

# **School Law**

**Alabama Association of School Business Officials  
Local School Financial Management Certificate Program  
November 3, 2015**

Whit Colvin  
Bishop, Colvin, Johnson & Kent, LLC  
wcolvin@bishopcolvin.com



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# **Introduction**

- I. Alabama's Ethics Law
- II. Personnel Records, the Open Records Act, and Recordkeeping Requirements
- III. Copyrights
- IV. Students First and Employment Law Basics
- V. Title IX and Sexual Harassment
- VI. HIPPA, FERPA and Privacy



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# **Alabama's Ethics Law**



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**Alabama's Ethics Law  
It's Your Responsibility!**

- Ethics law applies to individuals
- Violations can result in criminal liability
- Not the board's responsibility or the superintendent's to monitor, interpret, or enforce

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**The Basics**

- Can't use position for personal gain
- Can't use public resources for personal use
- Prohibits conflicts of interest
- Can't solicit or receive a thing of value because of position
- Can't be given anything to influence official action

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**Definitions**

- Ethics Law is hard to read
- Look to definitions
- Where the content is
- Definitions really drive the rest of the law

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**Public Employee**

Includes . . .

“Any person employed at the state, county,  
or municipal level of government . . .”

ALA. CODE §36-25-1(26)

(That means Board employees too!)

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**Family Member of a Public Employee**

“The spouse, or a dependent of the public  
employee.”

ALA. CODE §36-25-1(14)

For a public official, also includes an “adult child and  
his or her spouse, a parent, a spouse’s parents,  
siblings and their spouses. . .”

ALA. CODE §36-25-1(15)

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**Business with which  
the Person is Associated**

“Any business of which the person or a member of  
his or her family is an officer, owner, partner, board  
of director member, employee, or holder of more  
than five percent of the fair market value of the  
business.”

ALA. CODE §36-25-1(2)

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### **Conflict of Interest**

“A conflict on the part of a ...public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a ...public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs.”

ALA. CODE §36-25-1(8)

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### **The Rules Personal Use of Position**

Can't use position for personal gain:

“No...public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee...or any business with which the person is associated...”

ALA. CODE §36-25-5(a)

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### **The Rules Use of Public Resources**

Can't use public resources for private benefit:

“No...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 employee, any other person, or principal campaign committee...”

ALA. CODE §36-25-5(c)

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**The Rules**  
**Solicitation of Thing of Value**

Can't solicit a thing of value:

"No...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."

ALA. CODE §36-25-5(e)

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**What is a Thing of Value?**

"Any gift, benefit, favor, service, gratuity, tickets or passes to an entertainment, social or sporting event, unsecured loan, other than those loans and forbearances made in the ordinary course of business, reward, promise of future employment, or honoraria or other item of monetary value."

ALA. CODE §36-25-34(a)

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**Thing of Value - Exceptions**

- \* Anything that is paid for by a governmental entity ...except for tickets to a sporting event offered by an educational institution to anyone other than faculty, staff, or administration of the institution.
- \* Anything for which the recipient pays full value.
- \* Any function or activity pre-certified by the Director of the Ethics Commission as a function that meets any of the above criteria

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### ***Thing of Value - Exceptions***

- \* Payment of or reimbursement for actual and necessary transportation and lodging expenses to facilitate a public employee's participation in an economic development function.
- \* Hospitality, meals, and other food and beverages provided to a public employee (plus spouse) as an integral part of an educational function, economic development function, work session, or widely attended event, such as a luncheon, banquet, or reception hosted by a civic club, chamber of commerce, charitable or educational organization, or trade or professional association

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### ***Thing of Value - Exceptions***

- \* Meals and other food and beverages provided to a public official or public employee in a setting other than any of the above functions not to exceed for a lobbyist twenty-five dollars (\$25) per meal with a limit of one hundred fifty dollars (\$150) per year; and not to exceed for a principal fifty dollars (\$50) per meal with a limit of two hundred fifty dollars (\$250) per year. Notwithstanding the lobbyist's limits herein shall not count against the principal's limits and likewise, the principal's limits shall not count against the lobbyist's limits.

