



# EDUCATION LAW NOTES

## Federal and Virginia Developments in School Law

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### ***FOURTH CIRCUIT AFFIRMS HIGH SCHOOL DRAMA TEACHER NOT ENTITLED TO ADDITIONAL PAY***

On March 2, 2022, a panel of the United States Court of Appeals for the Fourth Circuit affirmed a North Carolina federal trial court's ruling in favor of defendant Board of Education of the Durham Public Schools ("DPS") in an employment discrimination case brought by one of the district's drama teachers. In *Tabb v. Board of Education of the Durham Public Schools*, an African-American male teacher alleged that DPS discriminated against him based on his race by: (1) refusing to hire a Theater Technical Director to assist him with staging performances; (2) refusing to provide him with additional compensation for the tech work; and (3) failing to compensate him for his "extra-duty" assignments at Hillside High School.

Tabb began teaching drama at Hillside in 1987. He was extraordinarily successful both as a teacher and preparing student theatrical productions. He received numerous awards. He emphasized in his Complaint that producing plays at a high level requires long hours. DPS paid Tabb according to salary schedules established by North Carolina law: (a) base pay (based on years of experience, level of educational achievement, and special certifications); (b) a local school board supplement (based on years of experience and advanced degrees); and (c) a "Performing Arts Supplement" for his work as a "Theater Director" supporting extracurricular activities - staging student performances. DPS paid the Performing Arts Supplement to teachers who are Theater Directors, Theater Technical Directors, Band

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Directors and Dance/Music Directors. Theater Directors and Theater Technical Directors are subject to the same State-approved teaching standards for theater arts, but Theater Technical Directors have particular knowledge for teaching technical aspects of theater productions: planning, designing, and implementing lighting, sound, sets, and costumes.

Tabb repeatedly requested that the School Board and Hillside principal provide him with a Theater Technical Director to relieve him of the hours he devoted to technical issues staging student performances. He argued that some other DPS high schools had both Theater Directors and Theater Technical Directors. Under DPS' hiring system, the school board allocates a number of teachers to each school based on projected student enrollment – its practice does not allocate teachers to schools for specific positions or subjects. The principal of each school hires and assigns teachers based on mandatory core curricula and the school's individual needs.

Hillside's principal requested larger teacher allocations but did not receive one sufficient to hire a Theater Technical Director. The School Board never allotted a teacher specifically to serve as Hillside's Theater Technical Director. Those DPS high schools that hired Theater Technical Directors did so with existing teacher allotments. The Hillside principal initiated a student registration process two to three times, which never yielded a demand from students for

such a class. Tabb contended that the refusal to provide him with such assistance was based on his race and referred to better staffing at three other DPS high school drama departments, one of which was the Durham School of the Arts – a magnet program for arts and drama. He alleged that he was "forced to do the work of two or three teachers in order to maintain the Hillside High School Drama Program, while White Theater Directors at White high schools with comparable theatre programs have had two or more teachers assigned to assist them."

Tabb also alleged that he performed work unrelated to his theater program at the request of Hillside administrators for which he did not receive extra compensation: new student orientations, open houses, senior orientations, senior pictures, class and yearbook pictures, class meetings, ring ceremonies, pageants, coronations, quiz bowls, science fairs, step shows, career and technology education events, leadership summits, awards day programs, banquets, and athletic awards ceremonies. He alleged that Theater Directors at other DPS schools did not perform those duties or, if they did, were paid for them.

The trial court granted DPS' motion to dismiss Tabb's claim that he was entitled to two Performing Arts Supplements – for serving as both the Theater Director and Theater Technical Director. In affirming, the Fourth Circuit emphasized that in his Complaint Tabb failed to identify any DPS performing arts teacher – Black or White – who received two supplements. The Court recognized that Tabb alleged that teachers at other schools were not required to work the excessive overtime hours he alleged he worked, but he also failed to allege that DPS required him to work excessive overtime. Notably, Tabb was an exempt employee from the Fair Labor Standards Act's overtime requirements. The Court of Appeals affirmed.

"We reach the same conclusion reached by the district court – that Tabb had failed to allege plausibly that the School Board's failure to pay

him a Theater Technical Director Supplement constituted race-based employment discrimination. While the complaint certainly alleged that Tabb worked 'excessively' long hours, it did not allege that those hours were mandated by the School Board as a requirement of his job. The complaint did allege that Tabb was required to 'work after hours with students,' but it also alleged that he was paid for after-hours work with the Theater Director Supplement. And the complaint did not allege that *any* performing arts teacher in the School System, regardless of the teacher's race received more than one supplement."

The Court of Appeals also affirmed the trial court's granting of summary judgment on Tabb's remaining claims. First, it affirmed that the Durham School of the Arts was a specialized program for arts and drama, thus providing "an obvious alternative explanation for its increased drama department staffing." Therefore, it was not a valid comparator in analyzing Tabb's racial discrimination claim. Second, the Court affirmed that nothing in the record revealed that the School Board was doling out an employment "benefit" – additional Theater Technical Director assistance – in a discriminatory manner. Staffing determinations were school specific. In one instance a Black drama teacher had a Theater Technical Director; in another, a White teacher who repeatedly asked for one, did not. Finally, regarding his claim that he did not receive comparable pay for extra-duty assignments, the Court affirmed the trial court's determination that, in fact, the opposite was true: during the relevant time period Tabb received significantly more extra-duty pay than the next most compensated teacher. He also failed to provide any comparator to show that he was the object of pay discrimination.

Principals are advised to confer with their division human resources offices to ensure that, as in this case, teachers and other employees receive pay equitably within the school board-approved pay structures for both base and supplementary pay.

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