AN ANALYSIS OF THE LAWS AFFECTING NORTH CAROLINA PUBLIC SCHOOL TEACHERS

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(ABSTRACT)

This study has provided an up-to-date source of information for North Carolina public school teachers to help them understand the sources of school law, the legal basis for education, the system of state and federal courts, and their rights and responsibilities.

Appropriate federal and state judicial decisions, federal and state constitutional law, state statutes, State Board of Education policies, and the opinions of the Attorney General have been analyzed to determine legal principles in the following areas:

1. constitutional rights of teachers as a public school employee and a private citizen which included the areas of freedom of speech and expression; academic freedom, freedom of religion; private life; personal appearance; loyalty;

2. terms and conditions of employment which included certification, tenure, teacher's duties, due process for tenured teachers, procedural rights for nontenured teachers, dismissal for cause; and the
3. teacher's liability for students.

Tort liability included strict liability; the intentional torts of assault and battery, defamation, and false imprisonment; the unintentional tort of negligence and its elements and defenses; educational malpractice; governmental immunity; and students' records. Of particular concern were assault and battery and child abuse cases as related to corporal punishment, the use of qualified privilege as a defense in defamation, and the option provided by the legislature for school boards to waive governmental immunity. North Carolina courts have determined that the fundamental principle of negligence cases in North Carolina is foreseeability of harm.

As a result of this study, it has been recommended that the study be updated on an ongoing basis to maintain an up-to-date source of legal information for North Carolina teachers. In addition, a similar study has been recommended for other states. It was further recommended that a study examine the developing case law in educational malpractice along with state legal restrictions which interfere with good educational practices.

DEDICATION

This dissertation is dedicated in memory of my parents, They gave me the desire to make something of myself, and sacrificed much so that I could obtain an education.

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Chapter I

INTRODUCTION

A wide range of legal issues influence the lives of teachers in American public schools today. Teachers are often unaware of the legal standards to be used in performing responsibilities and duties because many laws did not exist when teachers were students and very little school law training has been available in teacher education programs. Unlawful school practices are generally not intentional but result from a lack of knowledge or misunderstanding of the law. Teachers must become informed about legal issues and standards because school law has become very complex, and teachers are more vulnerable than ever to lawsuits.

In fact, the United States Supreme Court ruled in 1975 in the landmark case of _Wood v. Strickland_ that school officials could be sued personally for money damages if they knew or should have known that actions taken against students violated the students' constitutional rights.[1] Since teachers serve as school officials, they might be held liable under the principles of the _Wood_ decision.[2] The

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[1]Wood v. Strickland, 420 U.S. 308, 43 L.Ed.2d 214, 95, S.Ct. 992 (1975).

[2]Louis Fischer, David Schimmel, and Cynthia Kelly, _Teachers and the Law_ (New York, N.Y.: Longman, Inc., 1981), p. 80.

same legal principles apply to teachers whose rights are violated.

Another reason for teachers to be informed is that legal mandates affecting all aspects of public education have increased significantly in recent years along with an enormous increase in the number of lawsuits involving school actions. Greater federal involvement in individual rights has caused Americans to expect greater responsibility from public officials. This movement started with Section 1983 of the Civil Rights Act of 1871 which was originally passed to prevent discrimination against black citizens. This statute allows any person whose constitutional rights have been violated to sue for damages.[3] Prior to 1960 only 280 lawsuits were filed under all its sections because of a very strict interpretation of the Civil Rights Act. The Annual Report to the Director of Administrative Offices of U.S. Courts reports that by 1972, Section 1983 alone had generated 13,000 suits and by 1983, 13,000 suits were filed annually under Section 1983.[4]

The trend of a legal emphasis on civil rights started increasing in 1954 when the Supreme Court, in Brown v.

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[3] 42 U.S.C. sec. 1983 (1871).

[4] Nelda H. Cambron - McCabe, "School District Liability Under Section 1983 for Violations of Federal Rights, NOLPE School Law Journal 10(1982),pp.99-108.

Board of Education of Topeka, Kansas decided that it was a violation of the equal protection clause of the fourteenth amendment to separate students on the basis of race in the schools.[5] This emphasis was furthered in 1964 when Congress passed the Civil Rights Act with the Title VI provision which banned discrimination on the basis of race, color, and national origin, in programs or activities for students receiving federal funding.[6]

In 1968, the Supreme Court in Pickering v. Board of Education decided that public school teachers have the right as a citizen to engage in free speech activities regarding issues of public concern.[7] In Tinker v. Board of Education, a case in 1969 in which a few students wore black armbands to protest the Vietnam War, the Supreme Court decided that students do not relinquish their constitutional rights at the schoolhouse door. They may engage in nondisruptive symbolic speech that is within the Free Speech Clause of the First Amendment.[8]

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[5]Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 98 L. Ed. 873, 74 S.Ct. 686 (1954).

[6]42 U.S.C., Title VI, sec.2000(d) (1964).

[7]Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968).

[8]Tinker v. Board of Education, 393 U.S. 503, 89 S.Ct. 733 (1969).

Reforms continued into the 70s as evidenced when Congress passed Title IX to prohibit discrimination on the basis of sex in any educational program receiving federal money.[9] In addition, Title VII was amended in 1978 to prohibit sex discrimination on the basis of pregnancy.[10] Congress also amended Title VII of the Civil Rights Act to include discrimination in employment based on religion;[11] thus school boards were prohibited by Federal law in making employment decisions based on race, color, religion, national origin, and sex.

Beginning in the middle 1970s, the Supreme Court began shifting away from an emphasis on individual rights and toward a position more supportive of the right of elected officials to perform their responsibilities involving institutional authority. A significant case that can be cited as evidence of this trend is Connick v. Myers, in 1983, which involved an assistant district attorney in New Orleans who opposed a proposal by the district attorney to transfer her to a different section of the criminal court.[12] This case has had substantial impact on public education policies and procedures.

After distributing a questionnaire to other district attorneys, Myers was terminated from her position, and the

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[9] 20 U.S.C., Title IX, sec. 1681-82 (1972).

[10] Public Law 95-955, Pregnancy Discrimination Act.

[11] 42 U.S.C., Title VII, sec. 2000(e) (1972).

[12] Connick v. Myers, 103 S.Ct. 1684 (1983).

Supreme Court upheld that termination. Myers' right to engage in constitutionally protected free speech activities was outweighed by the right of the employer to maintain efficiency and close working relationships within the office. Questions on the questionnaire about office morale, the need for a grievance committee, the level of confidence in supervisors, a transfer policy, and her refusal to accept the transfer were considered acts of insubordination. Only the one question regarding pressure upon employees to work in political campaigns could be considered a matter of public concern. The intent was to undermine the District Attorney's authority in running the office.[13]

Today the courts must decide cases concerning individual rights based on the facts of the case rather than just the principles identified in Pickering. This balancing approach to termination cases involving first amendment activities certainly reduces individual rights because the rights of the public employee to speak out are not limitless.[14]

Finally, if teachers, parents, and students have their beliefs about individual rights based upon legal

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[13] Ibid, p.1687.

[14] Ibid, p.1691.

concepts of the early 1970s when individual rights took precedent over institutional authority, then a period of adjustment is taking place because court cases indicate a movement toward supporting appointed and elected officials who are attempting to implement the will of the majority as indicated in Connick.

A recent North Carolina public school case, Gregory v. Durham County Board of Education[15], illustrates how courts apply the Connick holding. The court ruled against Gregory, a tenured teacher, because her criticism of the superintendent and her grievance about a preschool workshop scheduled by the school system to implement a newly adopted statewide reading program were not matters of public concern. Since the workshop conflicted with Gregory's vacation plans, an alternative schedule was proposed by the school system which Gregory rejected by a letter. She stated that her attorney might advise her not to attend. The assistant superintendent notified Gregory that her letters would be placed in her personnel file and a recommendation was being made that she be terminated, if she did not attend either workshop. Gregory attended the alternative workshop but sued in

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[15]591 F.Supp. 145 (M.D.N.C.) 1984.

federal court claiming that placement of the letter in her personnel file damaged her reputation, harmed her future employment opportunities, and chilled her willingness to criticize the administration, all violations of her First Amendment free speech. In ruling against her, the court cited Connick for the proposition that "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision regarding such personnel concerns." [16]

The national trend for school reform has affected decisions by legislators and school board members. This is evidenced by the 1985 North Carolina General Assembly which reinforced its commitment to improving the state's public schools by ratifying legislation to implement a Career Development Pilot Program (CDP). The CDP is a performance-based program with differential pay based upon a teacher's and principal's evaluation and participation in professional activities. The four-year pilot program began in the 1985-86 school year in sixteen administrative units and will eventually be implemented statewide.[17]

Changes in teacher certification became effective as of January 1, 1985. Recent college graduates

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[16] Ibid, p. 153.

[17] N.C. Gen. Stat. sec. 115C-363 (1985).

are issued initial certificates for two years during which time the new teacher continues to refine skills and demonstrate effective performance on the job. This procedure extends the teacher preparation programs in North Carolina to six years: four years of professional training and two years on the job.[18]

The 1985 legislature also tightened the compulsory attendance law and redefined responsibilities and duties of parents, teachers, and principals. Regulations for enforcing compulsory attendance gave local boards the discretion to consider unexcused absences when assigning grades.[19]

The controversial issue of school prayer has continued. Local boards of education are permitted to authorize a moment-of-silence each day at the beginning of the first class in all grades, but the teachers may not suggest that this moment be used for prayer. This enactment, Ch. 637 (H 1410), amended G.S. 115C-47 after the United States Supreme Court's ruling in Wallace v. Jaffree, 105 S.Ct. 2479 (1985).

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[18] Ibid, sec. 363.3.

[19] N.C. Gen. Stat. sec. 115C-378 (1985).

This introduction has highlighted various reasons for teachers to be informed of the laws that affect them:

1. During the last ten years, educators have experienced an enormous increase in the number of lawsuits involving school actions.
2. A review of court cases shows a greater involvement in individual rights with the pendulum swinging recently from an emphasis on individual rights to greater support of appointed and elected officials.
3. The national trend for school reform has promoted an increase in federal, state and local mandates to improve schools and teaching.

By providing teachers with information about the law that affects them, the way the legal system works, and the way the law can work for teachers, litigation can be prevented.

Statement of the Problem

The purpose of this study is to provide public school teachers in North Carolina with an updated source of legal information for specific areas by examining and analyzing constitutional law, state statutes, federal and state judical decisions, State Board of Education Policies, and opinions of the Attorney General.

Legal aspects of teaching in North Carolina, conclusions and recommendations have been determined in the following areas:

1. Terms and Conditions of Employment
2. Constitutional Rights of Teachers
3. Tort Liability

School administrators, school board members, school attorneys, parents and students should find the information relevant, but the perspective is that of the classroom teacher. The issues are those that teachers face regularly in regard to their rights and responsibilites.

Need for the Study

This study is needed to provide an up-to-date source of information for North Carolina teachers to help them understand their rights and responsibilities, the sources of school law, the legal basis for education, and the system of state and federal courts.

North Carolina has a publication, Law and the North Carolina Teacher[20] by Michael Smith, 1975. North Carolina studies include A Historical and Legal Analysis of Teacher

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[20] Michael R. Smith, Law and the North Carolina Teacher (Danville, Illinois: The Interstate Printers & Publishers, Inc., 1975).

Certification in North Carolina[21], by Richard L. Thompson, 1979; Legal Aspects of the School Principalship,[22] by Doris Henderson, 1981; and The Supreme Court of North Carolina and the Public Schools[23], by Michael G. Pierce, 1987.

Similar studies in school law have been completed by Curcio in Virginia,[24] McNeel in West Virginia,[25] Alexander in Kentucky,[26] as well as the states of Illinois, Ohio, Mississippi, and Indiana, but school laws continue to change as courts reinterpret constitutional provisions, legislatures enact new laws, and state and local school boards revise their policies.

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[21]Richard L. Thompson, "A Historical and Legal Analysis of Teacher Certification"(unpublished dissertation, University of North Carolina at Greensboro, 1979).

[22] Doris J. Henderson, "Legal Aspects of the School Principalship" (unpublished dissertation, University of North Carolina at Greensboro, April, 1981).

[23]Michael G. Pierce, "The Supreme Court of North Carolina and the Public Schools (unpublished dissertation, University of North Carolina at Greensboro, May, 1987).

[24] Joan Lois Curcio, "An Analysis of the Legal Rights and Responsibilities of Virginia School Teachers" (unpublished dissertation, Virginia Polytechnic Institute and State University, May, 1976).

[25] William Thomas McNeel, "An Analysis of the Laws Affecting Public School Administrators, Teachers, Service and Auxillary Personnel in West Virginia" (unpublished dissertation, Virginia Polytechnic Institute and State University, April,1979).

[26] Samuel Kern Alexander, Jr. An Analysis of the Laws Affecting Public School Administrative and Teacher Personnel in Kentucky (dissertation, Indiana University, September, 1965).

Research Methods and Procedures

In law, constitutions, statutes, and court decisions comprise much of basic law research. Legal research of statutes has been undertaken by one of three ways: (1) descriptive word method which relies on terms in an index to point out the statutes; (2) the topic method which is found in the contents section and; (3) by using the name of the statute.[27]

The General Statutes of North Carolina and the Public School Laws of North Carolina, issued by the State Board of Education, have been examined to find statutes applicable to the study. Once significant statutes were identified, their validity was verified through the use of Shepards Citations to determine if a statute has been repealed or amended.

To identify significant cases which are applicable to the legal areas of this study, the descriptive word method, the topic method, and the table of cases method were used. These methods were applied to the following principal sources:

North Carolina Digest

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[27] Morris L. Cohen, Legal Research in a Nutshell, 3rd.ed. (St. Paul, Minn.: West Publishing Co., 1978) pp. 83-85.

South Eastern Digest

Modern Federal Practice Digest

Federal Digest

American Digest System

North Carolina Index

Corpus Juris Secundum

North Carolina case law has been analyzed by researching cases reported in the following sources:

North Carolina Reports

South Eastern Reporter

Federal Supplement

Federal Reporter

United States Supreme Court Reporter

Lawyers' Edition of the United States Supreme Court Reports

West's Education Law Reporter, begins in 1982.

In addition, the North Carolina Attorney General Reports provided answers and questions to cases or statutes which serve as a secondary source for research. Shepards Citations were used to determine if cases have been affirmed, reversed, dismissed, modified or appealed.

Other information was obtained from the North Carolina Institute of Government Principals' Executive Program, Institute of Government materials, School Law Bulletins, National Organization on Legal Problems in

Education (NOLPE) materials, and the Index to Legal Periodicals were used to locate journal articles to clarify legal principles. Finally, law dictionaries were used to define the legal terms in this study.

In summary, several methods were used in researching statutes and court cases, the primary sources for this study. The primary sources were supplemented with secondary sources such as legal encyclopedias, law reviews, educational articles and books. After synthesizing primary and secondary sources, conclusions and recommendations have been made for each area of study. General guidelines have been identified for practicing preventive school law when appropriate.

Sources of School Law

An explanation of the sources that produce the law governing school operations is needed in order to assess the varying importance of cases and legal principles affecting teachers. School law, as used in the context of this study, may be defined as a body of principles, standards and regulations affecting education as prescribed by constitutional law, statutory law, judicial law, administrative law and opinions of the Attorney General in North Carolina. These laws have a binding legal force on

the means of governing human behavior and policies conducted in public schools. In fact, most of what is done in carrying out the daily affairs of a public school possesses a legal dimension.

Constitutional Law

Public school systems are created by state constitutions and legislative mandates. Education is not mentioned in the Constitution of the United States, but the Tenth Amendment reserves to the states or to the people those powers not specifically assigned to the federal government.[28]

The Bill of Rights, known as the first ten amendments of the United States Constitution, limits the power of the federal government by assuring such rights as freedom of speech, press, assembly and petition, religion, trial by jury, freedom from unreasonable search and seizure, and by reserving to the states all powers not specifically assigned to the federal government nor prohibited to the states by the Constitution.

The thirteenth, fourteenth, and fifteenth amendments, known as the Civil Rights Amendments, were added to the

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[28] U.S. Const. amend. X.

Constitution after the Civil War for the purpose of limiting the powers of state and local governments. The Fourteenth Amendment has a clause that guarantees equal protection of the laws.

A person who is being denied public employment, a promotion, or some other job benefit may believe that he is being denied equal protection of the laws. For example, in United States v. South Carolina,[29] it was charged that the use of scores on the National Teacher Examination to certify and determine the pay levels of teachers in the state denied black teachers the equal protection of the laws. The United States Supreme Court held that the test was not used with the intent to discriminate and that classifications of teachers for certification and pay purposes were rationally based.[30] The Fourteenth Amendment also forbids the states to deny any person life, liberty, or property without due process of law. It made the First Amendment applicable to the states. The Fourteenth Amendment has had a major impact on the public schools. It has been invoked in cases regarding teacher dismissals, student dismissals, rights of the handicapped, racial desegregation, rights of married and pregnant students, and parents' rights.

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[29]445 F.Supp. 1094 (D.S.C. 1977), aff'd 434 U.S. 1026 (1978).

[30]Ibid., p. 1107.

The Constitution of North Carolina includes a Declaration of Rights which provides the same basic rights and freedoms guaranteed by the United States Constitution. It also provides the people with "a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[31]

In addition, the Constitution of North Carolina establishes the basic framework for operating public schools and it guarantees the people a "general and uniform system of free public schools which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students."[32] This applies to every person of the State less than 21 years old, who has not completed a standard high school course of study.[33]

This uniform system of free public schools with the requirement to attend school until the age of 16 in North Carolina, [34] gives students a "property interest in public education along with being entitled to due process in connection with suspension from school."[35]

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[31]N.C. Const. art. I, sec. 15.

[32]N.C. Const. art. IX, sec. 2(1).

[33]N.C. Gen. Stat. sec. 115C-1 (1985).

[34]N.C. Gen. Stat. 115C-378 (1985).

[35]Pegram v. Nelson, 469 F.Supp. 1134 (M.D. N.C. 1979).

The Constitution also creates a State Board of Education which consists of the Lieutenant Governor, the State Treasurer, and eleven members appointed by the Governor, with the General Assembly confirming the appointments in a joint session. No state or locally paid public school employee, employee of the State Department of Public Instruction, or a spouse of these employees may serve as an appointed member of the State Board of Education.[36]

The State Board is responsible for the formulation of rules and regulations needed to carry out the laws enacted by the legislature.[37] Its resolutions must not be in conflict with higher authorities such as state and federal statutes.[38]

In addition to the State Board of Education, the Constitution also creates the office of the Superintendent of Public Instruction to supervise and to administer the schools and to "be the secretary and chief administrative officer of the State Board of Education."[39] The State Superintendent, an official elected by the voters, executes the State Board's decisions through

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[36]N.C. Const. art. IX, sec. 4(1).

[37]Ibid. sec. 2(2).

[38]Ibid. sec. 5.

[39]N.C. Const. art. IX, sec. 4(2).

the State Department of Public Instruction and its eight regional centers throughout the state.

Statutory Law

The North Carolina Constitution places the legal authority to establish and to maintain a free, public school system directly in the hands of the state legislature. The large body of law enacted by the state legislature is the state's codified statutory law that usually applies to all school districts in the state. In addition, the legislature adopts special acts that apply only to specified city school districts. These special or local acts take precedent over the general statutes and are published only in the session laws of the General Assembly. They are not codified with the general statutes.[40]

By statutes, the General Assembly creates local boards of education and assigns them a large number of powers. This means that boards of education have general control, supervision, and enforcement of all matters pertaining to the public schools in their respective administrative units. Their responsibility includes all educational powers

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[40] Robert Phay and Robert Wood, Local Acts Creating and Providing for City School Administrative Units (Chapel Hill: Institute of Government, 1972).

that are not given to another person or institution.[41]

The local boards of education employ a chief executive officer, the superintendent, to supervise and administer the schools of the unit. A principal is elected by the local board of education upon the recommendation of the superintendent.[42] By statute and under traditional common law principles the superintendent and principal are teachers of the board. Teachers are recommended to the board by the superintendent, but the school board has final authority in hiring teachers.[43]

Judicial Law

Judicial law, case law, and common law are often used interchangeably. Some legal experts describe judicial law as unwritten law that emerges from custom (the way things are done over time), from opinion of courts of law, from precedents set by court decisions, by judge-made law, and by the opinions of the Attorney General. Judicial laws have their source in interpretations of the written law

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[41] N.C. Gen. Stat. Sections 115C-36.

[42] Ibid. 115C-284(a).

[43] N.C. Gen. Stat. Section 115C-299. Johnson v. Gray, 263 N.C. 507, 139 S.E. 3d 551 (1965).

as opposed to statutes or administrative regulations.[44]

The state case law or the state's common law as it is sometimes referred to comprises all the law that emerges from state appellate court systems. Actually, common law originated in England where customs became the accepted principles governing conduct and were applied to cases that came to court.[45]

Administrative Law

Administrative law is comprised of the formal regulations, orders, and decisions of various administrative agencies for the purpose of implementing their powers and responsibilities.[46] Federal administrative law results from such federal agencies as the Office of Civil Rights in the Department of Education and the office of Human Development Services.

State administrative law is one of the fastest growing areas of school law. The State Board creates this law when it adopts a policy. The State Superintendent of Public

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[44]H.C. Hudgins and Richard S. Vacca, Law and Education, Contemporary Issues and Court Decisions (Charlottesville, Virginia: The Michie Company, 1985), p. 3.

[45]Ibid.

[46]H.C. Black, Black's Law Dictionary, abridged fifth ed. by the Publisher's Editorial Staff (St. Paul, Minn: West Publishing Co., 1983), p. 22.

Instruction creates administrative law when he issues rules and regulations to local school districts concerning state board policy. Local school boards create administrative law when they adopt policies for the operation of their schools. School administrators add to this body of law while implementing school board policies. Finally, the classroom teacher creates administrative law for the school by determining rules for the classroom.[47]

Opinions of the Attorney General

The state Attorney General is recognized as an elective office by the North Carolina Constitution. The State Superintendent of Public Instruction may request the Attorney General to prosecute or defend suits related to the Department of Public Instruction.[48] The Attorney General will issue an official opinion to another state or local official to interpret state education law, school board policy, and the pronouncements and actions of school administrators and teachers. The Attorney General does not issue directives and his opinions are neither binding nor conclusive, but they are based on the evidence available at that time, and his opinions carry great weight.[49]

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[47]Robert E. Phay, The American Legal System, Ch.1 (Chapel Hill, N.C.: Institute of Government, 1983), p. 5.

[48] N.C. Const. art. III, sec. 7(1).

[49]Smith, Law and the N.C. Teacher, p. 38-40.

System of Federal and State Courts

Article III, Section 1 of the United States Constitution provides that "the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[50]

The federal court system has the authority to hear cases between citizens of different states in order to avoid possible bias in a state court that may favor its own citizens. It also hears cases in which individual rights, privileges, or immunity protected under the Constitution have been violated.[51]

Under the federal judicial system, North Carolina is divided into three federal districts: eastern, middle, and western. A case is tried in the district where the violation occurred and is binding only in that district.[52]

A federal case decision may be appealed to the federal circuit court of appeals that has jurisdiction for that

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[50] U.S. Const. art. III, sec. 1.

[51] Ibid. sec. 2.

[52] Anne Dellinger, North Carolina School Law, The Principal's Role (Chapel Hill, N.C.: Institute of Government, 1981), p. v.

district, and in some instances directly to the Supreme Court of the United States. There are thirteen circuit courts of appeals, each in one of the thirteen federal judicial circuits.

North Carolina falls within the Fourth Circuit Court of Appeals which also includes Maryland, South Carolina, Virginia, and West Virginia.[53] Decisions made by the Fourth Circuit Court of Appeals are binding throughout these five states. An appeal by the Fourth Circuit may be taken to the United States Supreme Court which is "the highest court in the land beyond which there is no redress."[54] Most school cases are taken to the Supreme Court on "writ of certiorari", which means that the case was removed from a lower court to a superior court.[55] If the court refuses to hear an appeal, the judgment from the lower court stands. So a denial from the Supreme Court is important because it is, in effect, affirming the decision of the lower court. The Supreme Court uses its discretion to hear an appeal. Four justices must agree to hear the cases in making the decision to hear a case. The court will determine "whether the issue has been previously decided by the United States Supreme Court,

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[53] 42 U.S.C.A. sec. 41.

[54] Kern Alexander and M.David Alexander, American Public School Law, 2nd ed. (St.Paul, Minnesota: West Publishing Col, 1985), p.16.

[55] Blacks, Law Dictionary, p. 118.

whether the court of appeals are in conflict on the issue, and whether a court of appeals or state court of last resort (usually the State Supreme Court) has come to a decision contrary to a previous United States Supreme Court decision. Undoubtedly the most significant reason for granting certiorari is the importance attached to the issue".[56]

Decisions of state courts of last resort may also petition the Supreme Court by certiorari and in some cases as a matter of right. The federal decisions that North Carolina school officials must obey are those of the United States Supreme Court, and final (unappealed) decisions of the Fourth Circuit Court of Appeals, the State Supreme Court, final decisions of the state Court of Appeals, and unappealed decisions of the trial court for the judicial district.

In addition to the federal court system, North Carolina, similar to other states, has a separate state system of courts. This system consists of three divisions: (1) The Appellate Division with two branches - the Supreme Court and the Court of Appeals, (2) the Superior Courts, and (3) the District Courts.[57]

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[56] Phay, Legal System, p. I-14.

[57] Joan G. Brannon, The Judicial System in North Carolina (Raleigh, N.C.: Administrative Office of the Courts, 1984), p. 1.

A case brought in state court in North Carolina is tried in either the district or superior court in the county where the alleged violation occurred. Then it may be appealed to the Court of Appeals, which was created in the 1960s to relieve the Supreme Court's heavy caseload, and finally to the State Supreme Court. The Supreme Court determines which court will hear the case. The Supreme Court's caseload mainly consists of cases involving questions of constitutional law, legal questions of major significance, appeals in criminal cases in which the death penalty or life imprisonment is involved, and cases from the Utilities Commission concerning rates. The Court of Appeals also decides questions of law which are less significant. In cases involving a constitutional question and in cases where there is a dissent in the Court of Appeals, the case goes on to the Supreme Court. A decision of either appellate court is binding throughout the state.[58]

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[58]Ibid. pp. 2-10. See also: Appendix 1 illustrates the routes of appeal, and Appendix 2 illustrates the state's judicial divisions and districts.

Delimitation of the Study

This study is delimited to the state and federal laws which pertain to North Carolina teachers, grades K-12. Principals and other employees are not included. Cases from jurisdictions other than North Carolina have been considered when appropriate to the study and when no precedent exists in North Carolina's Courts. Also, this study is delimited to the legal aspects of teaching in North Carolina as described in the Outline of the Following Chapters and the Table of Contents.

Finally, this study reflects research in the current state of the law as of December, 1986. Significant 1987 cases and statute amendments have been included in each area.

Outline of the Following Chapters

An outline of the chapters to follow shows the structure for the legal aspects of teaching in North Carolina Public Schools:

Chapter II deals with the constitutional rights of teachers in the areas of freedom of speech, religion, academic freedom, private life and personal appearance. This chapter deals with discrimination in employment: race,

sex, age, and the handicapped.

Chapter III is concerned with terms and conditions of teacher employment: certification, scope of duty, tenure, reduction in force, and teacher dismissal for tenured and nontenured teachers.

Chapter IV discusses tort liability which is divided into three categories: (1) intentional interference, (2) strict liability, and (3) negligence. Elements of negligence, defenses for negligence, supervision, educational malpractice, governmental immunity, defamation including libel and slander, and guidelines for pupil records and information are discussed.

Chapter V includes conclusions and recommendations resulting from the study. A description of the North Carolina Court System and the definition of terms is included in the appendix.

Summary

This first chapter includes an introduction to the study which reinforces the need and the purpose for the study. Research methods and procedures are described. A list of legal resources for the study is included. An explanation is included for the sources of school law and the system of federal and state courts. The delimitations of this study are delineated, and an outline of the following chapters is included.

Chapter II

RIGHTS OF TEACHERS

North Carolina statutory law is responsible for establishing a uniform system of public schools and for delineating requirements for certification, tenure, and dismissal proceedings as well as other aspects of teaching. Beyond these statutory provisions for teachers' employment, significant substantive rights are conferred through the Federal Constitution. In addition, Federal civil rights legislation has created guidelines that have resulted in a tremendous impact on employment practices. These guaranteed rights for teachers cannot be "relegated to a watered-down version of constitutional rights"[1]... solely because they are public employees. A teacher, as a public employee, may not be deprived of a constitutionally protected right without a compelling governmental interest, nor may the teacher be forced to choose between keeping his job and exercising a constitutional right.[2]

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[1]Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

[2]Board of Regents v. Roth, 408 U.S. 564, 576 (1972).

This chapter provides an overview of the scope of teachers' constitutional rights as defined by the courts: freedom of speech and expression, religion, academic freedom, private life, personal appearance, loyalty, self-incrimination, and discrimination in employment practices. When applicable, federal and North Carolina state laws will be discussed.

Freedom of Speech and Expression

The United States Supreme Court has issued several key decisions about the free speech rights of public employees since the 1960s. As a result, it is now well established that a teacher has interests as a citizen in commenting on matters of public concern that are protected by the First Amendment.[3]

The most definitive ruling on teachers' free-speech rights is Pickering v. Board of Education,[4] 1968. The controversy in this case centered around a letter that

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[3]Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); and Pickering v. Board of Education, 391 U.S. 563 (1968).

[4]Pickering, supra.

Pickering wrote to the local newspaper criticizing the school board's handling of a bond issue and its subsequent allocation of funds between the school's educational and athletic programs. The board contended that the letter was damaging to the best interests of the school. It also objected to certain statements which were not accurate. The lower courts upheld Pickering's dismissal saying that teachers, as employees of the school board, do not have the right to criticize public officials. The U.S.Supreme Court overruled the lower court's decisions and held that teachers are entitled to the same freedom to comment on public issues as any other citizen. Even if statements are inaccurate, a showing of disruption is still required unless school officials can prove that the statements were knowingly false or reckless. This disruption factor was later clarified in Tinker v. Des Moines,[5] 1969, in which the court said that disruption had to be real or substantial. Expressive activity cannot be proscribed or punished unless "it materially disrupts classwork or involves substantial disorder."[6] Pickering's comments were

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[5]Tinker, supra.

[6]Ibid., pp. 503, 509, 513.

not disruptive, and instead of criticizing his immediate supervisors, he criticized the superintendent and the board with whom he had no daily contact.[7]

But not all speech is protected by the First Amendment. Again, in Pickering, the U.S. Supreme Court established a balancing test to determine when a public employer's response to an employee's speech has violated the Constitution. The test that the Court used in Pickering was to balance " the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as as employer, in promoting the efficiency of the public service it performs through its employees."[8]

In Pickering, the U.S. Supreme Court developed the following general guidelines for evaluating the "balance of interest" between employee and employer.[9]

1. Was the employee's speech directed toward any person with whom he would normally be in contact in the course of his daily work?

2. Did the speech impede the employee's work?

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[7]Pickering, supra, pp. 569-570.

[8]Ibid., p. 568.

[9]Ibid., pp. 569-573

3. Did the speech raise a question that would threaten a supervisor's authority, or damage the professional reputation of its targets, or create controversy and conflict among co-workers?

4. Did the employee's job require strict confidentiality or personal loyalty?

5. Were the allegations so groundless that they reflected incompetence or questioned the teacher's fitness to perform classroom duties?

6. Would carelessly-made or false statements about matters related to the operation of the school system be difficult to counter because of the teacher's greater access to the facts and the inability of the public to independently evaluate the criticism?

7. Were the employee's comments a matter of public concern?

Another U.S. Supreme Court Case further elaborated the legal guidelines for First Amendment cases. In Mt. Healthy City School District Board of Education v. Doyle,[10] 1977, a nontenured teacher who was president of the Teacher's Association was dismissed for a lack of tact in handling professional matters which included making a telephone call to a radio station in response to a proposed teacher dress and appearance code. A second incident listed in the dismissal was making obscene gestures to female students.

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[10]Mt. Healthy City School District Board of Education,v . Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

Although, not part of the reasons for dismissal, Doyle had been in an argument with other teachers including the cafeteria manager over the amount of spaghetti served to him, and he used a vulgar phrase in reference to several male students during a disciplinary matter.

Actually, Doyle, as a nontenured teacher could have been nonrenewed without a "reason" or a "cause" according to Ohio State law; therefore, the burden of proof was on Doyle to show that the board dismissed him for an impermissible reason and that his behavior or speech was constitutionally protected. Doyle challenged the dismissal as violations of his first and fourteenth amendment rights. Both the trial court and the court of appeals concluded that reinstatement was warranted, since the telephone call was protected speech and was a substantial reason for dismissal. However, the U.S. Supreme Court reasoned that the exercise of protected speech should place an employee in no better or no worse position with regard to continued employment.[11] In reversing the lower court ruling, the U.S. Supreme Court introduced a test of causation, as an area of constitutional law. Would the school board have reached the same decision in the absence of the teacher's exercise of protected speech?[12] The case was remanded for a

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[11]Ibid., pp. U.S. 285-286. [12]Ibid., p. 287.

determination of whether the board could show by a preponderance of evidence that it would have reached the same conclusion as to Doyle's employment if the radio station incidents had not occurred.[13]

The guidelines determined in Mt. Healthy are in the form of a three-part test:

1. The nontenured teacher is required to show that the conduct or criticism at issue is protected under the First Amendment.
2. The nontenured teacher must show that this protected conduct was a substantial or motivating factor in the action taken by the board; if so
3. the burden then shifts to the board to show that by a "preponderance of evidence it would have reached the same decision even in the absence of the protected conduct."[14]

Another example of the lower courts using the criteria set forth in Pickering and Mt. Healthy is Daulton v. Affeldt, 678 F. 2d 487 (4th Cir. 1982). In this North Carolina case a nontenured accounting teacher with five

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[13]Ibid., p. 287.

[14]Ibid., p. 287.

years experience at Forsyth Technical Institute was nonrenewed because of her criticism of the administration's handling of curriculum and student needs. The school said that the teacher's personal problems were interfering with her work, but the nonrenewal occurred after the teacher was requested, along with others, to complete an evaluation sheet on the school's strengths and weaknesses. It was determined that the teacher's criticism caused no disruption of the school, because she was commenting on matters of school-related, public concerns. Since her criticisms were found to be the substantial reason for her nonrenewal, the court ruled for the teacher.

Pickering and Mt. Healthy v. Doyle were concerned with public expression. In 1979, the U.S. Supreme Court clarified that protected speech not only includes public but also includes private statements made by public school teachers. This decision was rendered in Givhan v. Western Line Consolidated School District.[15]

Givhan, a black teacher, was dismissed because she accused the school of discrimination in its policies and practices while under a court order for integration in rural Mississippi. Since Givhan had privately expressed her criticisms to her principal, the U.S. Supreme Court ruled

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[15] 439 U.S. 410 (1979).

that a teacher who speaks privately with a supervisor rather than expressing criticisms publicly does not forfeit free-speech rights.

In addition, if teachers are protected when they express controversial opinions either publicly or privately in school, then they are also protected when they speak publicly, out of school and in the community. In Johnson v. Branch,[16] 1966, a black, nontenured teacher in North Carolina was dismissed for her civil rights activity in the community. Johnson had twelve years of teaching with average to excellent evaluations, but her civil rights activities were interfering with her extracurricular activities at school. Although the principal had presented Johnson with a letter citing various infractions, he had recommended her for reappointment. Knowing that civil rights were protected, the school board gave other, trivial reasons for firing Johnson. After examining the reasons for dismissal, the Fourth Circuit Court of Appeals declared the dismissal so trivial as to render her nonrenewal as an irrelevant, arbitrary and capricious decision.

In all of these cases, the U.S. Supreme Court has considered teachers' criticisms or complaints to be matters of public concern, but the Court's decision in Connick v. Myers,[17] 1983, offers a clearer view

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[16] 364 F.2d 177, 187 (4th Cir. 1966).

[17] 461 U.S. 138 (1983).

of the types of employees' speech that may result in discipline or dismissal. Although the Connick case applies to public employment, Myers was not a teacher.

In the Connick case, the U.S. Supreme Court upheld the termination of an assistant district attorney. After a dispute with her supervisor, the district attorney, Myers distributed a questionnaire to other employees at the, office. In analyzing Myer's speech in the questionnaire, the courts looked at the (1) content (speech), (2) form (manner in which opinions were expressed), (3) and context (circumstances under which the incident occurred) of Connick's speech. The content of the questionnaire focused on the level of confidence in supervision, fairness in office transfers, the need for a grievance policy, and office morale.[18] The form of the speech was a questionnaire used to gather information for continued office dissatisfaction rather that for public information. The context of the survey showed that Myers was not expressing a matter of public concern, but was resisting authority as a result of her transfer. Her actions were considered a threat to the district attorney's authority as well as a disruption in the office.[19] The question on the questionnaire regarding pressure upon employees to work in political campaigns was the only issue that could be considered a matter of public concern.[20]

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[18]Ibid., p. 141-148. [19]Ibid, p. 152. [20]Ibid., p. 149.

In this case, the Court further narrowed the reach of First Amendment protections by establishing a threshhold test. The Court said:

> ...if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for discharge...and a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employer's behavior...[21]

To summarize, the Connick decision was consistent with the Court's earlier decisions in Pickering, but it strengthened a public employer's right to discipline employees by allowing employers to act before the speech becomes a disruption.[22] If the speech does not involve a matter of public concern such as a "political, social, or other community issue"[23], the employer may impose ordinary dismissals from government service which are non-reviewable by the courts.[24] "If the speech is a matter of public concern in only a most limited sense, the employer's reasonable belief that the speech will harm efficiency, authority, or harmony in the place of employment is all that is necessary for disciplinary action."[25] If the expressive speech or conduct primarily touches upon matters

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[21]Ibid., pp. 146-147. [22]Ibid., p. 152.

[23]Ibid., p. 146. [24]Ibid.

[25]Jones v. Dodson, 727 F.2d 1329, 1334.

of public concern then even some degree of disruption may not justify discipline by an employer. Strong justification, such as substantial disruption of work is required for any action to take place against this type of speech;[26] otherwise, the Court will generally strike the balance in favor of the teacher.[27]

Several recent North Carolina cases are examples of how lower courts have applied the Connick test. Two cases were decided jointly in the Federal Middle District Court in May, 1984. Gregory,[28] a career teacher in the Durham County School System, and Toggerson,[29] a junior high teacher with a master's degree in journalism brought suit against the superintendent and the school board. The teachers alleged that their First Amendment rights were violated when letters of reprimand were placed in their personnel files for retaliation of their criticism of school administrators. Gregory's grievance was related to the scheduling of a mandatory workshop before school started. Toggerson wrote a letter that was included in a teachers' newsletter which accused the superintendent of "working against the rights and interests of teachers."[30] The trial judge determined that Gregory's and Toggerson's

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[26] Ibid. [27] Pickering, supra.