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### ***The Rules De Minimus***

\$25.00 or less per occasion and an aggregate of \$50.00 per year from a single provider or as may be prescribed by the Ethics Commission.

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***The Rules***  
***Agency Heads; Reporting Violations***  
***Mandatory Reporting***

There is no “turning the other way” on violations:

“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.”

ALA. CODE §36-25-17(a)

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***Penalties***

“(a)(1) Any person subject to this chapter who intentionally violates any provision of this chapter shall, upon conviction, be guilty of a Class B felony.

(2) Any person subject to this chapter who violates any provision of this chapter shall, upon conviction, be guilty of a Class A misdemeanor.”

ALA. CODE §36-25-27(a)(1)(2)

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***Ethics and Schools***  
***Some practical examples***

- Employee with side business conducted at school
- Employee’s spouse with business (yard service, catering, marketing)
- Meals for coaches - team meals v. meeting for dinner
- Personal Purchases through school (food, equipment, etc)

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## ***Ethics and Schools More practical examples***

- School Equipment for personal use (computers, cameras, lawn mowers)
- Trips – coordinated by employees
- T Shirts, clothing, goods, “rewards” programs, etc.
- Alabama, Auburn, UAB Tickets/Other Recreational Tickets
- Camps, After School Functions and the use of school property

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## ***Ethics and Schools The Tupperware Opinion***

- 1995 opinion – Assistant principal could not sell Tupperware at school
- Cannot “use his or her position as assistant principal to benefit himself/herself as a Tupperware sales person”
- May not use her position to solicit business from subordinates
- Why? – Use of position for personal gain
- Can have outside employment BUT the outside employment must “in no way be related to the person’s public employment not may that public employment be used to increase the economic benefits of outside employment”

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## ***Ethics and Schools The Booster Club Opinion***

- 1996 opinion – Coach receiving a supplement from Booster Club
- Coach could not receive a salary supplement in the form of cash or anything else of value from Booster Club or other group in addition to salary and supplements from board except as otherwise provided by law or pursuant to a lawful employment agreement regulated by Board policy
- Why? – Use of position for personal gain

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## ***Ethics and Schools The Chaperone Opinion***

- 2000 opinion – Teacher receiving a few school trip for chaperoning
- Complimentary travel ok *provided* that the school system sanctions the event and designates the chaperones who will receive a free trip
- School board employees who would receive a free trip cannot solicit students to participate
- Why? – Use of position for personal gain and conflict of interest

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## ***Ethics and Schools The Lesson Plan Opinion***

- 1996 opinion – School administrators developed educational materials on own time and wanted to sell to school boards
- It was ok to do so as long as there is no use of public time, equipment, labor or materials; the administrator did not use his position to obtain the opportunity and the development of the lessons did not interfere with his public employment
- BUT could not sell to the school system where an administrator and would supervise the teachers he would sell to.
- All work on lesson plans has to be done on his own time.

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## ***Whistle Blower Protection Retaliation***

“A supervisor shall not discharge, demote, transfer, or otherwise discriminate against a public employee regarding such employee’s compensation, terms, conditions, or privileges of employment based on the employee’s reporting a violation, or what he or she believes in good faith to be a violation, of this chapter or giving truthful statements or truthful testimony concerning an alleged ethics violation.”

ALA. CODE §36-25-24(a)

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## ***False Accusations***

“No public employee shall file a complaint or otherwise initiate action against a public official or other public employee without a good faith basis for believing the complaint to be true and accurate.”

ALA. CODE §36-25-24(c)

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## ***Penalties***

“(a)(1) Any person subject to this chapter who intentionally violates any provision of this chapter shall, upon conviction, be guilty of a Class B felony.

