, his protected FMLA leave period expired on March 30, one month before it terminated Gladden. Alternatively, WSSU argued, if Gladden's FMLA leave began when it mailed him the FMLA application on February 7, his protected leave ended on May 3, the date on which he was terminated. Gladden, however, countered that he did not receive the FMLA application until February 11, meaning that he was terminated before his protected leave expired on May 5. Because of this factual dispute, this part of Gladden's claim cannot be dismissed.

The court next addressed Gladden's ADA claim: that WSSU had failed to make the reasonable accommodation of Gladden's disability that would have allowed him to perform the essential functions of his position. In short, he alleged that by refusing to extend his leave, WSSU had discriminated against him on the basis of his disability. As of May 5, 2005—four months since he had last worked—Gladden's physicians believed that he was incapable of returning to work and failed to specify when he might be capable of return. The ADA requires only reasonable accommodations, the court said; this does not mean that an employer must wait indefinitely for the return of a medically incapacitated employee. Because Gladden failed to show that with other reasonable accommodations he could have performed his job, the court dismissed his ADA complaint.

Court dismisses sexual harassment claim due to complainant's failure to show that she had completed the jurisdictional prerequisites to filing suit in court. Rorie v. Guilford County Schools, 2007 WL 1385655 (M.D.N.C.).

Facts: Colleen Rorie, a bus zone routing specialist for the Guilford County schools, filed a Title VII sexual harassment suit against the county. She alleged that the county maintained a sexually hostile work environment and retaliated against her for complaining about it. Guilford County filed a motion to dismiss Rorie's claim before trial, charging that she had failed to say that she had exhausted the administrative remedies required under Title VII.

Holding: The federal court for the Middle District of North Carolina granted the county's motion to dismiss. Title VII requires that a complainant receive a letter called the statutory notice of the right to sue before he or she may pursue a discrimination claim in court. The Fourth Circuit Court of Appeals (which has jurisdiction over the federal court for the Middle District of North Carolina) has long held that unless a complainant alleges receipt of this statutory notice, the court cannot exercise jurisdiction over the case. Because Rorie failed to make this allegation, the court dismissed her suit.

Receipt of 12 percent salary increase under North Carolina's National Board for Professional Teaching Standards program is not dependent on the recipient's being a classroom teacher. Rainey v. North Carolina Department of Public Instruction, ___ N.C. App ___, 640 S.E.2d 790 (2007).

Facts: Madeline Davis Tucker appealed a trial court ruling holding that because she was not a classroom teacher, she was not entitled to the 12 percent salary increase promised under North Carolina's National Board for Professional Teaching Standards (NBPTS) program.[2] That program, established to encourage excellence and retain excellent teachers in the teaching profession, requires the state to pay the participation fee, grant paid leave for eligible teachers who pursue certification, and provide teachers who attain NBPTS certification a significant salary differential.

Tucker is a career development education teaching coordinator in the Onslow County school system. She is licensed by the Department of Public Instruction (DPI) as (among other things) a business education teacher and career-exploration teacher. In 1999 she attended a seminar sponsored by DPI to provide information about and promote the certification program. She was assured by the seminar presenters that she met the criteria necessary to receive the salary increase upon successfully achieving certification because (1) her salary code began with a 1; (2) she had three years of teaching experience in North Carolina; and (3) she was paid on the teacher salary scale. In accord with the presenters' assurances and encouragement, Tucker filed an NBPTS application a month later.

In November 2000 the National Board told Tucker that she had received NBPTS certification. However, in Decem-

2. N.C. Gen. Stat. § 115C-296.2.

ber, DPI informed her that she didn't qualify for the salary increase after all, essentially because her office is located at the district's central office and she is not primarily engaged in classroom instruction. Tucker contended that despite her office location, she is paid on the teacher salary schedule and is classified as a teacher; she is not paid as an administrator and does not receive their bonuses or extra leave days.

DPI's decision was affirmed by the superior court, and Tucker appealed.

Holding: The North Carolina Court of Appeals reversed DPI's decision.