[28] Gregory v. Board of Education, 591 F.Supp. 145 (M.D.N.C. May, 1984).

[29] Ibid. [30] Ibid., p. 150.

constitutional rights had not been violated. The Court cited Connick saying "...a federal court is not the appropriate forum in which to review the wisdom of a personnel decision"...[31] resulting from an employee's personal grievance. Toggerson's letter gave the superintendent sufficient reason to believe that the efficient operation of his school system and his relationship with teachers was threatened.[32]

In another North Carolina case, Leiphart v. North Carolina School for the Arts,[33] the N.C. Court of Appeals rejected the teacher's free speech claim because his criticism focused on his own personal displeasure rather than a matter of public concern. Leiphart was the Director of Student Activities at the North Carolina School of the Arts. He called a meeting of division directors to discuss complaints which he had compiled about his supervisor while she was absent. Others objected to his actions, and he was dismissed on grounds of personal conduct. His conduct had damaged his credibility and his effectiveness with his peers and supervisors and caused disruption in his department.

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[31] Ibid., p. 153, citing Connick, 103 S.Ct. at 1690.

[32] Ibid., p. 154.

[33] 342 S.E.2d 914 (N.C. App. 1986).

Recent court decisions that have ruled on teacher's speech have generally focused on Connick's threshold test which determines whether speech in its content, form, and context touches on a matter of public concern. Examples of legitimate matters of public concern in which the courts held for the teacher include the following cases from jurisdictions outside of North Carolina and outside the Fourth Circuit Court:

> Two assistant coaches were transferred because of their criticism of the severe use of corporal punishment by the head coach.[34] A teacher lost coaching duties and was transferred to an elementary school for criticizing mileage allowances for coaches, the extent of liability insurance, and grievance procedures. Transfer would not have happened except for speech.[35]
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> An assistant football coach was suspended by the superintendent. The coach communicated directly with the board about his concerns over the athletic program.[36]

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[34] Bowman v. Pulaski County Special School District, 723 F.2d 640 (8th Cir. 1983).

[35] Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985).

[36] Anderson v. Central Point School District No. 6, 746 F.2d 505 (9th Cir. 1984).

Two elementary teachers were nonrenewed for speaking to the board, at the board's request, about lack of administrative support for a federal Right to Read program.[37] A nontenured teacher with an unblemished record was nonrenewed for publishing a letter in the newspaper that was contrary to the position of three school board members who wanted to eliminate track in the junior high schools.[38]

A middle school nontenured teacher complained about policies of the principal which resulted in low morale and interfered with work efficiency.The policies included grouping, signing in and out, and use of office telephones. Some issues were personal disputes while others were public concerns. Nonreappointment would not have occurred in absence of the speech.[39]

In the following cases, the courts ruled for the board because the teacher's complaints were limited to their own employment conditions instead of a public concern:

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[37]Wells v. Hico Independent School District, 736 F.2d 243 (5th Cir. 1984).

[38]McGee v. South Pemiscot School District R-V, 712 F.2d 339 (8th Cir. 1983).

[39]Cox v. Dardanelle Public School District, 790 F.2d 668 (8th Cir. 1986).

Two elementary teachers were nonrenewed because their speech interfered with the relationship with their supervisor and harmony in the school. They had expressed dissatisfaction with the manner in which the principal handled parental complaints about seating arrangements on a bus for a field trip, failure to provide monetary support for the trip, and teaching supplies.[40]

A tenured art teacher filed a grievance with the union complaining of numerous acts of hostility toward her by the administration. The charges against her were the inability to properly supervise students and poor attitudes toward fellow teachers.[41] Another teacher was not rehired because she filed grievances when she was offered a part-time position instead of a full-time position.[42]

A teacher was nonrenewed for complaints about her evaluation and the principal's explanation of it.[43]

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[40]Roberts v. Van Buren Public Schools, 773 F.2d 949 (8th Cir. 1985).

[41]Gavrilles v. O'Connor, 579 F.Supp. 301 (D. Mass. 1984).

[42]Renfroe v. Kirkpatrick, 722 F.2d 715 (11th Cir. 1984).

[43]Day v. South Park Independent School District, 768 F.2d 696 (5th Cir. 1985).

A nontenured guidance counselor was nonrenewed after she told the secretary and several teachers that she was bisexual and had a female lover. Her speech was personal because she asked that it be kept a secret.[44]

Another nontenured teacher criticized administrators and teachers. She was hostile and lacked the ability to work with teachers, students, supervisors and administrators. Her nonrenewal would have occurred anyway.[45]

A supervisor of minority studies applied for a promotion to supervisor of English and Social Studies. She was not promoted because of her incompetence in pushing for censorship of a high school play that she considered racially offensive. Even after the play was revised, her behavior raised questions of her suitability to supervise.[46]

A high school teacher complained about registration procedures in which students selected their own courses and teachers, and the practice of hiring physical education coaches to teach social

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[44]Rowland v. Mad River Local School District, Montgomery County, 730 F.2d 444 (6th Cir. 1984).

[45]Derrickson v. Board of Education of St. Louis, 738 F.2d 351 (8th Cir. 1984).

[46]Patterson v. Mason, 774 F.2d 251 (8th Cir. 1985).

studies. The criticisms stemmed from the teacher's inability to discipline. When the teacher was reassigned from 11th and 12th grade history and political science to electives for the 9th and 10th graders, he filed a grievance which the court concluded was not a matter of public concern.[47]

A teacher in a district court in Pennsylvannia wrote newspaper articles criticizing board policies. He also spoke to the superintendent about a possible kickback to the principal on the sale of school rings. His criticism interfered with the operation of schools. Reckless or false statements undermined the ability of the teacher to perform his duties.[48]

Another teacher was transferred from high school to elementary after personally telling the superintendent that he was a poor communicator, and "a poor communicator makes a poor educator." The superintendent had refused to permit students to speak at a meeting of the board of trustees.[49]

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[47]Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986).

[48]Gobla v. Crestwood School District, 609 F. Supp. 972 (D.C. Pa. 1985).

[49]Stevenson v. Lower Marion County School District No. 3, 327 S.E.2d 656 (S.C. 1985).

Academic Freedom

Academic Freedom is a special concern of the first Amendment. Although not mentioned in the First Amendment, it bestows teachers with the right to teach and students with the right to receive ideas, to inquire, and to freely discuss ideas in the classroom. Academic freedom is so essential to a democratic society that the courts have viewed the classroom as a marketplace of ideas to be protected by the First Amendment. In fact, the United States Supreme Court said in Griswold v. Connecticut,[50] that parents or a party may not restrict or "contract the spectrum of available knowledge." "The protection of constiutional freedoms is nowhere more vital than in the community of American schools," according to the Court in Shelton v. Tucker.[51] In Keyishian v. Board of Regents,[52] the Court held that the First Amendment "...does not tolerate laws that cast a pall of orthodoxy over the classroom."

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[50]381 U.S. 479 (1965).

[51]364 U.S. 479, 487 (1960).

[52]385 U.S. 589, 603 (1967),

The importance of a free, open inquiry to a democratic society was articulated by Chief Justice Warren in Sweezy v. New Hampshire:

> To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate...[53]

Thus when teachers are challenged about their choice of materials, lectures, classroom techniques, or answers to students' questions, they will usually claim First Amendment protection. This section will look at the attention the lower courts have given to the issue of academic freedom in the classroom. As the courts have examined each case, the following general guidelines have been used for balancing the teachers' rights to academic freedom against the state's interest in safeguarding the educational program and the welfare of students in the public schools:

1. Adherance to state and local curricular
2. Relevancy of materials, methods, and speech to age and maturity of students, state and local regulations and acceptance by experts in the teaching profession
3. Disruption of the speech to the school setting, discipline, and parental concern.

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[53]Sweezy v. New Hamphire, 354 U.S. 234 (1957). See also Epperson v. Arkansas, 393 U.S. 97 (1968) and Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982), and MeLean v. Arkansas Board of Education, 529 F.Supp. 1255 (1982).

In determining state and local curricular in North Carolina, local boards of education have the power and duty to implement the Basic Education Program in accordance with rules adopted by the State Board of Education.[54] This Basic Education Program describes the educational program to be offered to every child in the public schools of North Carolina including those with special needs such as learning disabilities, academically gifted, and discipline and emotional problems.[55] There is a set of competencies by grade level for each curriculum area, a list of textbooks for use in providing the curriculum, a remedial education program, and standards for student performance and promotion.[56] Teachers should keep in mind that although the classroom may be considered a "marketplace of ideas" a teacher's classroom discussion is entitled to constitutional protection as long as that discussion remains within curricular guidelines.[57] Secondly, teachers should be aware of the relationship between the materials

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[54]N.C. Gen. Stat. sec. 115C-47(12).

[55]Ibid., sec. 115C-81(b)(1).

[56]Ibid., sec. 115C-81(b)(2-5).

[57]Gambino v. Fairfax City School Board, 429 F. Supp. 731, 734 (E.D.Va.), aff'd, 564 F.2d 157 (4th Cir. 1977).

and methods used in teaching the course because the teacher's classroom speech must be relevant to the subject matter of the course and to the age level and maturity of the students. An example is Keefe v. Geanakos, 1969,[58] in which a twelfth-grade English teacher assigned a reading assignment of an article from the Atlantic Monthly. The article contained several references to a "vulgar term for an incestuous son."[59] Keefe discussed the word in class and was dismissed after complaints from parents. The First Circuit Court of Appeals ordered reinstatement. The court found the magazine article to be relevant and scholarly rather than obscene. The court stated that "with greatest respect to such parents, their sensibilities are not the full measure of what is proper education."[60]

In contrast, a North Carolina teacher[61] was demoted to position of tutor for intercepting a note circulating among her elementary students, for reading the note to the students, and explaining three vulgar colloquialisms to her class. She explained that the meanings were not obscene

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[58] Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969).

[59] Ibid., p. 361.

[60] Ibid. p. 363.

[61] Frison v. Franklin County Board of Education, 596 F.2d 1192 (4th Cir. 1979).See N.C. Gen. Stat. sec. 115C-307(b).

when used in a different context. The Fourth Circuit Court of Appeals upheld the demotion in light of the state statute which designates "encouraging morality" as one of the teacher's duties.[62]

Other courts have recognized the right of schools to dismiss teachers for similar conduct. In Mailloux v. Kiley,[63] an eleventh-grade English teacher in Massachusetts wrote a socially unacceptable word of sexual meaning on the chalkboard during a discussion of taboo words.

This time the First Circuit reemphasized that teachers did not have a license to say or write in class whatever they choose. The court also recognized the right to suspend or discharge a teacher who insisted in teaching in a manner that is not supported by the preponderant opinion of the teaching profession, although the higher court noted that each case must be examined separately based on age, objective of the lesson, and context and manner of presentation. The court held for the teacher because the school failed to give proper notice.[64]

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[62]Ibid.

[63]323 F. Supp. 1387 (D. Mass.), aff'd, 448 F.2d 1242 (1st Cir. 1971).

[64]Ibid.

A third guideline used by the courts in balancing the teacher's interests against school interests is whether the speech, conduct, or material substantially disrupts the school or discipline. This test was applied in the dismissal of another high-school English instructor.[65] Parducci, the teacher, had assigned a short story by Kurt Vonnegut that parent and school officials found offensive. They construed the story to encourage "the killing off of elderly people and free sex."[66] In this case, the teacher had refused a request from her superiors to stop using the book. The court overturned the dismissal because the material had no disturbing effect on the class.

Another factor to consider concerning school disruption is citizen and parental influence on school board decisions concerning curricula selection, methods, and materials used by teachers. Parental complaints were factors in the Keefe and Parducci cases, although they were unsuccessful. A North Carolina case, Moore v. Gaston County Board of Education,[67] in the Western District of North Carolina, was influenced by parent complaints. Moore, a student teacher was substituting for a

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[65]Parducci v. Rutland, 316 F. Supp. 352, pp. 353-54 (M.D. Ala. 1970).

[66]Ibid.

[67]357 F. Supp. 1037 (1973).

seventh-grade teacher. To encourage discussion in a social studies lesson, he asked the student about the evolution of Hebraic beliefs. The discussion led to questions from the students about evolution. Moore stated that evolution was a valid theory and that the story of Adam and Eve was symbolic to the unity of mankind and not to be taken literally. He revealed that he did not attend church, did not believe in a "soul", heaven, hell, or life after death. Moore was accused by parents of teaching his own religion. The very next day he was terminated from his student teaching assignment. The judge ruled that the school board had violated Moore's free-speech rights as well as his rights to due process and equal protection laws.

The courts have affirmed teacher's rights to procedural and substantive due process rights in these speech cases. In addition, the courts have been influenced by what is recognized as a student's right to intellectual opportunities "free from state propaganda or an excessively one sided curriculum."[68] However, the Parducci court recognized that parents are justified in their concern over social and political values taught to their children.[69] "In some situations, this interest will override a teacher's right to free speech or a student's right to investigate controversial or radical ideas."[70]

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[68]Robert E. Phay, "First Amendment Issues," School Law Cases and Materials (Chapel-Hill, N.C.: The Institute of Government, 1977), Ch. 8, p.30.

[69]Parducci, supra, p.555. [70]Phay, p.30.

Freedom of Religion

Conflicts concerning teachers' freedom of religion or exercise of beliefs have also arisen in the public school setting. To define religious freedom it is necessary to focus on the First Amendment[71] which contains two principles about the relationship between church and state:

1) the "establishment clause" which prohibits the government from setting up an official public church, prohibits public aid or support of religion, and prohibits the government from forcing a person to profess a belief or disbelief in any religion, or for punishing a person because of their beliefs.[72]
2) and the "free exercise clause" which aims to keep religious beliefs and practices voluntary and free from government coercion.[73]

In addition, religion and education are addressed in Articles I and IX of the Constitution of North Carolina.

> All persons have a natural and inalienable right to worship Almighty God according to the desires of their own consciences, and no human authority shall, in any case whatever control or interfere with the rights of conscience.[74]

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[71]U.S. Const. amend. I.

[72]Everson v. Board of Education, 330 U.S. 1 (1947).

[73]School District of Abington Township v. Schempp, 374 U.S. 203, 222-23 (1963).

[74]N.C. Const. art. I, sec. 13.

> Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged...[75]

Yet, this basic principle of "separation of church and state" as it affects public education has been a continual source of litigation.

Religious Activities in Schools

United States Supreme Court cases have prohibited prayer,[76] Bible reading and any devotional activity in the public schools as a required or authorized activity.[77] The use of the Bible or its parts as examples of various types of literature or as supplemental materials in such classes as music, art, and drama is considered permissible, but not as part of the curriculum for the basis of religious beliefs. In addition, religious symbols may be used as a temporary part of a regular instructional program but not to promote or support a religious holiday or ceremony, and only if "such symbols are displayed as an example of the cultural and

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[75]N.C. Const. art. IX, sec.1.

[76]Engle v. Vitale, 370 U.S. 421 (1962).

[77]Abington v. Schempp, 324 U.S. 203 (1963).

religious heritage... and are temporary in nature."[78]

Schools may observe religious holidays through cultural arts activities but not for religious purposes. The Eighth Circuit Court of Appeals [79] reasoned that when an activity serves a primarily secular purpose, the inclusion of religious content does not make it unconstitutional. That includes the holidays of "Christmas, Easter, Passover, Hannukah, St. Valentine's Day, St. Patrick's Day, Thanksgiving, and Halloween." Observances include the singing of Christmas carols which have assumed a cultural significance.

Schools in North Carolina may also observe a moment-of silence each morning. According to N.C. General Statutes, Section 115C-47(29)...local boards of education may adopt policies to authorize the observance of a moment-of-silence at the commencement of the first class of each day in all grades in the public schools. Such a policy shall provide that the teacher in charge of the room in which each class

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[78]Florey v. Sioux Falls Schools District 49-5, 619 F.2d 1311 (8th Cir.), cert. denied, 449 U.S. 987 (1980). Stone v. Graham, 449. U.S. 39(1981) This case struck down a Kentucky statute that required the posting of the Ten Commandments in classrooms. The first four commandments deal with duties to God. Refers to use of religious symbols: crosses, menorahs, crescents, stars of David, creches, symbols of Native American religions.

[79]Florey, supra.

is held may announce that a period of silence not to exceed one minute in duration shall be observed and that during that period silence shall be maintained and no one may engage in any other activities. Such period of silence shall be totally and completely unstructured and free of guidance or influence of any kind from any sources.[80]

It is unclear, however, whether such a moment-of-silence policy would be constitutional under the establishment clause. In contrast to North Carolina's legislation, most court cases have struck down moment-of-silence statutes which included the word "prayer" in the legislation. The United States Supreme Court addressed the question in 1985 in Wallace v. Jaffree.[81]

In 1985, the Third Circuit Court of Appeals struck down a New Jersey statute that required schools to permit a one-minute moment-of-silence at the beginning of each

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[80] Ibid., p. 1320. See William w. Peck, Senior Associate Superintendent, Kay S. Oney, Editor, School Management Advisor, Raleigh; N.C. Department of Public Instruction, Series 4, 1986; See Benjamin B. Sendor, "The Wall Between Preaching and Teaching in the Public Schools", School Law Bulletin, Vol. IV, No. 3., Chapel Hill: Institute of Government, University of N.C., 1983).

[81] Jaffree v. Wallace 105 S.Ct. 2479(1985), Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (N.M. 1983), and Belk v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982).

school day "to be used solely at the discretion of the individual student... for quiet and private contemplation or introspection."[82] The Court used the Lemon test, known as a three-part test, to judge the challenge of the statute based on the establishment clause: (1) the governmental act that bears on religion must have a clearly secular purpose, (2) it may neither advance nor inhibit religion as its primary effect, and (3) it must avoid excessive governmental entanglement with religion, Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court of Appeals found that the New Jersey statute did not improperly advance or inhibit religion, did not unduly entangle school authorities in religious affairs, but it upheld a lower court finding that the legislative history of the statute showed that it had an unlawfully religious purpose.

In addition, Bibles should not be distributed to students on school property.[83] This practice would create the opportunity for all outside groups to distribute their literature through the schools.

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[82]May v. Cooperman, 780 F.2d 240 (3rd Cir. 1985), cert. granted sub nom.

[83]Tudor v. Board of Education, 41 N.J. 31, 100 A.2d 857 (1953), cert.denied, 348 U.S. 816 (1954); Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977).

In looking at the teacher's right to religious beliefs, the courts have acknowledged that a school board may not interfere with a teacher's religious beliefs. Likewise, a teacher may not use this influence and authority to promote a religious cause or belief in the classroom.[84]

Also, a teacher may not eliminate parts of the prescribed curriculum of the school because it conflicts with religious beliefs. In Palmer v. Board of Education,[85] 1972, the Seventh Circuit upheld the dismissal of a nontenured kindergarten teacher who refused to teach curriculum matters concerning the flag, love of country, and observance of patriotic holidays. By refusing to hear the teacher's appeal, the United States Supreme Court allowed the Seventh Circuit's decision to stand. However, the Second Circuit Court of Appeals upheld a teacher's right to refuse to pledge to the flag. The teacher stood silently at attention during classsroom recitation and did not try to influence students to follow her example. Her conduct was not disruptive. The court distinguished this case, Russo v. Central School District,

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[84]LoRocca v. Board of Education of Rye City School District, 406 N.Y.S. 2d 348 (App. Div. 1978).

[85]603 F.2d 1271, 1274 (7th Cir. 1979), cert. denied 444 U.S. 1026, 100 S.Ct. 689 (1980).

No. 1[86], 1972, from Palmer because Russo's job was to teach art, not to teach patriotism to young children. Russo had a right to remain silent when faced with an illegitimate demand.

Religious Garb

While courts have attempted to insure that a teacher's religious beliefs do not affect the content of the instruction, religious clothing and symbols also have some potential for indoctrination. North Carolina courts have not addressed the issue, and courts throughout the country have not reached a consensus on religious apparel or symbols. Some courts have ruled that teachers may wear religious clothing or symbols unless prohibited by a statute or regulation and as long as they do not inject personal religious views into their teaching.[87]

A New Mexico Court ruled that a teacher's religious clothing provided a subtle but effective form of religious indoctrination because of her daily presence in the classroom.

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[86] 469 F.2d 623, 634 (2d Cir. 1972), cert.denied, 411 U.S. 932, 92 S.Ct. 1899 (1973).

[87] O'Connor v. Hendrick, 184 N.Y. 421, 77 N.E. 612 (1906) State regulation prohibited teachers from wearing religious apparel was upheld. See also Gerhardt v. Hied, 66 N.D. 444, 267 N.W. 127 (1936); Rawlings v. Butler, 290 S.W.2d 801 (Ky. Ct. App. 1956); Moore v. Board of Education, 4 Ohio Misc. 257, 33 Ohio Op. 2d 406, 212 N.E.2d 833 (1965).

In 1986, an Oregon special education teacher, Janet Cooper, became a Sikh and donned white clothes and a white turban and wore them while teaching her sixth and eighth grade classes. Although the teacher was warned not to wear her garb, she continued to do so anyway. The Oregon Supreme Court upheld the revocation of her teaching certificate because her attire did not help in achieving the purpose of maintaining religious freedom and neutrality in the public schools.[88]

Leave for Religious Reasons

Both the free exercise clause and Title VII of the Civil Rights Act of 1964 require school boards to make reasonable accommodations to employees' religious needs including requests for religious leave. The Civil Rights Act of 1964, 42 U.S.C.A. Section 2000e et seq., prohibits any employer from discriminating against individuals because of religion. The 1972 Amendment concludes that religious observances, practices, and beliefs must be accommodated unless the employer is unable to reasonably

[88] Cooper v. Eugene School District. No. 4J, 723 P.2d 298 (Or. 1986).

accommodate the employee without undue hardship on the employer's business. In TransWorld Airlines v. Hardison,[89] the Court ruled undue hardship for TWA to give an employee Saturdays off because it resulted in more than a de minimis (insignificant) cost to the employer.

In North Carolina, the North Carolina Administrative Code,[90] provides that "the employee may be absent for no more than two days in a school year due to bona fide religious holidays which are not scheduled as vacation days or holidays in the school calendar. The superintendent must approve these absences in advance and the employee must make up the time missed." Otherwise, such absences, approved in advance by the superintendent, are without pay.

In determining the scope of a teacher's right to religious leave, each case must be considered individually. Courts usually consider the difficulty and expense in qualified substitutes, the number of leave days requested, whether the days requested are paid or unpaid leave, and the number of days of leave available for secular purposes such as attending other meetings. The following cases provide examples of how the courts have used these factors to determine if a teacher's leave incurs undue hardship for a school system.

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[89] 432 U.S. 63 (1977). [90] 16 NCAC 6C .0404(9) (1986).

In Rankin v. Commission on Professional Competence,[91] a California teacher was dismissed for taking five to ten days each year without pay to observe the Worldwide Church of God holidays. The court ruled for the teacher because he had prepared detailed lesson plans, he had not exceeded the number of days that California law allowed for illness or personal necessity, and other school systems permitted such leave. In examining the circumstances of this case the court ruled that the board would not have incurred undue hardship by honoring the teacher's leave.

In Wangness v. Watertown School District No. 14-4, etc.,[92] another member of the Worldwide Church of God requested seven days leave without pay to observe a religious festival. The school board dismissed the teacher after he attended the festival even though his request was denied. In this case, the court ruled no undue hardship because a guidance counselor substituted for the teacher, lesson plans and carpentry models were prepared, and there were no complaints about the performance of the counselor. The school system had at least one month's notice to obtain a substitute teacher but only reviewed a list of substitutes and made no attempt to obtain one.

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[91] 593 P.2d 852 (1979).

[92] 541 F. Supp. 332 (D.S.D. 1982).

The Tenth Court of Appeals reviewed a challenge to a school district's leave policy in Pinsker v. Joint District No. 28J of Adams and Arapahoe Counties.[93] The policy gave teachers two days of paid, special leave for observing their religious holidays. This policy forced Pinsker, a Jewish teacher, to take additional unpaid days to accommodate his holidays. The court found that the policy neither jeopardized the teacher's job nor the observance of his religious holidays. Pinsker argued that Title VII required the school board to develop a leave policy that would be less burdensome to his religious practice. The basis of the claim was that the school calendar accommodated Christian teachers' religious holidays so that they need not take unpaid leave days. The court determined that the school board could not develop a policy that would accommodate all the religious holiday needs of teachers and their "degrees of devotion" to their religion. The board's policy did not unconstitutionally burden Pinsker's First Amendment right to free exercise of religion.

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[93]554 F. Supp. 1049 (D.Colo. 1983).

In Hunterdon Central School v. Hunterdon Central High,[94] the court ruled that a school board could not have a negotiated agreement to allow leave days for religious participation. Such action did not have a secular purpose because it encouraged religion and excluede non-believers.

In a case decided in 1986 by the United States Supreme Court, Ansonia Board of Education v. Philbrook,[95] a high school teacher brought action under Title VII. The school board had a policy of allowing three days of paid leave for religious reasons but would not allow leave for business to be used for religious reasons. Philbrook, the teacher, alleged that this policy conflicted with the beliefs of his church, the Worldwide Church of God. The church prohibited him from working on designated religious holidays which usually amounted to more than three days. Philbrook asked the board to allow him to use the three days of personal leave for business as religious leave or to allow him to pay and supervise a substitute, and to make up the days missed by performing extracurricular responsibilities. The board rejected both proposals. The United State Supreme Court ruled that Title VII requires an employer to make a reasonable accommodation to an employee's religious needs but not to adopt any specific proposal as presented by the

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[94] 174 N.J. Super. 468, 416 A.2d. 980 (1980).

[95] 93 L.E. 2d 305, 107 S.Ct. 367 (1986).

employee. The case was remanded to the federal district court to determine whether the leave provisions offered a reasonable accommodation to Philbrook's needs or whether they discriminated in favor of secular use of "necessary personal business" leave against religious use of such leave. The Court said that when paid leave is provided for all reasons except for religious ones, unpaid leave is not an acceptable accommodation for religious leave. A provision for paid leave "that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free...not to provide the benefit at all...[96]

Although the law regarding requests for paid religious leave is not settled, the Supreme Court's decision in Philbrook suggests that Title VII probably would permit a school board to prohibit employees from taking any paid personal leave. The Court's decision suggests that if a board allows any paid leave, then it must let employees use as much paid leave for religious reasons as it would allow for similar secular purposes. In addition, when boards permit teachers to take a certain number of days of paid leave without limiting the purpose of the leave, it may not prohibit the religious use of such days. If the board uses nondiscriminatory criteria to accommodate employees' religious leave, it can probably require additional religious leave to be unpaid leave.

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[96]Philbrook, supra, p. 316.

Private Life

The constitutional right of privacy is far from being fully defined. While teachers receive protection under the First Amendment which guarantees freedom of speech and expression as well as the Fourth Amendment which guarantees freedom in private affairs from governmental surveillance and intrusion, the courts have recognized the duty of school officials to maintain certain values and standards. Dismissals resulting from unacceptable private conduct are generally based on immorality.[97] The most contested issues have involved the sexual conduct of teachers: unwed pregnancies[98] homosexuality,[99] and other sexual improprieties.[100]

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[97]Faulkner v. New-Bern Craven County Board of Education, 311 N.C. 42, 316 S.E.2d 281 (1984). N.C. Gen. Stat. sec. 115C-325(e)(1)(b).

[98]Carey v. Population Services International, 431 U.S. 678, 686 (1977); Harvey v. Young Women's Christian Association, 533 F. Supp. 949(W.D.N.C. 1982); Doslter v. Wahlert High School, 483 F. Supp. 266, 271 (N.D. Iowa 1980); Avery v. Homewood City Board of Education, 674 F.2d 337 (5th Cir. 1982); Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975). The court rejected the board's argument that unwed pregnancy is prima facie proof of immorality.

[99]Gaylord v. Tacoma School District No.10, 88 Wash. 2d 286, 559 P.2d 1340.

[100]Weissman v. Board of Education of Jefferson County School District No.R-1, 190 Colo. 414, 547 P.2d 1267 (1976); Lile v. Hancock Place School District, 701 S.W.2d 500 (Mo. Ct. App. 1985).

In North Carolina the courts have not defined immorality but have based immorality dismissal cases on the ground of "neglect of duty" brought about by the teacher's immorality. A charge of immorality must be shown to affect the classroom adversely;[101] therefore, to support a dismissal charge, the board must show a connection between the unacceptable conduct and teaching effectiveness in the classroom. Courts generally try to balance the teacher's right to privacy against the school's interest by using two tests:

1. Does the teacher's conduct affect classroom performance or cause a harmful effect on students?[102] or

2. Has the conduct become so notorious in the community as to significantly impair the teacher's ability to perform teaching duties?[103]

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[101] Frison v. Franklin County Board of Education, 596 F.2d 1192 (4th Circ. 1979); Thompson v. Wake County Board of Education, 31 N.C. App. 401, 230 S.E.2d 538 (1977); N.C. Gen. Stat. sec. 115C-325(e)(d). Faulkner v. New-Bern-Craven Board of Education, 311 N.C. (1984). Also see Dismissal for Cause, Chapter III, this document.

[102] Burrow v. Randolph County Board of Education, 61 N.C. App. 619, S.E.2d (1983).

[103] Sullivan v. Meade Indep. School District No. 1, 530 F. 2d 799 (S.D. 1976).

An example of how the courts balance the teacher's performance and conduct against harmful effects on students is the seriousness of sexual involvement with students. In New York, a tenured teacher-guidance counselor[104] was discovered to be having an affair with an eighteen-year-old who had graduated from his school two months prior to the discovery. His involvement with the minor female student resulted in dismissal. Another male teacher admitted to getting a female student pregnant and was dismissed.[105]

In Weissman v. Board of Education of Jefferson County School District in Colorado,[106] 1976, the court upheld the dismissal of a tenured male teacher for tickling and touching female students and making sexual remarks while on a field trip with the students.

The circumstances alone do not always support dismissal as evidenced in a case from the Eighth Circuit. A middle-aged, divorced high school teacher housed male guests in her one-bedroom apartment because hotel accomodations were unavailable. The guests were friends of her sons. The school board noted a strong potential for

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[104] Jerry v. Board of Education, 35 N.Y. 2d 535, 324 N.E. 2d 106 (1974).

[105] Denton v. South Kitsap School District, No. 402, 516 P.2d 1080 (1973).

[106] 190 Colo. 414, 547 P.2d 7267 (1976)

sexual misconduct and dismissed the teacher. The court found no evidence that the teacher's conduct resulted in an adverse reaction from the community or her high school students.[107]

Yet, a South Dakota teacher lived with a man out-of-wedlock in a mobile home that she rented from the board of education. School officials encouraged her to ask her boyfriend to move out, but she refused. Eventually, parents refused to send students to her class and the school board dismissed her because her notorious conduct impaired her effectiveness as a teacher.[108]

School boards have frequently associated out-of-wedlock pregnancies with immorality but the connection between a charge of immorality and fitness to teach must establish a detrimental effect on students in the classroom.[109] To simply dismiss an unmarried teacher

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[107]Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973).

[108]Sullivan v. Meade, supra.

[109]Drake v. Covington County Board of Education, 371 F.Supp. 974, (M.D. Ala. 1974); Brown v. Bathke, 416 F. Supp. 1194, (D. Neb. 1976), rev'd on procedural grounds, 566 F.2d 588 (8th Cir).

because she becomes pregnant would be a "prima facie" violation of Title VII and Title IX.[110]

Also, the U.S. Supreme Court has stated:

> If the right to pregnancy means anything, it is the right of the individual married or single, to be free of unwarranted governmental intrusion into the matters affecting a person as the decision whether to bear or beget a child.[111]

The Court in Cleveland Board of Education v. La Fleur,[112] determined that the right to bear a child is one of the "basic civil rights of man", a liberty right protected by the Due Process clause of the Fourteenth Amendment.

Federal district courts in North Carolina and Virginia have had to reconsider their actions against unwed, pregnant teachers. The following two cases are examples:

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[110]The EEOC regulations implementing Title IX state: "A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery there from." (45 C.F.R. sec. 86 57(b)) The Pregnancy Discrimination Act (Pub. L. 95-955) 1978, is an amendment to Title VII of the Civil Rights Acts. The basic principle of the Act is that all women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability to work.

[111]Carey v. Population Services International, 431 U.S. 678, 686 (1977).

[112]414 U.S. 632, 640 (1979).

In Stokes County, North Carolina, 1977, a tenured teacher was dismissed for giving birth to a child out-of-wedlock. The board adopted a resolution requiring the dismissal of any unwed teacher with a child. After the teacher brought suit in federal district court the teacher was reinstated with payment of back wages.[113] In a district court in Virginia a pregnant teacher was given the choice of getting married, taking a leave of absence, or resigning. The federal court ruled that the teacher's right to privacy and her statutory rights under Title VII were violated because she was forced to take a leave of absence simply because she was single and pregnant.[114]

There is considerable controversy over the homosexual teacher's right to privacy. In Gaylord v. Tacoma,[115] 1977, the court ruled that a high school teacher's admission of homosexuality implied illegal as well as immoral acts and that he could no longer serve as an adequate role model for high school students.

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[113] Morehead v. Stokes County Board of Education, U.S. Fed. Dist. Ct. (M.D.N.C. 1977).

[114] Ponton v. Newport News School Board, 632 F. Supp. 1056 (E.D. Va. 1986).

[115] 88 Wash. 2d 286, 559 P.2d. 1340.

In another homosexual case, Morrison v. State Board of Education,[116] 1969, the California state board revoked a teacher's credentials because he had privately engaged in a brief homosexual relationship with a fellow teacher. The court held that the board must show a nexus between the teacher's conduct and his fitness to teach, otherwise, school officials might be inclined to investigate the private life of every teacher, no matter how exemplary his classroom performance.[117]

The court concluded that classroom performance may be affected by adverse reactions of other teachers and parents as well as a disruption of effective discipline; therefore, potential harm rather than actual harm may render the teacher as unfit to teach.[118]

In summary, teacher's freedoms have been given a high degree of protection by the courts, but within reasonable limits. Teachers serve as role models for students as emphasized in Bethel v. Fraser, supra. Therefore, it is reasonable to conclude that out-of-school conduct that damages the teacher's effectiveness or influences the morals of students may result in dismissal.

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[116] Cal. 3d. 214, 82 Cal. Rptr. 175, 461 P.2d 375 (1969).
[117] Ibid., p. 82. [118] Ibid.

Personal Appearance

Mandatory dress and grooming regulations have been challenged under the First Amendment. The United States Supreme Court has not directly addressed personal appearance standards for teachers, but it has upheld the right of public employers to impose reasonable regulations governing the appearance of public employees. In Kelly v. Johnson,[119] 1976, a case involving hair grooming regulations for policemen, a test was established that has been applied to personal appearance cases. The test established that a protected right is deprived, if the regulations concerning appearance being enacted are considered irrational and arbitrary. "The individual challenging the regulation must establish that there is not a rational connection between the regulation...and the ...safety of persons and property."[120] This constitutional test was applied in East Hartford Education Association v. Board of Education,[121] 1977, a case in which a teacher was reprimanded for refusing to wear a tie. Brimley, the teacher, argued that he wanted to achieve closer rapport with his students, and that he was not tied to

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[119] 425 U.S. 238 (1976). [120] Ibid. p. 247.

[121] 562 F.2d 838 (2nd Cir. 1977).

"establishment conformity". He claimed that refusal to wear a tie was "symbolic speech" or conduct which deserved protection from the First Amendment. The court reasoned that as "conduct becomes less and less like 'pure speech', the showing of governmental interest required for its regulation is progressively lessened."[122] Also, the court recognized the unique role of the teacher in maintaining classroom discipline and the need for school boards to require teachers to dress in a professional manner. In concluding its discussion on the First Amendment, the court stated that Brimley's speech claim was "so unsubstantial as to border on the frivolous."[123]

In considering hair, beards, and mustaches, the courts have generally ruled that such appearances do not disrupt the educational process,[124] although the Fifth Circuit Court upheld a school board's rule prohibiting employees from wearing beards in the interest of hygiene and uniformity.[125]

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[122] Ibid., p. 858.

[123] Ibid., p. 860. 863.

[124] Conrad v. Goolsby, 350 F.Supp. 713 (N.D. Miss. 1972).

[125] Domico v. Rapides Parish School Board, 675 F.2d 100 (5th Cir. 1982).

Other courts have upheld dress regulations that are neither irrational nor unrelated to legitimate school concerns.[126] The First Circuit Court upheld the dismissal of a Massachusetts' teacher for wearing very short skirts.[127] Although the teacher's skirts caused no adverse effect on her students and the length was similar to that worn by other professional young women, the teacher could not show that the school board's requirement was so irrational that it lacked good faith in its actions.[128]

Specific dress requirements such as the wearing of neckties or the length of skirts may vary from jurisdiction to jurisdiction.

Loyalty

Teachers have a right to associate with and join groups[129] including teachers' associations and unions,[130] but involvement with a subversive organization has been a

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[126]Tardiff v. Quinn, 545 F.2d 761 (1st Cir. 1976).

[127]Ibid. [128]Ibid. [129]U.S. Const. amend. I.

[130] McLauglin v. Tilendis 389 F.2d 287, 288 (7th Cir., 1968).

ground for dismissal in some states.[131] Loyalty oaths have been used as a way of enforcing allegiance. The United States Supreme Court has upheld the states' concern in safeguarding public services, but loyalty oaths or dismissal statutes concerning loyalty must not be overly broad or vague.[132] Furthermore, individual members cannot be held responsible for positions or acts of a group when they are unaware of the actions or did not participate. These rights were confirmed in Wieman v. Updegraff, 1953, by the U.S. Supreme Court which said that "...public employees could not be fired solely on organization membership, regardless of their knowledge concerning the organizations"[133]

Another U.S. Supreme Court decision challenged an Arkansas law that required teachers to file annual affidavits listing organizational memberships and contributions for the past five years. As a result, teachers were discouraged from joining or contributing to any association. The Court held the requirement to be

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[131] Wieman. v. Updegraff, 344 U.S. 183 (1953).

[132] Elfbrant v. Russell, 384 U.S. 11 (1966); Bagett v. Bullitt, 377 U.S. 260 (1964); Cramp v. Board of Pub. Instr., 368 U.S. 278 (1961); Weiman v. Updegraff, 344 U.S. 183 (1952).