(2) Any person subject to this chapter who violates any provision of this chapter shall, upon conviction, be guilty of a Class A misdemeanor.”

ALA. CODE §36-25-27(a)(1)(2)

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## ***Personnel Records, the Open Records Act, and Recordkeeping Requirements***

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## ***Personnel Records***

- Personnel records are business records
- Maintain information on employees that helps accomplish business purposes
- Place where put required information

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## ***The Law***

- Most businesses maintain personnel files, even though they don't have to
- In Alabama, there is a law requiring personnel files for employees of boards of education
- "Each board shall establish and maintain a personnel file on each employee." Ala.Code §16-22-14 (1975)

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## ***Maintenance of File***

- Executive officer is responsible for supervising maintenance of file and for maintaining "updated, complete and accurate records."
- Clear those tasks may be delegated, but ultimate responsibility is Superintendent's

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### ***What Goes in the File?***

- Immigration materials
- Tax information
- Name/address
- Work performance materials may be placed in file

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### ***Work Performance Records***

- Statements, reports and comments
- Work performance
- Discipline
- Suspension
- Dismissal
- Have to be written and signed as to accuracy
- Information attached to the work performance materials

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### ***Work Performance Records***

- Materials pertaining to work performance provided to employee
- Also have to provide all materials that:
  - Tend to diminish employee's professional or work status
  - Reflect adversely on employee's record of performance or character

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## ***Anonymous Materials***

- Anonymous materials can go in the file under prescribed conditions:
  1. Must be transmitted to Superintendent
  2. Superintendent decides if investigation is needed
  3. Investigation
  4. Results reduced to writing
    - Signed by Superintendent or other responsible official
    - Dated
    - Attached to anonymous complaint
  5. Place results in file
- If no investigation within thirty days, complaint has to be destroyed

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## ***Typical Contents of Personnel Files (This is NOT in the Code)***

- Application
- Insurance information
- Retirement and benefit information
- Transcripts
- Certificate information
- Leave requests
- Health information
- Pay information
- Evaluations
- Accolades
- Disciplinary matters
- Reprimands
- Responses and reprimands
- Personnel actions
- Photographs

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## ***Use of Personnel Files***

- Personnel files should not be a dumping ground for everything related to an employee
- Everything in them should have a business related use
- Used to store information that is needed or will be used for board's purposes
- Ask the question – what do we really need?

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### ***Employee Access to Records***

- Employees have access
- Employee representatives have access
- Access to the whole file (“No document shall be withheld”)
- Can get copies of all documents in file
- Can “answer or object” in writing to material and the “answer or objection” will go in file

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### ***Public Access to Files Confidential or Not?***

“Public access to school personnel files is affirmed subject to the privacy rights rulings of the various federal and state courts.”

ALA. CODE §16-22-14 (1975)

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### ***Open Records Act Ala. Code §36-12-40***

“Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise provided by statute.”

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## ***Public Writing***

- Not defined in the Open Records Act
- A record as is 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 can be known by our citizens.

Stone v. Consolidated Publishing Co.

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## ***Public Record***

Ala. Code §41-13-1

- Written, typed or printed books, papers, letters, documents and maps
- Made or received in pursuance of law by public officers
- In transaction of public business

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## ***Public Records***

- Computerized information
  - E-mail, sent or received
  - Data stored on disc or hard drive
  - Data posted on internal or external web page
- Final drafts or documents reflecting ultimate decisions
- Written notification of unusual or unauthorized fiscal transactions
- Other written reports required of CSFO
- Documents required by ALA. CODE §16-13A-6 Fiscal Accountability Act

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**Public Records  
Financial Documents**

ALA. CODE §16-13A-6(d)

- All financial documents, in whatever source retained, are public documents and shall be open . . . to the public
- Budget, financial statements
- Supporting spreadsheets
- Audit reports

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**Exceptions**

- Recorded information received by a public officer in confidence
- Sensitive personnel records
- Pending criminal investigations
- Records the disclosure of which would be detrimental to the best interests of the public.