G.S. 115C-296.2 defines "teacher" (for purposes of NBPTS participation, and with the omission of some irrelevant qualities) as a person who is (1) certified to teach in North Carolina and is a state-paid employee of a North Carolina public school; (2) is paid on the teacher salary schedule; and (3) spends at least 70 percent of his or her work time (a) in classroom instruction, if the employee is employed as a teacher, or (b) in work within the employee's area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction. DPI argued that Tucker did not meet the requirements of either (a) or (b) above: she wasn't a classroom teacher, and the "other than direct classroom instruction" prong actually only covered the NBPTS certification areas of media and school counseling.

The court flatly rejected DPI's contention that classroom teaching was the emphasis of the NBPTS program. The DPI's interpretation of the "other than classroom instruction" prong contains limits that are not mentioned anywhere in the statute's text, said the court. Further, the National Board itself does not classify its certification categories into "classroom" and "other than classroom" areas. Nor, noted the court, did the General Assembly mention "classroom" in its statement of purpose for the NBPTS program; instead it spoke of seeking to retain excellent teachers in the "teaching profession."

As the DPI's decision conflicts with the statute, Tucker's salary increase was improperly withheld.

Variance between trust fund coverage agreement and excess liability insurance policy means school board waived its immunity for claims equal to or above the amount specified in the excess liability policy. Lail v. Cleveland County Board of Education, ___ N.C. App. ___, 645 S.E.2d 180 (2007).

Facts: Hayley Lail was a varsity cheerleader at King's Mountain High School in Cleveland County. During a practice supervised by a university student instead of the squad's actual coach, Lail fell from a human pyramid, fractured her skull on the unpadded floor, was then lifted from the floor and placed on a bleacher where she remained for the duration of the practice without medical attention. Lail filed negligence charges against the Cleveland County Board of Education and Leigh Bell, the cheerleading squad's coach. The board moved to dismiss Lail's claims on the basis of sovereign immunity.

Holding: The North Carolina Court of Appeals denied the board's motion.

Sovereign immunity generally bars suit against governmental agencies such as county school boards. This immunity can be waived by the purchase of liability insurance. The board presented evidence of a coverage agreement with the North Carolina School Boards Trust (NCSBT) that maintained the board's immunity from liability of $150,000 or less. (Earlier cases have established that such an agreement does not constitute liability insurance.) The board also presented evidence of an excess liability policy obtained by the NCSBT from a private insurance carrier for liability between $150,000 and $1 million.

The board alleged that the terms of the excess insurance policy were governed by the terms of the NCSBT coverage agreement. Among other exclusions, that coverage agreement contained an exclusion for injuries arising out of cheerleading activities and further noted that the excess insurance was subject to the same exclusions. However, although the excess insurance policy stated some of the same exclusions named in the NCSBT agreement, it did not mention others—including the cheerleading exclusion.

According to rules governing the interpretation of insurance policies, courts must interpret any ambiguous liability-limiting provision in a policy against the insurer. The excess liability policy's specific incorporation of some of the NCSBT coverage agreement's exclusions, and not of others, indicates that the policy did not incorporate all of the exclusions.

Student carrying closed pocketknife violated ban on possession of a weapon on school property. In the Matter of B.N.S., ___ N.C. App. ___, 641 S.E.2d 411(2007).

Facts: During the course of a consent search, Assistant Principal Randall Wells found a closed, 2.5-inch-long pocketknife in the jacket of one of his students (B.N.S.) at Southeast Raleigh Magnet High School. School resource officers handcuffed B.N.S. and charged him with violation of G.S. 14-269.2(d), which prohibits weapon possession on school property. The trial court adjudicated B.N.S. delinquent, and he appealed.

Holding: The North Carolina Court of Appeals affirmed the lower court adjudication.

B.N.S. argued that the closed pocketknife was not a weapon under G.S. 14-269.2. That law includes in its definition of "weapon" the following language: "any sharp-pointed or edged instrument except instructional supplies, unaltered nail files and clips and tools used solely for the

preparation of food, instruction, and maintenance." The pocketknife fits none of these exceptions. Nor does the pocketknife fall into any of the categories exempted from the prohibition—generally weapons used for ceremonial, educational, or law enforcement purposes.

