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

Clearinghouse

edited by
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Cases and Opinions That Directly Affect North Carolina

United States Supreme Court rules that a school district must provide continuous one-on-one nursing services for a ventilator-dependent student as "related services" under the Individuals with Disabilities Education Act. Cedar Rapids Community School District v. Garret F., No. 96-1793, 1999 WL 104410 (U.S. Mar. 3, 1999).

Facts: Garret F., a student in the Cedar Rapids (Iowa) Community School District, was paralyzed from the neck down in a motorcycle accident when he was four years old. As a result Garret is ventilator-dependent, and during the school day he requires a continuous one-on-one attendant for certain physical needs. For Garret's first five years of school his family paid for the services of the attendant. In 1993, however, the family requested that the school district assume financial responsibility. The district refused, believing it was not legally obligated under the Individuals with Disabilities Education Act (IDEA).

Garret's family pursued its request through state administrative procedures, and after the administrative law judge ruled in the family's favor, the school district appealed to federal district court. The district court affirmed the ruling in favor of Garret's family, and the school district then appealed to the Eighth Circuit Court of Appeals—again the district was unsuccessful. The school district's appeal to the United States Supreme Court was accepted for review.

Holding: The United States Supreme Court held that the district is legally obligated to pay for the healthcare services Garret required.

The IDEA requires school districts to pay for "related services" that are necessary to help children with disabilities benefit from special education. In the 1984 case of *Irving v. Tatro*, 468 U.S. 883 [see "Clearinghouse," *School Law Bulletin* 15 (Oct. 1984): 35–36], the Supreme Court interpreted the IDEA to mean that a school district must provide "student health services" as required related services, unless those student health services in a particular case qualify as "medical services." Services qualify as medical services if they require the participation of a physician.

Because Garret cannot attend school without the requested health services, they clearly fall within the definition of related services—that is, those services without which a child cannot benefit from special education. The services requested *do not* qualify as medical services as defined by the Supreme Court in *Tatro* in that they do not require the participation of a licensed physician but instead can be performed by a school nurse or other trained personnel. Thus the district is required to provide them.

In so finding, the Court rejected the district's argument that the Court should adopt a new, multifactor

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test for determining whether a school district is required to provide a related service. The Court found that while the district's proposed test incorporated various concerns—such as whether the care is continuous or intermittent, the cost of the services, and the potential consequences of improperly performed services—the test essentially boiled down to financial concerns. Financial concerns may be relevant in interpreting IDEA provisions, the Court said, but cost is not employed in the IDEA's definition of related services, and Congress has given no guidance on the issue. Absent a more convincing presentation that the district's proposed test was a better interpretation of the IDEA, the Court found no good reason to depart from its settled test: Health services are related services that school districts must provide unless the service requires the participation of a physician.

Virginia statute restricting commonwealth employees from accessing sexually explicit material on commonwealth-owned or -leased computers does not violate the Free Speech Clause of the First Amendment. Urofsky v. Gilmore, 167 F.3d 191 (4th Cir. 1999).

Facts: In 1998 a federal court in the Eastern District of Virginia ruled that a Virginia statute that limited the ability of commonwealth employees to access sexually explicit material on commonwealth-owned or -leased computers violated the Free Speech Clause of the First Amendment to the United States Constitution. The court held that the interest of Virginia employees in reading, researching, and discussing sexually explicit materials within their areas of expertise, and the public's interest in hearing speech of this kind, outweighed the commonwealth's interest in promoting workplace efficiency and minimizing sexual harassment claims based on exposure to sexually explicit materials on computer screens. [See "Clearinghouse," *School Law Bulletin* 29 (Fall 1998): 28–29.] The commonwealth appealed.

Holding: The Fourth Circuit Court of Appeals reversed the lower court's ruling, holding that the statute is constitutional.

When a public employer's restriction of employee speech is challenged as unconstitutional, began the court, the first question is whether the employee speech involves a matter of public concern. If the speech does not involve a matter of public concern, there is no constitutional problem in restricting it. In determining that speech does involve a matter of public concern, it is crucial that the employee be speaking primarily in his or her role as a citizen, not primarily as an employee. In this case, however, it is clear, said the court, that the statute regulates the speech of employees in their capacity as employees. The statute prohibits commonwealth employees from accessing sexually explicit materials only when they are using computers owned or leased by the commonwealth, and the employees challenged the constitutionality of the statute only insofar as it denied them access to sexually explicit material for work-related purposes. Therefore the statute's restrictions do not involve citizen speech on a matter of public concern and are constitutional.

The National College Athletic Association is not subject to Title IX merely because it receives dues payments from recipients of federal financial assistance. National College Athletic Association v. Smith, 119 S. Ct. 924, 142 L. Ed. 2d 929 (U.S. 1999).

Facts: The National College Athletic Association (NCAA) includes as dues-paying members virtually all public and private universities and four-year colleges conducting major athletic programs in the United States. The NCAA promulgates rules governing intercollegiate athletics. One of these rules is the Postbaccalaureate Bylaw, which allows a postgraduate student-athlete to participate in intercollegiate athletics only at the institution that awarded him or her an undergraduate degree. Renee Smith played volleyball at St. Bonaventure University during the two and one-half years she took to obtain her undergraduate degree there, but because of the Postbaccalaureate Bylaw she could not play volleyball at Hofstra University or at the University of Pittsburgh, both of which she attended for postgraduate study. Smith requested a waiver of the bylaw, but it was denied by the NCAA.

Smith filed suit against the NCAA, alleging that it violated Title IX of the Education Amendments of 1972, which prohibits sex discrimination in educational programs receiving federal funding, by granting more waivers from eligibility restrictions to male than to female postgraduate student-athletes. The NCAA moved to dismiss Smith's suit, arguing that it did not receive federal funding and thus was not subject to Title IX. Smith opposed dismissal by arguing that the NCAA governs the federally funded intercollegiate athletic programs of its members, that these programs are educational, and that the NCAA benefits economically from its members' receipt of federal funds. Through a series of appeals the case ended up before the United States Supreme Court on the issue of whether a private

association that does not itself receive federal financial assistance is subject to Title IX because it receives payments from entities that do.