[133] Wieman, supra.

unconstitutional. It violated the right of teachers' freedom of association.[134]

In <u>Keyishian v. New York Board of Regents</u>,[135] 1967, the U. S. Supreme Court struck down as constitutionally vague a New York statute that made membership in a subversive organization "prima facie" evidence of dismissal from employment in public schools and colleges. <u>Keyishian</u> made it clear that the state must prove or have evidence of illegal intent on the part of a member of the organization rather than guilt-by-association methods.[136]

The Supreme Court went further in protecting the freedom to associate by establishing some limitations on loyalty oaths required of teachers. The Court has declared as unconstitutional any loyalty oaths that require an employee to swear that he is not a member of the Communist Party, or a member of any group that believes in the overthrow of government, or that he will not lend aid or support to a subversive group. Such statements as "I swear I will support federal and state constitutions" were upheld by the Court in <u>Connell v. Higginbotham</u>, 1971.[137]

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[134] Shelton v. Tucker, 364 U.S. 479 (1960).

[135] 385 M.S. 589, 87 S.Ct. 675, 1967

[136] Ibid.

[137] 403 U.S. 207, 91 S.Ct. 1772, See Knight v. Board of Regents, 269 F.Supp. 339 (S.D.N.Y. 1967), aff'd, 390 U.S. 36 (1968).

North Carolina teachers are not required by statutes to take loyalty oaths, but N.C. General Statutes, section 115C-325(e)(1)(h) specify that "Advocating the overthrow of the government of the United States or of the State of North Carolina by force, violence, or other unlawful means..." is one of the grounds for dismissal. Massachusetts has a loyalty oath with similar provisions which was held constitutionally permissible in Cole v. Richardson,[138] 1972.

Self-Incrimination

In addition to protecting a teacher's right to speak, the courts have recognized that teachers have the right to remain silent and exercise their Fifth Amendment privilege[139] against self-incrimination.[140]

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[138] 405 U.S. 676 (1972).

[139] The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself," ...also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future proceedings.

[140] Slochower v. Board of Higher Education of N.Y.C., 350 U.S. 551 (1956).

In Sweezy v. New Hampshire,[141] 1957, an attempt was made to force a state university professor to answer questions regarding his classroom lectures and his knowledge of allegedly subversive organizations. The Court declared this action as an unconstitutional denial of equal protection.[142] The Court emphasized ..."that teachers and students must always remain free to inquire, to study, to evaluate, to gain... new understanding; otherwise, our civilization will stagnate and die."[143]

In a similar case,[144] Professor Slochower was presumed to be disloyal and was dismissed for invoking the Fifth Amendment rather than answer a question before a congressional committee about his official conduct at Brooklyn College. The U.S. Supreme Court held the dismissal as unconstitutional.[145]

In contrast, the U.S. Supreme Court held in Beilan v. Board of Education,[146] that a teacher could be dismissed

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[141] 354 U.S. 234 (1957).

[142] Ibid., p. 250. [143] Ibid.

[144] Slochower, supra.

[145] Ibid.

[146] Beilan v. Board of Education, 357 U.S. 399, 78 S.Ct. 1317 (1958).

for refusing to answer questions by his superintendent that would confirm or refute information about his involvement with the Communist Political Association in 1944. Beilan was dismissed for incompetency and insubordination rather than disloyalty. He was warned that his refusal to answer questions might lead to dismissal. The Pennsylvania Supreme Court equated Beilan's refusal to answer the questions of the superintendent with "statutory incompetency."[148] His conduct was considered "unbecoming a teacher."[149] The questions that Professor Slochower refused to answer were admittedly asked for a purpose unrelated to his college functions.

Thus, school authorities may inquire into relevant activities of a teacher, and the teacher must answer questions. If any action is taken, it will be based on the answers. This raises entirely different issues such as disciplinary actions against teachers.[150]

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[147]Beilan, supra, p. 409. [148]Ibid, p. 406 n. 8.

[149]Slochower, supra, p. 558.

[150]E. Edmund Reutter, Jr., and Robert R. Hamilton, The Law of Public Education (New York: The Foundation Press, Inc., 1976), p. 428.

Discrimination in Employment

Introduction

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws"[151] which basically means that persons similarly situated be treated in like manner. The Constitution of North Carolina provides the same basic equal protection in the Declaration of Rights.[152]

In addition to the Equal Protection Clause, there are various Federal Statutes and court decisions which prohibit school boards as employers in making employment decisions and practices that discriminate against teachers due to race, sex, age, handicapping conditions, and religion which has been previously discussed.

Statutes and court decisions as applied to discrimination in employment will be discussed in this section.

Race Discrimination

Since Brown v. Board of Education,[153] the courts have decided numerous employee discrimination cases involving race. Most of these cases have been brought under Protection Clause of the Fourteenth Amendment, Title VI and Title VII of the Civil Rights Act of 1964.

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[151] U.S. Const. amendment XIV. [152] N.C. Const. art. I, sec. 15.
[153] 347 U.S. 483, 74 S.Ct. 686 (1954).

Title VII. Title VII of the Civil Rights Act of 1964, which has been applied to schools since 1972, forbids employers from discriminating "against any individual with respect to his compensation, terms, conditions or privileges of employment because of his race, color, religion, sex, or national origin,..."[154] The "terms, conditions, or privileges of employment," cover a broad area of employer actions: hiring, firing, promotions, demotions, transfers, discipline, working conditions, time off for religious holidays (see section on religion as previously discussed), health insurance and benefits, and working conditions. An employer who discriminates based on race, color, religion, sex, or national origin while performing employment actions may be liable under Title VII.[155] In job discrimination, Title VII is most often used to challenge discrimination in teacher and administrator employment. For instance, a black plaintiff in Stallworth v. Shuler,[156] 1985, brought suit in Florida under Title VII because the school board had consistently appointed less

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[154] 42 U.S.C. sec. 2000e-2 (1972).

[155] Robert P. Joyce, "Employment Discrimination: Race, Sex, Age, and Handicap," Education Law in North Carolina (Chapel Hill: Institute of Government, 1987), Ch.30, pp.1-25.

[156] 777 F.2d 1431 (11th Cir. 1985).

qualified white persons to administrative positions and principalships. The Eleventh Circuit Court held that race was the motivating factor for Stallworth's failure to be promoted. The court awarded Stallworth with back pay measured by the salary of a high school principal from two years prior to filing his complaint to his acceptance of a high school principalship. He was awarded attorney's fees and compensatory damages of $100,000. In addition, punitive damages of $1000 were awarded against the superintendent for conducting sham selection procedures and changing job requirements. Punitive damages may not be assessed against the school board because such damages only punish the taxpayers. The wrongdoer, in this case the superintendent, may be assessed punitive damages if his acts knowingly and maliciously deprive others of their civil rights.[157]

Also, the Supreme Court has pronounced two methods for plaintiffs to pursue discrimination under Title VII,"disparate treatment" and "disparate impact". Stallworth's discrimination claim was brought as a "<u>disparate treatment</u> issue" which means that the plaintiff must prove that the employer treated him less favorably than others because of his race.[158] In some cases, proof of discrimination may be inferred by differences in treatment.

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[157]City of Newport v. Facts Concerts, Inc. 453 U.S. 247, 101 S.Ct. 2748 (1981).

[158]Stallworth, supra, p. 1432.

Claims of "disparate impact" involve employment practices that are neutral in their treatment of different groups such as in race, but their impact falls more heavily on one group than another. Proof is required under "disparate treatment" but not under "disparate impact."[159] For instance, the Mobile Alabama County school system used a policy of non-reemployment of nontenured teachers who failed to score 500 on the Common Section of the National Teacher's Exam. Although the policy applied to both blacks and whites, it was racially neutral on its face, but the court ruled for the teachers on the basis of "disparate impact" because two-thirds of all teachers nonrenewed were black.

Other examples of employment discrimination cases include Singleton v. Jackson School District[160] 1970, and U.S. v. Montgomery County Board of Education,[161] 1969. The United States Supreme Court upheld a lower court order requiring a school board to employ more black teachers in order to increase their number so that the black-white teacher ratio was the same as the racial percentage of the students in the school system.

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[159]See Alexander and Alexander, American Public School Laws, p. 629, citing Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843 (1977).

[160]419 F.2d 1211 (5th Cir. 1970) cert.denied, 396 U.S. 1032 (1970).

[161]395 U.S. 225 (1969).

In North Carolina Teachers' Association v. Asheboro City Board of Education,[162] 1968, the Fourth Circuit ruled that if displaced white teachers are given preference over new candidates for job openings, displaced black teachers must be given the same preference. When there is a vacancy, the position must first be offered to a person of the same race, color, or national origin as the previous employee;[163] otherwise the board must justify its actions and the displaced person is entitled to damages.[164]

Equal Protection. "The equal protection standard developed in the school desegregation cases prohibits discrimination that can be ultimately traced to a racially motivated purpose".[165] If the discriminatory action was the result of a racially motivated purpose, then the school bears the burden of showing that it had a compelling governmental reason to act as it did.[166] In a North Carolina

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[162] 393 F.2d 736 (4th Cir. 1968).

[163] Singleton v. Jackson, 419 F.2d 1211 (5th Cir. 1970), cert.denied, 396 U.S. 1032 (1970).

[164] Wall v. Stanley County Board of Education, 378 F.2d 275 (4th Cir. 1967).

[165] Alexander and Alexander, Amer. Public School Laws, p. 626 citing Keyes v. School District No. 1, 413 U.S. 189, 93 S.Ct. 2686 (1973).

[166] McGowan v. Maryland, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1105 (1961).

case, Evans v. Harnett County Board of Education,[167] in 1981, the court shifted the burden to the school board. The school system had been desegregated for seven years, but the evidence showed the pattern persisted of assigning white principals to formerly all white schools and black principals to formerly black schools.

Another example involves a school system with a history of racial segregation which dismissed a large number of black teachers as a result of the desegregation plan for its schools. There may be an opinion that the black teachers' dismissals were racially motivated. The Fourth Circuit Court has ruled that in such circumstances the burden shifts to the school system to show by clear and convincing evidence that a teacher was not dismissed for racial reasons.[168]

Although the equal protection standard allows courts to order school districts to reassign black and white teachers to schools for the purpose of eliminating desegregation, North Carolina has passed the following legislation to desegregate faculties and staffs:

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[167] 684 F.2d 304, 307 (4th Cir. 1982).

[168] Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 192 (4th Cir. 1966)(en banc); N.C. Teachers' Association v. Asheboro City Board of Education, 393 F.2d 736, 743 (4th Cir. 1968)(en banc).

> There is an affirmative duty on the part of the North Carolina State School Board, as well as on the part of other school officials throughout the state, to desegregate staffs and faculties. This is a constitutional duty apart form any federal regulatory scheme.[169]

Reverse Discrimination. Reverse discrimination is defined as "prejudice or bias exercised against a person or class for the purpose of correcting a pattern of discrimination against another person or class."[170]

Reverse discrimination has been challenged in several United States Supreme Court cases. In the University of California v. Bakke,[171] 1978, minority candidates who did not qualify for admission into medical school through the regular process could apply for one of sixteen reserved positions for disadvantaged minority students. Bakke, a white candidate, challenged the admission process because he was only allowed to apply through the regular admission program. The Court held that the admission program had established quotas which were impermissible. Quotas may be used if a history of past discrimination exists and racial

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[169]N.C. Gen. Stat. sec. 115C-1-n.3, p.15. Quoted from Godwin v. Johnson. Also, the equal protection clause allows courts to order school district to reassign black and white teachers to schools. Godwin v. Johnson County Board of Education 301 F.Supp. 1339 (E.D.N.C. 1969).

[170]Blacks, Law Dictionary, Abridged 5th Edition p.685.

[171]483 U.S. 265, 98 S.Ct. 2733 (1978).

classifications are designed to further a remedial purpose and to be related to the achievement of such a governmental objective. In the Bakke case, the University was attempting to attain diversity of ethnic groups in the medical program by giving candidates special consideration. The Court determined that race could carry a greater influence on admission policies, but it could not be the only factor.

In another case, the United Steelworkers, etc. v. Weber,[172] 1979, the court ruled that Title VII does not prohibit all voluntary, remedial, race conscious affirmative action plans in the private sector. The Court was unwilling to define permissible and impermissible affirmative action plans.

In a school case in the Seventh Circuit, white teachers with seniority were laid off by a school coorporation during reduction-in-force. They brought reverse discrimination action against the school corporation and teachers' union for not laying off minority teachers. The Court of Appeals held that finding of past discrimination supported the affirmative action plan, and the inclusion of no minority lay-off provisions did not unnecessarily hinder the interests of white employees, or violate Title VII, or violate the equal protection clause.[173]

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[172] 443 U.S. 193, 99 S.Ct. 2721 (1971).

[173] Britton v. South Bend Community School Corporation, et al. 775 Federal Reporter, 2d, 794 (7th Cir. 1985).

In a 1986 case, the United States Supreme Court did not find past discrimination in Wygant v. Jackson Board of Education.[174] Ms. Wygant was laid off during reduction-in-force while a number of less-senior black teachers were not. A provision in the collective bargaining agreement called for layoffs by seniority with the exception that the percentage of minority layoffs could not be greater than the percentage of minority teachers employed at the time. The lower courts did not find the policy in violation of Title VII and neither did the Supreme Court, but the Court did find the policy to be unconstitutional. It violated the equal protection clause of the Fourteenth Amendment because of the way the rules of classification were applied in denying employment. To be constitutional, the court determined that layoffs must be narrowly tailored to correct proven past discrimination. The Court also rejected the argument that black role models were necessary for black students as a justification for the racial classification. Creating more discrimination does not alleviate past discrimination. This decision also has implications for hiring policies. Will such policies also have to prove past discrimination in order to justify voluntary affirmative action plans? The future of voluntary affirmative action plans is uncertain at this time.

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[174]106 S.Ct. 1842, 90 L.Ed.2d 260 (1986).

Testing Teachers. North Carolina, along with other states, requires prospective teachers to be tested before they are issued a certificate. North Carolina has adopted the National Teachers Exam(NTE) for use in its certification program. The NTE is designed to measure whether the candidate has the minimum amount of knowledge that a teacher should have in order to teach. Blacks have challenged the use of the test in determining certification, pay scales, promotion, and transfers. Their arguments are that the test promotes bias and fails to measure teacher competence.[175] Challenges to the use of the NTE for employment decisions are based on alleged violations of the equal protection clause or due process clause of the Fourteenth Amendment, or violations of Title VII. Although the United States Supreme Court has not ruled on the validity of the NTE or on any case directly related to testing teachers, other cases provide guidelines on how the tests may be used to make employment decisions.

In Griggs v. Duke Power Co.,[176] 1971, the United States Supreme Court determined that employment standards and tests which are not significantly related to job performance violate Title VII of the Civil Rights Act of 1964. The Court held Duke Power liable under Title VII for

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[175] United States v. North Carolina,400 F.Supp 343 (E.D.N.C. 1975) vacated, 425 F.Supp. 789 (E.D.N.C. 1977).

[176] 401 U.S. 424, 91 S.Ct. 849 (1971).

its rule that applicants have a high school diploma to be hired. Although the requirement was "facially neutral," its intent was to screen out blacks. Duke Power could not show that its hiring standards were job-related.

Another U.S. Supreme Court case, Washington v. Davis,[177] 1976, held that testing procedures may have a rationally disproportionate impact on blacks and not unfairly discriminate against them as long as there is no motive or intent to discriminate. In the Washington case, prospective police officers were required to take a written personnel test to determine whether applicants had acquired a particular level of verbal skill. The test excluded a disproportionatlely high number of black applicants. Basing its decision on the Fourteenth Amendment rather than Title VII, the Supreme Court upheld the practice of using a pre-employment test which compared the applicant's performance on the pre-employment test with performance in job training rather that with actual job performance. The court found success in training to be a good indicator of success on the job.

Similarly, the use of the NTE has been found to be a rational, job-related test for certification and pay

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[177] 426 U.S. 229, 251 (1976), 96 S.Ct. 2040 (1976).

purposes in South Carolina. South Carolina could correlate scores on the test with performance in teacher training.[178]

In 1981, the Fourth Circuit Court upheld the use of the NTE for the purpose of granting teacher pay raises in order to improve the school district by attracting the best qualified teachers. The testing service recommended the use of the NTE as a measure of academic preparation for teaching, not the act of teaching.[179]

North Carolina requires a minimum score of 950 on the NTE as a prerequisite to certification. In 1975, a North Carolina federal court declared the use of score to eliminate teacher candidates as unconstitutional. In 1976, after the Washington decision, the North Carolina federal court vacated its original judgment. When the court reheard the case, it held that the state had not validated the test and could not provide evidence that the cut-off score of 950 distinguished between competent and incompetent teachers.

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[178] United States v. South Carolina, 445 F. Supp. 1094, (D.S.C. 1977), affirmed, 434 U.S. 1026, 98 S.Ct. 756 (1978).

[179] Newman v. Crews, 651 F.2d 222 (4th Cir. 1981).

In a court sanctioned settlement, North Carolina was allowed to require new applicants to achieve a minimum NTE score. In addition, the state was also required to provide remedial programs for those applicants who failed the exam.[180]

North Carolina does not use tests to make employment decisions _after_ hiring; therefore, due process violations do not occur in North Carolina. Due process rights are afforded to teachers with a property interest which exists only after being hired. In states where tests for post-hiring employment decisions are practiced, teachers must be told in advance that the tests will be used in making promotions. Also, procedures must be designed to provide an opportunity for a hearing to review the possibility of errors in the testing procedures.[181]

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[180] United States v. North Carolina, 400 F.Supp. 343 (E.D.N.C. 1975), vacated, 425 F.Supp. 789 (E.D.N.C. 1977). See Julia M. Shovelin, "Testing of Teachers", _Education Law in North Carolina_ (Chapel Hill, N.C.: Institute of Government, 1987), p. 10-13.

[181] Lines, "Teacher Competency Testing: A Review of Legal Considerations", 23 _Education Law Reporter_, p. 811, supra note 63, p. 826 (1985).

Sex Discrimination

Sex-based classifications may violate Title VII of the Civil Rights Act of 1964 which prohibits school employers from discriminating against employees on the basis of sex. In establishing a claim under Title VII a teacher must prove by a preponderance of evidence a prima facie case of employment discrimination. It then becomes the board's burden to explain clearly the nondiscriminatory reasons for its actions. If the board is successful, the teacher must have the opportunity to prove by a preponderance of evidence that the board's reason was not true or merely a "pretext" for discrimination.[182]

The Supreme Court has rejected the idea that Title VII obligates an employer to prove by objective evidence that the person hired was more qualified than the plaintiff. Neither is the employer required to hire the minority or the female applicant whenever that person's objective qualifications are equal to those of a white male applicant. The employer may choose among equally qualified

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[182] 42 U.S.C.A. sec. 2000e-e-2. See also, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); See Board of Trustees of Keene State College v. Sweeney, 439 U.S. 23 (1979).

candidates as long as the decision is not based on unlawful criteria.[183] An example of unlawful criteria is found in the recent case, Phyliss A. Anderson v. City of Bessemer City, North Carolina,[184] 1985, in which the United States Supreme Court overruled the Fourth Circuit Court of Appeals which determined that the Western District Court of North Carolina had erred in its finding of sex discrimination. A thirty-nine year old school teacher was rejected for a job managing the city's recreational facilities and programs. A twenty-four year old male who had recently graduated from college and had a degree in physical education was selected for the position. The trial court determined that the teacher did not receive the position because of her sex. The testimony of one male member implied that it would be difficult for a woman to handle the job, and he would not want his wife in the position. In addition, she was asked how her husband would feel if she had the job. None of the male applicants were asked these questions. Although the duties of the position were not precisely delineated, the director would develop recreational programs and serve the city's residents. The teacher was qualified for these responsibilities because of her education, her teaching experience, and her knowledge of the community.

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[183] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[184] 470 U.S. 564, 565 (1985).

In addition to Title VII, lawsuits challenging sex discrimination practices have been filed under the Equal Protection Clause of the Fourteenth Amendment, The Pregnancy Discrimination Act of 1978, the Equal Pay Act of 1963, and Title IX of the Education Amendments. Teachers have challenged unequal treatment based on sex in such employment practices as hiring and promotion,[185] equal pay,[186] maternity leave and benefits,[187] age,[188] and handicapping conditions.[189]

In Froneberger v. Yadkin County Schools, supra, a male teacher brought suit in the Middle District Court of North Carolina against the school board and the personnel director after he was rejected for a position in ninth grade general science. He claimed sex and age discrimination because the board selected two female applicants both under the age of twenty-three. By

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[185] Froneberger v. Yakdin County Schools, 630 F. Supp. 291 (1986), and Springfield Township v. Knoll, 105 S.Ct. 2065 (1985).

[186] Jacobs v. College of William and Mary, 517 F.Supp. 791 (E.D. Va. 1980).

[187] Nashville Gas Co. v. Satty, 434 U.S. 136(1977); California Federal Savings and Loan v. Guerra, 93 L.Ed.2d 613 (1987).

[188] Palmer v. Ticcione, 576 F.2d 459 (2d Cir. 1978); EEOC v. Wyoming, 460 U.S. 226 (1983).

[189] Upshur v. Love, 474 F.Supp. 332 (N.D. Cal. 1979); Norcross v. Steed, 573 F.Supp. 533 (1983).

his own pleadings, the teacher established that he was not qualified for the job. He had been on disability for paranoid personality problems. The court noted that a ninth grade teacher must be capable of dealing with stresses and challenges of the classroom.

Several female teachers have filed suits against their school districts for discrimination based on sex when the board failed to promote them to an administrative position.[190] Love, a black teacher in Alamance County, North Carolina, claimed violations of Title VII and the Thirteenth and Fourteenth Amendments because she was denied positions of principal or assistant principal for which she had applied. The board's reason for not hiring her was that she was less qualified than other candidates. The Fourth Circuit Court upheld the district court's decision as legitimate and nondiscriminatory because the board had included women and blacks on the selection committees.[191]

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[190] Springfield Township v. Knoll, 105 S.Ct. 2065 (1985), Danzl v. North St. Paul-Maplewood-Oakdale-Independent-School district No. 622, 706 F.2d 813.

[191] Love v. Alamance County Board of Education, 757 F.2d 1504 (4th Cir. 1985).

Equal Pay. Where a disparity in pay is involved the Equal Pay Act may be implicated. In general, it prohibits an employer from discriminating in pay on the basis of sex by paying disparate wages for equal work in jobs which require... "equal skills, effort, and responsibility and which are performed under similar conditions..."[192] Title VII was amended to include almost the same specifications regarding equal pay and sex except it includes race, color, religion and national origin.[193]

To establish a claim of wage discrimination, the United States Supreme Court has held that the Equal Pay Act gives an employee the right to sue when his or her compensation is discriminately lower than that of a member of the opposite sex in an equal or substantially equal job.[194] Once an employee has established disparate wages,

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[192] 29 U.S.C.A. sec. 206(a)(1).

[193] 42 U.S.C.A. sec. 2000e-e-2.

[194] Odomes v. Nucare, Inc. 653 F.2d 246(6th Cir. 1981), see Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223 (1974).

the employer has the responsibility to show that the differential pay is not unlawful because it results from one of the four exceptions of the Equal Pay Act:

1. a seniority system,
2. a merit system,
3. a system that measures earning by the quality or quantity of work produced, or
4. a variation based on any factor other than sex.[195]

Title VII includes the same exceptions with the one difference that involves unequal pay being based on some "other factor" other than sex, a concept merely implied in Title VII (for example, race or religion).[196]

An example in which pay difference violates the Equal Pay Act and the employer has been required to pay a price in backpay awards to an employee who has been unlawfully underpaid is the case of Katz v. School District.[197] Katz, a female, was paid as an assistant while doing work substantially equal to that done by all male

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[195] Corning Glass Works, supra., 29 U.S.C.A. sec. 201(d)(1).

[196] 42 U.S.C.A. sec. 2000e-2(h).

[197] 557 F.2d 153 (8th Cir. 1977).

teachers at the school. The school district defended on the grounds that whatever her day-to-day work, she was classified and paid as an assistant. The court found the school district liable, saying, "The Act cannot be avoided...(on the basis that) the job titles of the employees are not the same..."[198].

Another example, Marshall v. A.& M. Consolidated School District,[199] 1979, arose when a school district's policy paid male teachers a yearly three hundred dollars as a "head of household" bonus based on extra duties such as standing at gates at football games and patrolling the school grounds during lunch. The court found these duties to be substantially equal to the duties of female teachers who were required to sit in the bleachers during games and to patrol the halls during lunch.

An example where jobs were not found to be substantially equal is Marshall v. Dallas Independent School District,[200] 1979. The Fifth Circuit Court of Appeals reversed a trial court's ruling that the male custodians and female custodians performed equal work which

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[198] Ibid., p. 156.

[199] 605 F.2d 186 (5th Cir. 1979).

[200] 605 F.2d 191, 195 (5th Cir. 1979).

required "equal skills, effort and responsibility". The trial court, made this ruling even though the males worked during the summer moving heavy furniture, refinishing floors, and performing grounds maintenance. During the year the men continued with heavy maintenance work, removing trash from the building, and shoveling snow. The Court of Appeals ruled that the difference in pay in favor of the males did not violate the Equal Pay Act.

In County of Washington v. Gunther,[201] 1981, a case in which male guards were paid more than female guards, the U.S. Supreme Court ruled that where there is "direct evidence" of sex discrimination in pay, an employee may make a Title VII claim without showing unequal pay for equal work. In a pay scale study, the employer showed that the female guards should earn ninety-five percent as much as the men, but he set their salaries at seventy percent. This decision provided a significant additional standard in establishing claims in discrimination for wages.

Another school-related example of sex discrimination is coaching pay. Female coaches who can show that male coaches receive more pay and longer contracts may have a prima facie case of sex discrimination under Title VII.[202]

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[201] County of Washington v. Gunther, 452 U.S. 161 (1981).

[202] Coble v. Hot Springs School District No. 6, 682 F.2d 721 (8th Cir. 1982).

In contrast, a case in the Eastern District of Virginia was decided before the U.S. Supreme Court ruling in Gunther. The court upheld increased pay for male coaches because their positions required greater skill and more work.[203]

In North Carolina, salaries for teachers are determined by the state legislature according to a state salary schedule adopted by the State Board of Education. Local revenues may be used to supplement salaries but may not be differentiated on the basis of sex, race, national origin or marital status.[204] If subjective judgments are used for supplemental salary decisions such as in the Career Ladder program, criteria must be specific and relevant.[205]

<u>Title IX.</u> Section 901(a) of Title IX of the Education Amendment of 1972 prohibits discrimination on the basis of sex in any of the educational programs or activities receiving federal funds.[206] This means that Title IX is

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[203] Jacobs v. College of William and Mary, 517 F.Supp. 791 (E.D.Va.1980).

[204] N.C. Gen. Stat. sec. 115C-12(9) (1986).

[205] N.C. Gen. Stat. sec. 115C-363.11.

[206] 20 U.S.C. sec. 1681 et. seq.

applied to employees as well as students of educational institutions. In the North Haven Board of Education v. Bell case,[207] 1982, a tenured teacher sued under Title IX's prohibition of gender discrimination. The board refused to hire her after a one-year maternity leave. The Department of Health, Education and Welfare, (HEW), investigated the school board's employment practices. The school board refused to comply by claiming that Title IX had no authority over employment practices. The United States Supreme Court ruled that employment discrimination falls within the jurisdiction of Title IX.

The Department of Health, Education, and Welfare (HEW) is the primary enforcement agency for Title IX.[208] It provides only one penalty for violating its terms - termination of federal funds to the specific program receiving federal funds - but not the entire institution.[209] HEW regulations based on the Act became effective in 1975 and relate to discrimination in recruitment, hiring, pay, fringe benefits, job classification, pregnancy leave, and other employment practices. For discrimination to exist an employee must

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[207] North Haven Board of Education v. Bell, 456 U.S. 512, 102 S. Ct. 1912 (1982).

[208] 45 C.R.F. sec. 86 et. seq (1982).

[209] North Haven, supra, pp. 535-38, S.Ct. pp. 126-27.

show a disparity of treatment or a difference in his or her condition as compared to other employees.[210]

Sexual Harassment. The Supreme Court has agreed in Meritor Savings Bank, FSB v. Vinson,[211] 1986, that a work environment made offensive by sexual harassment may lead to liability under Title VII. The court ruled that "when a supervisor sexually harasses a subordinate because of her sex, the supervisor discriminates on the basis of sex."[212] To constitute sex discrimination in violation of Title VII, the harassment either involves sexual favors for some employment condition such as promotion or it adversely affects the work environment as related to its terms and conditions of employment.[213] In fact, "an employer violates Title VII merely by subjecting female employees to sexual harassment, even if the employee's resistance to that harassment does not cause the employer to deprive her of any tangible job benefits."[214] This development of the law of sexual harassment in the workplace has evolved from a

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[210] 40 Fed. Reg. sec. 86, 1-71(1975).

[211] 106 S.Ct. 2399, 91 L.Ed.2d 49(1986).

[212] Ibid., p. 2404.

[213] Ibid.

[214] Bundy v. Jackson, 641 F.2d 934, 938 (D.C. Cir. 1981).

requirement in the 70s by the courts that "an arbitrary barrier to employment" such as being fired must be evident to constitute a violation of Title VII.[215]

According to the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces Title VII, sex discrimination can take a variety of forms of harassment: unwelcome verbal remarks or gestures, continuing to express sexual interest after being informed that the sexual interest is unwelcome, submission to or rejection of sexual conduct as a condition of employment, and the conduct affects or interferes with the individual's performance.[216] In addition, the courts have determined sexual harassment to include sexually indecent language,[217] display of nude pin-up pictures,[218] and offensive questions about sexual practice.[219]

Title IX of the Education Amendments of 1972[220] applies to the prevention of discrimination in employment, as well as to students in education programs that receive

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[215] Garber v. Saxon Business Production, Inc. 552 F.2d 1032 (4th Cir. 1977).

[216] 29 C.F.R. section 1604.11

[217] Morgan v. Hertz Corporation, 542 F.Supp. 123 (W.D. Tenn., 1981).

[218] Brown v. City of Guthrie, 30 E.P. 30 E.P.D. 33031, 22 F.E.P. 1621 (W.D. Okla., 1980).

[219] Morgan v. Hertz Corp., supra.

[220] 20 U.S.C. sec 1681.

federal assistance.[221] In the leading case involving sexual harassment of students under Title IX, Alexander v. Yale University,[222] the Second Circuit Court of Appeals recognized that an instructor is guilty of sexual harassment if he solicits sexual favors in exchange for good grades. However, the courts in Alexander rejected the former student's claims because the student had already graduated and Yale University had adopted procedures to address such complaints as a result of the suit.

According to Thomas Griffin,[223] schools should have complaint procedures for investigation of students' reports of harassment by individuals who are under the control of the school. If a teacher is aware that a student is being sexually harassed and fails to take action to correct the situation, the school district may be liable under Title IX for sexual harassment.

Pregnancy. School policies on maternity leave are affected by court decisions which are made on the basis of equal protection and due process clauses of the Fourteenth

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[221] North Haven v. Bell, supra.

[222] 631 F.2d 178(2nd Cir. 1980).

[223] Thomas Griffin, "Sexual Harassment and Title IX," 18 Education Law Reporter, 513-20 (1984).

Amendment, Title VII of the 1964 Civil Rights Act[224] and EEOC guidelines prohibiting discriminatory employment acts,[225] Title IX of the Education Amendments of 1972,[226] HEW regulations, and the North Carolina State Board of Education regulations governing sick leave.[227]

A leading case on maternity leave is Cleveland Board of Education v. La Fleur,[228] 1974. Noting that the right of personal choice in matters of family life is a liberty protected by the due process clause of the Fourteenth Amendment, the U.S. Supreme Court ruled that arbitrary and mandatory leaves of absence have no rational relationship to legitimate school interests. Pregnant teachers were required to leave their jobs without pay after the fifth month of pregnancy. Reemployment was not guaranteed, and the teacher could not return until the first semester after the child was three months of age. The five-month cut-off rule was determined to be arbitrary in violating due process because it assumed that every pregnant teacher was unable to work by the fifth or sixth month.

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[224] 42 U.S.C. sec. 2000e et.seq.(1972).

[225] 29 C.F.R. sec. 1604, 9-10 (1975).

[226] 20 U.S.C. sec. 1681, et. seq. (1972).

[227] 16 NCAC 6C sec. .0402 (1986).

[228] 414 U.S. 632 (1974).

A companion case to La Fleur was Cohen v. Chesterfield County School Board,[229] 1974. The U.S. Supreme Court overruled the Fourth Circuit opinion upholding a Virginia school board policy. Teachers were required to resign at least four months before delivery and were not allowed to return until the beginning of the next school year after delivery. However, the Court affirmed rules requiring teachers to give notice of their pregnancy to their employer so that continuity of school instruction could be provided.

Disability plans for maternity leave have been challenged as discriminatory under Title VII.[230] As a result, Title VII was amended in 1978 with the Pregnancy Discrimination Act. The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A pregnant woman is, therefore, protected against such policies as mandatory leaves, being fired, refusal of a job or promotion, denial of fringe benefits, sick leave and health insurance.[231]

In 1985, in California Federal Savings and Loan Association v. Guerra, a bank employee, Lillian Garland,

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[229] 414 U.S. 632 ,94 S.Ct. 791(1974).

[230] Gilbert v. General Electric, 429 U.S. 125 (1976), Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485 (1974).

[231] Pub. Law 95-955.

took pregnancy disability in January, 1982, and sought reinstatement in April, 1982. Although the state provided disability leave for maternity reasons, she was told that the job had been filled and there were no similar positions. The lower courts found; that male employees were not provided jobs at the end of their disability; therefore, they ruled for the bank. The case was appealed to the United States Supreme Court in 1987. As a result, the Court guaranteed women the basic rights to participate fully and equally in the work force without denying them the fundamental right to full participation in family life.[232]

The North Carolina State Board of Education does not distinguish maternity leaves from other temporary disabilities for the purpose of sick pay; therefore, teachers receive sick pay while they are disabled for maternity. Sick leave is paid at the rate of one day per month for full-time employees and is accumulated indefinitely.[233]

A probationary teacher is not distinguished from a tenured teacher for the purpose of sick leave.[234] If a teacher returns for leave within thirty days, she is entitled to return to the same classroom in the same school.[235] The time of reinstatement when leave exceeds thirty days is left to the local superintendent's discretion.

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[232] 107 S.Ct. 683, 694; 93 L.Ed.2d 613 (1987).

[233] 16 NCAC 6C sec. .0402(a) (1986).

[234] Ibid. sec. .0402(g). [235] Ibid.

Age Discrimination

The Age Discrimination Act of 1967 which was amended in 1978 prohibits an employer from discriminating against a potential employee or an employee between the ages of forty and seventy, except "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on other factors other than age."[236] In 1974, this act was extended to include state and local governments. In 1978, amendments to the Act were passed to protect teachers from forced retirement before the age of seventy, and in 1986 (effective January 1987) the upper age limit was removed entirely for most employers and employees.[237].

Although the constitutionality of the Age Discrimination Employment Act as applied to state and local governments was upheld in EEOC v. Wyoming,[238] in 1983,

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[236] 29 U.S.C.A. sec. 621 amend. of 1978.

[237] 29 U.S.C. sections 621-634; N.C. Gen. Stat. 115C-47(27) which required local boards of education to retire "administrative officers and certificated personnel" at age 70 was repealed by the 1987 Legislature.

[238] 460 U.S. 226 (1983). A Wyoming game warden was involuntarily retired at age fifty-five. State mandatory age requirements were voided by the United States Supreme Court.

there are many unresolved issues. In addition to The Age Discrimination Employment Act, Title VII also makes it unlawful to discriminate because of an individual's age. Courts look to interpretation of Title VII in deciding Age Act cases.[239]

Discrimination Against the Handicapped

Handicapped teachers have certain rights under Section 504 of the Rehabilitation Act of 1973 which states that... "No otherwise qualified handicapped individual in the United States shall be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance."[240]

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[239]Robert P. Joyce, "Employment Discrimination", p. 30-41; 29 U.S.C. section 623(a), section 2507. See also Grebin v. Sioux Falls Independent School District, 779 F.2d 18 (8th Cir. 1985). Jury found no age discrimination when forty-three year old Janet Grebin lost a job to a twenty-seven year old. She had less teaching experience than the younger teacher. See Palmer v. Ticcione, 576 F.2d 459 (2nd Cir. 1978), Teacher forced to retire at age seventy.

[240]29 U.S.C.A. sec. 790(a)(1978), P.L. 93-112 sec. 500(a).

The appropriate test for determining discrimination of the handicapped is the rational basis test. First, the teacher must show that he is qualified for the position sought. In Southeastern Community College v. Davis,[241] 1979, the U.S. Supreme Court concluded that "an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap".[242] The Court also determined that the educational institution is not required to substantially modify or lower its standards to accommodate a handicapped person.[243] In Davis, the United States Supreme Court held that the plaintiff who was deaf was not entitled to relief because a North Carolina Community College refused to accept her. Her handicap would cause a safety problem.

Second, the teacher must show that even though he was qualified, he was rejected solely on the basis of his handicap.[244] Then the board must present genuine nondiscriminatory reasons for refusing to hire the teacher.

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[241] 442 U.S. 397 (1979).

[242] Ibid., p. 406.

[243] Ibid., p. 413.

[244] Davis, supra.

An example is Norcross v. Steed,[245] a case in which an Arkansas District Court upheld the board's reasons for denying employment to a legally blind applicant as a librarian. A more qualified applicant received the position; otherwise the legally blind applicant would have been hired. When a teacher or other employee is determined to be qualified, Section 504 specifies that the employer must "reasonably accommodate the individual."[246]

In 1985, North Carolina enacted a new state law, the Handicapped Persons Protection Act, which prohibits discrimination in employment on the basis of a handicap.[247] In addition, the General Statutes of North Carolina recommend employment of the handicapped. The statutes state that..."The Board and each local educational agency shall make positive efforts to employ and advance in employment qualified handicapped individuals."[248]

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[245] 573 F.Supp. 533 (1983).

[246] 29 U.S.C.A. sec. 790(a) (1978).

[247] G.S. Chapter 168A.

[248] N.C. Gen. Stat. sec. 115C-330.