Former teacher's generalized anxiety disorder was not an occupational disease. Hassell v. Onslow County Board of Education, ___ N.C. App. ___, 641 S.E.2d 324 (2007).

Facts: Barbara Hassell, once a sixth grade teacher in the Onslow County school system, appealed a ruling of the Industrial Commission denying her claim for workers' compensation benefits.

The facts, as found by the commission, established that Hassell had almost constant and quite significant trouble maintaining order in her classroom. In addition to suffering the resultant jibes and spitballs of students, Hassell received frequent criticism from parents and supervisors. All of this, coupled with the fear of becoming unemployed, created great stress for Hassell. Just shortly before leaving her position, Hassell suffered a severe emotional crisis that caused her psychologist to excuse her from work on medical grounds and to conclude that she was unable to return to the teaching profession. He stated: "Her job was driving her crazy."

The commission found that the generalized anxiety disorder for which Hassell sought benefits was not due to causes and conditions characteristic of her job. Rather, Hassell's failure to control her classroom and students, coupled with the large number of complaints this situation engendered, caused Hassell's stress and anxiety disorder. Hassell appealed.

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

Wake County Board of Education did not illegally contract for the erection of a school building on leased property. Citizens Addressing Reassignment and Education, Inc. v. Wake County Board of Education, ___ N.C. App. ___, 641 S.E.2d 824 (2007).

Facts: An organization called Citizens Addressing Reassignment and Education, Inc. (CAREI) filed suit to prevent the Wake County Board of Education from building a modular school on property leased from a private organization. The board planned to use the modular unit to temporarily house approximately five hundred students until construction of permanent school buildings was completed. CAREI contended that the board was violating G.S. 115C-521(d), which prohibits local boards of education from contracting for construction of any school building unless the site upon which it is located is owned in fee simple by the board. The relief CAREI sought was as follows: (1) a declaratory judgment that the lease agreement was void; (2) an order prohibiting the expenditure of any additional public funds for the construction of the modular facility on the leased premises; and (3) an order requiring the board to repay to the Wake County Board of Commissioners all public funds spent on lease payments and the modular facility's construction.

By the time CAREI filed its complaint, the court found the situation moot because the unit had already been built and students were preparing to attend school there shortly. The court dismissed CAREI's case.

Holding: The North Carolina Court of Appeals affirmed the lower court's dismissal of CAREI's case.

The court supported the lower court's finding that CAREI's claims had been rendered moot by the fact that the modular building was almost complete by the time CAREI filed suit—and it is well known that a "court cannot restrain the doing of that which has already been consummated." The court did, however, agree with CAREI's contention that not *all* of its claims were moot.

For instance, the request for a judgment voiding the lease and prohibiting future lease payments addressed an ongoing issue. But the court found that CAREI's mistaken interpretation of the statute rendered this claim untenable. CAREI construed G.S. 115C-521(d) to mean that the board could not construct any school buildings on leased property. The court begged to differ: G.S. 115C-521(d) prohibits the board from entering into a *contract for the erection of any school building* on land not owned by the board. But what CAREI sought to void is merely a *contract to lease land*, with all the usual landlord-tenant provisions contained in such a document. That contract contains no agreements relating to the erection of any building at all.

Furthermore, the court went on, while the lease does state that the board intended to use the site to construct a modular facility for approximately five hundred students, it also states that "such use shall be undertaken in a manner that complies with applicable law as now or hereafter enacted or construed." Thus the land lease specifically disavows any illegal intent.

In conclusion, the court denied CAREI's request for an order prohibiting similar contracts in the future. The court might have ruled that as it had determined that the contract was not an illegal contract—merely a contract for the lease of land—there was no reason to prohibit similar future contracts. But the court found an entirely different reason for denying the order. It observed that CAREI had failed to present any evidence that the board intended to place another modular unit on leased land in the future: it is axiomatic that "completed acts and past occurrences in the absence of any evidence tending to show an intention on the part of the defendants to commit future violations, will not authorize the exercise of the court's injunctive power." ■