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**Sensitive Personal Information**

- Social Security Number
- Bank accounts
- Employee tax information
- Employee health care payment information
- Employee home addresses, phone numbers, marital status, drug test results, etc.

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## ***Balance***

Interest of citizens in knowing what public officials are doing vs. Interest of general public in having government run efficiently and without undue influence

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## ***Citizen's Burden***

- Responsibility of citizen to identify the documents needed under reasonable safeguards established by the board
- Also, it is the citizen's burden and expense to copy the writings and delivery

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## ***But, remember . . .***

- Open Records Act is construed broadly and in favor of disclosure
- It is the board's burden to show why disclosure is not required

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## Exceptions

- Statutory (State and Federal)
  - Banking Records
  - Juvenile court records
  - Hospital records
  - Certain medical records
  - Records subject to privilege
  - Probation reports
  - Identity of Medicaid recipients
  - Records under FERPA
  - Records under HIPAA
  - Confidential information under federal grants
- Other
  - Personnel Records

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## Personnel Records & Confidentiality Teachers

Attorney General Opinion No. 96-00003

### Must disclose

- a. Salary expenditure account information
- b. Race and gender
- c. Current assignment
- d. Rank and type of certificate
- e. Employment experience
- f. Salary
- g. Hire and tenure date
- h. Applications and disciplinary action
- i. Superintendent's recommendation for transfer or discipline after board action

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## Emerging Issues

- Personnel files in the electronic age
  - Electronic mail
  - Computer records
- FERPA
- HIPAA

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### ***A Word About the FLSA Recordkeeping Requirements***

- The FLSA requires that certain records be kept
  - Not required to go in personnel file necessarily, but make sure you have all of these kept somewhere
- |                                       |  |
|---------------------------------------|--|
| 1. Name & Social Security Number      | 8. Basis for wage payment                          |
| 2. Address and Zip Code               | 9. Regular hourly pay                              |
| 3. Birth date                         | 10. Total earnings – straight time for day or week |
| 4. Gender and job title               | 11. Total overtime – week                          |
| 5. Time and day when work week begins | 12. Additions/ Deductions from wages               |
| 6. Hours worked each day              | 13. All wages in pay period                        |
| 7. Hours worked each week             | 14. Date of wage payments                          |

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### ***CSFO Reports Required***

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|--|---|
| 1. A monthly financial statement showing the financial status of the local board accounts with itemized categories specified by the State Board of Education | 5. Monthly and/or quarterly reports showing expenditures relative to such projected budget  |
| 2. A monthly report showing all receipts and the sources thereof   | 6. A yearly report of the fixed assets inventory of the local board of education with itemized categories specified by the State Board of Education |
| 3. A monthly report showing all expenditures with itemized categories specified by the State board of Education  | 7. Financial and other information necessary to participate in national statistical studies on education  |
| 4. An annual projected budget  |   |

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### ***Recordkeeping***

- Records kept by public officials to document business must be protected from “mutilation, loss, or destruction”
- Must be kept as required by Examiners
- Must be kept as required by local government records commission
- If it is required to be kept, pretty good bet it is considered “public”

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**Copyrights**

- Protects literary, musical, dramatic, dance, pictorial or graphic, audiovisual, or architectural works or recordings from being copied without permission
- Copyright Act

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59

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**Copyrights**

Must be fixed in a tangible medium of expression  
AND  
Original

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## ***Copyright Infringement***

- Copy or reproduce the work
- Create a new work from the original work
- Sell or give away the work for the first time (after the “first sale,” it is fair game)
- Perform or display work in public without permission from owner

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## ***Fair Use Exception***

“Fair use” permits certain uses that override owner’s rights for public policy reason