Also, the statutes speak specifically to blind persons who desire to teach. As long as the teacher is able to carry out the duties of the position for which he applies, North Carolina statutes prohibit discrimination against the blind or the partially blind in the following areas:

- -Receiving training to become a teacher
- -Receiving credentials from the State Board of Education
- -Engaging in student teaching
- -Becoming a teacher[249]

Contagious diseases. Contagious diseases may also prevent a teacher from being "otherwise qualified". In School Board of Nassau County v. Arline,[250] the school board dismissed Arline after she had three relapses of TB. The board perceived her to be a threat to others. The United States Supreme Court said that her handicap substantially limited one of her major life activities which is a definition of the term handicap;[251] therefore, she could not be denied employment. The Court sent the case back to the trial court to determine the following facts:

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[249]N.C. Gen Stat. sec. 115C-229(b).

[250]772 F.2d 759 (11th Cir. 1985), 107 S.Ct. 1123, 94.

[251]Robert P. Joyce, "Employment Discrimination", Chapter 30, Section 3009 B., pp.16-17.

how the disease was transmitted, how much harm was presented to others, and was there a chance that others would be infected. The Court was not making a decision that would apply to the person as a "carrier only" but whether the disease made the person not "otherwise qualified". In other words, if a person has a contagious disease which causes a physical impairment and the person is determined to be "otherwise qualified", that person is handicapped and is protected under the Rehabilitation Act. In Arline the case was remanded to determine her suitability for employment or whether some "reasonable accommodation" could be provided for her in some other position.

The Court recognized the fact the Acquired Immune Deficiency Syndrome (AIDS) as a disease that also has the possibility of being considered a handicap and emphasized that it was not ruling on AIDS as a handicap.[252]

Drug Testing. The New York State Supreme Court has ruled that absent reasonable suspicion, probationary teachers may not be required to submit urine samples for drug testing in order to be eligible for tenure. Such a requirement would be a violation of the Fourth Amendment's ban on unreasonable searches.[253]

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[252] Ibid., p. 30-17.

[253] Patchogue-Medford Congress of Teachers v. Board of Education of the Patchogue-Medford Union Free School District, 505 N.Y.S. 2d 888,890 (1986).

Summary

This chapter has provided an overview of teachers' significant substantive rights as conferred through the Federal Constitution. Although these rights will continue to be delineated by the courts, the following generalizations reflect the present status in the areas of freedom of speech and expression, religion, academic freedom, private life, personal appearance, loyalty, self-incrimination, and discrimination in employment:

1. Teachers have a constitutional right under the First Amendment to express their views as a citizen both in-school or out-of-school in commenting on matters of public concern.
2. Not all speech is protected by the First Amendment. Speech that interferes with the management of the school or creates a substantial disruption in the classroom can be restricted by school officials. The employer may impose ordinary dismissal or demotion which is non-reviewable by the courts, if the speech is not a matter of public concern.
3. Private expression to a principal or other superior is protected speech.

4. Courts attempt to balance the interests, of a teacher, as a citizen, against the interests of the state, as an employer. The courts prefer not to scrutinize personnel decisions taken by public agencies in reaction to an employee's behavior.
5. When an employee claims exercise of protected speech as a defense to dismissal, the dismissal will not be invalidated if the court can show by a preponderance of evidence, that it would have reached the same decision had the protected speech not occurred.
6. In balancing the teacher's right to academic freedom in the classroom against the state's interest in protecting the welfare of students, the courts have looked at the following factors: the relevancy of materials and methods; state and local regulations; acceptance of methods by experts in the teaching profession; and if the speech is a substantial disruption to the school, the discipline; and affects parental and citizen influence.
7. Age and maturity of students is an important factor in evaluation of the suitability of teaching materials, methods, and discussion of controversial issues.

8. Teachers may not say or write in class whatever they choose.

9. Teachers may not promote their own or any other religious doctrines in their classrooms.

10. Schools may observe religious holidays through cultural arts activities but not for religious purposes.

11. Although other states have struck down moment-of-silence statutes, North Carolina law permits school boards to authorize a one-minute moment-of-silence at the beginning of each school day, but teachers are not to suggest that this time be used for prayer. Prayer and Bible reading as required or authorized school activities are not permitted.

12. School officials must make reasonable accommodations to an employee's request for religious needs including leave, unless such accommodations would cause undue hardship to the school district. Although, paid leave should be nondiscriminatory, the law in this area is not settled. Unpaid leave is permitted.

13. The wearing of religious clothing in the classroom may be prohibited by school boards when the clothing interferes with religious

freedom or provides a religious indoctrination to students because of the daily presence of the teacher.

14. Private conduct of teachers may be restricted when it adversely affects students and what happens in the classroom as well as the operation of the school.
15. Mere community disapproval of a teacher's personal conduct is not grounds for dismissal unless the conduct seriously affects the teacher's fitness to teach.
16. Teachers may not be dismissed because of an unwed pregnancy on grounds of immorality unless it can be related to fitness to teach. The right to bear a child, wed or unwed, is a personal liberty protected by the due process clause of the Fourteenth Amendment.
17. Public knowledge of homosexuality may justify dismissal when effectiveness is impaired.
18. School officials may impose reasonable regulations on a teacher's dress or personal appearance.
19. Membership in a organization with unlawful purpose is an unconstitutional basis for excluding teachers from employment or for imposing sanctions on teachers.

20. A teacher must answer questions posed by the superintendent, if the questions are related to a determination of fitness to teach.
21. Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, religion, sex, or national origin with respect to hiring, firing, salary, and conditions or privileges of employment.
22. Two methods of pursuing discrimination are "disparate treatment" which means the teacher or employee must prove he was treated less favorably because of his race, and "disparate impact" which means employment practices are neutral. But their impact falls more heavily on one group than another.
23. Established racial quotas for college admission programs are impermissible. Although race may carry greater influence on admission policies, it cannot be the only factor.
24. In reduction-in-force policies where racial classifications are developed, minority lay-off provisions may not receive preferential treatment unless the plan is to correct proven past discrimination against blacks. Race-based remedies for societal discrimination are not justified when they create more societal discrimination.

25. Reverse discrimination is unlawful.
26. Employment standards and teacher testing for determining certification and salaries must be significantly related to job performance. The NTE has been found to be a rational, job-related test because of its relationship to teacher training.
27. In hiring a teacher, a school board may choose from among equally qualified candidates as long as the decision is not based on unlawful reasons such as sex discrimination.
28. The Equal Pay Act gives an employee the right to sue when his compensation is discriminately lower than that of a member of the opposite sex in an equal or substantially equal job.
29. Differential pay may be lawful if it results from a seniority system, a merit system, a system that measures earning by the quality or quantity of work produced, or a variation based on any factor other than sex.
30. Title IX prohibits discrimination based on sex in any of the educational programs or activities receiving federal funds. This applies to employees as well as students of the institution. Withdrawal of funds from the particular program is the remedy.

31. Sexual harassment involves sexual favors for some employment conditions such as loss of job or promotion or it adversely affects the work environment as related to the terms and conditions of employment. Subjecting female employees to sexual harassment violates Title VII and Title IX.
32. Schools may be liable under Title IX for not taking corrective action against a student under their supervision who is sexually harassing another student.
33. A teacher affected by pregnancy and its related conditions must be treated the same as other applicants and employees on the basis of their ability to work. This includes mandatory leave, hiring and firing, refusal of a job or promotion, denial of fringe benefits, sick leave, and health insurance.
34. In North Carolina, sick leave is paid for maternity leave the same as it is paid for other disabilities. A probationary teacher is not distinguished from a tenured teacher for the purpose of sick leave.
35. Unless age is a bona fide occupational qualification which makes it necessary for the

normal operation of the business or agency, age may not be used in discriminating against any person in respect to hiring, firing, salary, and terms and conditions of employment. This applies to individuals beginning at age forty. In 1986 (effective January, 1987) the upper age limit of seventy was removed for most employers and employees.[250]

36. A handicapped teacher may not be the victim of discrimination if he can show that he was qualified for the position because he could meet all the requirements of the position in spite of the handicap, and that he was rejected solely on the basis of his handicap. The board must show genuine nondiscriminatory reasons for refusing to hire the teacher.

37. A contagious disease may also prevent a teacher from being qualified for a position. A teacher may not be denied employment if the handicap substantially limits one of his major life

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[250]P.L. 99-592 provides that until the end of 1993 faculty members at institutions of higher education who serve under contracts of unlimited tenure may be forced to retire at age seventy.

activities. The courts will look at how a disease is transmitted, how much harm is presented to others, and the chances that others may be infected. If a contagious disease causes a physical impairment and the person is determined to be otherwise qualified, the person is protected by the Rehabilitation Act.

38. Teachers may not be required to submit to drug testing unless school officials have determined with reasonable suspicion that a teacher may be involved with drug use.

Chapter III

TERMS AND CONDITIONS OF EMPLOYMENT

Introduction

The legislature, through statutory law, establishes the parameters within which the educational system operates. Among the areas affected by the North Carolina statutory provisions are the terms and conditions of a teacher's employment. In this chapter, state requirements for teacher certification, the scope of teachers' duties, reduction-in-force policies, tenured and nontenured dismissal procedures, and dismissal for cause are discussed. Also, in focusing on the procedural due process rights of North Carolina teachers, the concept of due process will be summarized.

Certification

In conformity with the North Carolina Constitution, the responsibility for certification resides with the legislature. The duty "to certify and regulate the grade and salary of teachers and other school employees"[1] has been delegated to the State Board of Education which

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[1] N.C. Gen. Stat. sec. 115C-12(9)(a).

exercises its legal authority through the Department of Public Instruction.[2]

To qualify for a certificate the applicant must be at least eighteen years of age,[3] must have fulfilled requirements for a bachelor's degree or other required degree, must have minimum scores on a standard examination which is the National Teacher's Examination (NTE),[4] and must have an endorsement from an institution of higher learning. The institution of higher learning is a senior college or university which has a state department approved teacher education program.[5]

An applicant for a teacher's certificate must be of good moral character and must continue with good moral character to remain certified.[6] Since teachers are responsible for developing morality and good citizenship in students, they are expected to be role models. Teachers influence the attitudes of students toward

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[2] 16 NCAC 6C .0102(a) (1986).

[3] N.C. Gen. Stat. sec. 115C-295(a).

[4] Ibid. section 115C-284(c), 115C-296(a), 115C-315(d).

[5] 16 NCAC 6C .0303 (1986).

[6] N.C. Gen. Stat. sec. 115C-325(e)(1)(b).

government, the political process, and a citizen's social responsibilities.[7] In fact, the United States Supreme Court, in 1979, upheld the power of a state to require that public school teachers be United States citizens or be in the process of applying for citizenship. The court emphasized the governmental role of public education. Schools are responsible for "the preparation of individuals for participation as citizens and in the preservation of the values on which our society rests."[8]

After meeting the qualifications for certification as established by the State Board of Education, teachers must apply for and obtain certification from the State Department of Public Instruction. All certificates are effective as of July 1 of the year issued or upon the date the requirements are completed for certification.[9] Certificates are effective for a five-year period, but a certificate is not valid until approved and signed by the local superintendent.[10] Finally,

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[7]Ambach v. Norwick, 441 U.S. 68, 99 S.Ct. 1589 (1979).

[8]Ibid. p.76, p. 1954. The Imigration Reform and Control Act of 1986, Pub. L. No. 99-603 (Nov. 6, 1986), requires all employers to verify, when the person is hired, that the individual is either a United States Citizen or is authorized to be employed in this country.

[9]16 NCAC 6C .0301(a)(e) (1986).

[10]N.C. Gen. Stat. sec. 115C-297.

the teacher must be elected by the local board of education.[11] Once employed a teacher may be assigned or transferred by a local board to any school or grade at the board's discretion[12] as long as the assignment is an area in which the individual holds certification. The assignment must be made on a non-discriminatory basis.[13]

Among the regulations for employment is that all teachers and all school employees upon initial employment and after one or more years of separation from employment shall provide a health certificate certifying that the employee does not have tuberculosis in the communicable form. This same regulation applies to other communicable diseases or any disease or physical impairment, which would prohibit the ability to perform duties.[14] A teacher or any employee may be required by the local board or superintendent to take a physical examination when it seems necessary. A health certificate is also a requirement for

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[11]Johnson v. Gray, 263 N.C. 507, 139 S.E.2d 551 (1965). Taylor v. Crisp, 21 N.C. App. 359, 205 S.E.2d 102 (1974), aff'd and remanded, 286 N.C. 488, 212 S.E.2d 381 (1975).

[12]N.C. Gen Stat. sec. 115C-57.

[13]16 NCAC 6C .0301(g) (1986).

[14]N.C. Gen. Stat. sec. 115C-323, See School Board of Nassau County Florida v. Arline, 107 S.Ct. 1123 (1987) (Teacher with tuberculosis protected under section 504 of Rehabilitation Act of 1973.)

substitute teaching.[15]

Another employment requirement of interest to teachers concerns residency. Although there is no employee residency requirement for teachers in North Carolina,[16] the United States Supreme Court, in 1976, declared employee residency requirements as constitutional.[17] Employees may be required to live within the geographic boundaries of the political units by which they are employed. If teachers live and pay taxes in the area where they are employed to work, they will be more committed to the future of the area and to solutions for the racial, social, and economic problems of the students they teach. They will be more likely to help obtain passage of school tax levies, and they will be more likely to become involved in activities that will bring about contact with parents and community leaders thus encouraging integration of society and schools.[18]

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[15] 40 N.C. Attorney General Reports 273 (1969).

[16] Superintendents, local school board members and school district committeemen are required to reside in the district they serve and to take an oath of faithful service. N.C. Gen. Stat. sections 115C-37(d), 115C-272(a), 115C-54.

[17] McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645, 96 S.Ct. 1154 (1976).

[18] Wardwell v. Board of Educ. of Cincinnati, 529 F.2d 625 (6th Cir. 1976).

Types of Certificates

The State Department of Public Instruction issues two classifications of certificates - the initial certificate which is valid for two years and the continuing certificate which authorizes continuing employment.[19] Certificates indicate grade level, content areas, specializations and preparation levels for which the teacher has been prepared. Certificates are based on the level and the degree of career development and competence achieved by the teacher. There are two categories of certificates for a teacher: class "A", undergraduate, and class "G", graduate. There are four levels of preparation: bachelor's degree, master's degree, sixth-year degree and doctorate.[20]

An interim certificate[21] is available for a candidate who has been selected as the best teacher for the position and did not know that a minimum score on the National Teacher's Examination was required. The interim certificate is valid for a four-month period which should allow the

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[19] 16 NCAC 6C .0304(c) (1986).

[20] Ibid. .0304(b)(1).

[21] Ibid. .0311.

candidate time to satisfy the exam requirement. Interim certificates are not permissible for graduates of approved teacher education programs in North Carolina. In addition to the approved teacher education program route to certification, there are at least four other routes for obtaining initial certification: lateral entry, endorsement, direct certification, and reciprocity.[22]

The provisional certificate is granted to skilled persons from the private sector who are graduates of an accredited institution of higher learning and who desire to teach under the lateral entry provisions of N.C. Gen. Stat. section 115C-269(c). This provision exempts them from a formal teacher education program prior to employment. An institution of higher education or a teacher education consortium which involves professional groups from the Department of Public Instruction, colleges and universities, and public schools must evaluate the credentials of the applicant.[23] The teacher must obtain a satisfactory score on the National Teacher's Examination or the Graduate Record Examination and complete an approved teacher education program within five years. Successful

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[22] 16 NCAC 6C .0301(g) (1986).

[23] Ibid. .0305(b)(4).

teaching experience may take the place of student teaching. Regular certification shall be required before a teacher can be contracted for a sixth year of teaching in North Carolina public schools.[24]

The local superintendent, with State Department approval, may recomend endorsement of certification for a secondary teacher who needs to teach another subject area and lacks certification in that area. The teacher must have at least eighteen semester hours of study in the subject matter area but nine of those semester hours may be satisfied with past teaching experience.[25]

Direct certification is a method of certifying individuals who desire to teach but have not graduated from an approved teacher education program. Certification is granted directly by the State Department of Public Instruction based on an evaluation of the person's academic transcripts, experience, and other pertinent data.[26]

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[24]Ibid. .0305(b)(5)(6). N.C. Gen. Sta. sec. 115C-296(C).

[25]Ibid., .0306.

[26]Ibid., .0305(a). Also, the 1987 UNC Board of Governors Task Force Report to the General Assembly, <u>The Education of North Carolina Teachers</u>, noted by one estimate that nearly "40 percent of newly hired teachers are not graduates of an approved program and are hired under one of the four methods above".

Reciprocity Certificates

North Carolina, along with most other states, participates in the Interstate Certification Compact which will "facilitate the movement of teachers and other professional educational personnel among the states party to it, and to authorize specific interstate educational contracts to achieve that end."[27] Participation in the Compact provides for the employment of qualified educational personnel who move for family and other personal reasons, and it increases the number of qualified teachers for North Carolina.[28]

Reciprocity certificates are granted for one year to candidates who graduate from out-of-state accredited institutions but do not meet the specified requirements set forth by the State Board of Education. This provisional limitation may be removed after the teacher has taught in North Carolina for one year and has met the certificate renewal requirements.[29]

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[27]Ibid. sec. 115C-349(a). [28]Ibid. sec. 115C-349(b).
[29]16 NCAC 6C .0309(4)(c)(e) (1986).

Expired Certificates

When a certificate has expired, an applicant must earn fifteen units of appropriate credit from a college or university, local courses, workshops and activities, which must be approved by the Department of Public Instruction. To be eligible for a valid certificate, the credit must be earned during the five-year period immediately preceding the date of application for reinstatement of the certificate.[30]

Certificate Suspension, Revocation, Reinstatement

Revocation of certification is different from removal or dismissal from employment. A local board may legally dismiss a teacher but only the State Board of Education may legally revoke a certificate. Generally, courts of law will not intervene when a certificate has been revoked unless the teacher has lost the certificate for reasons not specified in statute, or if mandatory procedures were not followed.[31]

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[30] Ibid. .0308.

[31] 68 Am. Jur. 463 (1973).

Plaintiffs are required to exhaust administrative remedies before taking complaints into the court system.[32] Also, a certificate may be suspended or revoked for fraud. This happened in Huntley v. North Carolina when the State Board revoked a certificate of a teacher who had certified a test score on the NTE to be her score when she had someone else to take the test for her.[33]

A certificate may also be revoked for illegal changes on the certificate document which makes the teacher ineligible to hold a certificate. In addition, revocation may result from a plea of no contest of a crime, if there is a reasonable and adverse relationship between the crime and the ability of the teacher to perform duties. This was the case in Burrough v. Randolph County Bd. of Education,[34] in which the North Carolina Court of Appeals upheld the Randolph County Board decision to dismiss Mrs. Burrough who had entered a plea of no contest to a charge of involuntary manslaughter of her husband. Based on testimony from parents

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[32] Burrow v. Randolph County Board of Educ. 301 S.E.2d 704 (1983).

[33] Huntley v. North Carolina, 539 F.2d 705(4th Cir. 1976).

[34] 16 NCAC 6C .0312(1) to (4).(See N.C. Gen. Stat. sec. 115C-325 (e)(1) for grounds for dismissal of a career teacher.)

and teachers of the community, Mrs. Burrough's crime caused a loss of respect for her from the community, and her ability to discipline high school students would be impaired. She was no longer viewed as a proper role model for students.

A certificate may be revoked because of a final dismissal based on statutory cause such as incompetency, neglect of duty, immorality, and physical or mental incapacity. Other reasons include resignation without thirty days' notice except with the prior consent of the local superintendent, and by revocation from another state when the teacher's North Carolina certificate was issued by reciprocity.[35]

"The State Board of Education may suspend an individual's certificate for a stated period of time or may permanently revoke the certificate"[36] except as limited by statute for not giving thirty days' notice for resignation. In such a case, the teacher's certificate may be revoked until the end of the school year.

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[35]Ibid.

[36]Ibid. .0312(c).

If the teacher applies for a suspended or revoked certificate to be reinstated and can show good cause for such action, the State Board may grant a new certificate. All other states will be notified of suspension, revocation, or reinstatement of an individual's certificate.[37]

Certificate Renewal

The State Board of Education not only controls the certifying process for public school teachers, grades K-12, in North Carolina, it also establishes the regulations for certificate renewal every five years.[38] Renewal credit may be obtained through one of the following means: a college or university accredited program, teaching experience (one unit for every year), local in-service courses or workshops, approved independent study, and activities approved by the Department of Public Instruction. A professional growth plan is required for currently employed teachers.[39]

The validity of the state to establish renewal has been challenged by a North Carolina history teacher who held a class "G" certificate and was also an assistant principal.

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[37]Ibid. .0312(d)(e). [38]N.C. Gen. Stat. sec. 115C-296(a).
[39]16 NCAC 6C .0307(b)(c)(1-4) (1986).

He was offered summer employment with earnings of $1,000 a month. In order to satisfy the certificate renewal requirements of the State Board of Education, the teacher was forced to forego summer employment. If he refused to renew his certificate, he would be disqualified from teaching in North Carolina Schools or be fined a penalty of a deduction of twenty dollars ($20.00) a month from his salary as a teacher. The plaintiff contended that the state board regulations were:

(1) In excess of the authority delegated to the state Board of Education;

(2) Unreasonably discriminatory and, therefore, violated the Equal Protection Clauses of the State and Federal Constitutions; and were

(3) Arbitrary and, therefore, violated the Due Process clause of the Fourteenth Amendment to the Constitution of the United States and the Law of the Land Clause in Art. I section 19, of the Constitution of North Carolina.[40]

The Supreme Court of North Carolina found no merit in any of these contentions. Since the authority to establish regulations for certificate renewal is granted by the North Carolina State Constitution, delegation of power was not found to be excessive. The regulations adopted by the State

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[40]Guthrie v. Taylor, 1851 S.E.2d 193 (1971).

Board of Education were not in violation of state and federal laws. In upholding the board's decision, the court held that the rule applies to all teachers, irrespective of age, teaching experience, or previous education; therefore, the requirements are not discriminatory. This rule does not need to apply to employees of the State Board of Education who do not teach. Furthermore, it cannot be considered arbitrary to expect teachers to keep their knowledge abreast of the constant changes in teaching skills, methods, and techniques. It is reasonable to believe that the quality of a classroom teacher's performance will be improved if the teacher takes further courses in a college or university or by one of the prescribed methods of renewal.[41]

Tenure: Career Status

The 1971 General Assembly enacted the Principals' and Teachers' Employment and Contracts Act, the so-called Tenure Act, which prescribed both the substantive and procedural relationship of the State to teachers. Possibly the greatest value of the act is that it provides teachers with the security that school board members who are elected to office and are subject to political pressure and community

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[41] Ibid. p. 198.

influences will follow a procedure prescribed by law, if there is a just cause for dismissal.[42] In fact, "a court of law will not uphold the dismissal of a tenured teacher, regardless of the cause, if the procedures set forth in the tenure statute are not strictly followed."[43]

The decision for tenure, or career status as it is referred to in the North Carolina General Statutes, is made by the local school board at the end of three consecutive years of employment in a North Carolina public school system.[44] The board should provide the teacher with written notice of that decision by June 1 of the third year of employment. "If the majority of the board votes against reemploying the teacher, he shall not teach beyond the current school term. If the board fails to vote on granting career status

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[42]Bennett v. Hertford County Bd. of Educ. 69 N.C. App. 615, 317 S.E.2d 912, cert. denied, 312 N.C. 81,321 S.E.2d 893 (1984), and Thompson v. Wake County Bd. of Educ. 31, N.C. App. 401, 230 S.E.2d 164 (1976), rev'd on other grounds, 292 N.C. 406, 233 S.E.2d 583 (1977); and Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975); See N.C. Gen. Stat. sec. 115C-325.

[43]Roy G. Williams, "Legal Cause for Teacher Dismissal," Legal Issues in Education, edited by E.C. Bolmeir (Charlottesville, Virginia: The Michie Co., 1970), p.122.

[44]N.C. Gen. Stat. sec. 115C-325(c)(1).

but reemploys him for the next year, he automatically becomes a career teacher on the first day of the fourth year of employment."[45]

Once having achieved career status in a North Carolina public school system, a teacher transferring to another school system within the state may be immediately employed by the board as a career teacher or may be required to serve another probationary period but for no more than two years. After being out of teaching for five consecutive years, a teacher returning to the same school system may be reemployed as a career teacher, at the option of the board, or may be required to serve no more than one year as a probationary teacher. In both situations, a teacher who is rehired for the next year after a probationary period automatically becomes a career teacher.[46] Furthermore, "a career teacher who has been granted a leave of absence by a board shall maintain his career status but must return to teaching at the end of the approved leave."[47] Also, if a career teacher has performed

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[45]Ibid and Davidson v. Winston-Salem/Forsyth County Bd. of Educ., 62 N.C. App. 489, 303 S.E.2d 202 (1983).

[46]Ibid. sec. 115C-325(c)(2).

[47]Ibid. sec. 115C-325(c)(4).

the duties of a principal or a supervisor for three consecutive years and the school board votes not to reemploy the teacher for that position, the teacher maintains a statutorily protected right in his job as a career teacher.[48]

A career teacher has certain rights and privileges created with career status and may not be demoted or dismissed except with competent evidence as prescribed by statutes.[49] Evidence of competence or incompetence requires documented proof. For example, the N.C. General Statutes, section 115C-325(b), specify that any commendations, complaints, or suggestions for correction or improvement for a teacher shall be signed by the person making the statement and shall be placed in the teacher's file which is maintained by the superintendent only after five days' notice to the teacher. Any denials, comments, or explanations by the teacher shall be placed in the files, also.

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[48]Ibid. sec. 115C-325(d)(2), Rose v. Currituck County Board of Education, 83 N.C. App. 408, 350 S.E.2d 376 (1986).

[49]Thompson v. Wake County Bd. of Educ., 31 N.C. App. 401, 230 S.E.2d 164 (1976) rev'd on other grounds, 292 N.C. 406, 233 S.E.2d 538 (1977).

Even with the security of career status, a teacher works in a sensitive position. "In his teaching capacity he (a teacher) is engaged in the exercise of what may plausibly be vital First Amendment rights,"[50] but tenure, or career status, is a statutory right not a constitutional right. Once career status is granted a "property" right is created. The teacher has the right to continued employment in the area of certification and is subject only to dismissal for cause.[51]

A career teacher does not have the right to be employed in a particular school, and school boards may transfer and reassign, despite tenure, as long as the action is not arbitrary or unreasonable.[52]

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[50]Moore v. Gaston County Board of Educ., 357 F. Supp. 1037 at 1041 (1973), quoted from Keyishian v. Board of Regents, 87 S.Ct. 675 at 684 (1967).

[51]N.C. Gen. Stat. 115C-325(d)(1)(c).

[52]68 Am. Jur.2d "Schools" sec. 158 (1973), pp. 157-158.

Scope of Teacher's Duties

Local school boards upon recommendation of the superintendent have the implied right to determine appropriate and reasonable rules and regulations[53] affecting conduct of teachers, the kinds of reports they make, and their duties in the care of school property.[54]

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.[55]

Yet, regulations concerning a teacher's speech and conduct cannot possibly mention every specific kind of behavior. Factors such as "the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid educational objectives, and the context and manner of presentation"[56] must be considered when making decisions

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[53]Fowler v. Williamson, 39 N.C. App. 715, 251 S.E.2d 889 (1979).

[54]N.C. Gen. Stat. sec. 115C-47(18).

[55]Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159 (1968)

[56]Frison v. Franklin County Bd. of Educ., 596 F.2d 1192 (4th Cir., 1979).

about a teacher's speech and conduct in relation to duties and responsibilities.

In addition to giving local school boards and school officials the right to determine rules and regulations for teachers in carrying out their duties, the legislature has prescribed the following duties as specified in the N.C. General Statutes, sections 115C-307:

(a) Maintain good order and discipline.

(b) Provide for the general well-being of students: encourage temperance, morality, industry, and neatness; Promote the health of all students, especially in the first three grades, by providing frequent periods of recreation, supervise play activities during recess, and encourage wholesome exercises.

(c) Provide some medical care to students: administer any drugs or medications prescribed by a doctor upon written request of the parents. - Give emergency health care, perform first aid or lifesaving techniques in which the employee has been trained in a program approved by the State Board of Education. Prior to the beginning of each school year the principal shall determine which persons will administer medications and emergency care. Teachers are not to be held liable for such services unless their acts are a result of gross negligence or intentional wrongdoing. No one shall be required to administer drugs or attend lifesaving techniques programs.

(d) Teach as thoroughly as the teacher is able in all branches required to be taught, provide for singing in the school, and give instruction in public school music.

(e) Enter actively into the superintendent's plan for professional growth.

(f) Cooperate with the principal in determining the cause of pupil nonattendance.

(g) Make reports required by the board of education. Make reports to the principal required by the superintendent. - Any teacher who knowingly and willingly makes false reports on daily attendance of pupils or other reports or makes or procures another person to make any false report on records, on requisitions, or payroll shall be guilty of a misdemeanor (upon conviction may be fined or imprisoned and the certificate revoked.)

(h) Instruct students in the proper care of public property; exercise due care in protecting school property.

Other duties are specified by the following state statutes:

> Local boards shall provide for efficient teaching at appropriate grade levels all the materials set forth in Basic Education Program, including the areas of citizenship in the United States of America, government of the State of North Carolina, fire prevention, the free enterprise system, and dangers of harmful or illegal drugs, including alcohol.[57]
>
> Teachers are required to teach and conduct all classes in English except foreign language classes. Any teacher who refuses to do so may be dismissed.[58] General Statutes 7A-543 and 115C-400 require teachers to report suspected child abuse and neglect to the director of the County Social Services. Section 7A-550 designates immunity from any civil or criminal liability in making a report provided that the person acted in good faith.

Teachers may be dismissed for "failure to fulfill the duties and responsibilities imposed upon teachers by the General Statutes of this State."[59] Finally, teachers may have a written job description that specifies duties and responsibilities to be performed.

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[57]N.C. Gen. Stat. sec. 115C-81(c). [58]Ibid.

[59]Ibid. sec. 115C-325(c)(1)(i).

Out of classroom assignments is an area of teachers' duties that often result in dissatisfaction and sometimes litigation, particularly when no extra compensation is paid for the performance of extra duties. Today, it is clear that a teacher's duties and obligations to students and to the school are not satisfied by closing the classroom door at the conclusion of a day. The direction and supervision of extracurricular activities outside of school hours is part of the teacher's duties. Parents have the right to expect and demand that all school activities be under the supervision of teachers and other school officials.[60] Teachers are not expected to perform janitorial services, police services, drive school buses or perform duties not related to their respective teaching responsibilities.[61] Assignments should be professional in nature, and not unreasonably time consuming or burdensome.[62] Additionally, extra duty requirements do not need to be spelled out in school board rules and regulations to be considered valid.[63]

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[60]McGrath v. Burkhard, 131 Cal. App.2d. 367, 280 F.2d 864 (1955).

[61]Ibid.

[62]Littrell v. Board of Education, etc. 45, Ill. App.3d. 690, Ill.Dec. 355,360 N.E.2d 102 (1977).

[63]Thomas v. Board of Education of Community Unit School District, 117 Ill. App.3d 374, 72 Ill. Dec. 845, 453 N.E.2d 150 (1983).

The following cases took place in other states and are not binding precedent for North Carolina but further illustrate the dimensions of the area of non-classroom duties.

In Pennsylvania a teacher with a temporary contract was dismissed because she failed to attend "open" house after being required and directed to do so.[64]

In Alabama a guidance counselor was dismissed for refusing to supervise the school campus before school,[65] and another teacher was dismissed for refusal to participate in an enrichment program designed to improve classroom management and student behavior.[66] However, a case in Pennsylvania held that a teacher could not be forced to collect tickets at a football game because it was a task any adult could perform. In this case, the requirement was motivated by a desire to cut expenses. In another Pennsylvania case a teacher could not be required to supervise a voluntary high school bowling club for boys which did not compete intramurally or interscholastically but met at a private bowling alley once a week for approximately two and a half hours.[67]

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[64]Johnson v. United School District Joint School Board, 191 A 2d 897 (1963).

[65]Jones v. Alabama State Tenure Commission, 408 So.2d 145 (1981).

[66]Howell v. Alabama State Tenure Commission, 402 So. 2d 1041 (Ala.1981).

[67]Todd Coronway v. Lansdowne School District Number 785, Court of Common Pleas of Delaware County, Penn. (1951).

An industrial arts teacher in Louisiana was dismissed because he refused to obey the principal's directive to have his students complete the forms for a sidewalk connecting the lunchroom to the main building. A contractor would pour the concrete mix in the forms. The course was considered to be ninety percent practical because it included the use of tools and demonstration of techniques. The plaintiff willfully neglected his duty by refusing to comply with a project that had functional value while enhancing the ease to improve the facilities of the school. Teachers are expected to accept teaching assignments in their area of competence.[68]

The North Carolina appellate courts have not decided on cases dealing with noninstructional duties. In 1970 the Attorney General issued an opinion that teachers in North Carolina could be required to supervise extracurricular activities after school hours. The activities must be under the auspices of the school, distributed impartially, and reasonable in number and in hours of duty required.[69]

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[68]State of Louisiana ex. rel., Henry Williams, Jr. v. The Avoyelles Parish School Board, 147 S.2d 728 (1962).

[69]41 Op. N.C. Attorney General Reports 188 (1970).

It's reasonable to summarize the North Carolina teachers may be called on to perform many outside classroom duties which may include supervision of athletic events, field trips, club activities, selling of tickets at student activities, loading of school buses, monitoring study halls, and other job-related duties. The assigned duties must be in the general area of the teacher's field of expertise, and should be evenly distributed among the teachers.

To help minimize dissatisfaction among teachers, the expectations of the administration should be made clear, and teachers' preferences should be respected when possible. When teachers must be involved in extra duties, they should be encouraged to volunteer. When attendance is required at PTA meetings, workshops, and parent conferences, teachers should be notified of dates as soon as possible. If teachers do not attend such required meetings, they should be notified that their absence was noticed.

Refusal to perform extra duties may constitute grounds for disciplinary measures ranging from reprimand to dismissal. This is based on North Carolina statutory grounds for dismissal due to insubordination, neglect of duty, and failure to comply with board requirements.[70]

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[70] N.C. Gen. Stat. sec. 115C-325(e)(1).

Reduction in Force

The tenure law of North Carolina[71] ensures that a teacher will not be dismissed except for cause - reasons which deal with a teacher's abilites and competencies or conviction of specified crimes. However, school districts may be forced to establish appropriate cutbacks in staff or reductions in force(RIF) because of conditions beyond their control. Consequently, such a necessary reduction in employment positions constitutes sufficient cause for the dismissal of a career teacher which will not reflect upon the teacher's abilites. Layoff may result from a "justifiable decrease in the number of positions due to district reorganization, decreased enrollment, or decreased funding, provided that there is compliance with"[72] the minimal due process procedures of adequate, written notice by certified mail, a specification of the reasons for dismissal, and an opportunity for a review of the recommendations by the board.[73] When a career teacher is dismissed through RIF procedures, the person's name is placed on a list of available teachers who have

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[71]N.C. Gen. Stat. sec. 115C-304, 115C-325.

[72]N.C. Gen. Stat. sec. 115C-325(e)(1)(l).

[73]N.C. Gen.Stat. Sec 115C-325(e)(2).

"priority on all positions for which they are qualified which become available in that system for three consecutive years succeeding their dismissal. However, if the local administrative unit offers the dismissed teacher a position for which he is certified, and he refuses, his name shall be removed from the priority list".[74]

Reduction-in-force issues that come before the courts include: (1) justifying that the extreme action of laying off employees is necessary; (2) determining the positions and the specific teacher to be riffed; (3) allegations that the board acted in bad faith or caprice; and (4) length of service or seniority (longevity).[75]

When RIF action is challenged, the burden is on the board to prove that extreme circumstances exist, and it is necessary to RIF. The courts will uphold the board's decision on which position and teacher to RIF as long as the board does not act in bad faith.[76] If the teacher alleges that RIF is a subterfuge to cover up a discharge for an impermissible reason, the burden of proof is on the laid-off

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[74]Ibid.

[75]Robert E. Phay, "RIF's Substantive Legal Issues," School Law Bulletin Vol. XI, No. 3 (Chapel-Hill, N.C.: Institute of Government, July, 1980).

[76]Ibid.

teacher. An excellent example of subterfuge is a claimed RIF case, Duarte v. Mills,[77] which took place in Western North Carolina. A Spanish instructor, Duarte, said that the community college had laid him off because of a decline in enrollment in Spanish classes when he was actually dismissed for criticizing how the college was operated. Duarte criticized the president and circulated a petition against the president's replacement of a committee that had objected to a proposal to eliminate tenure. The Federal District Court for Western North Carolina found the RIF dismissal to be a flagrant violation of free-speech rights protected by the First Amendment.

North Carolina's statutes specifically authorize the school board to dismiss a tenured teacher because of enrollment decline, district reorganization, or decreased funding,[78] but a school board may not dismiss a tenured teacher and retain a non-tenured teacher when the tenured teacher is qualified for an available position. Implicit in the tenure act is the superiority of the tenured teacher's claim to that of a nontenured teacher to a position for which they are both qualified.[79]

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[77]Duarte v. Mills No. C-C-76-230 (W.D. N.C. March 6, 1979). Digested in School Law Bulletin, Vol. XI, no.1, (January, 1980).

[78]N.C. Gen Stat.sec. 115C-325(e)(1)(1). [79]Ibid.

In Goodwin v. Goldsboro City Board of Education,[80] 1984, the North Carolina Court of Appeals upheld the dismissal of a career art teacher due to reduction in force mandated by revenue shortfall. The school board had determined which group of tenured teachers should be terminated, the factors to be considered and the weight to be given to the factors. According to Robert Phay the board should consider length of service, evaluations, vital curriculum areas and other factors deemed relevant, but seniority should not be the primary consideration. Riffing the more recently hired teachers may result in a reduction or elimination of mandated programs such as the exceptional children's program; and seniority does not guarantee competence, enthusiasm, or the ability to meet the needs of students. Since the primary responsibility of the school board is to have the best educational system possible, its actions made in riffing must meet the needs of students as well as comply with laws which mandate special programs, curriculum changes,[81] job security as mandated by the tenure statutes, and constitutionally protected rights of teachers.[82]

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[80]Goodwin v. Goldsboro City Board of Educ., 312 S.E. 2d 892, 67 N.C. App. 243 , 1984, review denied 317 S.E.2d 680.

[81]Phay, p.17-18. N.C. Gen. Stat. 115C-81(a1).

[82]Phay, p. 17-18.

