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ALABAMA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS

Current Issues in Local School Procedures Conference

Bryant Conference Center

Tuscaloosa, Alabama

Hot Legal Topics and Liability for School or Extracurricular Events

By Mark S. Boardman

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**ALABAMA ASSOCIATION OF
SCHOOL BUSINESS OFFICIALS**

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by *Mark S. Boardman*

This handout goes with the PowerPoint I have prepared. The goal is to allow you to listen, without taking too many notes. And this way you won't need to leaf through a bunch of printed PowerPoint slides.

- I. **THE ALABAMA'S ETHICS ACT:** You are a public employee; the same basic rules that apply to the governor and state legislators apply to you. *Alabama Code Section 36-25-1, et seq.*
 - A. Be sure you have viewed the Ethics Commission's online course: "All public employees required to file the Statement of Economic Interests required by Section 36-25-14, no later than May 1, 2011, shall participate in an online educational review of the Alabama Ethics Law provided on the official website of the commission. Employees hired after January 1, 2011, shall have 90 days to comply with this subsection. Evidence of completion of the educational review shall be provided to the commission via an electronic reporting system provided on the official website." (*Alabama Code Section 36-25-4.2(e)*)
 - B. "No public official or public employee shall, other than in the ordinary course of business, solicit a thing of value from a subordinate or person or business with whom he or she directly inspects, regulates, or supervises in his or her official capacity." (*Alabama Code Section 36-25-5(e)*)
 - C. "No public official or public employee shall use or cause to be used equipment, facilities, time, materials, human labor, or other public property under his or her discretion or control for the private benefit or business benefit of the public official, public employee, any other person . . ." (*Alabama Code Section 36-25-5(c)*)
 - D. PUBLIC EMPLOYEE. "Any person employed at the state, county, or municipal level of government or their instrumentalities, including governmental corporations

and authorities. . . .” (*Alabama Code Section 36-25-1(26)*)

- E. PUBLIC OFFICIAL. “Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal level of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal level of government or their instrumentalities, including governmental corporations. For purposes of this chapter, a public official includes the chairs and voice-chairs or the equivalent offices of each state political party as defined in Section 17-13-40.” (*Alabama Code Section 36-25-1(27)*)
- F. FAMILY MEMBER OF THE PUBLIC EMPLOYEE. “The spouse or a dependent of the public employee.” (*Alabama Code Section 36-25-1(14)*)
- G. FAMILY MEMBER OF THE PUBLIC OFFICIAL. “The spouse, a dependent, an adult child and his or her spouse, a parent, a spouse’s parents, a sibling and his or her spouse, of the public official.” (*Alabama Code Section 36-25-1(15)*)
- H. “Every governmental agency head shall within 10 days file reports with the commission on any matters that come to his or her attention in his or her official capacity which constitute a violation of this chapter.” (*Alabama Code Section 36-25-17(a)*)

II. GENERALLY, SUITS AGAINST AN EDUCATOR MUST MEET FOUR REQUIREMENTS:

- A. Duty
- B. Breach of Duty
- C. Causal Relationship (the breach of duty must cause the injury or damage)
- D. Injury or Damage

III. IMMUNITY:

Sovereign Immunity - - For Boards, but that includes official capacity claims: Article I, Section 14, Alabama Constitution of 1901.

State-agent Immunity - - Individuals Only, State Torts.

“A State agent *shall* be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's

- (1) formulating plans, policies, or designs; or
- (2) exercising his or her judgment in the administration of a department or agency of government, including but not limited to, examples such as:
 - (a) making administrative adjudications;
 - (b) allocating resources;
 - (c) negotiating contracts;
 - (d) hiring, firing, transferring, assigning or supervising personnel; or
- (3) discharging duties imposed on a department or agency by statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or
- (4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; or
- (5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating

students.

Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent shall not be immune from civil liability in his or her personal capacity

- (1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or
- (2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law.”

Ex parte Cranman, 792 So. 2d 392 (Ala. 2000). Also *Alabama Code Section 36-1-12 Qualified Immunity* - - Individuals Only, Federal Torts

IV. THE EDUCATOR LIABILITY TRUST FUND: The Educator Liability Trust Fund defends and indemnifies, to the extent the legislation applies and the fund is funded, board of education employees who are sued in the scope of their employment. Go to that website for a claim form: <http://www.riskmgt.alabama.gov/PDF/forms/ELTFClaimForm032315.pdf>

V. RECORDS REQUESTS:

Alabama has an Open Records Act, found at *Alabama Code Section 36-12-40 and 41*. It allows a citizen “a right to inspect and take a copy of any public writing” with certain exceptions: “Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute. Provided however, registration and circulation records and information concerning the use of the public, public school or college and university libraries of this state shall be exempted from this section. Provided further, any parent of a minor child shall have the right to inspect the registration and circulation records of any school or public library that pertain to his or her child. Notwithstanding the foregoing, records concerning security plans, procedures, assessments, measures, or systems, and any other records relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures, including without limitation information concerning critical infrastructure . . . the public disclosure of which could reasonably be expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public shall be exempted from this section.” (*Alabama Code Section 36-12-40*)

- A. The statute does not provide a time through which you must response.
- B. This is a request for documents and DOES NOT require the creation of documents.
- C. What is a public writing? Our Supreme Court held that the "public writing" spoken of in Section 36-12-40 was such a record as was reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities could be known by the citizens. *Stone v. Consolidated Publishing Company*, 404 So. 2d 678, 679 (Ala. 1981)
- D. The Freedom of Information Act does not apply to you. It is a federal statute applying to the federal government, not a state government.
 - “The Freedom of Information Act (FOIA) is concerned only with shedding light on misconduct of the federal government, not state governments. As numerous federal circuits have noted, it is beyond question that FOIA applies only to federal and not to state agencies.”