Holding: The Supreme Court held that dues payments from recipients of federal funds were insufficient to render the NCAA susceptible to suit under Title IX.

In relevant part, Title IX regulations define a "recipient" of federal funding as an entity that operates an educational program "to whom federal financial assistance is extended directly or through another recipient. . . ." While it was possible, the Court noted, that the NCAA indirectly benefited from federal financial assistance granted to its members, Smith made no showing that the NCAA itself actually received any of its dues from federal funds paid to its members. Thus the NCAA was not, according to the evidence in this case, a recipient of federal funding and was not, therefore, subject to Title IX.

The Court refused to discuss Smith's two alternative theories for why the NCAA was subject to Title IX because she had not raised them in the lower courts. However, they may be raised in future litigation and so bear mention here. The first theory was that the NCAA itself was a recipient of federal funding through the National Youth Sports Program it administers. The second theory was that when a federal funding recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless of whether the entity itself is a recipient.

Duke University had no legal obligation under Title IX to allow a female to play on its football team. Mercer v. Duke University, 32 F. Supp.2d 836 (M.D.N.C. 1998).

Facts: Heather Mercer was a high school All-State placekicker in New York before enrolling at Duke University (N.C.). She attempted to join the football team at Duke but was denied a place on the team by the head coach, Fred Goldsmith. Mercer filed suit against the university and Goldsmith in federal court for the Middle District of North Carolina, arguing that they had violated Title IX, which prohibits sex discrimination in educational programs receiving federal funding. She alleged that she was treated differently from male players of lesser ability and was denied full and fair consideration for team membership because of her gender. The defendants moved to have her claims dismissed before trial.

Holding: The court dismissed Mercer's claim, holding that Title IX does not require schools to permit females to play football, a contact sport.

Title IX regulations provide that no person shall be discriminated against on the basis of sex in interscholastic, intercollegiate, or intramural athletics offered by an educational institution receiving federal funds. However, the regulations specifically state that an institution is not required to allow members of the other sex to try out for teams operated for one sex when those teams are involved in contact sports, including football. Thus Mercer made out no claim under Title IX.

Wake County Board of Education was not immune from suit brought by person injured while visiting a PTA-sponsored haunted house on school premises. Seipp v. Wake County Board of Education, No. COA98-320, 1999 WL 20518 (N.C. Ct. App. Jan. 19, 1999).

Facts: Deborah Seipp was injured while visiting a haunted house sponsored by the Parent-Teacher Association (PTA) on the premises of a Wake County (N.C.) public school. She sued the Wake County Board of Education to recover damages for her injuries. The board sought to dismiss Seipp's claim, arguing that it was protected from the claim by sovereign immunity. The board acknowledged that it had purchased liability insurance, which under Chapter 115, Section 42, of the North Carolina General Statutes (hereinafter G.S.) acts as a waiver of sovereign immunity. But it pointed to G.S. 115C-524(b), which provides that this waiver does not apply when persons are injured in the use of school property if such use (1) was for other than school purposes, (2) was pursuant to an agreement with a non-school group, and (3) was entered into consistent with rules and regulations adopted by the local board of education.

Seipp responded that none of the three requirements was satisfied in this case because the PTA-sponsored haunted house was for school purposes, the PTA is a school group, and the haunted house was not held pursuant to an agreement consistent with board rules. The trial court concurred with Seipp and denied the board's motion to dismiss. The board appealed.

Holding: The North Carolina Court of Appeals affirmed the denial of the board's motion to dismiss, holding that sovereign immunity had been waived.

Wake County Board of Education rules for school facility use require that any group wanting to use a school facility make an application, on a standard written form, to the principal of the school facility at least two weeks prior to the date of intended use. The appli-

cation must be signed and dated, as an indication of a contractual agreement to abide by school policy, and must provide proof of liability insurance as well as a "hold harmless" agreement. The PTA did not satisfy any of these rules in this case. There was no written application; the school principal orally and informally agreed to the use of the school for the haunted house; and the PTA provided no proof of liability insurance or a hold harmless agreement. Although this method of allowing use of school facilities was common throughout the district, it nonetheless was inconsistent with board rules. Therefore G.S. 115C-524(b) did not apply and the board was not immune from suit.

Liability of the North Carolina Insurance Guaranty Association for claim covered by insolvent insurer cannot exceed $300,000; immunity of insured school board is waived to the same extent. North Carolina Insurance Guaranty Association v. Burnette, ___ N.C. App. ___, 508 S.E.2d 837 (1998).

Facts: Jelinda Burnette was hit by a vehicle while walking to a bus stop established by the Catawba County (N.C.) Board of Education. Jelinda's guardian ad litem sued the school board, alleging negligence in the placement of the bus stop. At the time of the accident, the board was insured by United Community Insurance Company (UCIC), with a primary policy coverage limit of $1 million and an excess policy coverage limit of $5 million. UCIC, however, was declared insolvent before it made any payment on Jelinda's claims; the claims thus remained unsettled when the North Carolina Insurance Guaranty Association—an entity established to pay covered claims under certain insurance policies when the insurer becomes insolvent—took over UCIC's obligations to its policyholders.

The association asked for a court declaration that Jelinda's claims did not constitute "covered claims" that the association was obligated to pay or if they did constitute covered claims, that the association's obligation was limited to $300,000 (the association's maximum liability under the statute). Jelinda filed an answer seeking a judgment that the association was obligated to pay at least $300,000 under each of the policies (the primary and the excess) that UCIC had had with the board. The board joined the action, arguing that if Jelinda's claims were not covered, the board had not waived its immunity and owed her nothing.

The trial judge ruled that the association was obligated to provide coverage up to $300,000, with a setoff against the recovery of up to $25,000 of the insurance provided to the driver who had hit Jelinda. The judge also ruled that the board had waived its immunity to the same extent. Jelinda appealed these rulings.