Due Process

The Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive a person of his life, liberty, or property without due process of law.[83]

Capital punishment is not among a school's personnel practices so deprivation of life is not a concern, but the other two elements, deprivation of liberty and of property, have been widely discussed and interpreted by the courts.[84]

The United States Supreme Court said in Board of Regents v. Roth that "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money..."[85] In fact, property interests take many forms, one of which is a "legitimate claim to an entitlement" to continue public employment.

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[83] Due Process Clause, Fourteenth Amendment, United States Constitution.

[84] Robert P. Joyce, "Constitutional Protections of Teachers and Other Public Employees," School Law Bulletin, (Chapel Hill, North Carolina) The Institute of Government, Spring, 1985), p.8.

[85] 408 U.S. 564 92 S.Ct.2701 (1972).

This entitlement to employment is created by state law, not by the United States Constitution. An example is the North Carolina Teacher Tenure Law which sets out the causes and the elaborate steps for dismissal of a tenured teacher.[86] A career teacher has a property interest in employment, and a nontenured teacher who has a contract for a certain term has an entitlement to employment for that period. The property can be taken away only for reasons spelled out in the state statutes.[87]

The Fourteenth Amendment's due process requirement also protects persons who are being deprived of liberty. A liberty interest is involved when an employer, or the government, publicy and falsely accuses a discharged employee of behavior such as misconduct on the job, dishonesty, and immorality. The accusation creates a stigma by damaging the person's good name, reputation, honor or integrity in a manner that forecloses the freedom to take advantages of future employment opportunities.[88]

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[86]N.C. Gen Stat. sec. 115C-325.

[87]Ibid.

[88]Presnell v. Pell, 298 N.C. 715, 724 (1979). See Wisconsin v. Constantineau, 400 U.S. 433 (1971), Paul v. Davis, 424 U.S. 693 (1976), Wieman v. Updegraff, 344 U.S. 183 (1952), Goss v. Lopez, 419 U.S. 565 (1975).

In Bishop v. Wood,[89] 1976, a Marion, North Carolina policeman was dismissed for insubordination, poor attendance at training classes which caused low morale among other officers, and behavior unsuitable for an officer. The policeman claimed that his dismissal denied him of a property right since he was classified as a permanent employee with an expectation of continued employment. His second, claim was deprivation of a liberty interest. Although the city manager provided the reasons for dismissal in private, Bishop claimed that the reasons were false and serious enough to constitute a stigma that would seriously damage his reputation. The United States Supreme Court ruled that the dismissal did not deprive him of a property right because the city ordinance specified that a cause was necessary for dismissal. In addition, Bishop served at the "will and pleasure of the city;" therefore, he did not have tenure. As a result, an expectation of employment would continue as long as work remained satisfactory. In addition, his discharge did not deprive him of a liberty interest since the reasons were never made public. The court said that the reasons for dismissal made no more difference on his reputation than if they had been true.[89]

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[89] 426 U.S. 341, 343, 347, 349.

In another North Carolina case, Presnell v. Pell,[90] 1979, a public school principal fired a cafeteria manager because he was told by a third party that the manager had served liquor to painters who were working in the school cafeteria. The manager claimed that the principal spread rumors about the liquor incident. The State Supreme Court decided that the cafeteria manager had a valid claim because her constitutionally protected liberty interest had been violated. "The court made it clear that due process demands that the employee be afforded a hearing in order to have an opportunity to refute the accusation and remove the stigma upon his reputation."[91] The Board of Regents v. Roth[92] decision held that the purpose of a hearing is to provide the person with an opportunity to clear his name. "Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons."[93]

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[90] 298 N.C. 715, 724 (1979).

[91] Ibid., p. 724, See Board of Regents v. Roth, 408 U.S. 564, (1972).

[92] Ibid. [93] Ibid. p. 573, n. 12.

There are two types of due process: substantive and procedural. Substantive due process was not defined by the United States Supreme Court until 1923.[94] Substantive law creates duties, rights, and responsibilities, and it generally encompasses the First Amendment Freedoms of religion, speech, press, and assembly. It means that the state is without power to deprive a person of life, liberty, or property by an act having no reasonable relation to any proper governmental purpose.[95] The United States Supreme Court has extended substantive protections to include a persons's right to an education.[96]

Procedural due process means that if an employee is to be deprived of life, liberty, or property, or any right guaranteed by statute, certain constitutionally adequate procedures of fundamental fairness must be followed.[97]

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[94] Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394 (1923).

[95] Ibid.

[96] Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, (1925).

[97] H.C. Black, Black's Law Dictionary, abridged fifth ed. by the Publisher's Editorial Staff(St. Paul, Minn.: West Publishing Co., 1983), p. 629.

Due Process for Tenured Teachers

A career teacher is entitled to due process in connection with termination of employment because the teacher's continued public employment is a property or liberty interest that is initially recognized and protected by state statutes.[98] The North Carolina General Statutes, section 115C-325, create detailed procedures for the dismissal or demotion of a career teacher; therefore, the courts have ruled that a career teacher must pursue the established procedures and exhaust them before appealing to the courts.[99] In fact, the courts have recognized that the federal court is not the appropriate forum for reviewing personnel decisions made by public schools, even incorrect personnel decisions, unless there is clearly a gross violation of either constitutional or federal statutory law.[100]

The Fourth Circuit Court of Appeals which has jurisdiction over North Carolina said that "the

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[98] Still v. Lance, 275 N.C. 254, 182 S.E.2d 403 (1971).

[99] Church v. Madison County Board of Education, 31 N.C. App. 641, 230 S.E.2d 769 (1976), cert. denied and appeal dismissed, 292 N.C. 264, 233 S.E.2d 391 (1977).

[100] Bishop v. Wood, supra, p. 149.

exact contours of the procedural due process right (have not) been definitely established ...."[101]
However, several basic procedural guarantees are clear. First of all, the teacher who claims deprivation of property must receive "adequate notice of charges and a fair opportunity to meet them."[102] The pertinent sections of due process for adequate notice and impartial hearing are summarized below:

> Before recommending dismissal to the board the superintendent shall give written notice to the career teacher by certified mail of his intention to make such a recommendation. The recommendation shall include the reasons for dismissal.[103]

> Within the fifteen-day period after receipt of the notice, the career teacher may file with the superintendent a written request for a review of the superintendent's proposed recommendation by a panel of the Professional Review Committee, or the teacher may request a hearing before the board within ten days. If a teacher requests an immediate hearing before the

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[101] Morris v. City of Danville, 744 F.2d 1041 (4th Cir. 1984).

[102] Bowens v. North Carolina Department of Human Resources, 710 F.2d. 1015, 1019 (4th Cir. 1983).

[103] N.C. Gen. Stat. sec. 115C-325(h)(2).

board, he forfeits his right to a hearing before the Professional Review Committee.[104] If a teacher makes no request for a review by the Professional Review Committee or by the school board, the superintendent may file his request for dismissal with the board, and the board by resolution, if it sees fit, may dismiss the teacher. If the teacher requests a review by the committee, the Superintendent of Public Instruction shall designate a panel of five members within seven days of receipt of the request to review the proposed recommendations of the superintendent for the purpose of determining whether in its opinion the grounds for the recommendation are true and substantiated. The teacher may require that at least two members of the committee shall be members of his professional peer group. At least two members shall be lay persons. None of the members may work or reside in the county where the review is being made.[105]

Within five days after the superintendent receives his recommendation from the Professional Review Committee he shall submit his written recommendation to drop the charges or to continue with dismissal of the teacher. If the decision is to dismiss, the teacher has five days after receiving the notice to decide whether to request a hearing before the board and shall notify the superintendent in writing. If the teacher requests a hearing, the superintendent has five days to submit his recommendation to the board along with a copy of the committee's report.[106]

Within seven days after receiving the superintendent's recommendation, the board shall notify the teacher by certified mail that it has received the report of the committee and the superintendent's recommendation. The notice shall specify a date, time and place for a hearing before the board to review the superintendent's recommendation.[107]

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[104]N.C. Gen. Stat. sec. 115C-325(h)(4)(3).

[105]N.C. Gen. Stat. sec. 115C-325(i)(5)(4).

[106]N.C. Gen. Stat. sec. 115C-325(i)(6).

[107]Thomas v. Ward, 529 F.2d 916 (4th Circuit, 1975), and N.C. Gen. Stat. sec. 115C-325(i)(3).

> The teacher and the superintendent must be afforded the right to confront and cross-examine witnesses, and have representation by counsel. The teacher may have access to written reports in advance of the hearing.[108]

In addition, due process requires that the teacher has a right to an impartial decision maker, but due process is not violated if the official who makes the charges is also the one who is the decision-maker. For instance, mere familiarity with the facts of a case does not disqualify a superintendent from making the initial recommendation to dismiss and then being involved in the final decision.[109] The decision-maker would have to show bias or prejudice steming from a source other than knowledge obtained from participating in the case.[110]

The hearing shall be conducted informally and in private,[111] and it is not necessary to follow strict, formal rules of evidence or to exclude hearsay evidence as in a court of law.[112]

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[108]N.C. Gen. Stat. sec. 115C-325(j)(5).

[109]Thompson v. Wake County Board of Education, 31 N.C. App. at 412, 230 S.E.2d at 170.

[110]Morris v. City of Danville, 744 F.2d 1044. Baxter v. Poe, 42 N.C. App. 404, 257 S.E.2d 71 (1979), cert. denied, 298 N.C. 293, 259 S.E.2d. 298 (1979).

[111]G.S. 115C-325(j)(1).

[112]G.S. 115C-325(j)(4), and Baxter v. Poe, supra.

Also, the courts have determined that evidence which occurred more than three years prior to the written notice for dismissal is permissible in a hearing but only for background information. The actual dismissal must be based on evidence which occurred less than three years before the written dismissal notice from the superintendent.[113] This rule applies to evidence found, in a teacher's personnel file.[114]

Finally, a teacher who is being dismissed by action of the board after following the administrative proceedings as summarized above, has the right to appeal the decision of the board to the superior court for the judicial district in which the teacher is employed.[115]

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[113] Baxter v. Poe, supra.

[114] Gregory v. Durham County Board of Education, 591 F.Supp. 145 (M.D.N.C. 1984).

[115] Church v. Madison County Board of Education Board of Education, supra, and N.C. Gen. Stat. sec. 115C-325(n).

Procedural Rights of the Nontenured Teacher

Prior to 1972, the due process rights of nontenured teachers were poorly defined, but the United States Supreme Court significantly clarified this area in two landmark decisions, Board of Regents v. Roth and Perry v. Sindermann. Although the two cases involved college faculty members, the rulings are equally applicable to public elementary and secondary teachers, serving as precedent in teacher nonrenewal cases. Roth, a professor, was not rehired for a second year of teaching. In the Roth case,[116] the Supreme Court ruled that a nontenured teacher's employment affords no property interest and does not require procedural due process unless the teacher is deprived of a constitutional right. In the Sindermann[117] case, the court concluded that a Texas state junior-college professor had an expectancy of reemployment based on a "de facto" tenure program. Statements in the college's official Faculty Guide pertaining to permanent tenure and his length of service enabled Sindermann to establish an entitlement to continued employment; therefore the college was obligated to give him a hearing on the nonrenewal of his contract. In cases rendered since Roth and Sindermann, courts, generally, have held that a public

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[116]408 U.S. 564, 92 S.Ct. 2701, 1972.

[117]408 U.S. 593, 92 S.Ct. 2694, 1972.

employee does not have property entitlement to continued employment unless governmental action has clearly established such a right by statute or contract.[118] This was the case in Bishop v Wood, 1976,[119] in which a North Carolina policeman was dismissed without a hearing. He claimed that he had "de facto" tenure because his permanent classification as described by a city ordinance and his thirty-three months of service gave him a reasonable expectation of continued employment. The court ruled that Bishop did not have a property interest because he served at the "will and pleasure of the city".[120] In addition to not having a property interest, Bishop could not prove that he had been denied a liberty interest because he had been given the reasons for discharge in private.[121] Citing Roth, the court held that as long as the employer does not make public the reasons for dismissal, the employee will not be stigmatized; therefore, no liberty interest has been denied.[122]

The law is also clear in Roth that a teacher who believes that his nonreappointment is impermissible must assert that claim and request a hearing. The teacher bears the

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[118]Still v. Lance, 275 N.C. 254, 182 S.E.2d 403 (1971).

[119]Bishop v. Wood, 426 U.S. 341, 345 (1976).

[120]Ibid., at 347.

[121]Ibid.

[122]Board of Regents v. Roth, supra, p. 573.

burden of proving the allegation. Even if a teacher can show that the board's reason to dismiss was partly because of constitutionally protected conduct such as in Mt. Healthy v. Dole,[123] the court will uphold the board's decision, if the board can show "by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct".[124] This decision was applied in Mayberry v. Dees,[125] a case involving an East Carolina assistant professor, who was not reappointed in his fifth year, a tenure-year decision. The professor claimed that his criticism of the department chairman was protected speech under the First Amendment. The court said that there are many requirements that must be met before tenure is granted. It is not enough for a teacher to show an exercise of First Amendment rights followed by a denial of tenure. If all the teacher has to do is to prove retaliation to allow a jury to rule in his favor; there would be no reasonable way for a court to deny tenure to anyone.[126] The court also upheld the use of subjective evaluations as being natural and necessary in making tenure decisions.[127]

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[123]Mt. Healthy v. Dole, 429 U.S. 274 (1977)

[124]Ibid, p. 287. [125]663 F.2d 502 (4th Cir. 1979).

[126]Ibid.

[127]Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979).

The North Carolina Tenure statute provides that "a school board, upon recommendation for the superintendent, may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or political reasons".[128]

Court decisions in North Carolina have applied the limitations of the statute to a number of nonrenewals. First of all, this section of the statute does not establish a property interest under the Fourteenth Amendment; therefore, a probationary teacher being denied renewal has no right to a pretermination hearing.[129] When a teacher claims that nonrenewal is the result of "arbitrary, capricious, discriminatory, personal or political reasons," the claim is an independent right and must be tried by the court rather than by the school board.[130]

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[128]N.C. Gen. Stat. sec. 115C-325(m)(2).

[129]Williams v. Hyde County Board of Education, 490 F.2d 1231 (4th Circuit, 1974), and Satterfield v. Edenton-Chowan Board of Education, 530 F.2d 567 (4th Cir. 1975).

[130]Sigmon v. Poe, 564 F.2d 1093 (4th Cir. 1977), and Stitute its evaluation for the board of Education, 530 F.2d 567 (4th Cir. 1975).

It is the legal responsibility of the school board to determine a substantive basis for the superintendent's recommendation of nonrenewal and to assure that the nonrenewal is not for a prohibited reason.[131] An example is the North Carolina case, Abell v. Nash County Board of Education,[132] 1983, in which two teachers were nonrenewed by the board with the only reason being that the superintendent had recommended nonrenewal. The teachers were hired to teach math and to serve as football coaches. When a new football coach was hired, the teachers were given their notice of nonrenewal. Neither teacher had received any criticism of their performance. Later, the superintendent filed a statement that the nonrenewal was partly based on a reduction in funds, and the superior court granted summary judgment to the defendant board. The court of appeals reversed the decision and remanded the case because the board did not show a specific substantive reason for nonrenewing the contracts. It can be argued that a decision to nonrenew is arbitrary and capricious when a teacher is evaluated as "meeting expectations," but a board's decision to nonrenew is not arbitrary and capricious when a reason is given based on facts for employing a better-qualified teacher.[133]

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[131]Abel v. Nash County Board of Eduction, 71 N.C. App. 48,321 S.E.2d 502 (1984), cert. denied, 313 N.C. 506, 329 S.E.2d 389 (1985), appeal pending, 1987.

[132]Ibid.

[133]N.C.A.G.O., Informal Attorney General's Opinion, June 3, 1985. Cited from School Law Bulletin, Summer 1985.

The board's reasons for nonrenewal should not be made public in order to protect the teacher's privacy and due process rights. Discussions of reasons for nonrenewal should be made in executive session where they will be made private, and the reasons for nonrenewal may be placed in the teacher's personnel files to avoid public disclosure.[134]

Another case in which the board presented no evidence for nonreappointment and was found to be arbitrary and capricious in its decision was Prewit v. Transylvania Board of Education in 1981.[135] In spite of a recommendation for tenure by the principal and superintendent the board failed to reappoint the teacher. Prewitt had received good evaluations with no mention of any deficiencies or criticisms of her teaching. The board required that deficiencies be made in writing with the teacher being advised. The trial court ordered reinstatement and back pay. Since the Prewit case is a trial court decision, it is not a binding precedent in other North Carolina counties, but it reinforces the duty of the school board to offer evidence to support its decision to nonrenew because of the need to find a more qualified or better teacher.

In Chappell v. Brunswick County Board of Education,[136]

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[134]N.C. Gen. Stat. 115C-325(b) and N.C.A.G.O., Informal Attorney General's Opinion, June 5, 1985, cited from School Law Bulletin, Summer, 1985, p. 30.

[135]See Phay, School Law Bulletin, Vol. XV, no. 3, 1984.

[136]Chappell v. Brunswick County Board of Education, No. 82 CVS 293 (N.C. Superior Ct. Oct. 24, 1983). See Phay, School Law Bulletin, Vol. XV, no. 3, 1984.

a special education teacher in Brunswick County was nonrenewed for lack of organization, planning, individualized teaching, and weaknesses in testing and diagnosing students. The teacher alledged that evaluations were subjective, were based on false information, and that he had not been adequately informed of the evidence and criteria being used in making the decisions. The superior court granted summary judgement to the board. It was not arbitrary or capricious to nonrenew under these facts and allegations.

The Federal District Court in the Western District of North Carolina found sufficient evidence of an arbitrary and capricious nonrenewal when two Haywood County teachers were nonrenewed because of their activity in the teachers' union and their criticism of the superintendent and the school board. They had publicly advocated renewal of their contracts, and they were new residents of the county.[137] In Hasty v. Bellamy,[138] school officials made an attempt to circumvent the tenure act's three-year limit on probationary status. When a high school teacher and head coach became eligible for tenure, the principal conditioned a recommendation for renewal based on the teacher's signing a statement that his probationary period would extend into a

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[137]Head v. Haywood County, Cir. No. A-C-75-69 (W.D.N.C. July 15, 1976). See Phay, School Law Bulletin, Vol. XV.

[138]Hasty v. Bellamy, 44 N.C. App. 15, 260 S.E.2d 135 (1979).

fourth year. The teacher refused to sign, and the board nonrenewed. The teacher sued. The appellate court said that if the board's decision to nonrenew was based solely on the two administrators' recommendation not to reappoint, then the board had not made an arbitrary or capricious decision, but if the decision was based solely on the teacher's refusal to sign the statement, then the board had an arbitrary and capricious cause for failure to rehire. The teacher, Hasty, alleged that he had discovered that Bellamy, the principal, was charging personal items to the high school and that Bellamy had made a statement that he would "get rid of Hasty."[139] Yet, if the teacher's contract had been renewed, he would have become a career teacher, and the letter would have had no effect if had he signed it.[140] The court of appeals remanded the case to the trial court to determine on which basis the board's decision had been made.

The courts have said that a board may refute the arbitrary and capricious allegations by showing a reasonable, educational reason for the nonrenewal decision, but boards may not nonrenew for trivial and frivolous, or unconstitutional reasons. The Johnson v. Branch[141] case constitutes an arbitrary and capricious nonrenewal for trivial and unconstitutional reasons that took place in 1966 before the adoption of the State's Tenure Act. Mrs. Johnson was a black teacher with twelve years' service and average or excellent

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[139] Ibid, 260 S.E.2d at 136. [140] Ibid.

[141] 364 F.2d 177 (4th Cir. 1966).

evaluations. Although Mrs. Johnson's principal recommended her for reappointment, he had presented her with a letter stating seven infractions of school rules in the spring of 1964, just prior to her nonrenewal. The infractions included being fifteen minutes late to supervise a night athletic contest, arriving late to school but before the starting of classes, not furnishing a written explanation for missing a PTA meeting, not keeping cabinets neat, and not standing at her classroom door to supervise class changes. None of the infractions were related to the quality of her classroom performance, but the board voted to nonrenew her contract for the reasons stated in the letter. Johnson sued, alleging that the board had acted arbitrarily and capriciously and had penalized her for exercising her constitutionally protected rights. She was actively involved in civil rights activities in a small eastern town that was in the throes of a civil rights campaign. Her husband and father were candidates for public office. The trial court dismissed the suit, but the Fourth Circuit found the board to be arbitrary in its dismissal for trivial reasons. In addition, the court found the reason to nonrenew to be based on the teacher's constitutionally protected rights. The board would not have made the decision if the teacher had not been involved in civil rights activities.

The cases reviewed in this section show that due process is required when the reasons for nonrenewal seriously damage the persons's standing, reputation, or associations in the

community because of what the board has publicly said about the teacher, and when the publicity prevents future job opportunities.[142] Also, abuse exists when the reasons for nonrenewal are based on trivial reasons[143] with no educational basis[144] or when the decision is in violation of the teacher's constitutionally protected rights.[145] Case law on nonrenewal supports the fact that it is not an arbitrary or capricious action when the board chooses not to reappoint an average or satisfactory teacher in order to obtain a better teacher. Since schools have a commitment to put the best available teachers in the classroom, the probationary period is the time for weeding out all but the very best teachers.[146]

Dismissal for Cause

Although career status gives a teacher a vested interest in continued employment which cannot be denied without due

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[142]Board of Regents v. Roth, Supra, p. 573.

[143]Johnson v. Branch, supra, p. 81.

[144]Prewit v. Transylvania Board of Education, supra p.226.

[145]Johnson v. Branch, supra, p. 226.

[146]Mayberry v. Dees, supra, p. 509.

process of law, it does not guarantee permanent employment. A school board may discharge a teacher for cause, but the board cannot base the dismissal decision on reasons other than those contained in the law.

The North Carolina General Statutes list the following twelve grounds for dismissal of career teachers, sections 115C-325(e)(1)(a-n):

a. Inadequate performance
b. Immorality
c. Insubordination
d. Neglect of duty
e. Physical or mental incapacity
f. Habitual or excessive use of alcohol or nonmedical drugs[147]
g. Conviction of a felony or a crime involving moral turpitude.[148]
h. Advocating the overthrow of the government of the United States or the State of North Carolina by force, violence, or other unlawful means
i. Failure to fulfill the duties and responsibilities imposed by the General Statutes

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[147] For nonmedical use of a controlled drug, see Article 5 of Chapter 90 of the General Statutes.

[148] Moral turpitude is an act of baseness, vileness, shameful wickedness, and depravity, in the private and social duties that man owes to his fellowman or to society in general...behavior done contrary to justice, honesty, modesty, or good morals. Crimes include bribery, child-beating, embezzlement, forgery, fraud, larceny, perjury, armed robbery, rape, tax offenses. Crimes may involve misdemeanors and felonies, so the phrase is ambiguous. The list of crimes cuts across other categories of criminal offenses. Caution is advised in initiating a dismissal for a crime involving moral turpitude. See Black's Law, Abridged Fifth Edition, p. 789; see Robert E. Phay, The Nonreappointment, Dismissal, and Reduction in Force of Teachers and Administrators Proposed Board Policies. (Chapel Hill, North Carolina, 1982) p.16. Cited from Memorandum of Michael Crow dated December 23, 1975, in the Institute of Government Library, Chapel Hill, N.C..)

j. Failure to comply with reasonable requirements the board may prescribe
k. Any cause which constitutes grounds for the revocation of a career teacher's certificate
l. A justifiable decrease in the number of positions due to district reorganization, decreased enrollment, decreased funding
m. Failure to maintain a certificate in a current status
n. Failure to repay money owed to the State[149]

Since dismissal poses a threat to future employment opportunites for a career teacher, it often results in litigation. One approach used in contesting the dismissal is to attack the statutory grounds of dismissal as being "constitutionally void for vagueness."[150] This means that the statute terms are so vague, indefinite and uncertain that a person of common intelligence cannot determine the meaning and may differ in how his behavior meets its requirements.[151] Another approach is to charge that the reason for the board's dismissal is not true and is unsupported by substantial evidence.[152] To make this determination, the courts use a standard known as the "whole record test" which takes into account all the evidence from the record including the

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[149]See Article 60, Chapter 143 of the General Statutes.

[150]Nestler v. Chappel Hill-Carrboro City Schools Board of Education, 66 N.C. App. 232, 311 S.E.2d 57 (1984).

[151]Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 130, 70 L.Ed. 322 (1925).

[152]Nestler v. Chappel Hill-Carrboro, supra, p. 59.

complete testimony of all the witnesses and the report from the Professional Review Committee. The court must consider evidence that justifies the board's decision but also contradictory evidence or evidence from which conflicting inferences could be drawn.[153] The court may not weigh the evidence and substitute its evaluation for the board. If the conclusions of the board are based on all of the facts and are not contrary to law, its order should be affirmed by the courts, regardless of the nature of offenses charged.[154]

Other approaches teacher litigants have used in seeking judicial relief include a claim of breach of contract for wrongful discharge[155] and violation of due process rights,[156] but boards are careful to dismiss teachers only after strict compliance with the terms of the contract and the applicable school law under the provisions of G.S. 115C-325.

Also, teachers have brought about litigation by alleging an arbitrary and capricious dismissal for personal reasons and lack of impartiality by the board as a decision-maker.[157]

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[153] Public School Laws of North Carolina, Issued by the State Board of Education, 1986, p. 153 cited from Thompson v. Wake County Board of Education, 292 N.C. 406, 233 S.E.2d 538 (1977).

[154] Ibid.

[155] Rhodes v. Person County Board of Education, 58 N.C. App. 130, rev. denied, 293 S.E.2d 299 (1979), 295 S.E. 2d 479.

[156] Baxter v. Poe, 42 N.C. App. 404, 257 S.E.2d 71, cert. denied, 259 S.E. 2d 299 (1979).

[157] Ibid.

In reviewing the cases based on the twelve grounds for dismissal, one of the more frequently cited grounds for dismissal is inadequate performance. "In determining whether the professional performance of a career teacher is adequate, consideration shall be given to regular and special evaluation reports...Failure to notify a career teacher of an inadequacy in his performance shall be conclusive of satisfactory performance."[158] The inadequate performance standard for dismissal has been challenged as being "constitutionally void for vagueness" in two recent court cases decided by the North Carolina Court of Appeals. In Nestler v. Chappel Hill-Carrboro City, 66 N.C. App. 232, 1984, the inadequate performance standard was constitutional as applied to Nestler because the school system had specifically defined the inadequacies in his performance for two and one-half years with twenty-one observation reports which included concrete recommendations for improvement; therefore, Nestler had sufficient prior notice of the expectations for his performance. The court said that inadequate performance is a term that a person of ordinary understanding can comprehend in regard to how he is to perform. Nestler was notified by his principal that he was being placed on "conditional status" under which he

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[158] N.C. Gen. Stat. 115C-325(e)(3).

was given a detailed performance improvement plan and a schedule for increased observations. Observers on numerous occasions cited Nestler's inability to control and maintain discipline in his classroom. He made little or no attempt to correct students who were engaged in conversation unrelated to class activity. In the observation reports, Nestler was criticized for not providing sufficient structure in his lesson plans, not establishing an anticipatory set at the start of the class, failing to engage students in discussion, and failing to assess the students' level of comprehension on a regular basis. The court noted evidence that detracted from the board's finding of inadequate performance such as testimony that Nestler had an excellent grasp of his subject matter, chemistry, and found there was no evidence showing that his students were not as proficient in chemistry as other students. Inspite of the contrary evidence, the court found that the testimony of the principal and other evaluators was not so discredited as to violate the board's finding of inadequate performance; therefore, the Court of Appeals concluded that the superior court had acted improperly in substituting its judgement for the board of education.

In the second case, Crump v. Durham County Board of Education,[159] 1985, the Professional Review Committee, the superior court, and the North Carolina Court of Appeals found more than sufficient evidence that Crump failed to maintain any semblance of good order and discipline in her classroom as observed on innumerable occasions. Crump's students disturbed other clases, by yelling, banging on walls, climbing in and out of windows, playing cards, misusing textbooks and audio-visual aids. The same students behaved in other classrooms throughout the day. Crump was required to observe classroom methods of teachers in other schools, and the principal and math-science coordinator made recommendations for her improvement. In spite of prior notice and efforts for remediation, her classroom discipline and teaching effectiveness did not improve; therefore, the Court of Appeals ruled that "the inadequate performance standard was constitutionally applied because it could be readily understood by any person of ordinary intelligence who knows what a teacher's job entails."[160]

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[159]Crump v. Durham County Board of Education, N.C., 327 S.E.2d 599 (1985).

[160]Ibid., p. 601.

School boards often cite a number of factors related to classroom performance in attempting to establish the standard of inadequate performance as a basis for dismissal. In addition to inappropriate teaching methods[161] and failure to maintain good classroom order and discipline,[162] teachers have been dismissed for use of unreasonable or excessive discipline.[163] Also, a number of grounds may be introduced and supported in a single case. An illustrative example is Baxter v. Poe,[164] 1979.

A career teacher of orthopedically handicapped children (including physically disabling handicaps such as cerebral palsy, muscular distrophy, fragile bones, and malformed limbs) was instructed by her principal not to use corporal punishment without the principal's prior approval and the presence of an adult witness. She continued to whip students in violation of the principal's orders for trivial reasons such as not doing homework. Baxter was dismissed for inadequate performance, insubordination, neglect of duty, and failure to comply with the board of education

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[161] Nestler, supra.

[162] Nestler and Crump.

[163] Kurtz v. Winston-Salem/Forsyth County Board of Education, 39 N.C. App. 412, 250 S.E.2d 718 (1979).

[164] Baxter v. Poe, 42 N.C. App. 404, 257 S.E.2d 71, cert. denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

requirements. The North Carolina Court of Appeals, in looking at the whole record, found substantial evidence for dismissal on all four grounds. The board of education followed the elaborate dismissal procedures so there was no denial of due process, and a board member's knowledge of the situation prior to the hearing did not indicate a lack of impartiality on the part of the board. Also, the court rejected Baxter's claim that the board used evidence over three years old in making its decision. The law prohibits the court from basing its decision on evidence over three years old but not from hearing it.

It is not unusual to find dismissal cases with similar factual situations but based on different grounds such as in Baxter v. Poe[165] and Kurtz v. Winston Salem/Forsyth County Board of Education,[166] 1979. Both cases involved the use of excessive discipline, but Kurtz was a probationary teacher who was dismissed while under contract. The testimony showed that Kurtz had slapped students in the face for such reasons as not putting a pencil down after being asked to do so. She hit a student in the head with a book and pinched and grabbed several students hard enough

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[165] Ibid.

[166] Kurtz v. Winston-Salem/Forsyth County Board of Education, supra.

to leave bruise marks. Board policy required that punishment 1) be limited to paddling because striking or slapping a student about the face was forbidden, 2) be administered in the principal's office with an adult witness, 3) be used only after other methods of discipline had failed, 4) be applied when the school official was not angry, 5) and be administered after students had been advised of the types of behavior which might result in corporal punishment.[167]

The court rejected the board's findings of inadequate performance and insubordination but affirmed the dismissal because there was substantial evidence that Kurtz had failed to follow board policy on the administration of corporal punishment. The board policy was not in conflict with the state statute allowing corporal punishment[168] because it provided that teachers could use reasonable force to restrain or correct pupils and maintain order.[169]

Lack of order and discipline in the classroom may be considered as inadequate performance, neglect of duty, or

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[167] Ibid, N.C. App. at 417-419.

[168] N.C. Gen. Stat. sec. 115C-390.

[169] Kurtz v. Winston-Salem/Forsyth County Board of Education, supra, p. 412.

insubordination, but if a career teacher's ability is to be judged solely by one incident, the evidence of that incident should be clear. In Thompson v. Wake County Board of Education,[170] 1977, a teacher was dismissed for allowing two eighth grade boys to fight in a classroom and for using inappropriate language while encouraging the students to settle their dispute. Based on this incident, Thompson was charged with grounds of immorality, insubordination, neglect of duty and physical or mental incapacity. The North Carolina Supreme Court overruled the dismissal. The Court looked at the contradictory evidence involving the incident and decided that Thompson's conduct at times was imprudent and ill-advised, but it did not justify dismissal.

In the Thompson[171] case, the North Carolina Court of Appeals said that "insubordination imparts a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders." A local board need not tell its teachers in advance of all possible types of misconduct before it can find a teacher guilty of insubordination. Repeated acts of teachers' misconduct which are obviously contrary to the accepted standards of behavior

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[170] Thompson v. Wake County Board of Education, 31 N.C. App. 401, 230 S.E.2d 164(1976), 292 N.C. 406, 233 S.E.2d 538 (1977).

[171] Ibid, 31 N.C. App. at 401. 31 N.C. App. 401.

in the teaching profession and the community in general should constitute insubordinate behavior.[172]

A career status driver's education teacher, was dismissed for insubordination because he refused to follow the principal's orders. The teacher was directed to have two students in a car during roadwork anytime a female was in the car. The court said this was a reasonable request by the principal because complaints had been received from female students about the teacher's conduct and personal comments.[173]

Several cases mentioned have used neglect of duty as a ground for dismissal, but in Overton v. Goldsboro City Board of Education, 1981,[174] the court made a requirement for neglect of duty:

"Regardless of circumstances to which neglect of duty is sought to be applied, dismissal under statute of career teachers on such grounds alone cannot be sustained unless it is proven that a reasonable man under the same circumstances would have recognized the duty and would have considered himself obligated to conform to it."[175] Overton was a high school teacher with fifteen years of effective teaching. He

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[172]Ibid.

[173]Crump v. Board of Education, Hickory Administrative Unit, 79 N.C. App. 372, 339 S.E.2d 483 (1986).

[174]Overton v. Goldsboro City Board of Education, 304 N.C. 312, 283 S.E.2d 495 (1981).

[175]Ibid., 304 N.C. at 319.

learned by the radio that the police were looking for him on a felony drug charge. He notified his principal and superintendent and requested a leave of absence without pay until the matter was resolved. The superintendent agreed that it would be in the best interest of the students for Overton not to be in the classroom. Overton was never directed to return to his classroom so he did what a reasonable man would do in such a situation. He stayed away from school. The school board dismissed Overton for neglect of duty. The school board appealed to the Supreme Court of North Carolina after the superior court and the Court of Appeals affirmed for Overton. The State Supreme Court reversed the board's dismissal, but the outcome would probably have been different if the teacher had been convicted rather than indicted. The teacher had an excellent record and his teaching had not been impaired.

In another case, Faulkner v. New Bern-Craven County,[176] 1984, an above average teacher of eleven years was dismissed. The grounds for dismissal listed by the school board included neglect of duty, immorality, insubordination, and excessive use of alcohol on school property during school hours. The teacher admitted that he had been absent from his classroom for extended

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[176] 311 N.C. 42, 316 S.E.2d 281 (1984).

lengths of time after being warned, but the controversial issue was the habitual or excessive use of alcohol. The Court of Appeals concluded that there was not substantial evidence for the excessive alcohol charge. The court argued that "if the charge had been drinking during school duty hours, the decision would be otherwise, but, of course, the Legislature has not seen fit to make that a ground for discharging career teachers."[177] The State Supreme Court upheld the dismissal and concluded that the use of alcohol by a teacher on school property during school hours which was obvious to students, parents, and other school personnel and which continued after repeated warnings, "was excessive within the meaning of the statute."[178] The court emphasized the role of teachers in promoting morality, temperance, and in promoting the health of students.

Before the charge of immorality can serve as a basis for dismissal, it must be shown to affect the classroom adversely. To show a relationship between immoral conduct and the teacher's performance, North Carolina cases have based their dismissal decisions on the ground of neglect

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[177]Ibid, 316 S.E.2d 281 at 285.

[178]Ibid, p. 282.

of duty which is brought about by the teacher's immorality. An example is Frison v. Franklin County Board of Education, 1979.[179] Frison, a career teacher, was demoted to the position of tutor. In order to discourage students from passing notes in the classroom, Frison read parts of notes which contained three vulgar colloquialisms. The Professional Review Panel found that Frison acted in an unprofessional manner and exercised poor judgement. It concluded that she should be severely reprimanded for her conduct but not dismissed. The superintendent recommended dismissal, but the board demoted Frison to the position of tutor. The Fourth Circuit Court of Appeals upheld the demotion because the North Carolina statutory definition of a teacher's duties gave the teacher reasonable prior notice that the speech for which she was demoted was grounds for dismissal.(See N.C. Gen. Stat. section 115C-307(b))

The teacher's influence on the students remains the strongest motivation in teacher dismissals based on immorality. In fact, schools have the right, if not the duty, to uphold the integrity of the school system and to create a properly moral scholastic environment.[180] In the

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[179]Frison v. Franklin County Board of Education, 596 F.2d 1192 (4th Circuit 1979).

[180]Adler v. Board of Education, 342 U.S. 485 (1952); Bielan v. Board of Education, 357 U.S. 399 (1958), Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159 (1986).

Faulkner case the court said that the teacher's "character and conduct must be expected to be above that of the average individual not working in so sensitive a relationship as that of the teacher to pupil."[181]

Another case that involved the teacher's influence on students was Burrow v. Randolph Board of Education,[182] 1983. A career teacher was dismissed because her crime of involuntary manslaughter of her husband caused her to lose credibility in the community. Having a teacher in the classroom on work release from prison would not create a moral environment for students. There was a reasonable and adverse relationship between her crime and the ability to perform her duties. It was her plea of nolo contendere (a guilty plea) that resulted in the revocation of her certificate rather than dismissal for immorality.

Since the term "immorality" covers a broad range of conduct, lawmakers leave the task of defining the term to the courts. In other states, examples of cases that have been considered sufficient grounds for dismissal because of immorality include sexual advances to a pupil;[183] known

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[181]Faulkner v. New Bern-Craven County Board of Education, 311 N.C. at 59.

[182]Burrow v. Randolph County Board of Education, 61 N.C. App. 619.

[183]Kilpatrick v. Wright, 437 F.2d 297, (M.D. Ala. 1977).

homosexuality;[184] criminal conviction for homosexual solicitation;[185] and homosexual activism;[186] conviction for prostitution;[187] transsexuality;[188] cohabitation;[189] growing marijuana plants in a greenhouse;[190] directing hostile racial, sexual, humiliating language toward students which subjects a class of people to public ridicule;[191] misappropriation of funds;[192] false statements on an application;[193] and false documents submitted to the Internal Revenue.[194]

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[184] Gaylord v. Tacoma School District No. 10, 88 Wash. 2d 286, 559 P.2d. 1340 (1979). Bowers v. Hardwick, 42 L.Ed.2d 140 (1986). Rowland v. Mad River Local School District , Montgomery County, 730 F.2d. 444 (6th Cir. 1984).