Rimmer v. Holder, 700 F.3d 246, 249 (6th Cir. 2012)

- “To assure that the federal funds are spent for the purposes for which they were intended, extensive federal regulations are promulgated and must be complied with. However, those regulations do not convert acts of local and state governmental bodies into federal governmental acts.”
St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369, 1373-74 (9th Cir. 1981); citing *United States v. Orleans*, 425 U.S. 807, 816, 96 S. Ct. 1971, 1976, 48 L. Ed. 2d 390 (1976).

VI. USE OF EMAIL: Public documents are required to be kept by *Alabama Code Section 41-13-1, et seq.* This is generally thought to include electronic records, which means your board’s e-mail system. Additionally, Alabama’s old ethics law and current ethics law prohibit using government resources for personal use. Accordingly, please do not use your school e-mail for personal or non-school uses. Doing so means that you are creating an electronic document which might be saved as a public record, plus you are using a government computer and public internet time for personal activities.

- “While the Ethics Law prohibits the use of public time, labor, equipment, facilities, etc. for the private benefit of the public official or public employee, where his or her financial interest would be materially affected, it is not unreasonable to expect a public official and/or a public employee to be required to conduct a certain amount of personal business while being paid by the State of Alabama. However, the conducting of personal business on State time must be reasonable and must be kept to a minimum.” *Ethics Opinion 2000-48*
- “Under the facts as provided, it is reasonable for the Commissioner and Deputy Commissioner of the Department of Children’s Affairs to have a State cellular phone with a separate and distinct private number that is billed to their home address and not to the State of Alabama; provided, the use of the private number is kept to a minimum and is reasonable in nature.” *Ethics Opinion 2000-48*

VII. OPEN MEETINGS ACT / EXECUTIVE SESSION

“(b) A governmental body desiring to convene an executive session, other than to conduct a quasi-judicial or contested case hearing, shall utilize the following procedure:

- (1) A quorum of governmental body must first convene a meeting as defined in Section 36-25A-2(6)a.1 and 2.
- (2) A majority of the members of the governmental body present must adopt, by recorded vote, a motion calling for the executive session and setting out the purpose of the executive session, as provided in subsection (a). If subsection (a) requires an oral or written declaration before the executive session can begin, such oral or written declaration shall be made, prior to the vote.
- (3) The vote of each member shall be recorded in the minutes.
- (4) Prior to calling the executive session to order, the presiding officer shall state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.”

Alabama Code Section 36-25A-7(b)(1)(2)

VIII. NEPOTISM

Alabama Code Section 16-22-15.1 says that, as of September 1, 2015, “no person shall be eligible to apply for or be hired in a position for which his or her immediate supervisor would be relative.”

- Relative is defined as:
 - the spouse
 - a dependant
 - an adult child or his or her spouse
 - a parent
 - a spouse’s parent, or
 - a sibling or his or her spouse
- By this statute, a person may apply for and be hired into a position where a relative would be in the chain of command, but not the applicant’s immediate supervisor.
- This statute makes it clear that recusal is allowed, in particular for a board member, and that no relative may be involved in any way with the employment process, including conducting interviews, vetting or recommending candidates, or making any recommendations. Further, once hired, the relative may not evaluate the performance of, have any input in the compensation of, or otherwise set the terms and conditions of employment of a relative.
- If the nepotism act is violated, any other applicant for the position filled by the relative can bring suit within 21 days of the board’s vote to hire. If successful, the applicant can bar the relative from being hired. Further, the board must re-advertise and start the hiring process all over again.
- The enforcement section of this Code section, found in subsection (j), goes even further than the definition of relative. It says: “A willful violation of this section shall subject the employee and the person or persons within the fourth degree of affinity or consanguinity of the employee to disciplinary action, up to and including termination.”
- Those within the fourth degree of consanguinity and affinity include:
 - Child, grandchild, great grandchild, and great great grandchild
 - Parent, sibling, niece or nephew, and grand niece or nephew
 - Grandparent, great grandparent, great great grandparent
 - Aunt, uncle, great aunt, great uncle, and first cousin
 - The spouse of any of the above

IX. STATE DEPARTMENT REPORTING: “Each local superintendent shall submit to the Alabama State Superintendent of Education within ten calendar days of the decision, the name and social security number of each employee holding an Alabama certificate or license who is terminated, or nonrenewed, resigns, or is placed on administrative leave for cause, and shall indicate the reason for such action. Superintendents shall provide personnel records and all investigative information immediately upon request by the Alabama Department of Education. Superintendents shall not be required to report teachers who are nonrenewed without cause. Failure to comply may result in disciplinary action against the employing local superintendent.” *Alabama Administrative Code Section 290-3-2-.34(2)*

- Administrative leave must be reported; “detached duty” does not. “Detached duty” for a teacher may be wise, maybe later to change to administrative leave.

- X. **ALABAMA'S CHILD ABUSE REPORTING ACT**, found at *Alabama Code Section 26-14-3*, requires "all k-12 employees" to report to law enforcement or DHR when a "child is known or suspected to be the victim of child abuse or neglect." Although the law changed to cover all board employees, not just teachers and administrators, as mandatory reporters, one point has not changed - - oral reports must be followed up in writing. Remember, too, a "child" is defined as 17 or younger.

Should you have any questions about any of the above, please do not hesitate to contact me at the above number.

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