Fair use is essential

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## ***Fair Use - Test***

Balance four factors

- Whether purpose and character of use is commercial or nonprofit educational
- Whether nature of work is primarily factual or creative
- How much of work is used compared to the whole work
- How the use affects author’s ability to market and make money from the work

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## ***Fair Use – Test for Schools***

Generally safe if, when copies are made, copied portion is:

1. Brief
2. Spontaneous
3. Limited in cumulative effect, and
4. Includes copyright acknowledgment

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## ***Copyright – Practical Tips***

- Don't indiscriminately copy materials, either hard copy, or online
- Don't copy computer programs
- Don't copy "consumables" – workbooks, worksheets, standardized tests, booklets, etc. without specific permission
- Don't copy short articles, essays or graphics to create anthologies or collections
- Don't copy in excess of fair use guidelines

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## ***Computers and Copyright***

### **Areas of Concern**

- Scanning
- Caching
- Linking and "posting"
- Facebook
- Pinterest
- Message boards
- Logos
- Advertising

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**Students First Act  
and Employment Law**

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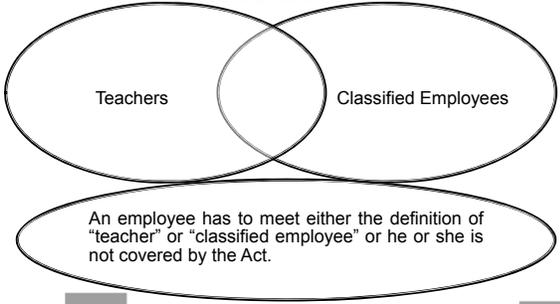
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**Students First Act  
Who is Covered?**



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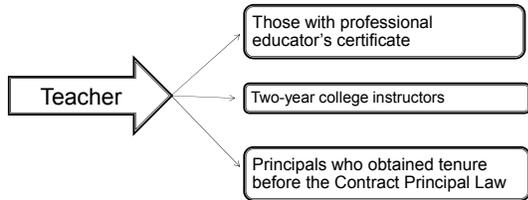
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**Students First Act  
Who is Covered?**

69



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70

### Students First Act Who is Covered?

Classified Employees

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71

### Students First Act Who is not Covered?

Superintendents	CSFOs	Temporary, part-time, substitute
Summer school	Occasional, seasonal, supplemental, or irregularly employed	Pilot programs or programs with short-term or finite funding

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72

### Students First Act \*Practical Tip\*

Documenting Status

- Memorialize it if you know a position is not covered
- Think about an employee acknowledgment
- If it is temporary, put end date on Personnel Action AND put that position is not covered
- If funding is limited, identify that criteria
- Less may not be more – make sure the situation is clear

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73

**Students First Act**  
**Earning "Tenure" & "Nonprobationary Status"**

- Three consecutive complete school years
- Complete school year is anytime before October 1<sup>st</sup> through end of year
  - If hired after October 1<sup>st</sup>, that year doesn't count
- Earn it unless written notice is given :
  - For teachers, on or before last day of third consecutive school year
  - For classified employees, on or before June 15<sup>th</sup> following that third year (except for 1<sup>st</sup> year of legislative quadrennium, then June 30<sup>th</sup>).

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**Students First Act**  
**Earning "Tenure" and "Nonprobationary Status"**

- Only complete school years count
- Includes creditable leave time
- Tenure/nonprobationary status as teacher or classified employee separate and not transferrable or interchangeable between categories
- Not transferrable between boards, except for annexation, school district formation, consolidation, or a similar reorganization

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**Students First Act**  
**\* Practical Tip \***

Contracts

- The old teacher tenure act was based on a series of one-year contracts, with automatic renewals
- The contracts renewed unless they were "non-renewed" in the non-renewal window at the end of the year
- The contract/renewal/non-renewal language does not appear in the new act
- Be careful about using those terms and try to think about service on a continuum three year trial period