Holding: The North Carolina Court of Appeals affirmed the trial court's rulings and remanded the case to the trial court for determination of whether Jelinda's claims were covered claims.

State law limits the association's exposure to $300,000 for a covered claim: this limitation applies regardless of the existence of the board's excess policy with UCIC. As to the board itself, it had waived its immunity to the extent that it was covered by insurance. That the board's insurer had become insolvent did not mean that the board was no longer insured (and thus once again immune) because the association picked up UCIC's obligations to the board to the extent of $300,000. The board was thus only immune from suits seeking more than $300,000.

North Carolina Association of Educators is not subject to the requirements of the Family and Medical Leave Act. Harvell v. North Carolina Association of Educators, Inc., No. COA 98-396, 1999 WL 20514 (N.C. Ct. App. Jan. 19, 1999).

Facts: Michael Harvell was an employee of the North Carolina Association of Educators (NCAE) when he requested and received unpaid leave under the Family and Medical Leave Act (FMLA). The NCAE later terminated Harvell for an apparently unrelated cause. Harvell did not challenge his termination but did file a complaint with the United States Department of Labor (DOL), contending that the NCAE had violated the FMLA.

During its investigation the DOL determined that the NCAE is not subject to the FMLA because it does not have fifty employees within seventy-five miles of its headquarters. Harvell then filed suit in state trial court, complaining of the FMLA violation, and the NCAE requested that the court dismiss Harvell's claim before trial because the NCAE is not subject to the FMLA. The court granted the request, and Harvell appealed the trial court's dismissal of his claim.

Holding: The North Carolina Court of Appeals affirmed the dismissal of Harvell's claim. Harvell argued that the NCAE does have more that fifty employees within seventy-five miles of its headquarters because the employee total should have included UniServ field representatives of the NCAE who travel all the time. According to Harvell, these employees should have been counted as within the seventy-five-mile radius be-

cause although they had remote offices, they were not required to report there daily (and so the offices did not really count), they received their work assignments from the headquarters, and they had other significant contact with the headquarters. The court found that Harvell's personal interpretation that the field representatives' remote offices did not constitute "worksites" under the FMLA did not refute evidence presented by the NCAE that the offices were branch offices. Thus Harvell failed to present any evidence raising a genuine issue for trial.

Punitive damage award against Duke University reinstated. Watson v. Dixon, ___ N.C. ___, 511 S.E.2d 37 (1999).

Facts: In 1998 the North Carolina Court of Appeals ruled that a $500,000 punitive damages award against Duke University (N.C.) was contrary to law and could not stand. A jury had determined that the university had ratified the harassing conduct of one employee, Bobby Dixon, against another employee, Sarah Watson, by failing to investigate Watson's numerous complaints about the behavior even though university officials had knowledge of Dixon's propensity to harass other employees. The jury ordered Dixon to pay $5,000 in punitive damages and Duke to pay $500,000 in punitive damages.

The university argued that the punitive damages award against it was contrary to law because of existing case law holding that when an employer's liability is solely derivative, as in cases of ratification, the employer's liability cannot exceed the employee's. The judge nonetheless refused to set the award against Duke aside, and Duke appealed. The court of appeals initially remanded the case to the trial court for rehearing on the issue of punitive damages against Dixon and the university [see "Clearinghouse," *School Law Bulletin* 29 (Fall 1998): 24] but then agreed to hear the punitive damages issue itself.

Holding: The North Carolina Court of Appeals let the punitive damages award stand. The court found that the jury, in reaching its verdict, had drafted a letter to the university denouncing its reckless indifference to Watson's plight and suggesting that in the future it pay attention to its own policies and procedures for avoiding workplace harassment. Thus, the court concluded, the punitive damages award was based upon more than the university's mere ratification of Dixon's harassing behavior.

Public duty doctrine does not shield the city of Charlotte from suit for the negligence of a school crossing guard, but school crossing guard herself is immune from suit in her individual capacity. Isenhour v. Hutto, 129 N.C. App. 596, 501 S.E.2d 78 (1998).

Facts: Anthony Isenhour, an elementary school student on his way home from school, was struck and killed by a car while crossing a Charlotte (N.C.) street under the direction of a crossing guard. Anthony's mother, Anita Isenhour, brought a negligence suit against the crossing guard and the guard's employer, the city of Charlotte. Two different arguments were put forward for dismissing the suit. First, the guard and the city sought to have Isenhour's claims dismissed because of the public duty doctrine. The public duty doctrine protects a governmental unit and its agents from suit when an individual is injured as a result of the negligence of a governmental employee but when, at the time of the injury, the employee acts for the public benefit generally, not for a particular individual specifically. Second, the guard also sought dismissal of Isenhour's claim against her in her individual capacity, arguing that her status as a public official immunized her from suit. The trial court denied these motions to dismiss, and the guard and the city appealed.

Holding: The North Carolina Court of Appeals affirmed the trial court's refusal to dismiss the claims against the city of Charlotte and the guard in her official capacity under the public duty doctrine, but it granted dismissal of the suit against the guard in her individual capacity because she is a public official not liable personally for mere negligence.

Public duty doctrine. The theory underlying the public duty doctrine is that governmental units, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect or serve specific individuals; because there is no duty to specific individuals, the governmental unit cannot be held liable for failure to protect any individual. The doctrine arose because of a fear that allowing members of the public to sue governmental units for every negligent act on the part of their employees would impose an overwhelming burden of liability on the units. The court found that the doctrine should not apply in this case for two reasons. First, crossing guards do not serve the public at large; instead they are employed specifically to protect each individual child seeking to cross the street. Second, this is not a case where a city employee *failed* to act to protect the public: the guard did act to perform her duty but allegedly per-

formed it negligently. Such cases have always fallen outside the ambit of the public duty doctrine.