[185] Moser v. State Board of Education, 22 Cal. App.3d 988, 101 Cal. Reporter , 86 (1972).

[186] McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971).

[187] Governing Board v. Metcalf, 36 Cal. App.3d 546, Ill. Cal. Reporter 724 (1974).

[188] Grossman v. Board of Education, 127 N.J. Super. 13, 316 A.2d 39, cert. denied, 65 N.J. 292, 321 A.2d 253 (1974).

[189] Jerry v. Board of Education, 35 N.Y.2d 535, 324 N.F.2d 106 (1974), Sherburne v. School Board of Suwannee County, 455 So.2d 1057 (Fla. App. 1984).

[190] Adams v. State Professional Practices Council, 406 So.2d 1170 (Fla. App. 1981) petition denied, 412 So.2d 463.

[191] Clark v. Board of Education of School District of Omaha, 214 Neb. 250, 338 N.W.2d 272 (1983).

[192] Appeal of Haney, 406 Pa. 515, 178 A.2d 751 (1962).

[193] Acanfora v. Board of Education, 491 F.2d. 298 (4th Cir. 1974).

[194] Logan v. Warren County Board of Education, 549 F.2d 145 (S.D. Ga. 1982).

Shortly after the Supreme Court's decision in Faulkner, the Court of Appeals considered the meaning of the phrase "physical incapacity"[195] as a ground for dismissing teachers. In Bennett v. Hertford County Board of Education, 1984,[196] a career teacher was dismissed by the school board because her physical ailments prevented her from devoting sufficient attention and effort to the performance of her responsibilities. Bennett was absent from work a substantial amount of time from 1978 until April, 1981, because of numerous and various physical ailments. On April 6, 1981, the teacher returned to work from a leave of absence and worked for the remainder of the year without missing a day. Approximately two weeks after Bennett returned to work the superintendent initiated dismissal proceedings. The Court of Appeals found no evidence of physical incapacity at the time of the superintendent's recommendation or thereafter. In holding for the teacher, the Court of Appeals stated:

> We hold that physical incapacity under G.S. 115C-325(e)(1)(e) refers to a present and continuing inability to perform the duties and meet the responsibilities and physical demands customarily associated with the individual's job (as) a career teacher in the public schools. The incapacity must be in effect at the time action is

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[195] G.S. 115C-325(e)(1).

[196] Bennett v. Hertford County Board of Education, 69 N.C. App. 615 (1984).

taken by the board of education. The projected duration of the incapacity must be long term or indefinite with no reasonable prospect for rapid rehabilitation.

This decision was important because it provides a test against which proposed actions may be measured for dismissing a career teacher because of physical problems. The state statutes may be read as only permitting teachers to be dismissed for "present physical incapacity."[197]

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[197]Ibid.

Summary

Terms and conditions of employment are provided by North Carolina statutory provisions. State requirements for certification, tenure, duties of teachers, reduction-in-force policies, tenured and nontenured dismissal procedures, and dismissal for cause are summarized below:

1. An applicant for a certificate must be at least eighteen years old, must have fulfilled requirements for a bachelor's degree or other required degree, must have an endorsement from an institution of higher learning, and must have a satisfactory score on the National Teacher's Examination.
2. An applicant must be of good moral character.
3. Certificates must be approved and signed by the local superintendent.
4. A teacher must be elected by the local board of education and may be assigned or transferred at the board's discretion.
5. Health certificates are required upon initial employment and after one or more years of separation from employment.

6. The State issues two classifications of certificates, initial and continuing; and two categories, class "A", undergraduate, and class "G", graduate. There are four levels of preparation: bachelor's degree, master's degree, sixth-year degree and doctorate.
7. An interim certificate is available for candidates who did not know that a minimum score on the NTE was required. The requirement must be met after a four month period.
8. A provisional certificate may be granted for no more than five years to skilled persons from the private sector who desire to teach under the lateral entry program. A regular certificate is required by the sixth year of employment.
9. A reciprocity certificate is available for teachers who have graduated from accredited out-of-state institutions but need to meet the State Board requirements for certification.
10. A certificate may be suspended or revoked only by the State Board of Education for fraud, illegal change on the certificate, a plea of no contest of a crime, final dismissal based on statutory cause, and resignation without thirty days' notice or prior consent from the local superintendent.

11. A certificate must be renewed every five years, and a professional growth plan is required for all teachers.
12. Career status, a statutory right, may be granted by the local board after three consecutive years of employment.
13. A career teacher has certain rights and privileges and may not be demoted or dismissed except with competent evidence that must be documented, signed by the teachers, and placed in the teacher's file.
14. Local school boards and officials have the implied right to determine rules and regulations for teachers in carrying out their duties.
15. In addition, the legislature has prescribed duties in the state statutes that require teachers to maintain order, discipline, morality, industry, neatness, and health; provide medical care and medications; teach thoroughly all subjects required by the teacher; enter the superintendent's professional growth plan; report pupil non-attendance; accurately complete all required reports; instruct proper care of the building; and teach areas of citizenship, fire prevention, free enterprise system, and dangers of harmful drugs and alcohol.

16. Teachers who fail to fulfill the duties and responsibilities as required by statutes may be dismissed.
17. Extra duty assignments do not need to be spelled out in school board rules and regulations because teachers are expected to perform outside clasroom duties that are in the area of the teacher's competence.
18. Reduction-In-Force is one of grounds for dismissal of career teachers resulting from a decrease in the number of teaching positions due to district reorganization, decreased enrollment, or decreased funding.
19. Career teachers dismissed throught RIF procedures will have their names placed on a list of available teachers who have priority on all positions for which they are certified which become available in that system for three consecutive years succeeding their dismissal.
20. A career teacher has a property interest in employment, and a non-tenured teacher who has a contract for a certain term has an entitlement to employment. Neither may be dismissed except for reasons spelled out in the state statutes.

21. A teacher may establish a liberty interest if nonrenewal or dismissal imposes a stigma or forecloses opportunities for future employment.
22. A teacher is entitled to procedural due process if dismissal action impairs a property or liberty interest.
23. Due process requires, at a minimum, that a teacher must have adequate notice of charges and must be provided with an opportunity for a hearing.
24. An adequate notice of dismissal must specify charges, adhere to statutory deadlines, follow designated guidelines, allow the teacher time to prepare for a hearing.
25. Lack of proper notice can result in reinstatement of a teacher.
26. A school board is considered an impartial decision maker unless bias of its members can be clearly established.
27. A career teacher must exhaust all administrative remedies for a review by the Professional Review Committee and a school board hearing before appealing the decision to the superior court.

28. Full procedural rights in a hearing include representation by counsel, examination and cross-examination of witnesses, and a record of the proceeding; however, formal trial procedures are not required.
29. A nontenured teacher must bear the burden of proving the allegation of dismissal for arbitrary, capricious, discriminatory, personal, political or unconstitutional reasons. The claim is an independent right and must be tried by the court rather than by the school board.
30. A school board may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any reasonable, educational reason it deems sufficient.
31. It is not arbiatrary or capricious action when a board chooses not to reappoint an average or satisfactory nontenured teacher in order to obtain a better teacher.
32. A school board may only dismiss a career teacher for reasons contained in state law: inadequate performance; immorality; insubordination; neglect of duty; physical or mental incapacity;

excessive use of alcohol or nonmedical drugs; conviction of a felony or a crime involving moral turpitude; advocating the overthrow of the state or federal government; failure to fulfill statutory duties, or comply with board requirements; causes resulting in revocation of a certificate; decrease in enrollment, funds, or district reorganization; failure to maintain a current certificate; and failure to repay money to the state.

33. The burden of proof is on the school board to introduce sufficient evidence to support a teacher's dismissal.
34. Failure to notify a teacher of an inadequacy in performance shall be conclusive of satisfactory performance.
35. The inadequate performance standard is not considered "constitutionally void for vagueness" when the teacher has received prior notice of inadequacies with efforts for remediation and when the standard can be readily understood by any person of ordinary intelligence who knows what a teacher's job entails.

36. Dismissal of a career teacher for "neglect of duty" alone cannot be sustained unless it is proven that a reasonable man under the same circumstances would have recognized the duty and felt obligated to conform to that duty.
37. Insubordination imparts a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders. Repeated acts of teachers' misconduct which are obviously contrary to the accepted standards of behavior in the teaching profession and the community should constitute insubordinate behavior.
38. Use of alcohol by a teacher on school property during school hours which is obvious to school personnel, students, and parents and which continues after repeated warning is considered evidence for the "excessive use of alcohol" charge.
39. A charge of immoral conduct must be shown to influence students and affect the classroom adversely. North Carolina cases have based dismissal decisions on the ground of neglect of duty which is brought about by the teacher's immorality.

Chapter IV

TORT LIABILITY

Introduction

Teachers often express concerns over being sued for some action or failure to act on the job that may result in harm to a student. This type of legal action is called tort law. The term, "tort", is difficult to define because the "language can be so broad that it includes other matters than torts or else so narrow that it leaves out some torts themselves."[1] The definition of a tort is as follows: A tort is "a private or civil wrong or injury other than a breach of contract"[2] which refers to any harm done to another that is not a crime such as hurting someone carelessly either by some action or failure to act. The remedy is for the injured party to file suit in court for damages suffered at the expense of the person responsible for the harm. In comparison to a crime, a tort is a "wrong of person against person as opposed to person against the state.... in a crime the state brings criminal proceedings to protect the interests of the public against the wrongdoer."[3]

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[1] Prosser and Keeton and the Law of Torts, ed. W. Page Keeton, 5th ed. (St. Paul, Minn.: West Publishing Co., 1984), p. 2.

[2] H.C. Black, Black's Law Dictionary, abridged 5th ed. (St. Paul Minn.: West Publishing Co., 1983), p. 774.

[3] Alexander and Alexander, Law in a Nutshell, p.204.

Under common law a school board is not liable for torts whether committed by the board, its officers, agents, or employees. Although superintendents have limited immunity, principals and teachers are liable for tort actions. This common law doctrine for torts will be discussed in the section on "Governmental Immunity."

In 1955 the North Carolina legislature authorized boards of education in North Carolina, if they choose, to waive their immunity for torts by obtaining liability insurance but only to the extent the insurance covers negligence or torts. North Carolina General Statutes, section 115C-42, direct school boards which choose to waive their immunity to be responsible for determining which liabilities, officers, agents, and employees are to be covered by the insurance. Negligent acts or torts may be covered when members or employees of the school board or particular school act within the scope of their authority and in the course of duty. Boards are not authorized to pay for claims entered against individuals who act or fail to act because of "actual fraud, corruption, or malice..."[4]

A board of education that does not waive immunity from tort liability, as authorized by G.S. 115C-42, is not liable in a tort action or proceeding except for liability that may be established under the Tort Claims Act, G.S. 143-291. However, the Tort Claims Act only authorizes recovery against a board of education for injuries or death

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[4]N.C. Gen. Stat. sec. 115C-43.

which occur because of negligent acts of employees while driving a school bus or a school transportation vehicle. Operation of the vehicle must be paid from the State Public School Fund. The North Carolina Industrial Commission has jurisdiction to hear and determine damages of tort claims against a school board arising out of operation of school buses or vehicles. The legislature has created a contingency fund for the Tort Claims Act which provides for damages up to $30,000 for deaths or injuries.[5]

Torts can be divided into three categories: (1) intentional interference, (2) strict liability, and (3) negligence.

Intentional torts include assault and battery and defamation. Strict liability means"'without fault'.... where the defendant is held liable in the absence of both intent to interfere with the plaintiff's interests and intelligence."[6] Torts involving strict liability comprise a developing area of tort law and are not found in the school setting, ... "although injuries resulting from equipment failure in shop or chemistry classes come close."[7]

An unintentional tort is considered negligence. The courts will decide whether or not a person has been negligent and, therefore, liable for damages through the following elements of tort action:

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[5]Ibid. sec. 143-300.1. [6]Prosser, Torts, p. 31-32.

[7]Robert E. Phay, "Tort Liability," School Law Cases and Materials, Ch. 9 (1977), p. IX-11

(1) The existence of a legal duty to maintain a standard of conduct that will protect others from reasonable risk

(2) A breach of that duty

(3) A reasonably close connection between the conduct and the resulting injury known as "proximate cause"

(4) Actual loss or damage[8]

This chapter will focus on intentional interference and negligence, defenses of negligence as well as governmental immunity, educational malpractice, and student records.

Intentional Interference

Intentional torts are the result of a conscious act by an individual for the purpose of bringing about... "a result which will invade the interests of another in a way that the law forbids."[9] The intent may range from being hostile with a desire to do harm to a defendant who intends nothing more than a good-natured joke.[10] Nevertheless, the courts have drawn the line between intentional torts and negligence "...at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and become in the mind of the actor a substantial certainty."[11]

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[8]Prosser, Torts, pp. 164-165. [9]Ibid. p. 136.

[10]State v. Monroe, 121 N.C. 677, 28 S.E. 547 (1897).

[11]Prosser, Torts, p. 36.

Assault and Battery

The most common types of intentional torts for which teachers may be held liable are assault and battery. Although assault and battery usually go together, it is possible for one to exist without the other. Assault occurs when a person intentionally attempts to create a fear of a threat to cause bodily injury to another without actually touching or striking the person.[12] Battery is the actual harmful result to a victim which may be bodily harm or offensive touching.[13]

It is an assault when a person swings a fist or other object to strike another person, and the person sees the movement; and a battery when the fist or object comes in contact with the person. A tort is committed when a person verbally threatens to harm another person. The failure to carry it through to battery will not prevent liabilities; therefore, the key to establishing an assault is the intent of the person who is attempting to harm another and the knowledge of that harm by the victim. There is no assault if the victim is not aware of any physical threat.[14]

Assault and battery cases against school personnel are usually the result of excessive use of corporal punishment.

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[12]Blacks, Law Dictionary, p. 59. [13]Ibid. p. 80.

[14]Prosser, Torts, p. 46.

How do the courts draw the line between corporal punishment, which is legal in most states, including North Carolina, and assault and battery?

First of all, North Carolina General Statutes allow the principal, the assistant principal, the teacher, and a substitute teacher to use reasonable force "in the exercise of lawful authority to restrain or correct pupils and maintain order."[15] Two early North Carolina Supreme Court

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[15]The 1987 session of the General Assembly of North Carolina amended Gen. Stat. 115C-391(a) to require local boards of education to adopt policies for the administration of corporal punishment to include at a minimum the following conditions:

(1) Corporal punishment shall not be administered in a classroom with other children present;
(2) The student body must be informed of the general type of misconduct which may result in corporal punishment;
(3) Assistant principals are added to the list of school personnel now authorized to administer corporal punishment: that includes the teacher, substitute teacher, principal, or assistant principal in the presence of the same people. A teacher aide or assistant and a student teacher may be witnesses only.
(4) Parents must be notified of the use of corporal punishment, and upon request, given a written explanation of the reasons and the name of the second school official who was present.

...School personnel may use reasonable force, including corporal punishment, to control behavior, to remove a person from the scene in those situations when necessary:

(1) To quell a disturbance threating injury to others
(2) To obtain possession of weapons or other dangerous objects...
(3) For self-defense, or
(4) For the protection of persons or property.

cases, Drum v. Miller,[16] 1904, and State v. Pendergrass[17] 1837, have been used to determine what the term, "reasonable", means. Discipline must further an educational goal rather than be a result of malice However, a school official may be liable only if the punishment inflicts a serious or permanent injury that could have been seen as a natural and probable consequence of the reasonable force that was used on the student. This test was applied in Gaspersohn v. Harnett City Board of Education, in 1985.[18] Three students received six days in the In-School Suspension program for skipping school for one day of school. After making two requests for corporal punishment as alternative discipline, the students received six licks by the assistant principal in the presence of another faculty member. Gaspersohn, a female student, suffered bruised buttocks for three weeks with recurrent nightmares and other stress-related symptoms. Gaspersohn sued the assistant principal and the school board for assault and battery. The North Carolina Supreme Court upheld the lower courts decision which said that the assistant principal acted reasonably and without malice.

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[16]135 N.C. 205, 47 S.E. 421 (1904).

[17]19 N.C. 365 (1837).

[18]330 S.E.2d 489 (N.C. App. 1985).

Although the courts have upheld the use of corporal punishment to maintain discipline, there are other sources of liability for teachers who administer excessive corporal punishment.

In State v. Menshaw and State v. Scoggins,[19] two teachers were convicted of child abuse by a North Carolina district court under the North Carolina Child Abuse Act [20] for paddling a student in their fifth-and sixth-combination class. Twice during one day the teachers jointly gave the girl a paddling of ten licks because she had sneaked a look at the teachers' gradebook, lied about it, and later made faces behind the teachers' backs. The family physician reported the teachers for child abuse because of large bruises where the girl had been paddled. The district judge determined that the girl had received a beating instead of a spanking and found the teachers guilty of child abuse. On appeal, a North Carolina Superior Court granted the defense motion to dismiss the case because there was no evidence on the teachers' part to inflict serious injury on the student.

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[19]N.C. District Court (July 18, 1977), N.C. Superior Court (October, 1977). See Johnson, School Law Bulletin, Oct., 1984.

[20]N.C. Gen. State. section 14-318.2, 14-318.4 (1981 and Supp. 1985). The felony and misdeamor child abuse statutes use the phrase "parent or any other person providing care to, or supervision of... (the) child..."

Another example of excessive punishment from the Fourth Circuit Court of Appeals is Hall v. Tawney,[21] 1980, in which a West Virginia elementary school, female student was paddled so violently that she was hospitalized for ten days. Her parents sued the teachers who administered the paddling and the principal who authorized it. The court concluded that the facts alleged were sufficient to justify a substantive due process claim for damages under 42 U.S.C. Section 1983 of the Civil Rights Act of 1871. The courts acknowledged the punishment as brutal, demeaning, inspired by malice, and a "shock to the conscience" of the court.[22]

The 1977 case, Ingraham v. Wright,[23] was one of the most famous cases to address the constitutional issues in excessive corporal punishment. Ingraham, a student, was hit more than twenty times with a paddle while being held over a table in the principal's office. He suffered a hematoma that kept him out of school for several days. The United States Supreme Court ruled that the abuse of corporal punishment does not constitute cruel or unusual punishment in the violation of the Eighth Amendment. The Court also

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[21]Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

[22]See Garcia By Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987). A case closely analogous to Hall... grossly excessive corporal punishment violates student's substantive due process rights.

[23]Ingraham v. Wright, 430 U.S. 651, 51 L. Ed. 2d 711 (1977).

determined that students have no constitutional right to a hearing to challenge the reasons for discipline before being punished since other common law remedies (criminal and civil liability suits for injury) provide adequate due process.[24]

In comparing the decision of the Hall case in 1980 to the majority view of the court in Ingraham in 1977, the circuit court held that the severity of a child's punishment could elevate it to a substantive right because school children do have a right to bodily security. Although Ingraham determined that procedural due process is not necessary before corporal punishment is administered, the 1987 North Carolina General Statutes require local boards of education to adopt specific policies.(See footnote 15.)

Another significant corporal punishment Case in 1975, Baker v. Owen,[25] was affirmed by the United States Supreme Court. This North Carolina case upheld the right of school officials to use reasonable corporal punishment with school children whose parents specifically forbid school officials from using physical force in disciplining their children. The Court rejected the argument that the use of corporal punishment against parents' wishes was an invasion of family privacy.

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[24]Ibid, p.672. [25]423 U.S. 907 (1975).

Teachers should keep in mind that a charge of criminal assault and battery[26] may result in suspension (with or without pay)[27] by the board pending the outcome of the trial. If the parents report the teacher for child abuse, the County Department of Social Services will investigate the case to determine any wrongdoing. Also, the parents may file an assault and battery tort and ask for damages.[28] Although courts usually side with the educator, unless the punishment was excessive, corporal punishment can result in litigation.

In addition, teachers may be dismissed for excessive use of corporal punishment based on the grounds of "neglect of duty", and/or "failure to comply with reasonable requirements of the board,"[29] and/or "insubordination.[30]

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[26]N.C. Gen. Stat. sec. 115C-325(e)(1)(g).

[27]N.C. Gen. Stat. sec. 115C-325(f). This statute was amended by the 1987 legislature to require a superintendent to meet with a teacher and give written notice of the charges before suspending the teacher without pay.

[28]Misdemeanor child abuse is made an offense by N.C. Gen. Stat. sec. 14-318.2 (1981). Felony child abuse is made an offense by N.C. Gen. Stat. sec. 14-318.4 (1981 and Supp. 1985).

[29]N.C. Gen. Stat. sec. 115C-325(e)(1)(d). See Kurtz v. Winston-Salem/Forsyth Board of Education, 39 N.C. App. 412, 250 S.E.2d 718 (1979), Baxter v. Poe, 42 N.C. App. 404(1979).

[30]N.C. Gen. Stat. sec. 115C-325(e)(1)(c).

Defamation

The civil law of defamation makes it unlawful for one person to use language that tends to harm another person's reputation and good name. Statements are defamatatory if they are false, if they tend to expose another person to hatred, shame, disgrace, ridicule or contempt, and if the person is damaged by the statement.[31]

"Defamation is not a legal cause of action but it encompasses the twin tort actions of libel and slander."[32] When defamatory statements are spoken, they are called libel. "Libel must be false, unprivileged and malicious to be actionable."[33] Words spoken or written to the injured party do not constitute defamation. They must be communicated to a third party.[34] Slander is in writing.

The courts have recognized that there are four kinds of slander which are automatically assumed as defamatory or clearly defamatory on their face and do not require proof of actual injury. These are called slander _per se_ and are as follows:

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[31]Prosser, _Torts_, 793.

[32]Alexander and Alexander, _Law in a Nutshell_,p. 241.

[33]Ibid. p. 242.

[34]Ibid. pp. 242-243.

(1) When the statement charges that a person has committed a crime involving imprisonment or moral turpitude,

(2) or has some loathsome, communicable disease,

(3) or imputes unchastity to a woman or serious sexual misconduct of either sex,

(4) and when the false statement damages the person in his business, trade, profession or calling.[35]

All other slanderous words which cannot be fitted into one of the above categories are actionable only by specific proof that the person was harmed in some way by the statements. This is slander per quod which must show special damages. Examples of such harm could include loss of salary, loss of standing in the community, personal humiliation, physical or mental anguish or suffering.[36]

In North Carolina, two defenses may be used by the defendant in defamation cases: truth and privilege.[37]

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[35] Prosser, Torts, pp. 788-797.

[36] Alexander and Alexander, Law in Nutshell, p. 243.

[37] Robert E. Phay, "Tort Liability", p. IX-49.

Truth is an absolute defense to an action of libel or slander if the statements are accurate. However, the defendant must prove the truth of his statement. If statements are false or not made with good intention, the defendant may be personally liable for the injury.[38]

Since principals and superintendents are responsible for reporting teacher performance and teachers are responsible for communicating student progress there is a concern that the content of the communications may be considered defamatory to the individual. In addition to truth, a determining factor in educator defamation suits is whether the statements were privileged. Privileges are of two types - absolute and qualified.[39]

Absolute immunity which excuses defamatory statements is accorded only to certain members of the executive branch of government, judges, and legislators while carrying out their official duties. "...because freedom of speech in these arenas is viewed as necessary to the performance of public duties."[40]

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[38]Ibid.

[39]Ibid.

[40]Allen D. Schwartz, J.D., "Defamation: A Worry for All Seasons," Education Law Reporter, vol. 10, No. 1-3, 1983, p. 914. See also Hutchinson v. Proximire, 99 S.Ct. 2675 (1979).

"Public officers holding executive positions also have absolute immunity for communications made in connection with the performance of their official duties."[41] Similarly, school board members and superintendents have absolute immunity for communications shared during the board's formal meeting or hearing to discuss evaluations and performance of the school system's employees.[42]

The defense of qualified privilege also excuses defamatory statements. It protects board members, principals, and teachers for their written and oral communications when dealing with school matters and public interests. An example, is a United States Federal District Court case in the Middle District of North Carolina, Gregory v. Durham County Board of Education.[43]

In this case a teacher's article to a newsletter accused the superintendent of being against the rights and interests of teachers because of his position in a newly formed administrator's organization. In response to the article, the superintendent told a group of teachers that the article was a lie or the teacher was a liar.

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[41]Alexander and Alexander, American Public School Law, p. 500.

[42]William v. School District of Springfield R-12, 447 S.W.2d 256 (Mo. 1969) and Buckner v. Carlton, 623 S.W.2d 102 (Tenn. App. 1981).

[43]594 F.Supp. 145 (1984).

The teacher's claim that the superintendent's public statement and the placement of a letter of reprimand in her personnel file constituted slander and libel was denied by the court. Her article infringed legally cognizable interests of the superintendent to have an efficient school system and a good relationship with teachers even though the teacher believed her statements to be true.The superintendent had a qualified privilege under law to protect his interests.[44]

In another North Carolina case, the school board and superintendent were protected by the qualified privilege doctrine when the school system decided to dismiss a cafeteria manager because the principal had discovered that the manager brought liquor on the school grounds and served it to painters. Shortly after dissmissal, the principal told the school's employees why the manager was fired. The State Supreme Court agreed that the manager's complaint had stated a claim of slander but only against the principal, since the defamation had been articulated by the principal.[45]

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[44]591 F. Supp. 145, 156. See Goforth v. Avemco Life Insurance Co., 368 F.2d 25, 31 (4th Cir. 1966) (applying N.C. law); R.H. Boulingny, Inc. v. United Steelworkers, 270 N.C. 160, 154 S.E.2d 344, 355 (1967).

[45]Presnell v. Pell, 298 N.C. 715 (1979).

In a Wisconsin case, the court found that school board members were entitled to qualified privilege. The president of the school board, in his letter dismissing a teacher, said the teacher was guilty of unpatriotic behavior, "utter dispassion, an offensive attitude, intemperance, and disrespect for elected leaders." When the assassination of President Kennedy was announced, the teacher reportedly shook a child and rebuked other members of the class because they were crying.[46]

Qualified privilege requires that statements be made in good faith, without malice, in an answer to an inquiry, and as the result of a duty to society. In addition, the individual must believe that the communication was true;[47] but when board members or teachers make defamatory statements that are outside their scope of duty, they are not protected by any privilege.[48]

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[46]Ranous v. Hughes, 30 Wis.2d 452, 141 N.W. 2d 251 (1966).

[47]Baskett v. Crossfield, 190 Ky. 751, 228 S.W. 673 (1921).

[48]Lipman v. Brisbane Elementary School District, 11 Cal. Rptr. 96 (1961) and Supan v. Michelfield, 468 N.Y.S.2d 384 (Sup. Ct. App. Div. 1983).

Similarly, parents who complain to the school board about the performance of principals[49] and teachers, or express their concerns to a principal about the perceived weaknesses or unfitness of a teacher to teach,[50] are protected with the same qualified privilege afforded to educators. In California, parents of high school students sent letters to the principal and questioned the fitness of a teacher to teach typing. The teacher sued the parents because they accused her of being rude, vindictive, unjust, and of misusing her authority by giving failing grades to students she did not like. The trial court and the appellate court ruled in favor of the parents. Although the courts agreed that the statements may have been defamatory in another setting, the parents did not have to prove their

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[49]Schultze v. Coykendall, 218 Kan. 653, 545 P.2d 392 (1976). A principal sued a citizen for a written complaint to the school baord that he was unfit for his job. The court held that citizens have conditional or qualified privilege. The principal would have to prove that the statement was false or made with reckless regard.

[50]Segall v. Piazza, 46 Misc. 2d 700, 260 N.Y.S. 2d 543 (1965). Parents had a legitimate interest in writing a letter for an art teacher because the teacher had bloodied a student's nose. Although the court found the letter to be false and libelous, the action of the parents was considered priviliged.

suspicions but only to believe what they said to be true. The court said:

> One of the crosses a public school teacher must bear is intemperate complaint addressed to school administrators by overly-solicitous parents, concerned about the teacher's conduct in the classroom. Since the law compels parents to send their children to school, appropriate channels for the airing of supposed grievances against the operation of the school system must remain open.[51]

In Louisana, a parent informed a high school principal that certain male teachers had fondled female students and carried on sexual activities with them. The principal investigated the incident and told the parent that he had not observed such behavior. The school board found no basis for any action and closed the case. The plaintiff teacher sued for defamation. The court held that even if the communication was false and defamatory, parents share an interest or duty; therefore, a qualified privilege exists as long as the statements are made in good faith and without malice. In this case the parent believed her statements to be true.[52]

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[51]Martin v. Kearney, 124 Cal. Rptr. 281 (Ct. App. 1975).

[52]Desselle v. Guillory, 407 So.2d 79 (3rd Cir. 1981).

In general, then, statements made by teachers are subject to qualified privilege when they are made in good faith and concern school matters. Usually, teachers will not be liable for defamatory statements even if statements turn out to be false as long as they do not act maliciously or with reckless disregard of the truth. Yet, they may be liable if their statements concern matters outside the scope of their official duty as a teacher.

When a teacher sues as the plaintiff in a defamation suit, he/she is sometimes, though not always,[53] liable as a public figure. The teacher is, therefore, required to prove that the individual being sued made publication with actual malice or with wanton and reckless absence of care.[54] As a private person, the teacher is only required to establish that the statements were false.[55]

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[53]Poe v. San Antonio Express News Corp. (Tex. Cir. App.), 590 S.W.2d 537 (1979).

[54]Sewell v. Brookbank, 119 Ariz. 422, 581 P. 2d 267 (1978).

[55]Poe v. San Antonio, supra; and New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964).

False Imprisonment

The tort of false imprisonment is the intentional, confinement of an individual's personal liberty of freedom of movement. "Neither ill-will nor malice are elements of the tort, but if these elements are shown, punitive damages may be awarded in addition to compensatory or nominal damages."[56] In addititon to being unlawful, the restraint or confinement must be against the will of the individual.

The legal authority of school personnel to discipline students is a recognizable defense to the tort of false imprisonment which was first set out in an 1887 case in Indiana involving after-school detention of a student.[57] School teachers, acting in loco parentis, have the authority to detain a student or enforce some other reasonable restraint, but the teacher's actions must be in "good faith, without malice, and in the best interest of the student and/or the school."[58] This principle was accepted by the Court of Appeals of New York in 1973 in a

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[56]Blacks, Law Dictionary, p. 310.

[57]Fertich v. Michener, 111 Ind. 474, 11 N.E. 605 (1887).

[58]Kern Alexander and M. David Alexander, The Law of Schools, Students, and Teachers in a Nutshell (St. Paul, Minnesota: West Publishing Co. 1984), pp. 209-210, see Fertich v. Michener, supra.

case where, after a school bus driver stated that he was driving to a police station because of damage students had done to the bus, a student tried to get out of a window and was seriously injured. The court said that even if false imprisonment should be found on retrial, recovery for bodily injury would not be permitted if the student's actions were unreasonable and affected his safety.[59]

Since teachers have the authority to discipline students including detention or physical restraint of the movement of a student, very few cases have occurred in this area. An unjustified detention does not..."in itself establish malice as to forego the teacher's privilege."[60]

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[59]Sindle v. New York City Transit Authority, 33 N.Y.2d 293, 352 N.Y.S.2d 183, 307 N.E. 2d 245 (1973).

[60]Alexander and Alexander, American Public School Law, p. 210.

Strict Liability

The doctrine of strict liability is often referred to as a liability without fault. Prosser defines fault as "...nothing more than a departure from a standard of conduct required of a person by society for the protection of his neighbors."[61]

Liability "at fault" refers to cases involving intentional interference or negligence. In strict liability cases, the defendant is not charged with any personal guilt, blame, or moral wrongdoing and has not departed from a reasonable standard of care or intent. Nevertheless, liability without fault is placed on the defendant because he is considered the person best able to bear this burden.[62] This doctrine has its origin in the social justice reasoning of "he who breaks must pay,"[63] regardless of whether the damage, loss, or injury was knowingly or negligently caused.

In general, strict liablity has been confined to activity by the defendant that causes some unusual hazard to exist or one that involves abnormal danger to others.[64] An example given by Prosser is the keepers of wild animals such as lions, tigers, bears and other similar animals which can be regarded as dangerous.[65]

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[61]Prosser, Torts, 535. [62]Ibid.

[63]Ibid., p. 534. [64]Ibid., p. 545-546.

[65]Ibid., p. 543.

There are no strict liability cases involving teachers in North Carolina. In fact, such cases are scarce, but the possiblity does exist in areas such as field trips, lab experiences, and shop activities.[66]

Workers' Compensation is a form of strict liablility as created by state statutes and which arises out of and in the course of employment.[67] The employer is responsible for the injuries arising out of his business that are considered to be unavoidable accidents regardless of the negligence of the employer or the employee.[68]

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[66]Alexander and Alexander, American Public School Law, p. 456.

[67]N.C. Gen. Stat. sec. 115C-337(a). See Sweatt v. Rutherford County Board of Education, 237 N.C. 653, 75 S.E.2d 738 (1953) and Casey v. Board of Education, 219 N.C. 739, 14 S.E.2d 853 (1941).

[68]Prosser, Torts, p. 573.

Negligence

Negligence is an unintentional tort from which liability may arise. Negligence is defined as conduct that falls below the acceptable standard, established by law for protecting others against unreasonable risk of harm.[69]

Although in practically any situation where nonintentional injury to a person occurs, a potential negligence claim exists against the person who caused the injury or damages. Yet, an unavoidable accident which was not intended and could not have been foreseen or prevented by the exercise of reasonable precautions is not considered negligence.[70] In addition, an act that results in an injury may constitute negligence in one situation but not in another because there are no precise rules as to what constitutes negligence.[71]

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[69] Prosser and Keeton on the Law of Torts, ed. W. Page Keeton, 5th ed. (St. Paul, Minn.: West Publishing Co., 1984), p. 169, citing Second Restatement of Torts, section 282.

[70] Prosser, Torts, p. 162.

[71] Ibid., p. 173.

A Reasonably Prudent Teacher

Since the "standard of conduct" of the defendant is the basis of the law of negligence, the courts have created a fictitious, hypothetical person to represent the community ideal or a model of conduct for human behavior known as the "reasonable man." Different courts have described the "reasonable man" as a "model of all proper qualities, with only those human shortcomings and weaknesses which the community will tolerate on the occasion;[72], therefore, this model varies in different cases based on the beliefs of the community. The characteristics of the "reasonable man" or reasonable person include (1) the physical attributes of the defendant; 2) normal intelligence; (3) normal perception and memory; minimum or ordinary knowledge and experience common to the particular community; and (4) superior knowledge, skills, intelligence, and training as required by certain professions or occupations and obtained by the defendant.[73]

Since teachers hold college degrees, teaching certificates, and have obtained superior knowledge and skills, their conduct may be held to a higher standard than

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[72]Ibid., p. 164. [73]Ibid. pp. 173-188.

the ordinary "reasonable person". In addition, a teacher acts *in loco parentis*, and is responsible for supervision of students in the parents' place while the students are at school. Because of this duty owed by a teacher in relationship to students the courts will determine if the teacher acted in the way a reasonable and prudent teacher would act in the same or similar circumstances.[74]

Elements of Negligence

Of all the lawsuits filed against teachers and administrators, negligence is the most prevalent;[75] therefore, it is necessary to understand the elements that constitute negligence. Four criteria must be satisfied before an individual or institution can be held liable for negligence:

(1) A duty to conform to a certain standard of conduct for the protection of others against unreasonable risks of foreseeable harm

(2) A failure to exercise a standard of care that would be taken by a reasonable person

(3) The conduct of the defendant must be the proximate cause or the legal cause of the injury

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[74]Kern Alexander and M. David Alexander, *The Law of Schools, Students, and Teachers in a Nutshell* (St. Paul, Minn.: West Publishing Company, 1984), pp. 211-213.

[75]Alexander and Alexander, *Law in a Nutshell*, p.210.

(4) injury, actual loss, or damage must result from the act[76]

Duty. In North Carolina the foreseeability of harm to pupils determines the extent of a teacher's duty to safeguard his or her pupils from dangerous acts of fellow pupils and other hazards that the teacher knows or reasonably should know to exist. In James v. Charlotte-Mecklinburg Board of Education,[77] 1983, the court said:

> One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold (defendant) bound in like manner to guard against what is unusual and unlikely to happen or what, as it is sometimes said, is only remotely and slightly probable.

In the James case, a sixth-grade girl suffered permanent blindness in her left eye as a result of a pencil sword fight between two boys. The incident occurred right after the class had returned from the lunchroom. The students had been instructed to stay in their seats and perform an assignment placed on the chalkboard. The students were unsupervised because the teacher was

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[76]Prosser, Torts, pp. 164-165.

[77]300 S.E.2d 21, 23 (1983), citing Hiatt v. Ritter, 223 N.C. 262, 25 S.E.2d 756 (1943).

finishing her lunch. The injured girl's father sued the teacher and school board, asserting that the teacher was negligent in leaving the class unsupervised and that the injury was a foreseeable result of the teacher's negligence. The plaintiff argued that the teacher knew that the class members were unruly and could have dangerous contact in the absence of an adult supervisor. The plaintiff also contended that the school board was negligent in allowing the teacher to subject her students to potentially dangerous conduct and in failing to enforce or establish rules concerning constant supervision of students. Both the school board and the teacher denied any negligence. They alleged that the teacher was a public officer exercising a discretionary function which is an "act of judgment requiring thought, evaluation, and decision."[78] She did not act out of malice or corruption. Following a mistrial, the court entered a directed verdict in favor of the defendants. The plaintiff appealed and the North Carolina Court of Appeals determined that foreseeability of harm to pupils was the standard governing the extent of a teacher's duty to safeguard pupils from dangerous acts of other students. The court also noted that decisions from

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[78] Black's, Law Dictionary. p.244.

other states reflect significantly differing standards of care required of public school teachers with respect to their duty to provide supervision of student conduct.[79] The court also reviewed significant North Carolina Supreme Court cases in analogous situations in attempting to define a standard of care that it would follow because there were no previous North Carolina appellate court decisions regarding a standard of care for public school teachers.

In Toone v. Adams,[80] 1964, an umpire alleged that the Raleigh Baseball, Inc. and its manager of the team should have reasonably foreseen that the manager's hostile behavior during a game toward the umpire, the plaintiff in this case, would result in the fans from cursing, striking, and injuring the umpire at the end of the game. The umpire contended that the defendants breached their duty owed the umpire by not providing adequate protection for his personal safety. In restating the general rule from the Restatement of Torts, sections 302 and 303, the court said;

> ...that an act is negligent if the actor intentionally creates a situation which he knows, or should realize, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another...[81]

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[79] James v. Charlotte-Mecklinburg, supra p.23.

[80] 262 N.C. 403, 137 S.E.2d 132, (1964).