Public official immunity. The court next turned to the guard's argument concerning the suit against her in her individual capacity. Essentially, individual capacity suits seek damages from an individual, as opposed to official capacity suits, which seek damages from the unit of government that the person sued officially represents (in this case, the city of Charlotte). Public *employees* may be held personally liable for their negligence, even if it occurs as part of work. Public *officials*, by contrast, may not be held individually liable for their negligence when engaged in the performance of governmental duties. In determining that the guard was a public official immune from suit, the court found that because the duties of a crossing guard are analogous to those of a police officer insofar as both protect the public safety to some extent and both direct traffic, and because police officers have been held to be immune from suit as public officials, the guard, too, was immune from suit in her individual capacity.

Charter schools are entitled to a per-pupil share of supplemental tax funds levied by a local school administrative unit. Attorney General's Opinion to C. Frank Goldsmith, counsel for Francine Delaney New School for Children, a public charter school, Sept. 23, 1998.

Question: Must a local school administrative unit that is authorized to levy a supplemental tax transfer to a charter school a share of such supplemental tax moneys collected?

Answer: Yes. Under the North Carolina Charter School Act, G.S. 115C-238.29H(b), if a student attends a charter school, the local school administrative unit in which the student resides must transfer to the charter school an amount equal to the per pupil *local current expense appropriation* to the local school administrative unit for the fiscal year. In the opinion of the North Carolina Attorney General's Office, supplemental taxes are to be considered part of the local current expense appropriations of the local unit.

The School Budget and Fiscal Control Act, G.S. 115C-426, provides that the *local current expense fund* is part of the local school budget; the act goes on to define local current expense fund to include supplemental taxes levied by or on behalf of the local school administrative unit. That the Charter School Act uses the term local current expense *appropriation* and the School Budget and Fiscal Control Act uses the term local current expense *fund* is a difference without import.

This interpretation is consistent, the opinion stated, with the legislature's intent that public charter school students be placed on an equal footing with students attending traditional public schools.

Due process and free speech claims of former associate director of university student health clinic were without merit. Evans v. Cowan ___ N.C. App. ___, 510 S.E.2d 170 (1999).

Facts: Gloria Ann Evans appealed her discharge from the position of associate director of a student health clinic at The University of North Carolina at Chapel Hill. [Earlier procedural stages of this case were digested in "Clearinghouse," *School Law Bulletin* 27 (Summer 1996): 39–40]. She alleged that university officials at the clinic (hereinafter the defendants) discharged her in violation of state constitutional provisions concerning due process (the "law of the land" provision) and free speech.

The trial court granted the defendants' motion to dismiss Evans's claims before trial, finding that Evans was not entitled to relief. Evans appealed.

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

The Law of the Land Claim. The North Carolina Constitution provides that, but by the law of the land, no person shall be deprived of life, liberty, or property. This provision is viewed by the courts as being essentially equivalent to the Due Process Clause in the United States Constitution. To prevail on her claim that she was entitled to due process, Evans was required to show that in being fired she was deprived of "property." That is, she had to show that she had a property interest in her job. However, the court found that Evans was an at-will employee, terminable at any time with or without cause, and that therefore she had no property interest in her job and no right to due process in her dismissal. In so ruling the court rejected Evans's argument that the conditions of her hiring removed her from the category of at-will employee. Although she gave up a tenure-track job offer in South Carolina to take the job at the university, the defendants never gave Evans assurances that she could be terminated only for cause.

The Free Speech Claim. Evans also failed to show two chief elements of a free speech claim: that the speech for which she was allegedly terminated (1) concerned matters of public interest and (2) actually motivated her termination. Evans voiced concern about several staffing issues at the clinic as well as about the lack of a protocol for alcohol-related student health is-

sues. But she never voiced these concerns publicly, and the evidence showed them to be merely private concerns. More importantly, however, the defendants produced evidence—which Evans failed to refute—that Evans was terminated because of documented failure to follow treatment protocols and an inability to communicate with her supervisors.

Plaintiff's claim for injunctive and declaratory relief in reactivated *Swann* case is dismissed; his claim for compensatory relief remains. Capacchione v. Charlotte-Mecklenburg Schools, No. 3:97-CV-482-P (W.D.N.C. Dec. 22, 1998).

Facts: The father of Cristina Capacchione filed suit against the Charlotte-Mecklenburg (N.C.) Board of Education, alleging that his daughter was unconstitutionally denied the benefits of the board's magnet program because of the school board's race-conscious student assignment policies. Plaintiffs from the 1971 *Swann* case, in which a court found that the school board had failed to eliminate the vestiges of past segregation and from which the school board's race-conscious student assignment policies arose, successfully sought to intervene in Capacchione's case and reactivate the *Swann* case [see "Clearinghouse," *School Law Bulletin* 30 (Winter 1999): 37]. Thus the case was before the court on the following issues: (1) whether the school board had achieved unitary status such that it was no longer required to use race in student assignments; (2) whether, if the school board had not achieved unitary status, the race-based assignments were still required and applied to Capacchione's claims; and (3) whether, if the school board had achieved unitary status, it could constitutionally use race in student assignments. Plaintiff Capacchione, however, moved to California during the suit, and the school board therefore sought to have his claims (though not the intervenor's claims) dismissed.

Holding: The federal court for the Western District of North Carolina granted the school board's motion in part and denied it in part. Capacchione's claim had three elements: he sought (1) an injunction prohibiting the school board from using race in student assignments; (2) a judicial declaration that future use of race in student assignments was unconstitutional; and (3) compensatory relief for the harm his daughter suffered in being prevented from competing on an equal basis for a place in the school board's magnet schools.

The court dismissed the claims for injunctive and declaratory relief, stating that Capacchione is not entitled to injunctive relief because he could not show that he was likely to suffer *future* injury or irreparable harm due to the school board's student assignment policies since, as he testified, he and his family do not intend to move back from California. For the same reason he is not entitled to seek, in a declaratory action, to prevent future injury by the school board's student assignment policies. However, because his daughter was ready and able to attend a magnet school at the time she applied and was allegedly unconstitutionally denied the opportunity to compete for a space on an equal basis, the family's move has no effect on the injury she says she had *already* suffered—that is, the claim for compensatory relief. In short, the claim for compensatory relief, unlike the claims for injunctive and declaratory relief, is backward-looking and does not depend on Capacchione's present residence.

Statute of limitations bars former university professor's suit. Huang v. Ziko, ___ N.C. App. ___, 511 S.E.2d 305 (1999).

Facts: Barney Huang was terminated from his faculty position in the Department of Biological and Agricultural Engineering at North Carolina State University after he was charged with attempted second-degree rape and assault on a female. After a series of appeals within the university system, the university's board of trustees affirmed Huang's dismissal on February 9, 1990. On June 21, 1991, Huang filed suit in the federal court for the Eastern District of North Carolina, alleging federal claims of civil rights violations, Title VII violations, free speech violations, and age discrimination. He also alleged state law claims of due process and equal protection violations. The court dismissed his federal claims and left him free to pursue his state law claims in state court. Huang appealed the dismissal to the Fourth Circuit Court of Appeals, which affirmed the dismissal on December 7, 1995.

On May 22, 1996, Huang filed suit in Wake County (N.C.) superior court, alleging state law claims of breach of contract, due process violations, malicious prosecution, intentional infliction of emotional distress, civil conspiracy, and constructive fraud. The defendants asserted that his claims were barred by a three-year statute of limitations, and the trial court agreed, dismissing Huang's claims. Huang again appealed.

Holding: The North Carolina Court of Appeals affirmed the trial court's dismissal of Huang's claims, finding that they were barred by the three-year statute of limitations.

The court began with the assumption that Huang's claims accrued on the date the board of trustee's af-

firmed his termination, February 9, 1990. Thus unless something occurred to stop the running of the statute of limitations (also known as "tolling"), his claims were time barred three years from that date. Both parties recognized, however, that Huang's filing suit in federal court did in fact toll the statute of limitations; the issue in dispute was for how long it tolled the statute.

Huang argued that the limitations period stopped running entirely while his federal case was pending and only started again after the resolution of his federal claim on December 7, 1995. Thus since the statute had run for only a year and a half before he filed that suit, he still had a year and a half after that suit was resolved to file his state claims. The defendants, on the other hand, argued that the statute was tolled only for so long as the federal case was pending and not one day longer. Thus the day Huang's federal claims were resolved, the time period on the statute had run. The court agreed with neither of these positions, finding instead that by 28 U.S.C.A. § 1367, a federal statute providing that when a federal court dismisses claims over which it has jurisdiction (in Huang's case, the federal claims) and refuses to exercise jurisdiction over the supplemental (that is, state) claims, the period of limitations for supplemental claims shall be tolled for a period of thirty days after the dismissal, unless state law provides for a longer tolling period.

Although North Carolina law does have a "savings" provision that allows a court to specify that a new action based on a claim in a dismissed action may be commenced within one year after such dismissal, no such savings was specified by the federal court in this case. Huang had thirty days from December 7, 1995, to file his state claims; because he failed to file within this time period, his claims were time-barred.

Court of Appeals dismisses breach of contract claim by prospective Guilford County teacher who was not hired. Stevenson v. Guilford County Board of Education, No. COA97-1486 (unpublished op., N.C. Ct. App. Oct. 6, 1998).

Facts: Saundra Stevenson had just recently entered a one-year contract with Southwestern Randolph (N.C.) High School as a part-time home economics teacher when she received an offer of full-time employment from Southern Guilford (N.C.) High School. Henry Alston, the principal of Southern Guilford, recommended that she not tender her resignation to Southwestern Randolph until her employment had been approved by the Guilford County Board of Education. Nonetheless, after the Guilford personnel office granted Alston approval to hire Stevenson, but before her application was complete and approved by the board, Stevenson resigned from her position with Southwestern Randolph.

The criminal record check Stevenson submitted in order to complete her application was six pages long and revealed thirty-one convictions for fraud and issuing worthless checks between 1981 and 1995. Consequently the board did not approve her employment application, and Stevenson was left without a job. She brought suit against the Guilford County Board of Education, alleging that she had an oral employment contract, which the board breached by wrongfully discharging her, or, in the alternative, that the board negligently misrepresented to her that there was a contract; she also alleged that the board maliciously induced her not to perform (fulfill) her contract with the Randolph County schools. The board moved to have Stevenson's claims dismissed before trial.

Holding: The North Carolina Court of Appeals, in an unpublished opinion, dismissed all of Stevenson's claims.

Stevenson claimed that she had an oral contract of employment with the board and that the board breached it by refusing to approve her hiring. Yet the application for employment, which she filled out and signed, contained language stating that no offer of employment in the Guilford County schools was binding until approved by the board of education; the application also stated that each applicant had to submit to a criminal record check. Although Stevenson started work for the board the day before her criminal record check was submitted, she admitted that she knew the board could not give her final approval without it. Thus there was no employment contract.

Stevenson argued that even in the absence of a contract, she was wrongfully discharged. She was entitled *not* to be treated as an employee-at-will, she asserted, because without Alston's assurances of a full-time, one-year job she would not have resigned her position with the Randolph County school system. Thus, Stevenson urged, she had been given sufficient extra consideration that her employment was transformed from at-will to contract employment. The court rejected this argument, finding that because Stevenson knew her application was incomplete when she resigned her position in Randolph County, she did not fall into this exception to the employment-at-will doctrine.

Stevenson also attempted to persuade the court that at the very least she had been justified in relying on Alston's negligent misrepresentations that the Guilford County schools would employ her. The language in her employment application, as noted above, clearly refutes the claim that she could justifiably believe she was employed before her criminal record check had been submitted.

Finally, Stevenson claimed that the board maliciously interfered with her contract with the Randolph County schools by inducing her to break that contract. However, the board did not prevent her from performing the contract; she made that choice herself, voluntarily. Thus she could not establish this claim either.