[81] James v. Charlotte-Mecklinburg, supra, p.23.

The court held that it did not agree that the manager of the baseball club should have reasonably anticipated that his actions would cause the fans to assault the umpire.

In Foster v. Winston-Salem Joint Venture,[82] 1981, the North Carolina Supreme Court considered the duty of the owners of a shopping mall in protecting its patrons from harmful acts of other persons on its premises. Two unidentified males assaulted the female plaintiff in this case as she was placing packages in her car. The court established forseeability as the test for determining the extent of a landowner's duty[83] to safeguard his business invitees from criminal acts. Although, the plaintiff presented evidence that thirty-one criminal incidents were reported on the shopping mall premises within the year preceding the assault on the plaintiff, the court determined the incidents as insufficient evidence for charging the defendants with knowledge that such injuries were likely to occur.

The North Carolina Supreme Court made a similar decision in Moore v. Crumpton,[84] 1982. The court considered the parent's liability for the harmful acts of their

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[82] 303 N.C. 636, 281 S.E.2d 36 (1981).

[83] Brown v. N.C. Wesleyan College, 65 N.C. App. 579, 309 S.E.2d 701 (1983). College student abducted, raped, murdered form college parking lot. Attack was not foreseeable.

[84] 306 N.C. 618, 295 S.E.2d 436 (1982).

seventeen-year old, unemancipated son who broke into the plaintiff's home and raped her. Since the son had a long history of undisciplined behavior, abuse of drugs and alcohol, the plaintiff contended that the parents should have exercised reasonable control over their son. In ruling for the defendant, the court decided that it must be shown that the parent knew or should have known of the propensities of the son and should have reasonably foreseen that failure to control his generally injurious nature would result in injury to someone. The question was whether the parent exercised reasonable care under all circumstances and not whether the particular injury that occurred was foreseeable.

After reviewing the decisions in these North Carolina Supreme Court cases the court looked at the evidence in the James case which provides only two previous incidents of pupil misbehavior during the teacher's absence from the classroom. One was an eraser fight in the class on the day before when the children were left unsupervised. The other was an orange fight in the hall several weeks before the accident. The court determined that these incidents were not sufficient to charge the teacher with the requisite knowledge that the pupils might injure each other in her absence. It would have to be shown that the teacher knew of the children's propensities to this type of behavior and that she could have reasonably foreseen that failure to

control these propensities would result in injury to another student. The facts did not establish foreseeabilty in this case and the teacher was not considered negligent.

As a general rule, a plaintiff will not have to show that a particular injury was foreseeable. It must only be determined that the general danger was foreseeable. An example is Raymond v. Paradise United School District of Butte County,[85] 1963. The California Appellate court held that a high school had a duty to provide adequate supervision at a school bus stop on its premises where elementary grade children were picked up and discharged. In this case, a seven-year old was injured when he ran toward the approaching bus, placed his hand on the side of the bus and fell backward on the sidewalk. The bus driver had warned the student about playing at the bus stop. The court considered the bus stop to be an accident hazard because the driveway was used for the frequent arrival and departure of several buses. Another factor was the character of the pupils who used the bus stop. Since the bus stop on the high school premises served primary school children, the amount of care increased with the immaturity of the child.

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[85] 31 Cal. Rptr. 847 (1963).

Standard of Care

The second prerequisite for holding a teacher liable for negligence is proof that the teacher was actually negligent in performing the duty owed. Failure to act in accordance with a reasonable standard of care can take the form of either a negligent act or the failure to act.[86] The reasonableness of the standard of care is determined by examining the circumstances when the injury occurred. Also, how would a reasonably prudent person or teacher conduct himself or herself under the same circumstances. Another factor to consider is the student's age. The amount of care owed increases with the immaturity of the student and decreases with maturity.[87]

An example of a case involving these factors is the 1986 California case, Phyllis P. v. The Superior Court of the State of California County of Los Angeles.[88] An eight-year-old girl was allegedly sexually molested by a thirteen-year-old male student a number of times while on the way to school and on the school premises. The student reported the incidents to her teacher who consulted the

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[86] Prosser, Torts, p. 373.

[87] Raymond v. Paradise, supra, p. 849. See also Satariano v. Sleight, 54 Cal. App.2d 278, 283, 129 P.2d 35.

[88] 228 Cal. Rptr. 776, 183 Cal. App.3d 1193 (1986).

school psychologist. When the principal learned of the incidents, he told the boy not to bother the girl. Neither the principal, the psychologist, nor the teacher reported the incidents to the girl's mother. The California Court of Appeals said that duty of care was owed to the mother and that the duty was breached when the school failed to notify the mother. The school's carelessness caused the injury. The defendants standing in loco parentis to the girl violated a number of duties to the mother: (1) to supervise the child on school grounds, (2) to notify the mother of the repeated sexual assaults, (3) to report the assaults to protective agencies for child abuse, and (4) to obtain the mother's consent before counseling an eight-year-old child on sensitive sexual matters. Finally, the court determined that the schools should have forseen that covering up the incidents would cause the mother more emotional distress than informing her of the incidents. An ordinary prudent person should have reasonably forseen such injury. It should be noted, however, that the appellate court did not quite decide whether the school officials were liable. That matter was left for the trial court.

The standard of care to be met by a teacher increases in as the foreseeable risk of injury or harm increases. Examples where a greater standard of care is needed include physical education classes[89] and playground or recess activities,[90] field trips,[91] and science or chemistry classes.[92] Failure to warn students of known or foreseeable dangers may constitute negligence in these areas.[93]

A higher standard of care requires the proper duty of supervision especially when a dangerous situation exists and the teacher knows about it. This includes the proper instruction in the use of materials and equipment and how to perform potentially dangerous activities.[94]

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[89]Clary v. Alexander County Board of Education, 286 N.C. 525, 212 S.E.2d 160 (1975).

[90]Thigpen v. McDuffie County Board of Education, 335 S.E.2d 112, 255 Ga. 59 (1985).

[91]Simmons v. Beauregard Parish School Board, 315 So.2d 883 (La. Ct. App. 1975). The Court of Appeals of Louisiana found the school board, the principal, and the teacher negligent for allowing a 13-year-old student to build a model volcano in his home without knowing the substances he was using and without knowing the danger it would incur.

[92]Paulsen v. Unified School District No. 368, 717 P.2d 1051, 239 Kan. 180(1986).

[93]Station v. Travelers Insurance Co., 292 So.2d 289 (La.App. 1974).

[94]Scott v. Independent School District, 256 N.W. 2d 485 (Minn. 1977). Violation of use of safety goggles constituted negligence when an electrical drill bit embedded in unprotected eye.

With regard to field trips the requirement of greater supervision or care is necessary when the location has potential for harm such as a factory where there is dangerous machinery or an unsafe land environmental condition.[95] Otherwise, field trips require the same duty of supervision as required when students are at school, but when teachers undertake to provide transportation for field trips in private cars, rented vans or cars, they have the duty to use ordinary care in doing so. This means that the teacher must ascertain that drivers are safe and competent, that vehicles are in good mechanical condition and adequate supervision is provided. Routes selected for travel must be safe and vehicles must not be overloaded with passengers or equipment.[96]

In general, the duty of reasonable supervision entails general supervision of students at least through high-school level unless a dangerous situation calls for more specific supervision.[97] Special emphasis is needed for

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[95]Morris v. Douglas County School District, 403 P.2d 75 (1965). Teacher should have used proper supervision to prevent a six-year old from being crushed by a log on the shore of the Pacific Ocean during a field trip.

[96]Janine Murphy, North Carolina School Bus Transportation Law, Part II, Tort Liability," Second Law Bulletin, (Chapel Hill, N.C.: Institute of Government, Spring, 1987) p.32.

[97]Rupp v. Bryant, 417 So.2d 658 (Hazing at a high school club initiation with failure of school to supervise and injury to student. See also Miller v. Yoshimoto, 56 Hawaii 333, 536 P.2d 1195 (1975).

the supervision of students at all levels at lunch, before and after school,[98] between classes, and of certain groups that no prudent teacher should leave alone, even for a brief time.[99]

Reasonable supervision was defined in the James case.[100] The court held that absent circumstances under which harm to pupils might have been reasonably foreseen during the teacher's absence, the teacher was not under a duty to either remain with her class at all times or to provide other adult supervision. The test of foreseeability does not absolve teachers from the responsibility of proper classroom supervision. It does however make it clear that if a student injury should occur in the absence of supervision, the teacher will not be considered negligent unless circumstances indicate that the teacher could have foreseen some harm that might result to a student. However, a teacher may be negligent when actually present in the classroom if an injury occurs and the teacher fails to stop a dangerous activity taking place under supervision.[101]

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[98]Broward County School Board v. Ruiz, 493 So.2d 474 (1986). Student attacked and beaten while waiting in cafeteria for a ride. School breached a legal duty to proved supervision.

[99]William R. Hazard, Education and the Law (New York: The Free Press, 1971), p.417.

[100]James v. Charlotte Mecklenburg, supra, See also Simonetti v. School District of Philadelphia, 308 Pa. Super. 555, 454 A. 2d 1038 (1982).

[101]Marcantel v. Allen Parish School Board, 490 So.2d 1162, writ denied 496 So.2d 328 (1986).

Proximate or Legal Cause. In addition to duty and standard of care, negligence must have the element of cause. If a person violates his or her duty and it causes injury, there will be liability for negligence. There are three basic requirements in establishing proximate or legal cause. First, negligence must be the substantial cause of the harm to the person injured. Second, for a legal cause to exist there must be a duty or an obligation to maintain a reasonable standard of care, and the injury must be a foreseeable consequence of the failure to fulfill that duty.[102] For example, a school system has a duty to keep playground equipment in reasonably safe condition. If school officials know that a slide is defective and a student is injured while playing on the slide, then the school's failure to repair the slide can be a proximate cause of the injury. School officials should have known that a child could have been injured.[103]

Third, courts usually will not hold a defendant liable for negligent conduct if an independent, intervening, and

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[102]Prosser, Torts, pp. 272-275. See also, Greening by Greening v. School District of Millard, 393 N.W. 2d 51, 223 Neb. 729 (1986).

[103]District of Columbia v. Washington, 332 A.2d 347 (D.C. App. 1975).

unforeseeable cause arises between the defendant's negligent act and the plaintiff's injury. The intervening cause must legally supersede the original negligent cause of the injury in order to break the chain of events leading to the injury.[104] In Fagan v. Summers[105], 1972, a student was injured when another student picked up and threw a rock found on the playground. The court determined that the proximate cause of the student's injury was not caused by the negligence of the teacher or the school district but by the unforeseeable, intervening act of the boy who threw the rock.

This point is illustrated in a school bus case in North Carolina.[106] A student sought to recover damages for knife injuries received during a fight on a school bus. The North Carolina State Supreme Court refused to hold the bus driver or school board liable because the plaintiff failed to establish that a negligent act or omission by the driver in operating the bus was a proximate cause of his injuries. The court noted that even though the same students had a fight on the bus several months before, there was no evidence of misconduct until the second fight

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[104]Prosser, Torts, p. 301, notes 1,2,3.

[105]498 P.2d 1227 (Wyo. 1972).

[106]Huff v. Northampton County Board of Education, 259 N.C. 75, 130 S.E.2d 26 (1963).

occurred. There was no reason for the bus driver to suspect that a second fight would occur that would require special precautions. If the intervening act of a second fight had been foreseeable and could have been prevented by reasonable care on the part of the defendant, the bus driver would have been held liable.

A teacher's absence from the classroom may be found to be the proximate cause of the injury only if the injury would not have happened in the teacher's presence or if the student's behavior was reasonably foreseeable. A case that illustrates this point is Rupp v. Bryant[107], 1982. A Florida high school faculty advisor was negligent for not supervising a club initiation in which a student was permanently paralyzed during a hazing ceremony. The Omega Club, a school-sanctioned club, had a reputation for violating the rules and had to obtain the principal's approval for any off-campus activities. It was also instructed not to haze students at its initiation ceremonies. In this case the students' behavior was reasonably foreseeable; therefore, the accident would not have happened if the advisor had been present.

Another case in which lack of supervision was the proximate cause is Carson v. Orleans Parish School Board[108], 1983. A Louisana teacher was not supervising the

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[107] 417 So.2d, p.668. [108] 432 So.2d 956 (1983).

bathroom area when a third grade student was injured in the eye by an apple that was thrown into the girls' bathroom. The school was aware of the possibility of injury because students played in the area during recess, but the teacher was expected to supervise the lunchroom line, the entrance into the school, the breezeway area during recess, and the boys' and girls' restrooms. The incident developed over a period of time beginning in the lunchroom with students removing the apples and carrying them into the breezeway to throw at students. The court held that the school board was responsible for gross negligence and that the injury could have been prevented with proper supervision.

Injury or Actual Loss. Finally, for liability to be determined, a definite injury must actually occur and the plaintiff must prove that he actually had an injury, loss, or damage resulting from the act. Without an injury there can be no liability. The extent of injury determines the amount of damages that will have to be paid. Punitive damages are seldom allowed, and if the injury is slight, nominal damages would probably be awarded.[109] "Nominal damages cannot be obtained where no actual loss can be shown or has occurred."[110]

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[109]Prosser, Torts, p.165.

[110]Alexander and Alexander, Law in a Nutshell, p. 220.

If the injury or loss is caused by more than one person, damages may be assessed by the courts among all the feasors. "Also, if more than one harm is present and the harms and damages can be distinguished, there will be apportionment among the defendants."[111]

In a New Jersey case, the court held the school board, the principal, and the defendant student liable for an eye injury to a student who was waiting before school for the doors to open. The injured student was hit in the eye by a paper clip by the defendant student. The principal had made no provisions for supervision of early arrivals before school, and the offending student's act was not a sufficient intervening cause to absolve them from liability.[112]

Educational Malpractice

Educational Malpractice is a specific form of negligence accusation based on the failure of students to receive adequate instruction in the basic skills. As a result, the student suffers harm such as a lack of

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[111] Ibid.

[112] Titus v. Lindberg, 49 N.J. 66, 228 A.2d 65 (1976).

meaningful employment or the inability to read or write;[113] therefore, he turns to the court for remedy. There have been no educational malpractice cases in North Carolina.

Basically, the courts have rejected educational malpractice, but to succeed in a suit that alleges educational malpractice, the plaintiff must prove the four elements of negligence: (1) a legal duty of care for academic achievement by students, (2) failure by the educator to provide adequate instruction with the appropriate standard of care, (3) a proximate cause which means a causal connection between the quality of instruction and academic injury, (4) and an academic injury suffered by the student.[114]

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[113]Peter W. v. San Francisco Unified School District, 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (1976).

[114]Peter W. v. San Francisco, supra; see also Donohue v. Copiague Union Free School District, 47 N.Y. 2d 440, 418 N.Y.S.2d 375 (1979); Hoffman v. New York City Board of Education, 49 N.Y.2d 121, 400 N.E.2d 317 (1979).

In addition to a formal pleading of a legal duty, a breach of that duty resulting in an injury and causal relationship between the teacher's behavior and the learning by the student, the plaintiff is faced with addressing three policy arguments against educational malpractice claims: (1) a cause of negligent action would open the door to countless student claims and would overburden the courts and the school systems, (2) litigation of such claims would lead to undesirable judicial interference in policy-making and allocation of scarce resources, and (3) alternative procedures already exist for handling complaints about incompetent instruction.[115] For example, the court in Donohue v. Copiague School District said, "To entertain a cause of action for 'educational malpractice' would require the courts ... to make judgements as to the validity of broad educational policies - a course we have unalteringly eschewed in the past,"[116] ... and would establish the courts as overseers of both the day-to day operation of the educational process as well as formulating its educational policies".[117]

Educational malpractice was almost unheard of before Peter W. v. San Francisco Unified School District,[118]

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[115] Ibid., See also Hunter v. Board of Education of Montgomery County, 439 A.2d 582, 584 (1982).

[116] 391 N.E.2d 1352, 1354. [117] Ibid.

[118] Peter W. v. San Francisco, supra.

the first reported case involving alleged educational negligence in a public school system. Peter W., an eighteen-year-old high school graduate, claimed that the school negligently failed to provide adequate instruction, proper counseling, and/or supervision in basic academic skills such as reading or writing. He alleged that the school failed to diagnose his reading disabilities, assigned him to classes in which he could not read the books and other materials, allowed him to pass from one grade level to the next without having mastered skills needed to succeed at the next level, assigned him to classes in which the instructors were unqualified or which were not geared to his reading level. They allowed him to graduate with only a fifth-grade reading ability when the state's educational code made an eigth-grade reading level a prerequisite of graduation. Peter W. asserted that, as a result, he could not secure meaningful employment in any job that required him to be able to read and write. The California Court of Appeals affirmed the trial court's decision to dismiss the claim for failure to establish a duty.

The second reported case was <u>Donohue v. Copiague Union Free School District</u>.[119] Donohue, a high school graduate, had received failing grades in several subjects. School authorities knew that according to state regulations

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[119] Donohue v. Copiague Union Free School District, supra.

Donohue's repeated failure should have resulted in testing to diagnose his problems. In order to acquire the skills of reading and writing, Donohue had to seek private tutoring. Donohue's attorney argued that the school had violated their duty of care by giving him passing grades; failing to evaluate his ability to learn; failing to provide adequate facilities, teachers, psychologists and practices and methods of teaching that were up to the standards of other high schools in the area. Relying on the analysis of the Peter W. case, the New York Court of Appeals dismissed the claim of negligence based on failure to state a cause for action.

The third reported case is Hoffman v. Board of Education.[120] After receiving a verbal I.Q. test in kindergarten, Hoffman was placed in a special education class. Since he scored near the top of the I.Q. range of mental retardation and had a severe speech defect, the psychologist recommended that he be retested in two years. Hoffman attended classes for the retarded until he was eighteen years old without being retested and without receiving speech therapy. At the age of eighteen, Hoffman was transferred to an occupational training center for the retarded, given an I.Q. test, and was found to have average intelligence. The same New York court that summarily rejected a claim of education negligence on Donohue judged

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[120] Hoffman v. Board of Education, 400 N.E.2d, 317 (1982).

Hoffman's case on its merits and decided for him. However, the New York Court Of Appeals dismissed the lower court's decision on a 4-3 split. The court declined to substitute its judgment for that of school officials engaged in the educational process.[121]

Another significant case was Hunter v. Board of Education of Montgomery County,[122] 1981, in Maryland. The parents of a sixteen-year-old sued the Montgomery County School Board, the principal of the elementary school, a teacher who performed diagnostic testing, and the boy's sixth grade teacher. The parents claimed that the school system intentionally, maliciously and negligently evaluated the child's learning abilities, required him to repeat first grade materials while being placed in the second grade (a practice that continued each year causing psychological damage), furnished false information concerning the student's learning disability, and altered school records to cover up their actions. The Maryland Court of Appeals rejected the educational malpractice claims by identifying public policy considerations as found in previous court decisions.[123] They found no actionable duty of care, no

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[121]Ibid.

[122]439 A.2d 582(1981), See also 2d Ed.Law 114 (1982).

[123]Hunter v. Board of Ed., supra. citing Peter W. v. San Francisco Unified School District, 131 Cal. Rptr., pp. 860-61.

reasonable certainty that Hunter suffered injury, no perceptible connection between the defendant's conduct and the injury suffered which would establish a causal link. Too many factors affect a student from outside the formal teaching process which are beyond the control of the school.

The Hunter case is significant because it is the first case to consider the question of whether public educators may be held liable for their intentional torts in the education of a child.[124] The court remanded the case for a judgment on the issue that the Hunters had produced evidence that the defendants willfully and maliciously injured their son during his education process. However, the Donohue and Hoffman cases "did imply in dicta that liability might exist for those charged with educational responsibility where their actions constituted 'gross violation of defined public policy.'"[125]

The dissenting opinion in the Hunter[126] case by Judge Davidson holds public educators as professionals who owe a duty of care to the students they teach. Negligent conduct on the part of an educator that results in psychological damage and emotional distress should be a viable tort action. Moreover, the fact that a teacher's purpose is to

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[124] 2 Ed. Law. Rep. 625; p.627, (1982).

[125] Ibid., see note 10.

[126] 439 A.2d 582, 589.

teach indicates some causal relationship existing between the conduct of a teacher and the failure of a child to learn.

While the Hunter case refused to support a claim of educational malpractice, the public schools received some unflattering comments. The most unflattering remarks treated teaching as something less than a profession. In agreeing with the Peter W. case, the Hunter court said that "classroom methodology affords no readily acceptable standards of care... The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught,..."[127] In continuing with its criticisms the court charged the schools with... "outright failure in their educational objectives; and according to some critics they bear the responsibility for many of the social and moral problems of our society at large."[128] Yet, the courts have defended the schools from its critics. To do otherwise would impose additional duties on educators and school systems that would create insurmountable litigation and financial devastation.[129]

However, it is possible that this support may not continue because the question of educational malpractice is

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[127] 439 A.2d at 584 (quoting Peter W. v. San Francisco Unified School District, supra, pp. 860-61.)

[128] Ibid., p.861.

[129] Hunter v. Board of Education, supra, p.584.

not settled and cases continue to be brought to court. In 1984, in Snow v. State of New York,[130] a case considered as medical malpractice had implications for educational malpractice. A deaf plaintiff was placed in a residential state school when he was almost three years old. He was given an I.Q. test which indicated a score of 24 and a notation about his hearing. He was reevaluated at age five and labeled "very bright" with a note about his deafness. Then he was not evaluated until age nine. The State had a duty to reassess the results of his tests. The court affirmed a $1,500,000 judgement for the student.

Another case of mistaken evaluations, labeled by the dissenting opinion as custodial malpractice, was found in Torres v. Little Flower Children's Services,[131] 1984, also in New York. Frank Torres was a seven year old, abandoned by his mother and enrolled in a public school by a child care agency of the state. Although fluent in speaking Spanish, he was just beginning to understand English when in the third grade he was evaluated as borderline retarded. He received limited services in special education, until grade eight when he was reevaluated as having a complex reading disability rather than mental retardation. The

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[130] 464 N.E.2d 1004 (1984).

[131] 474 N.E.2d 223 (1984).

reading plan recommended by the reading specialist was never implemented. The same court split 4-3 in dismissing the complaint of the former special education student. In comparing the unclear distinctions between Snow and Torres, the court concluded that such factors... "as age of the child upon entry, the nature of the institution and kind of care mark the difference between medical malpractice and educational malpractice."[132] The similarity between Snow and Hoffman is based on the fact that both were given a standardized intelligence test without recognizing their physical handicaps. Yet the Hoffman and Snow cases are distinguished by their reasons for a lack of reevaluation. Hoffman's teachers observed his lack of progress, and his mother never felt that he was misplaced. While in the Snow case, the lower courts said that the failure to reevaluate Snow's test results after learning that he was deaf was more than a mere act of misjudgment of his progress. It was an act of medical malpractice.

Nevertheless, the decisions in these last two cases were distinct from matters of educational policy as determined in Hoffman and Donohue. They may reflect limited openings by courts for liability in special education placement, minimum competency testing and contractual considerations for accountability.[133]

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[132] Ibid., p.226 note 2.

[133] Perry A. Zirkel, "Educational Malpractice: Cracks in the Door," 23 Education Law Reporter 453, 460 (1985).

Defenses Against Negligence

Once a plaintiff has established the elements of negligence, duty, breach of duty, proximate or legal cause, and injury, the defendant must respond with one or more of several tort defenses; they are: (1) contributory negligence, (2) last clear chance, (3) comparative negligence, (4) assumption of risk, (5) act of God, and (6) immunity. The most common tort defenses in teacher negligence cases are contributory negligence and assumption of risk.[134]

Contributory Negligence. Prosser defines contributory negligence as ..."conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his protection."[135] If the teacher can establish that the student's contributory negligence partly caused the injury, the teacher cannot be held liable for damages even if his negligence partly caused the accident. In North Carolina a teacher is not held liable for the injuries, if the student

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[134]Alexander and Alexander, Law in a Nutshell, p. 220, and Prosser, Torts, p. 451.

[135]Prosser, p. 451, n.3.

is deemed to have been contributorily negligent.[136] For example, a student was cut and injured by portions of broken glass when he ran into a glass panel in a wall at the end of the basketball court in his high school gymnasium. The student and his parents brought action against the school district. The school argued that the boy knew of the glass panel because he had been practicing in the gym for three years but made no attempt to stop running until he was three feet from the wall. The North Carolina Supreme Court reversed the decision by the lower court's directed verdict for the school and ordered the case to be sent to the jury for a determination of whether a finding of contributory negligence could be substituted in light of all the evidence.[137]

The fact that the plaintiff is a minor may be a modification to the legal doctrine of contributory negligence. If an injured child's negligence contributed to his harm, then a defendant teacher, who is also negligent may not be held liable. A child must conform to a required standard of conduct for a child of his age, intelligence, physical characteristics, sex, and training; otherwise, his conduct may be found to be contributorily negligent. However,

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[136]Clary v. Alexander County Board of Education, 286 N.C. 525 (1957). N.C. Gen Stat. sec. 143-299. Makes contributory negligence a defense brought against institutions of the state.

[137]Ibid. See also Bateman v. Elizabeth City State College, Travelers Ins. Co. and U.S.E. and G.Co., 5 N.C. App. 168, 167 S.E.2d 838 (1969).

according to Prosser, children cannot be held to the same standard as adults.[138] Courts have attempted to fix a minimum age below which a child is held to be incapable of negligence.[139] In North Carolina, as in a minority of states, children are incapable of negligence below the age of seven.[140] Courts in some states have also held that children between the ages of seven and fourteen are presumed to be incapable of negligent conduct, but this presumption may be rebutted by the defendant.[141] On the other hand, courts in these states have presumed students to be capable of negligence from fourteen to twenty-one, but the contrary may be shown by the defendant.[142] Therefore, in North Carolina, where the plaintiff is a minor, contributory negligence will depend upon the age of the child as much as the child's conduct.[143] According to Alexander and Alexander... "the courts have said that where a child is concerned, the test to be employed is whether the child has committed a gross disregard of safety in the

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[138]Prosser, Torts, p. 179, n.45. [139]Ibid., n.54.

[140]Ibid., p. 180, n.56. [141]Ibid., n.57.

[142]Ibid., n.58.

[143]Crawford v. Wayne County Board of Education, 275 N.C. 354, 168 S.E.2d 33 (1969). A six-year old plaintiff was held to be incapable of negligence as a matter of law.

face of known, perceived, and understood dangers."[144] In making decisions on cases of older students, the courts look for contributory negligence by the plaintiff that is a "substantial factor" in causing his or her own injury; otherwise, the defendant is liable anyway.[145]

For example, in a case in Tennessee,[146] a twelve-year-old was killed when he leaned his head out of a bus window and his head struck a guy wire supporting a utility pole. The student's age, plus the warnings he had received to keep all parts of his body in the bus, were sufficient for the court to refuse to hold the school district liable for inadequate supervision.

Last Clear Chance. "The most commonly accepted modification to the strict rule of contributory negligence is the doctrine of last clear chance."[147] According to Prosser, "...if the defendant has the last clear opportunity to avoid harm, the plaintiff's negligence is not a 'proximate cause of the results.'"[148] Alexander and

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[144]Alexander and Alexander, Law in a Nutshell, p. 222.

[145]Ibid.

[146]Arnold v. Hayslett, 655 S.W.2d (1983).

[147]Prosser, Torts, p. 462, n.1.

[148]Ibid., p.463, n.4,5.

Alexander describe the process as "...a defense for the plaintiff against a countercharge of contributory negligence by the defendant."[149] In other words, when a plaintiff's negligence has placed him in a position of danger and the defendant has had the last clear chance to prevent the accident, the plaintiff's negligence is not the legal cause of this injury.[150] Also, there must be proof that the defendant was aware of the situation and that he had time to take action which would have prevented the plaintiff's injury, and that he failed to exercise reasonable care to avoid the injury.[151] In the absence of these elements, the plaintiff will be barred from recovery caused by his contributory negligence.[152] This doctrine is not common in tort cases involving teachers...[153]

Comparative Negligence. Comparative negligence allows the courts to determine degrees of negligence for the plaintiff and the defendant based on the relative degree of fault. Some courts have determined that when a plaintiff is totally barred from any recovery because of his contributory negligence, a hardship is created for the

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[149] Alexander and Alexander, Law in a Nutshell, p. 222.

[150] Prosser, Torts, p. 465.

[151] Ibid. [152] Ibid., p. 466.

[153] Alexander and Alexander, Law in a Nutshell, p. 223.

plaintiff. Generally, if the plaintiff's fault was found to be equal to the defendant then the plaintiff would recover only one-half of the damages. If the plaintiff's fault was only one third, he would recover two-thirds of the damages.[154]

Courts have become more reluctant to rule that the plaintiff's conduct is negligent as a matter of law. Also, some courts have not waited for legislatures to shift from contributory to comparative negligence[155] because they consider comparative negligence to be unjust and inequitable for the injured plaintiff only partly at fault. "Where the comparative negligence standard has been adopted, last clear chance no longer has application."[156]

Assumption of Risk. Another defense to negligence is assumption of risk.[157] Under this doctrine, a student who voluntarily exposes himself to a known danger may not

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[154]Alexander and Alexander, Law in a Nutshell, pp. 224-225.

[155]Prosser, Torts, p. 469, n. 5: See also Hoffman v. Jones, 280 So.2d 431 (Fla., 1973).

[156]Alexander and Alexander, Law in a Nutshell, p. 225.

[157]Ibid.

recover from any injuries sustained as a result of this exposure. The plaintiff by expressed or implied agreement assumes the risk of the danger and thereby relieves the defendant of responsibility. For the doctrine to apply the plaintiff must not only know and be aware of the danger but also appreciate the danger produced by the risk.[158] For instance, a child's age or lack of information may prevent him from fully comprehending the risk involved in a known situation.[159]

According to Alexander and Alexander:

> ...The courts have generally established that the participant in athletic events, whether intramural or interscholastic, assumes the risk of the normal hazards of the game when he participates. This also applies to spectators attending sports or amusement activities. Spectators assume all the obvious or normal risks of being hurt by flyballs, fireworks explosions, or the struggles of combatants. ...but a spectator does not assume the risk of the stands falling down at a football game nor is risk assumed in attending a baseball game, where a player intentionally throws a bat into the stands and injures a spectator.[160]

Act of God. Man cannot be held liable for injuries caused by acts of God such as thunderstorms, lightning, snowfall, or a tornado. Teachers and coaches should be

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[158]Ibid. [159]Prosser, *Torts*, p. 487.

[160]Alexander and Alexander, *Law in a Nutshell*, pp. 226-227.

cognizant of weather conditions such as thunderstorms when students are practicing outside to prevent liability from an unexpected burst of lightning. School officials should take precautions in making decisions to close or open schools when road conditions are dangerous.[161] In addition, reasonable care is necessary in teaching students proper conduct and procedures during fire and severe weather drills.[162]

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[161]Alexander and Alexander, Law in a Nutshell, p. 227.

[162]N.C. Gen. Stat. sec. 115C-525.

Governmental Immunity

An immunity is a freedom from suit or liability.[163] Immunity from liability is based on the theory that the state and local governments are sovereign and cannot be sued without their consent.[164]

The doctrine of governmental immunity was first established in England and is based on the concept that the King can do no wrong; thus the government can do no wrong.[165] The origin of the common law concept can be traced to two early cases. The first is the English case, Russell and Others v. The Men Dwelling in the County of Devon, 1788.[166] A private citizen had no action against the county when his horse and wagon were injured because a bridge was in bad repair. The judge denied the recovery and said that it was better that the "...individual should sustain an injury than that the public should suffer..." because there was no money to pay such claims.

Governmental immunity reached America in the 1812 Massachusetts case of Mower v. The Inhabitants of Leicester[167]. In this case a horse was killed by a

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[163] Prosser, Torts, p. 1032, n.1.

[164] Ibid., p. 1034, n.15. [165] Ibid., p. 1033, n.3.

[166] 100 Eng. Rep. 359 (1788). [167] 9 Mass. 247 (1812).

negligently repaired bridge. The court found that the town was incorporated and could not sue and/or be sued. The town as a quasi-corporation was created by the legislature for purposes of public policy and was, therefore, not liable for any neglect unless covered by state statute.

The theory of sovereign immunity has extended to the states where it is made applicable to subordinate state agencies including school districts. Justification for governmental immunity includes the argument that the law provides no funds for the payment of damages. Since funds are not provided for the payment of tort claims, a governmental unit found guilty of a negligent act could not properly disburse these funds. Payment for tort claims would have to be budgeted before funds could be used for that purpose. Using school funds for tort defenses could very well close the schools in a school district.[168] Also, school districts only have those powers granted to the board to commit a tort, "and when it does, the act is beyond its legal powers and cannot bind the district. District immunity for acts of employees is based on the ground that the relation of master and servant does not exist; hence there is no application for the rule of respondeat superior governmental immunity."[169]

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[168]Cullinan v. Jefferson County 418 S.W.2d 407, 409(Ky.App. 1967).

[169]E. Edmund Reutter, Jr. and Robert R. Hamilton, The Law of Public Education, 2d ed. (New York: The Foundation Press, Inc., 1976), p. 272.

Arguments against governmental immunity are that the individual injured in a tort action is in a more difficult position to insure himself against financial disaster than the state. The state should be more secure financially and should be able to obtain insurance on an economically larger scale. In Cullinan v. Jefferson, the dissent stated that, "It is no more a hardship for a governmental unit to buy liability insurance than it is for a private individual."[170] The dissent in Cullinan also expressed the opinion that"...no immunity attaches where property rights are violated, but does attach where it is merely a matter of the life or limb of a human being."[171]

In the Cullinan case, sovereign immunity barred recovery for an injured student who stepped into a hole and fractured his ankle when he ran after a tennis ball that had rolled about twenty feet off the court.

The leading case attacking the concept of governmental immunity was Molitor v. Kaneland Community Unit, No. 302, in Illinois, 1959. In this case a student was injured in a school bus accident and the school district was held liable.[172]

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[170] Cullinan v. Jefferson, supra, p. 110.

[171] Ibid.

[172] 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

The court rejected the plea that abolition of immunity would create grave and unpredictable problems for the community. It was argued that the " ...burden of damage resulting from the wrongful acts of the government should ...be distributed among the entire community constituting the government where it could be borne without hardship upon any individual and where it justly belongs."[173] Since public education constitutes one of the biggest businesses in the country; the court held that school immunity could not be justified on the protection-of-public-fund's theory. The court abrogated immunity in Illinois[174] and, thereby, according to Prosser, set in motion a trend by the states toward abrogation for governmental immunity to some degree in a substantial or general way.[175]

In addition to judicial abrogation, the doctrine of governmental immunity is subject to certain statutory exceptions which authorize payments for torts committed by state employees in specific situations. First, there is the distinction between governmental and proprietary functions.

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[173]Ibid., p.90. [174]Ibid.

[175]Prosser, Torts, p. 1044-1045, notes 25-30. States are listed showing absolute immunity to varying degrees of immunity.

It has already been said that state and local governments may not be sued without their consent for injuries arising out of governmental activities. Governmental functions are those activities carried on pursuant to a state requirement in the areas of health, safety, education, or general welfare of the public like maintaining school buildings. If the defense is governmental immunity for a governmental function, it is a good defense, unless it has been waived according to statutes. But the state may be sued without the government's permission if a proprietary activity causes the injury. "A proprietary activity is a business-like or commercial venture carried on by branch of local government."[176] For example, in Morris v. School District of the Township of Mount Lebanon[177] a school district operated a summer camp and was liable for the drowning death of a child caused by negligence of its employees. First, the school district was not required by the state to undertake the recreation program nor was the program a part of the regular curriculum. Second, the camp was a type of activity that could be conducted by a private enterprise; and third, a charge was make for participation.

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[176] Janine Murphy, "North Carolina School Bus Transportation Law, Part II: Tort Liability", School Law Bulletin, (Spring, 1987), p. 27, n.1 .

[177] 393 Pa. 633, 144 A.2d 737 (1958).

The court held that the three factors were sufficient to render the school district liable for the negligence of its employees in what the court labeled as proprietary functions.

The North Carolina Supreme Court also seems reluctant to find that a school activity serves a proprietary rather than a governmental function. In Smith v. Hefner, 1952,[178] the court upheld the dismissal of a suit brought against the Hamlet School Trustees for the death of a spectator at the school's athletic field. The spectator was killed when a stack of cement blocks fell upon him. The court ruled the activity as a "governmental function", although the trustees had leased the field to a baseball club and joined with them in building a cement-block grandstand to facilitate the charging of admission to the games. The court recognized the necessity of ministering to the physical as well as mental needs of students by providing an athletic field and its necessary facilities.

Next, there are three major types of statutory exceptions to governmental immunity: "save harmless statutes", "safe place statutes," and tort claims acts which may include the first two exceptions.[179]

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[178] 235 N.C. 1, S.E.2d 783(1952).

[179] Robert E. Phay, "Tort Liability", School Law Cases and Materials, Ch. 9 (1977), p.29.

In "save harmless" statutes the school district is required to pay the judgment against teacher, administrators, and others or a suit arising out of the employee's negligence committed within the scope of employment. Typical of these statutes is the North Carolina school bus accident statute, General Statutes 143-300.1(c). This statute provides that claims involving bus accidents shall be tried before the North Carolina Industrial Commission, with appeal to the State Court of Appeals.

The second major type of statutory exception is the "safe place" statute.[180]. School districts in states with this statute may be liable for school facilities that are not constructed and maintained in a safe conditions. For example, a Wisconsin court held that a student injured by a falling flagpole could not collect damages under the "safe place" statute since the flagpole was not part of the building designated as a safe place.[181]

The most comprehensive type of statutory exception to governmental immunity is the State Tort Claims Act which was discussed at the beginning of the chapter. In North Carolina the "North Carolina Industrial Commission is constituted a court by state statute[182]...for the purpose of hearing and

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[180]Phay, p.29.

[181]Lawyer v. Joint School District No.1 288 N.W. 192 (Wis. 1939).

[182]N.C. Gen. Stat. sec. 143-291.

passing upon tort claims by the State Board of Education, the Board of Transportation and all other departments, institutions and agencies of the State."[183]

The Commission is charged with the responsibility of determining whether the injury complained of, and for which a claim for damages is made, was the result of the negligent act of officers or employees while acting within the scope of their duty. If the Commission finds that the claimant was not contributorily negligent, and that the negligence of the state officers or employees was the proximate cause of the injury, the Commission is directed to determine the amount of damages, including medical and other expenses, and to direct the payment of such damages by the department concerned.[184]

Waiver of Governmental Immunity. As suits against educators have increased, school boards have become more interested in purchasing insurance to protect against liability from such suits, but a school district has no authority to spend public funds to purchase such insurance unless the state legislature permits it.[185]

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[183]Ibid. See Turner v. Gastonia City Board of Ed. 250 N.C. 456, 109 S.E.2d 211 (1959). The Tort Claims Act does not include local units such as county and city boards of education except for accidents involving school buses.