Attorney General issues advisory opinion about community college trustees. Attorney General Advisory Opinion to Clay Tee Hines, Feb. 19, 1999.

Question: May a local board of education or the governor select a county commissioner to serve as a North Carolina community college trustee? May more than one commissioner serve as a trustee at a time? And relatedly, if a trustee is elected to the board of county commissioners, may he or she continue to serve as a trustee if another commissioner is already serving as a trustee?

Answer: Yes to all questions. G.S. 115D-12(a) governs election of community college trustees. It categorizes the trustees into four groups: (1) Group One: four trustees elected by the board of education of the public school administrative unit located in the college's administrative area; (2) Group Two: four trustees elected by the board of commissioners in the college's county; (3) Group Three: four trustees appointed by the governor; and (4) Group Four: the president of the student government of the college's student body. The statute provides that no more than one trustee from Group Two may be a county commissioner, but no similar limitation is placed on any other group. Thus the governor or the board of education may elect a county commissioner to the board. Because there are no prohibitions on the election of commissioners other than the one placed on Group Two, theoretically all Group One and all Group Three trustees could be county commissioners, in addition to the one commissioner potentially allotted to Group Two. Therefore there is no problem if a trustee is elected to the board of commissioners and one or more of the existing trustees also are commissioners.

Question: May the board of county commissioners or the governor appoint a member of the local board of education to the board of trustees?

Answer: Yes. The situation is similar to that of the commissioners. The only prohibition on electing a member of the board of education as trustee is placed on Group One, which may not elect one of its members as trustee.

Question: May an appointing authority limit the terms of its trustees to less than the statutory four-year term?

Answer: No.

Question: If a person is elected or appointed to the board of trustees in violation of G.S. 115D-12, what are the consequences of his or her participation on the board?

Answer: The acts of the trustee are valid until he or she is legally removed from office.

Question: Are there limits that apply to the power to appoint county commissioners or school board members as trustees to community colleges?

Answer: Yes. State law generally allows a person to hold concurrently two appointive offices or places of trust or profit in state or local government, and persons holding one elective office are authorized to hold one appointive office. County commissioners and school board members hold elective offices and thus are allowed to be a trustee, an appointive office, so long as they are not subsequently elected or appointed to another public office or place of trust or profit. If they are, they will be deemed by operation of law to have resigned from one of the two offices previously held.

Question: Are there restrictions on how persons holding office as both county commissioners and community college trustees exercise their duties?

Answer: Perhaps. The doctrine of incompatible offices is based on the principle that the holder of a public office must discharge his or her duties with undivided loyalty. This loyalty may be compromised when one office is subordinate to another. The office of community college trustee can, in some circumstances, be subordinate to that of county commissioner insofar as the annual budget of the community college must be reviewed and approved by the county commissioners. A trustee's duty is to pursue the college's best interests, while a commissioner's duty is to pursue the best interests of the county.

However, this potential conflict does not, the opinion warned, disqualify a person from serving si-

multaneously in both positions, especially since in permitting the county commissioners to appoint one of their own as trustee the General Assembly indicated that it is appropriate for a commissioner to serve as trustee. Nonetheless a person serving in both capacities must be aware of his or her duty of undivided loyalty and when a conflict arises in a particular case, should abstain from taking action on that issue.

Parent of child with a disability who sought reimbursement for son's private education twenty-one months after unilaterally removing him from a public school waited too long to obtain recompense. L.K. v. The Board of Education for Transylvania County, In the Office of Administrative Hearings, No. 98 EDC 0370 (Oct. 14, 1998).

Facts: J.H. attended public school in Transylvania County (N.C.) from kindergarten through fifth grade and generally received below average grades. During this period of attendance J.H. was never referred for evaluation for entitlement to special education services in the public schools—either by his mother, L.K., or by school officials. However, L.K. did obtain a private evaluation of J.H. during his fifth-grade year that indicated that he suffered from attention deficit/hyperactivity disorder. Thereafter L.K. removed J.H. from the Transylvania County school system and enrolled him in a private school. She indicated to officials at the private school that she intended to sue the Transylvania school system for the costs of the private school education.

Nonetheless, L.K. did not seek reimbursement for the education expenses until twenty-one months after she withdrew J.H. from the Transylvania County school system. The school system sought to have her claim dismissed for failure to file it in a timely manner.

Holding: The administrative law judge granted the school system's request and dismissed L.K.'s request for reimbursement.

At no time did L.K. inform the school system that she believed it had failed to identify J.H. as a child with disabilities entitled to special education and that it had failed to provide him a free appropriate public education as required by state law and the Individuals with Disabilities Education Act (IDEA). Nor, when she withdrew J.H. from the system's schools, did she inform any school official of her reason for doing so.

Case law interpreting the merits of particular IDEA claims provides that the timeliness of a petition is an appropriate consideration. In addition, the doctrine of *laches* may bar particular actions when there is an unreasonable delay in filing that results in prejudice to the opposing party. L.K.'s delay in filing did prejudice the school system. She contends that the system failed to provide J.H. a free appropriate education as far back as kindergarten, more than seven years before the filing of her petition. Since that time, personnel has changed, documentation has been purged, and it would be difficult to determine what school officials could have done to provide J.H. with an appropriate education. Furthermore L.K.'s delay is inconsistent with the IDEA's scheme intended to encourage prompt resolution of special education disputes.

Parents' request for relief under the Individuals with Disabilities Education Act was barred by the statute of limitations. M.E. v. Buncombe County Board of Education, In the Office of Administrative Hearings, No. 98 EDC 0566 (Oct. 7, 1998).

Facts: In March 1996 P.E. and M.E. requested that the Buncombe County (N.C.) Board of Education reimburse them for the in-home Lovaas therapy program they were providing to their autistic son, C.E. The board treated the request as a referral for special education services, evaluated C.E.'s eligibility for special education services, and offered a program of services it deemed appropriate for C.E.'s needs. P.E. and M.E. never accepted the proffered placement, instead requesting again that the board reimburse them for the in-home program they already were providing. The board rejected the request for reimbursement.