[184]N.C. has imposed a dollar limit on recovery; N.C. Gen. Stat. sec. 143-291 (Administrative Process - Damages awarded not to exceed the sum of thirty thousand dollars ($30,000).

[185]Board of Education v. Commercial Casualty Insurance Company, 116 W.Va. 503, 182 S.E. 87 (1935). School Board sued insurance company for indemnification. Since legislature had not authorized the purchase, school board had no authority to buy it.

The North Carolina legislature has authorized and empowered local boards of education to secure and pay for liability insurance thus waiving its governmental immunity to the extent that it has purchased liability insurance. Any person sustaining personal or property damages, or in the case of death his personal representative, may sue a local board that is insured for recovery of damages but only in the county of the board of education. Injury must be proximately caused by the negligent acts or torts of the agents and employees of the school board or particular school and employees must be acting within their scope of duty.[186] Accidents involving school buses or school transportation remain under the Tort Claims Act. See N.C Gen. Stat. sec. 143-301.1

A county board that does not waive immunity from tort liability is not liable for tort action except as established under the Tort Claims Act for school bus accidents. [187] In 1985, N.C. Gen. Stat.115C-42, the statute for waiver of immunity was amended to extend to injuries which are specifically covered by the insurance policy. The statute specifies that "the local board of education shall determine what liabilities and what officers, agents and

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[186]N.C. Gen. Stat. sec. 115C-42, amended 1985.

[187]See. N.C. Gen. Stat. sec. 143-291. Huff v. Northampton County Board of Education, 259 N.C. 75, 130 S.E.2d (1963).

employees shall be covered by any insurance purchased pursuant to this section." In Overcash v. Statesville City Board of Education and the City of Statesville,[188] 1986, a member of the Mooresville High baseball team, fell and broke his leg during a baseball game at Statesville High. He claimed that a concealed metal spike caused the fall. The student and his father claimed that the board of education's employees negligently maintained the ballfield. Claiming governmental immunity, the board moved for dismissal. The board had purchased a policy that excluded injuries that occur during school - sponsored athletic events. In ruling for the board the court found no legislative intent to require local boards to purchase insurance coverage for all tort liabilities. The legislature did not waive board immunity from tort liability, it simply permitted local boards to waive immunity to the extent that the board had purchased liability insurance.

Constitutional Torts. Another source of potential liability for school board members, school administrators, and teachers is the violation of an individual's civil rights. The suit for violation of a civil right has become known as the 1983 action because it is brought under Section 1983 of the Civil Rights Act of 1871. Under this

[188] 348 S.E.2d 524 (N.C. Ct. App. 1986).

law denial of an individual's constitutional rights can result in relief in the form of an injunction or monetary damages as "...assessed by federal courts against the school board or against an individual school board member, administrator, or teacher or against the individual responsible for the constitutional denial."[189] The law was primarily enacted to provide legal redress in preventing discrimination against southern blacks.[190]

The law states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and laws shall be liable to the party injured in an action at law, suit in equity,or other proper proceeding for redress.[191]

In 1961 in Monroe v. Pape[192] the United States Supreme Court examined the statute's legislature history and held that local governments, including school boards could not be sued under Section 1983 to recover damages for constitutional deprivation caused by actions of their public officers.

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[189] Alexander and Alexander, American Public School Law, p. 509.

[190] Ibid. [191] 42 U.S.C.A. sec. 1983, enacted 1871.

[192] 365 U.S. 167 (1961).

The court did not intend the word "persons" to include local governments. Action could be brought only against the individual officer or employee who caused the injury. In Monroe v. Pape the Supreme Court determined that policemen were personally liable as individuals, but the City of Chicago was not a person and could not be held liable.

In 1978 the United States Supreme Court, in Monell v. Department of Social Services,[193] reversed its earlier decision and declared that the word "person" included local governments or institutions. This decision determined that a local governing body could also be sued under Section 1983 and required to pay damages for the violation of another person's federal rights. For example, a school board may be found liable under Section 1983 but only for unconstitutional acts caused by its official policies, regulations, or customs. The school board may also be liable in a Section 1983 lawsuit if the violation is caused by a public officer whose acts represent the official policy or custom of the board. In Monell the Court ruled that a written policy was unconstitutional such as the one adopted by New York City's department of social services and board of education. The policy forced female employees to take unpaid leave at an arbitrary point in their pregnancy. The city was made liable for back pay.

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[193] 436 U.S. 658 (1978).

Wood v. Strickland,[194] a significant United States Supreme Court case, established that school board members and administrators could be sued personally for violating students' constitutional rights of due process. Three Arkansas high school students were expelled for violating a school regulation by "spiking" punch with malt liquor at a school sponsored event. They were denied procedural due process when the school board determined the question of expelling them in their absence and without telling them where or when its meeting would be held or giving them a chance to be heard.

The Court in Wood addressed the question of whether board members would be liable for any act that deprived a person of their constitutional rights regardless of whether the act was done deliberately or maliciously or whether it was done inadvertently. This question involved immunity from liability which would depend on a school board member's good faith. The court held that a school board member or other public officer acting sincerely and with a belief that he was doing right and operating in accordance with "settled, indisputable law..." would not be required to pay for damages.[195] This qualified immunity standard required in Wood plays an important role in many Section

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[194] 420 U.S. 308 (1975).

[195] Ibid., pp. 321-332.

1983 lawsuits against school officials. But a public official is not required to predict the future course of clearly established law. In Harlow v. Fitzgerald,[196] a 1983 non-school United States Supreme Court case, the court held that public officials may not be required to pay damages if their conduct did not violate clearly established constitutional or statutory rights of which a reasonable person should have known.

The Supreme Court in this case limited what had been considered absolute immunity to that of qualified or conditional immunity for officials acting in good faith. This means that individuals acting within the scope of their authority would have qualified immunity from civil liability.[197]

"Although individuals may assert good faith immunity as a defense in a constitutional tort action," [198] the United States Supreme Court in Owen v. City of Independence,[199] 1980, a non-school case, held that local governing bodies, which include public schools, sued under section 1983 are not entitled to any immunity from liability for damages.

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[196] 454 U.S. 886 (1982). [197] Ibid.

[198] Alexander and Alexander, Law in a Nutshell, p. 234.

[199] 63 L.Ed.2d 673, 100 S.Ct. 1398(1980).

In another important 1978 constitutional due process case, Carey v. Piphus,[200] a student was suspended from school without procedural due process and argued in the cases that substantive damages should be awarded. The United States Supreme Court said that Section 1983 was intended to create a type of tort liability for persons who are deprived of "rights, privileges, or immunities" as provided by the United States Constitution. Two high school students, were suspended for a twenty-day suspension for violation of the school rule against drugs (smoking marijuana), but they were readmitted after eight days under a temporary restraining order. The Court ruled that a plaintiff who establishes a denial of procedural due process in a Section 1983 lawsuit must prove actual injury to recover more that nominal damages which the Supreme Court set as one dollar ($1). The court held that substantive damages should be awarded only to compensate actual injury. Carey clarified the nature and extent of damages that could be given by the courts.[201]

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[200] 435 U.S. 247 (1978).

[201] Ibid.

The cases discussed in this section make it clear to school administrative units that the federal courts intend to hold them strictly accountable for official violations of federal constitutional rights.[202]

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[202]Uzzell v. Friday, 618 F.Supp. 1222 (M.D.N.C. 1985) Practices of Student Government (subsidy of Black student Movement excluded white students)at UNC-CH violated Fourteenth Amendment, Civil Rights Act of 1871 and Title VI of Civil Rights Act of 1964.

Student Records

The federal Family Educational Rights and Privacy Act of 1974, known as the Buckley Amendment,[203] requires that educational agencies or institutions establish procedures for granting parents or guardians and students at age eighteen the right of access to the student's records. The request must be honored within not more than forty-five days after it is made.[204]

Prior to the Buckley Amendment, it was difficult for students to be able to inspect their records. Twenty-four states had statutes that allowed parents or students to have any access to the records, and only five states "granted the right to challenge, correct, or expunge information in the student files."[205]

North Carolina General Statutes have established the following guidelines relating to student records in section 155C-114 which are in compliance with federal statutes:

1. The eligible student, his parents or guardian, or surrogate parent have the right to read, inspect, and copy the records; have the data fully explained, interpreted, analyzed;[206]

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[203] 20 U.S.C.A. sec. 1232g.

[204] Alexander and Alexander, Law in a Nutshell, p. 236.

[205] Ibid. 236. [206] N.C. Gen. Stat. sec. 115C-114(b).

and have incorrect, outdated, irrelevant or misleading entries expunged. If a school system refuses to expunge information being challenged, such person may request a due process hearing within thirty days after the agency's refusal.[207]

2. Any information containing individual grades of students on any test which might enable students to be identified shall not be made available to the public. Teachers may post grades but students may not be identifiable.[208]

3. The official record of students enrolled in North Carolina schools shall be permanently maintained in the files of the appropriate school after the student graduates, or withdraws from school, unless the local board determines that the records may be filed at the central office or other appropriate location.[209] The official record shall contain the following minimum information: date of birth, attendance data, grading and promotion information, and any other appropriate information as authorized by the local board of education.

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[207]Ibid. sec. 115C-116.

[208]Ibid. sec. 115C-182., G.S. 132-1. See also Kryston v. Board of Education East Ramapo, etc., 77 A.D.2d 896, 430 N.Y. S.2d 688 (1989).

[209]Ibid. sec. 115C-402.

4. No teacher or other school employee shall knowingly or willfully make or cause another person to make false reports on records. If found guilty of such action, the person shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned at the discretion of the court and the certificate to teach shall be revoked by the State Superintendent of Public Instruction.[210]
5. Finally, parents or guardians, or surrogate parents, or eligible students must provide written consent before the school can release the student's records to agencies outside designated educational categories. Records may be released to the following people: school officials within the local education agency who have legitimate educational interests, school officials at other local educational agencies in which the student intends to enroll, or authorized state and federal government officials who are determining the eligibility of the child for aid as provided under Public Law 93-380 or other federal law.[211]

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[210]Ibid., sec. 115C-317.

[211]Ibid., 115C-114.

Summary

Tort law imposes certain duties and restrictions upon teachers with respect to students, the violation of which results in the right of the injured student to sue for recovery of injury. While no tort is unique to education, assault and battery, defamation, and negligence are the most commonly involved claims. The following general principles and immunities of tort law have been found to apply to the recurring tort issues that arise:

1. An intentional tort includes assault and battery. Assault is the attempt to create a fear of bodily harm while battery is the actual bodily injury.
2. A school official may be liable in an assault and battery charge for corporal punishment, if the punishment inflicts a serious or permanent injury that could have been seen as a natural and probable consequence of the reasonable force used on the student. Teachers may also be liable for child abuse in the use of corporal punishment.
3. The United States Supreme Court has determined that students have no constitutional right to a hearing to challenge the reason for being punished with corporal punishment.
4. The North Carolina General Statute, 115C-391 (1987) requires boards of education to adopt

policies regulating the use of corporal punishment in public schools: (1) only authorized personnel are to administer and witness, (2) other children may not be present, (3) students must receive prior notice of the general types of misconduct which may result in corporal punishment, and (4) parents of students must be notified.

5. Teachers and administrators who make false statements that harm teachers' and students' reputations are liable for defamation.
6. The defense of qualified privilege excuses teachers of defamatory statements with their written or oral communications in dealing with school matters and public interests. Qualified privilege requires that statements be made in good faith, without malice, or reckless disregard for the truth, in an answer to an inquiry, and as a result of a duty to society. The individual must believe that the statement is the truth. Statements made outside the scope of duty are not privileged. Administrators have absolute privilege in some situations such as presenting the reasons for a teacher's dismissal in a school board hearing.

7. When parents make defamatory statements to the principal about a teacher, they have qualified privilege and do not have to prove their suspicions as long as they believe the statements are true. Teachers and administrators have a higher burden of proof in defamation suits when they are considered public officials or public figures.
8. Teachers acting _in loco parentis_ have the authority to restrain or detain a student after school as long as actions are in good faith, without malice, and in the best interest of the school. When the detention or restraint is performed with ill will or malice, and against the will of the student, it may be considered false imprisonment which is an intentional tort subject to punitive, nominal, or compensatory damages.
9. In strict liability cases the defendant is not charged with any wrongdoing and has not departed from a reasonable standard of care or intent. Liability is placed on the defendant according to the doctrine of "he who breaks must pay" regardless of whether the injury was knowingly or

negligently caused. The possibility of strict liability suits exists in activities that are abnormally dangerous to students such as field trips, lab experiences, and shop activities.

10. Negligence is an unintentional tort with four elements of action that must be established by the plaintiff to prove negligence on the part of the defendant: (1) duty, (2) breach of duty, (3) proximate or legal cause, and (4) actual injury or loss.

11. When a duty exists in a negligence case, the standard of care is reasonable care or the ordinary care of a reasonable man. In the educational setting where teachers are trained to deal with students and act <u>in loco parentis</u>, greater precautions are needed by a reasonably, prudent teacher.

12. Most negligence cases depend on the facts of the case and the view that the jury takes of the evidence. Although the precedential value of any one case can be limited, the fundamental principle of negligence cases in North Carolina is foreseeability.

13. The standard of care to be met by a teacher increases in relationship to the foreseeable risk of injury or harm. Failure to properly instruct or warn students may constitute negligence in

potentially dangerous school activities. Age is an important factor to consider in providing a greater standard of care.

14. A defendant may respond to a negligence suit with one or more of several tort defenses: (1) contributory negligence, (2) last clear chance, (3) comparative negligence, (4) assumption of risk, (5) act of God, and (6) immunity.

15. Educational malpractice is a specific form of negligence accusation based on the failure of students to receive adequate instruction. Basically, the courts have rejected educational malpractice. Arguments against educational malpractice have claimed that such action would financially overburden the school systems and the courts, and create judicial interference in policy-making and supervision of the educational process. In dismissing educational malpractice suits, courts have ruled that the suits have failed to establish the existence of a duty, a breach of that duty, a proximate cause, and actual injury.

16. Governmental immunity is based on the theory that state and local governments are sovereign and cannot be sued without their consent for injuries arising out of governmental activities. This theory has been traced back to the English concept that the King can do no wrong. Justification for tort immunities applied to public schools has been related to lack of funds to pay for damage claims and to the policy of diverting money from the schools to pay for damage claims. State and local governments may be sued without the government's permission for activities that are proprietary activities which are profit-making, business-like activities that could be carried on by a business or agency.
17. North Carolina General Statutes, section 115C-42, authorize the local school boards to waive its governmental immunity to the extent that it has purchased liability insurance; therefore, the injured party may sue the school board for its

own actions or for the actions of its employees as long as those actions were committed in the course of employment. This legal principle is know as <u>respondeat superior</u>.

18. School districts that do not waive immunity from tort liability are not liable for tort action except as established under the Tort Claims Act, N.C. Gen. Stat. sec. 143-291. The North Carolina Industrial Commission conducts a hearing and makes decisions involving claims for damages made as the result of negligent acts of officers or employees of all state agencies and institutions while acting in the scope of their duty. All school bus accident claims are referred to the Commission. Other school board claims are excluded.

19. An individual's constitutional rights are protected through application of the Civil Rights Act of 1871 Section 1983. Under this law denial of a person's constitutional rights or federal statutory rights can result in a lawsuit under Section 1983. Monetary damages may be assessed against the school board, individual board members, administrator or a teacher or against the individual responsible for the damage.

20. The <u>Wood v. Strickland</u> case established the potential liability of school board members for

denial of students due process rights, and Carey v. Piphus clarified the nature and extent of damages that could be levied by the courts. The plaintiff must establish proof of damages caused by the denial.

21. An eligible student, parent, guardian, or surrogate parent has the right to read, inspect, copy, challenge and have corrected the student's record. Incorrect, outdated, irrelevant, or misleading entries may be expunged. If a school denies this right, the person may request a due process hearing within thirty days after the refusal. Written consent is necessary to allow an unauthorized person to review a child's record.

22. Teachers may post grades, but individual students may not be identified.

Chapter V

SUMMARY, CONCLUSIONS, RECOMMENDATIONS

In this study, appropriate federal and state judicial decisions, federal and state constitutional law, state statutes, State Board of Education policies, and opinions of the Attorney General have been examined and analyzed to determine the legal aspects of teaching in North Carolina. The legal principles derived from this study summarize the affect of the law on teachers in exercising rights as teachers and citizens, performing duties and responsibilities, and understanding liability to students:

Rights of Teachers

1. Teachers have a constitutional right to free speech on matters of public concern, but school officials may restrict speech that creates a substantial interference in the classroom or in management of the school. When an employee claims exercise of protected speech as a defense to dismissal, the court will generally uphold the dismissal, if it would have reached the same decision had the protected speech not occurred. First amendment

rights also cover private conversations of public employees.

2. A teacher's right to academic freedom in the classroom is balanced against the state's interest in protecting the welfare of students and providing a standard course of study for all students. Teachers must consider the age and maturity of students when discussing controversial issues. Teachers may not say or write in class whatever they choose. Although the classroom is considered a "marketplace of ideas," a teacher's classroom discussion is entitled to constitutional protection as long as the discussion remains within curricular guidelines. North Carolina Statutory duties of teachers give proper notice of what is acceptable conduct and speech for teachers in the classroom.
3. Teachers may not indoctrinate students to their religious beliefs by wearing religious clothing, conducting prayer or Bible reading, observing religious holidays, or conducting a moment-of-silence for the purpose of prayer, although school baords may adopt a moment of silence policy. Religious holidays may be observed through cultural arts activities.
4. Private conduct of teachers may be restricted when that conduct seriously affects the teacher's

fitness to teach. Membership in an organization with an unlawful purpose is not a lawful reason for sanctioning teachers, but a teacher may be required to answer questions about political activities if they are related to effectiveness or fitness to teach. Public school teachers have the right of free association and to refuse to take loyalty oaths.

5. It is unlawful to discriminate against teachers with respect to hiring, firing, salary, conditions or privileges of employment based on race, color, sex, or national origin. School boards are required to make reasonable accommodations for religious needs and in granting employees' requests for religious leave unless the leave causes undue hardship to the school district. Teacher testing, certification, and salary schedules must be related to job performance. Differential pay in equal or substantially equal jobs may not be related to sex.
6. Teachers affected by pregnancy and its related conditions may take maternity leave the same as other employees with disabilities. Unwed pregnant teachers may not be dismissed unless the pregnancy is related to fitness to teach because the right to bear a child, wed, or unwed, is a protected liberty right.

7. Teachers may not be discriminated against because of age in respect to hiring, firing, salary, and conditions of employment. There is no retirement age.
8. A teacher may not be rejected for a position because of a handicap if he meets all of the requirements of the position in spite of the handicap. Neither may an otherwise qualified teacher be denied employment because of a contagious disease, but the courts must determine how much harm the disease will present to others and the chance that others may be infected.
9. A teacher may be required to submit to drug testing only if there is reasonable suspicion that the teacher is involved with drug use.

Terms and Conditions of Employment

1. State requirements for certification in North Carolina include a degree and an endorsement from an institution of higher education, a minimum age of eighteen, a satisfactory score on the National Teacher's Examination, and a superintendent's approval and signature.

2. Types of certificates include class "A", undergraduate, and class "G", graduate. Interim certificates, provisional certificates, and reciprocity certificates are granted for a limited time and until specific provisions have been met.
3. A certificate must be renewed every five years, a professional growth plan is required, and career status is granted after three consecutive years of employment.
4. A career teacher has a property interest in employment and may not be dismissed except for reasons of inadequate performance, immorality, insubordination, neglect of duty, physical or mental incapacity, excessive use of alcohol or non prescription drugs, conviction of a felony or a crime involving moral turpitude, advocating the overthrow of the state or federal government, failure to fulfill statutory duties or board requirements, revocation of a certificate, failure to maintain a current certificate, and failure to repay money to the state.
5. Another reason for dismissal is reduction-in-force which results from a decrease in the number of teaching positions due to district reorganization, decreased enrollment, or decreased funding. Riffed

teachers have priority on all available positions for which they are certified for three consecutive years after dismissal.

6. Nontenured teachers with a contract for a certain period of time have an entitlement to a job and may not be dismissed except for the same statutory reasons as a tenured teacher. Yet, a nontenured teacher may be nonrenewed at the end of a probationary period provided the board has an educational reason for the nonrenewal decision. School boards may not nonrenew for trivial or unconstitutional reasons, but a school board may choose to nonrenew an average teacher in order to obtain a better teacher.
7. In addition to a property interest, a teacher may establish a liberty interest if the nonrenewal or dismissal imposes a stigma that seriously limits opportunities for future employment. When a property or liberty interest is threatened, the teacher is entitled to due process.
8. Minimum due process requires adequate notice of charges with an opportunity to be heard and the adherance to statutory guidelines and deadlines. A career teacher must exhaust administrative remedies by having a review by the Professional

Review Committee and a school board hearing before appealing the decision to the superior court. Full procedural rights in a hearing include representation by counsel, examination and cross-examination of witnesses, and a record of the proceeding.

9. A nontenured teacher must prove the allegation that dismissal was for arbitrary, capricious, discriminatory, personal, political or unconstitutional reasons. This claim must be tried by the court rather than the school board. When a career teacher is dismissed, the burden is on the school board to provide sufficient evidence to support dismissal.

10. When a career teacher is dismissed for "neglect of duty" the board must prove that a reasonable man under the same circumstances would have recognized the duty and felt obligated to perform that duty. Teachers have prior notice of their duties and responsibilities because the North Carolina legislature has prescribed duties of teachers in the state statutes, and local school boards and administrators have the implied right to determine rules and regulation for teachers in carrying out their duties.

11. Extra assignments and duties may be required of teachers as long as they are in the area of the teacher's competence.
12. When teachers receive notification that performance is inadequate, which should include efforts for remediation, the "inadequate performance standard" for dismissal is not "constitutionally void for vagueness" because it can be easily understood by any person of ordinary intelligence who knows what a teacher's job entails.
13. The "immoral conduct" charge has been based on the ground of "neglect of duty". This is brought about by the teacher's immorality which must be shown to adversely affect students and the teacher's fitness to teach.
14. To be dismissed for physical incapacity, a career teacher must have a condition that affects the present and long term inability to perform duties, responsibilities, and the physical demands of the job.

Tort Liability

1. Assault and battery, defamation, and negligence are the most commonly involved tort claims.
2. Administering corporal punishment that results in a serious or permanent injury to a student which could have been foreseen as a consequence of reasonable force may result in an assault and battery charge against a teacher.
3. Teachers may also be liable for child abuse when administering corporal punishment.
4. Although courts usually rule in favor of the teacher in corporal punishment cases, the North Carolina legislature requires only authorized personnel to administer and witness corporal punishment in the absence of other children, and to provide parental notification of punishment. In addition, students must receive prior notice of the general types of misconduct which may result in corporal punishment. Teachers may use reasonable but not excessive force in handling a disruptive or hostile student.
5. Teachers must adhere to local board policies pertaining to corporal punishment because teachers have been dismissed in North Carolina on the

grounds of neglect of duty, inadequate performance, and insubordination for not following board policy related to corporal punishment.

6. Teachers should be cautious in making defamatory statements or sharing confidential information about other teachers and students. False statements that harm another person's reputation may result in the tort action of libel and slander. Teachers have "qualified privilege" in written (slander) or oral(libel) communications in dealing with school matters which means that statements must be made in good faith, without malice, or without a reckless disregard for the truth. Teachers do not have "absolute privileged communication" as a superintendent in a board hearing.

7. Parents have "qualified privilege" in making statements about teachers to principals as long as they believe the statements to be true.

8. Teachers may restrain or retain students after school when the purpose is in the best interest of the student and the school. To do so with ill will or malice subjects a teacher to a charge of false imprisonment, an intentional tort.

9. Strict liability is placed on the defendant regardless of whether the injury was knowingly or negligently caused based on the doctrine of "he who breaks must pay." Activities that are abnormally dangerous to students such as shop, lab experiences, and field trips fall into this category. The possibility of a strict liability suit against a teacher is rare.
10. Negligence is an unintentional tort with four elements of action that must be proven to establish negligence: (1)duty, (2)breach of duty, (3)proximate or legal cause, and (4)actual injury or loss. Because of skill, knowledge, and training, teachers are expected to provide a higher standard of care to students than the ordinary "prudent person."
11. A teacher acts _in loco parentis_ and is responsible for supervision of students in the parents' place while students are at school; therefore, a "reasonably prudent teacher" must be able to determine that some general danger is foreseeable. As the foreseeable risk of injury or harm increases, the standard of care to be met by the teacher must increase. Failure to warn students of some danger; failure to properly instruct in the

use of materials and equipment; failure to properly supervise students on field trips, before and after school activities, during lunch, during physical education, during restroom breaks, and other potentially dangerous activities may constitute negligence in these areas. Without an injury there is no liability.

12. A teacher's absence from the classroom has been found to be the proximate cause of the injury in some cases in other states if the injury would not have happened in the teacher's presence. In North Carolina, the fundamental principle for negligence cases is "foreseeability." A teacher is not expected to remain with his class at all times. If a student injury should occur in the absence of supervision, the teacher will not be considered negligent unless the teacher could have foreseen that some behavior or conduct might result in harm to a student. However, if a student is injured and the teacher was present in the classroom and failed to stop a dangerous activity from taking place, the teacher may be negligent.
13. Another form of negligence that is a concern to teachers is educational malpractice, or the failure to provide students with proper

instruction. The courts have rejected educational malpractice suits for failure to establish a cause of negligent action - duty, breach of that duty, a proximate cause, and actual injury. The courts have recognized that teachers are generally responsible for providing the opportunity to learn but there are external factors affecting achievement over which the teacher has no control. However, even though no teachers have been dismissed for educational malpractice they have been dismissed for inadequate instruction.

14. School districts in North Carolina have authorization from the legislature to waive governmental immunity by purchasing liability insurance to cover board members and employees; therefore, an injured party may sue the school board and employees for actions committed during employment to the extent that the board has purchased insurance.

15. School districts that do not waive governmental immunity from tort liability are not liable for tort action except as established under the North Carolina Tort Claims Act. This Act covers claims resulting from school bus or transportation vehicle accidents. Teachers are liable for their torts.

In conclusion, a review of teachers' constitutional rights as defined by the courts makes it clear that teachers may not be deprived of protected constitutional rights. Yet, teachers' freedoms as public school employees and as private citizens must be balanced against the interest of the state or school board's responsibility in operating efficient schools and in providing for the education and welfare of students. This balance of interest is especially evident in areas of first amendment rights. Courts generally strike the balance in favor of the teacher unless the teacher's speech, conduct or appearance is a substantial disruption in the school, or seriously affects the teacher's classroom performance, or becomes so notorious in the community that the ability to teach is impaired. Courts have generally ruled for the teacher in corporal punishment cases unless the discipline was unreasonable and the teacher acted with malicious intent to do bodily harm. The North Carolina 1987 legislature has provided limitations and procedures in administering corporal punishment, but corporal punishment remains a controversial area of school law.

Another conclusion of this study is that certain areas of law are not settled especially in regard to requests for religious leave, religious clothing, school prayer, riffing policies, extracurricular duties of teachers, educational

malpractice, corporal punishment, and discrimination in employment such as age, sex, race, disease as a handicapping condition, and drug testing. School boards are faced with the difficult task of devising RIF policies that do not disproportionately affect minority teachers and do not violate white teachers' rights to equal protection.

Although the law is still developing in these areas, the courts have provided general guidelines for practicing preventive school law.

Recommendations

As a result of this study, the following recommendations are being made:

1. To maintain an up-to-date source of legal information for teachers this study should be updated on a ongoing basis to reflect the current status of the law.
2. A similar study is recommended for other states which lack an up-to-date source of legal information for teachers.
3. A study is recommended to examine the developing case law in educational malpractice as well as state legal restrictions which interfere with good educational practices. As a result of such a study, educational guidelines should be developed to remedy the possibility of educational malpractice suits.

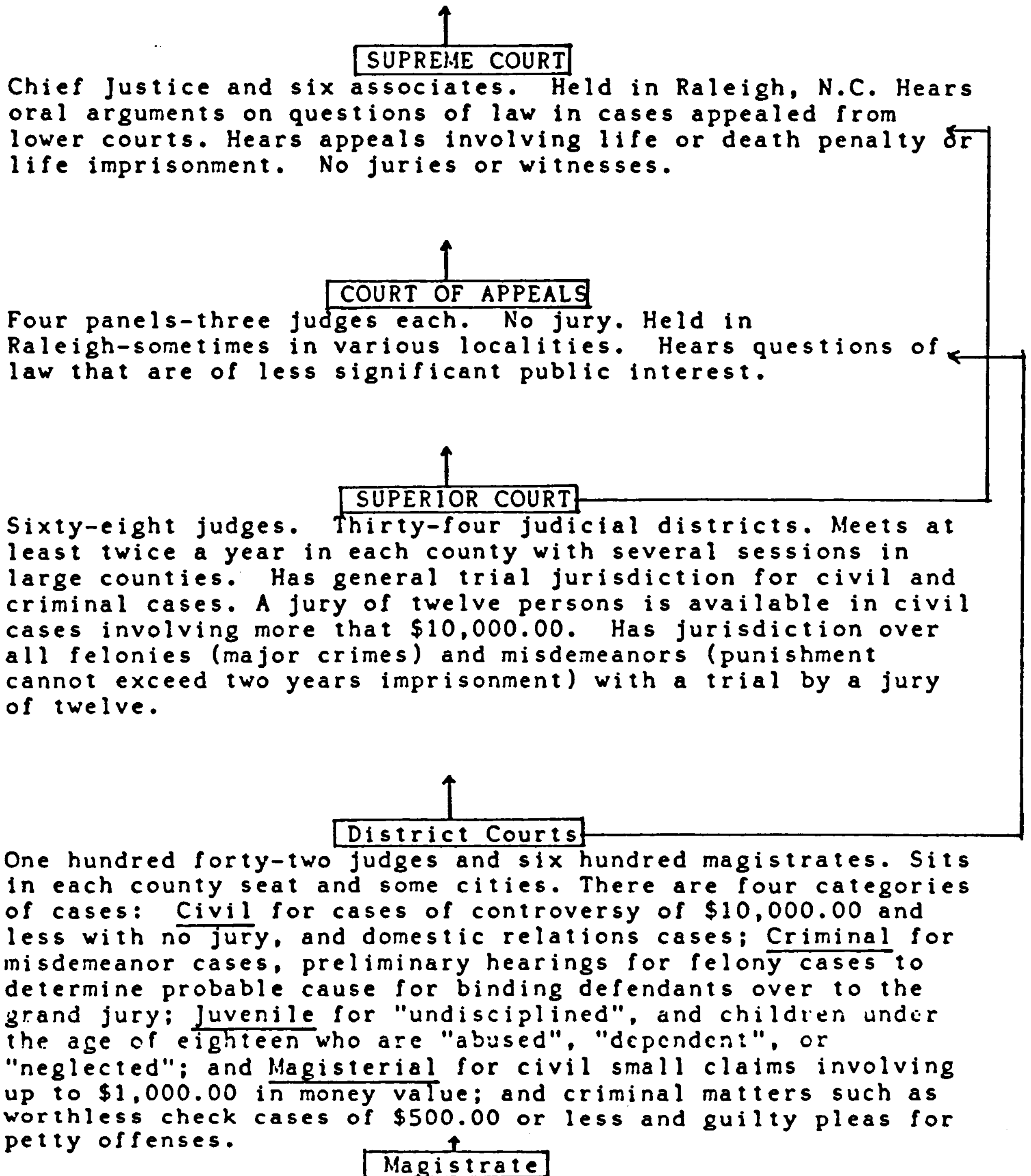
Postscript

The following suggestions for further research are recommended:

1. A study should be conducted to survey the teachers and administrators participating in the Career Ladder Pilot Program in North Carolina to determine the success of the program before it is fully implemented statewide. Some considerations include teacher/administrator evaluation results; effectiveness of outside evaluators, mentor teachers, teacher morale; and how teachers are selected to advance to higher levels.
2. To provide teachers with information about the laws that affect them, the way the legal system works, the way the law can work for teachers, and how litigation can be prevented, this study could be condensed into a cassette tape or video program for teacher staff development.

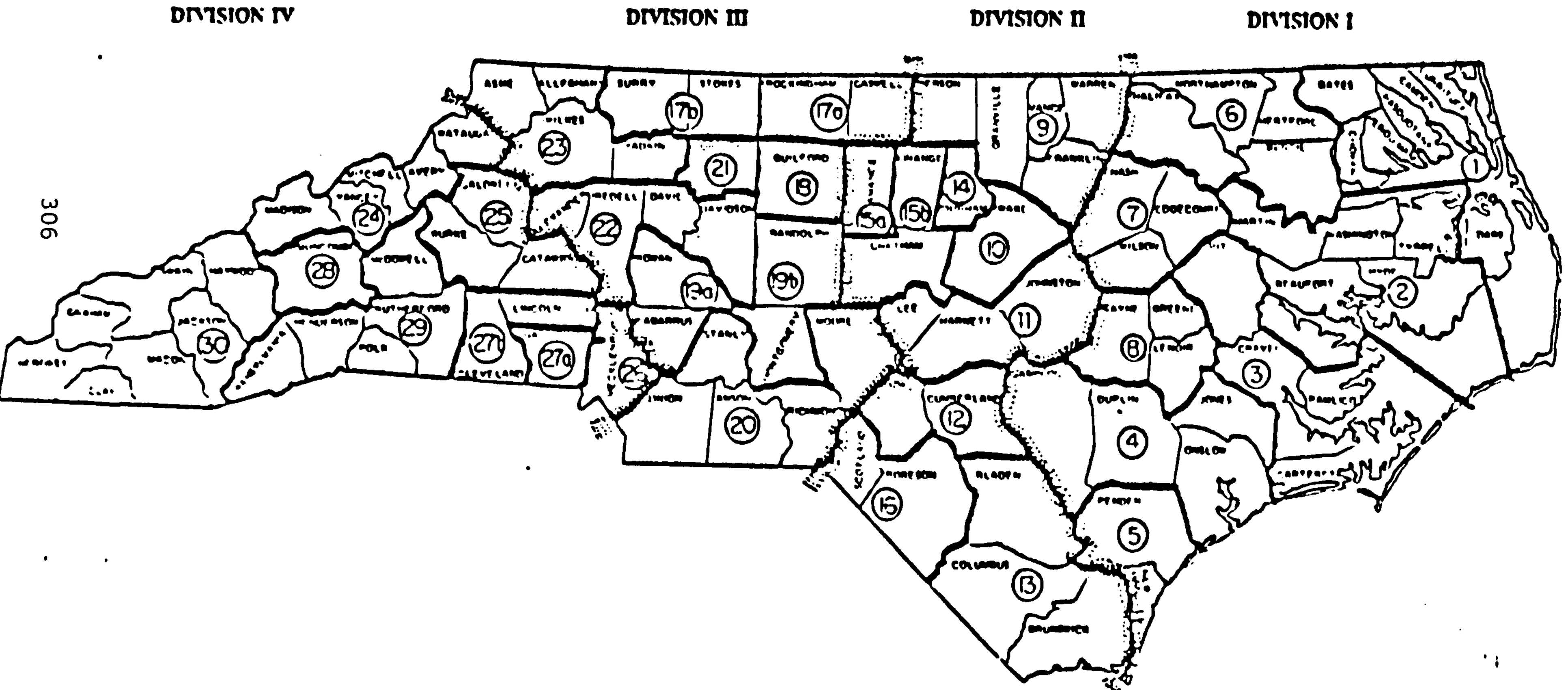
APPENDIX I

North Carolina
General Court of Justice
Routes of Appeal -1984



APPENDIX II

North Carolina Judicial Divisions and Districts



APPENDIX III

DEFINITION OF TERMS

For the purpose of this study, the following selected terms are defined, and have been taken from Black's Law Dictionary:

1. Appellant: The party who takes an appeal from one court or jurisdiction to another. The term includes one who sues out of writ of error.

2. Appellate Court: A court having jurisdiction of appeal and review; a court to which causes are removable by appeal, certiorari, or error; a reviewing court; and, except in special cases where original jurisdiction is conferred; not a "trial court" or court of first instance.

3. Appellee: The party in a cause against whom an appeal is taken and sometimes called the respondent. It should be noted that a party's status as an appellant or appellee does not necessarily bear any relation to his status as plaintiff or defendant in the lower court.

4. Defendant: The person against whom relief or recovery is sought in a suit or the accused in a criminal case.

5. Due Process: This means fundamental fairness and justice in legal proceedings so that no person shall be deprived of life, liberty, property or any right granted by statute. The essential elements of "due process of law" are notice and opportunity to be heard and to defend in an orderly proceeding adopted to the nature of the case; the guarantee of due process requires that every man have protection of a day in court and the benefit of general law.

6. In Loco Parentis : The doctrine which holds that the relationship of educator to pupil justifies power and authority over students and means "in place of the parent" while the pupil is in school, with a parent's rights, duties, and responsibilities.

7. Injunction: A prohibitive writ issued by a court of equity forbidding the defendant to do some act which is injurious to the plaintiff and cannot be adequately redressed by an action at law.

8. Liability: This word is a broad legal term defined to mean every kind of legal obligation, responsibility of duty, condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden.

9. Litigation: A lawsuit. Legal actions including all proceedings for the purpose of enforcing a right or seeking a remedy.

10. Negligence: The failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. To exercise due care in conduct toward others from which injury may result.

11. Plaintiff: A person who brings an action; the party who sues by filing a complaint to seek remedial belief for an injury to rights.

12. Public Schools: Schools established under the laws of the state, maintained by taxation and local control, and not limited to any particular class of the community but open without charge to all children residing within the established school district.

13. Prima facie: At first sight. A fact presumed to be true unless disproved by some evidence to the contrary.

14. Stare decis: To abide by, or adhere to, decided cases. When a court has once laid down a decision of principle of law as applicable to a certain state of facts, it will adhere to that principle.

15. Tort: A private or civil wrongful act which results in injury to a person, property, or reputation and for which the court will provide a remedy in the form of an action for damages.

16. Statute: A particular law enacted and established by the will of a legislative department of government.

17. Writ of certiorari: A writ issued by a superior court directing an inferior court to send up the records of a given case for review.

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