In June 1997 the board reevaluated C.E. at his parents' request and found that he was no longer eligible for special education services under the Individuals with Disabilities Education Act (IDEA). Without contesting this determination, P.E. and M.E. made one more request, in July 1997, for reimbursement of the cost of their program. In August 1997 the board sent them a letter again denying the request; the letter also contained notice of the filing requirements for a due process hearing under the IDEA. Most importantly, this notice stated that in order to exercise the right to a due process hearing, the parent must file a petition within sixty days of receiving written notice of a contested action.

P.E. and M.E. filed a petition for a due process hearing on April 22, 1998. The board moved to have the petition dismissed for failure to meet the sixty-day statute of limitations.

Holding: The administrative law judge granted the board's request, noting that the sixty-day statute of limitations had run more than two hundred days before P.E. and M.E. filed their petition.

Educational program provided to an autistic child did not violate the Individuals with Disabilities Education Act, the Rehabilitation Act, the Americans with Disabilities Act, state special education law, or any other law. CM v. The Board of Public Education of Henderson County, No. 1:98CV66 (W.D.N.C. Jan. 4, 1999).

Facts: The parents of CM, a child with autism, moved from New Hampshire to North Carolina in order to take advantage of the Treatment and Education of Autistic and related Communication Handicapped CHildren program (TEACCH), a nationally lauded program developed at The University of North Carolina to help children with autism. They enrolled CM in the Henderson County schools, which provided the TEACCH program. Three months after enrolling CM in the Henderson County schools, CM's parents withdrew her and began home schooling her in the Lovaas method, which they had decided was more appropriate for her. They then filed a request with the Henderson County Board of Education to reimburse them for the expense of the Lovaas instruction. The board refused.

CM, through her parents, filed a petition for a contested case hearing, alleging that the board had failed to provide her a free appropriate education. The state administrative law judge dismissed CM's claim. CM appealed to federal court for the Western District of North Carolina.

Holding: The court affirmed the dismissal of CM's complaint.

CM claimed that the board's failure to provide her with a free appropriate public education violated not only federal and state laws governing special education, but also the Rehabilitation Act and the Americans with Disabilities Act. The court found merit in none of these contentions.

Under the Individuals with Disabilities Education Act (IDEA), students with disabilities are entitled to a free appropriate public education (FAPE) from which they derive *some* benefit. Because CM's pleadings admitted that she was making some progress in the TEACCH program, it was conceded that the board did provide her the FAPE to which she was entitled under the IDEA. Under North Carolina's special education law, G.S. 115C-106, *et seq.*, the substantive standard is somewhat higher than that of the IDEA insofar as it requires a child to be given the opportunity to achieve his or her full potential; nonetheless the standard does not require the ideal or perfect education for a child. The board provided a program of nationally recognized excellence to CM—that CM's family moved to North Carolina in order to participate in the program supported this conclusion. If the TEACCH program was less than ideal for CM, that fact was insufficient reason for finding that the board violated the state special education law.

CM also alleged that the board violated federal laws prohibiting discrimination against individuals with disabilities, in particular the Rehabilitation Act and the Americans with Disabilities Act. To prove violations of these statutes, the court observed, a complainant must show that the defendants engaged in acts of bad faith or gross misjudgment. CM failed to make any such allegations.

The board's refusal to reimburse her for the expense of the Lovaas program also, CM claimed, violated her constitutional right not to be deprived of property without due process of law. This claim failed because the board did offer CM a FAPE in its schools and thus did not have a duty to provide her with money for a better or ideal program outside of its schools. She was deprived of no property interest and thus had no basis to claim inadequate due process.

Former university police officers get new trial on their sexual harassment and discrimination claims. Taylor v. Virginia Union University, No. 97-1667, 1999 WL 98647 (4th Cir. 1999).

Facts: Lynne Taylor and Keisha Johnson both held jobs as police officers for Virginia Union University (VUU) under the supervision of VUU's chief of police, Eugene Wells. Both ended up filing lawsuits against VUU and Wells after leaving their jobs because of sexual discrimination.

Wells repeatedly asked Taylor to serve as acting shift supervisor. But unlike most male officers who consistently served as acting shift supervisor, Taylor was not promoted to the rank of corporal, even after asking for the promotion. In addition, Wells refused to send Taylor to the police academy, although he had sent at least two male officers with less seniority than Taylor. Evidence showed that Wells had never sent any woman to the academy and had told a fellow officer that he never would. Taylor was discharged at Wells's suggestion after she was found at a VUU fraternity party where, according to another VUU police officer,

she was drinking and fraternizing with students in violation of the terms of her employment.

Johnson also frequenty served as acting shift supervisor and, like Taylor, also was not promoted to the rank of corporal. Wells denied her, too, the opportunity to attend the police academy, thus effectively foreclosing her opportunities for promotion. She later left her employment with VUU.

Taylor and Johnson both alleged that but for their gender, they would have been selected to attend the police academy and would have been promoted to corporal. Taylor also alleged that she would not have been discharged but for her gender. Johnson also made a claim of sexual harassment against Wells. At trial in the federal court for the Eastern District of Virginia, the court dismissed Johnson's sexual harassment claim for failure to exhaust her administrative remedies. During trial on the remaining claims, the court refused to allow into evidence testimony that Wells often referred to women in derogatory terms and that he had sexually harassed another female employee. After trial the court concluded that no reasonable jury could find in favor of Taylor on her discrimination claims and granted VUU judgment as a matter of law. The court allowed Johnson's claims to go to the jury, and the jury returned a verdict in favor of VUU. Taylor and Johnson appealed.

Holding: The Fourth Circuit Court of Appeals ruled that the district court had erred in dismissing Johnson's sexual harassment claim before trial, in excluding relevant evidence during trial, and in granting judgment as a matter of law to VUU on Taylor's claims. The court granted Taylor and Johnson a new trial.

The district court had dismissed Johnson's sexual harassment claim because it concluded that she had failed to raise it in the complaint she filed with the Equal Employment Opportunity Commission (EEOC) and thus was not entitled to bring it before the court. Although Johnson did not specifically use legal terms like "sexual harassment" or "hostile work environment" in her EEOC complaint, the court of appeals found that the allegations she recited in the complaint, including incidents of Wells touching her, calling her at home, and bringing her into his office for unnecessary meetings, were sufficient to raise the issue. Thus Johnson was entitled to raise the claim in court, and the court of appeals reinstated it.

The district court had excluded evidence about derogatory statements Wells had made about women and previous incidents of sexual harassment because it found that their probative value was outweighed by their prejudicial potential. The court of appeals, however, found that the evidence was prejudicial only in the same context in which it was relevant—that is, insofar as it tended to show that Wells's conduct was motivated by sexual discrimination. Because this evidence made it more likely that Wells was in fact behaving in a discriminatory fashion when he denied Taylor and Johnson the opportunity to attend the police academy and thus to obtain promotions, the district court should have allowed the jury to hear it.

Finally, the court of appeals found that the district court had erred in granting judgment as a matter of law to VUU on Taylor's claims. Judgment as a matter of law should be granted only when there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party.

Teacher's complaint that she was unconstitutionally discharged—or perhaps nonrenewed—because the school system did not like her husband states no claim for relief. Foote v. Barton, No. 1:98CV117 (W.D.N.C. 1998), *aff'd*, 1999 WL 141003 (4th Cir. 1999).

Facts: Laurie Foote and her husband Ira filed suit in the federal court for the Western District of North Carolina, alleging that she was unconstitutionally discharged from her teaching position in the Transylvania County (N.C.) school system because various officials within the system (the defendants) disliked her husband. The Footes alleged that Laurie Foote's discharge deprived her of liberty and property rights in her job and deprived Ira Foote of the benefit of his wife's income. This deprivation, they charged, was unconstitutional and occurred as the result of a "conspiracy" among Transylvania County school officials. The defendants moved to have the claims dismissed.

Holding: The court granted the defendants' request and dismissed the Footes' claim. Although the complaint was not entirely clear on the matter, the court inferred that Foote was a probationary teacher in Transylvania County and thus had no property or liberty interest in continued employment in the school system.

Likewise Ira Foote's interest in the support of his wife's income failed to state a constitutionally protected interest. Because no constitutional deprivation occurred in this case, there was no conspiracy to cause such a deprivation. The Footes failed to state a claim for relief.

Other Cases and Opinions

School district policy against racial harassment and intimidation, and the three-day suspension a student received for displaying Confederate symbols, were constitutional. West v. Derby Unified School District #260, 23 F. Supp.2d 1223 (D. Kan. 1998).

Facts: T.W., a seventh-grade student at Derby (Kan.) Middle School, was suspended for three days for intentionally violating the school district's policy against racial harassment and intimidation. The policy prohibited students from possessing at school any written material, either printed or in their own handwriting, that was racially divisive or created ill will or hatred and which included, as examples of prohibited items, any item that depicts the Confederate flag. The policy was developed after a series of racially charged incidents in the school system that, while not leading to violence or massive disruption, showed the potential to do so. Officials at each school within the system were authorized to administer the policy using their own common sense. For example, no student would be punished under the policy for having a textbook in his or her possession that contained depictions of the Confederate flag.

At the beginning of the school year during which he was suspended, T.W., like all other students at the school, reviewed the policy in the student handbook and signed an acknowledgment that he had read and understood the policy. In addition, teachers at the school reviewed the policy with students in class while T.W. was present. In November of that year T.W. received a short-term suspension for calling another student "blackie." In February he received an administrative conference for reportedly asking another student "what's up, nigger?" During this conference the assistant principal, Brad Keirns, reviewed the policy with T.W.

In April T.W. drew a Confederate flag during mathematics class and was sent to Keirns's office for doing so. There T.W. acknowledged making the drawing and said he knew that he had thereby violated the policy against racial harassment. Keirns obtained statements from fellow students indicating that they had warned T.W. not to make the drawing because he would get suspended and that T.W. had said he did not care. Keirns suspended T.W. for three days under the policy.

T.W., through his father, sued the school district seeking both a declaration that the policy violated the First Amendment to the United States Constitution and removal of the suspension from his record.

Holding: The federal court for the District of Kansas denied T.W.'s motion and dismissed his complaint.

The First Amendment protects the right to free speech. Schoolchildren have the right to free speech, but it may be limited constitutionally when the speech could materially and substantially interfere with the requirements of appropriate discipline in a school or when it undermines a school's basic educational mission. Derby officials had evidence from which they could reasonably conclude that possession and display of Confederate flag symbols would likely lead to substantial disruptions of school discipline; school officials were not required to sit back and wait until there was an actual melee before acting to prevent such a disruption. In addition the district appropriately took into account the likelihood that certain symbols associated with racial prejudice were so likely to provoke feelings of hatred and ill will among students that they were simply inappropriate in the school context.

T.W. alleged that the policy was overbroad because it punished students for possessing prohibited symbols even when they did not intend to harass anyone and even if no one was harassed. On its face, the court said, it is possible that the policy could be unconstitutionally overbroad. But the court did not interpret the policy in a vacuum, instead looking to any limiting construction that had been placed on it by school officials. For example, school officials considered whether a student's conduct was willful, whether the student displayed the prohibited symbol in some manner, and whether the conduct did in fact create ill will. These limitations, found the court, made it likely that the policy would be applied only in a constitutional manner. T.W. failed to show a substantial danger that the policy would be applied in a way violative of free speech rights.

T.W. also claimed that the policy was unconstitutionally vague in that it did not give him adequate warning of the kind of conduct for which he could be punished. This claim the court found simply incredible, given the clear evidence of T.W.'s state of mind at the time he drew the flag. ■