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76

**Students First Act**  
**Service Credit & Already Attained Tenure**

Employees who have attained tenured status or nonprobationary status shall be deemed tenured teachers under this Act. Current time in service shall be credited toward the attainment of tenure or nonprobationary status

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77

**Students First Act**  
**Earning "Tenure" and "Nonprobationary Status"**

Tenure is not earned in:

Position	Rank	Title
Work Site	Location	Assignment

or Rate of Compensation

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78

**Students First Act**  
**Termination**  
**Probationary Classified Employees**

- May be terminated any time upon written notice (recommendation by Superintendent, vote of Board) before nonprobationary status is earned
- If terminated, get 15 days pay and benefits from issuance of notice
- Decision not appealable

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79

**Students First Act  
Termination  
Non-tenured Teachers**

- May be terminated any time upon written notice (after recommendation of Superintendent and vote of the Board) on or before June 15<sup>th</sup> unless it is the third year and then the deadline is the last day of the school year
- During school year, requires 30 days notice
  - Teacher can submit written statement to Board
- Decision not appealable

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80

**Students First Act  
Termination  
Tenured and Nonprobationary Employees**

- Reasons for Termination
  - Justifiable decrease in number of positions
  - Incompetency
  - Insubordination
  - Neglect of duty
  - Immorality
  - Failure to perform duties in a satisfactory manner
  - Other good and just cause
- Cannot be for political or personal reasons

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81

**Students First Act  
Termination  
Tenured and Nonprobationary Employees**

1. Recommendation by Superintendent – written notice of proposed termination
  - Reason
  - Short and plain statement of facts
  - Statutory grounds for termination
  - Opportunity to request hearing within 15 days of notice
2. No hearing request, Board can go ahead and vote
3. If hearing requested, Board sets hearing between 30 and 60 days of issuance of notice of hearing (can be rescheduled by agreement or good cause)

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**Students First Act** 82  
**Tenured and Nonprobationary Employees**  
**Termination Hearings**

- Superintendent has burden of proof
- Employee can present testimony, evidence, and argument, and can cross examine witnesses
- Can have an attorney
- Court reporter paid by State
- Hearing can be private or public (employee choice)
- Subpoenas may be issued
- Board acts as a deliberative body

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**Students First Act** 83  
**A Word About Hearings . . .**

“Whenever this act affords an employee the right to be heard by the governing board . . . and such right to be heard is requested . . . the *merits* of the recommended employment action shall not be *deliberated or determined* by the governing board . . . before the hearing.”

Section 8, Act No. 2011-270

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**Students First Act** 84  
**Pay**

- Employment decisions are effective immediately
- For tenured and non-probationary classified personnel, pay continues until the sooner of:
  - (1) 75 days
  - (2) When the hearing officer rules
- Termination based on moral turpitude, immorality, abandonment of job, incarceration, or neglect of duty – pay may cease immediately
- If employee wins appeal, can receive back pay

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85

**Students First Act  
Tenured and Nonprobationary Employees  
Appeal of Board Decision**

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- Appeal is to State Superintendent
- Goes to hearing officer (retired judges trained in ADR)
- Notice of appeal contains grounds and served on Superintendent
- Superintendent will prepare record and send it
- Hearing officer holds hearing with deference to Board's decision and renders decision
- Can appeal that decision to Court of Civil Appeals

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86

**Students First Act  
Tenured and Nonprobationary Employees  
Suspensions**

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These provisions are a bit different and much simpler to follow:

- Can suspend for 20 work days without pay
- Notice has to be given and an opportunity to present evidence and argument to the Board
- If over 20 days, notice, hearing, and review process for terminations apply

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87

**Students First Act  
Reassignments and Transfers**

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Reassignments  
Within same school or campus

Transfers  
Between schools

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**Students First Act  
Teachers  
Reassignments**

88

Superintendent can reassign

- Within same school, campus, or facility
- By 20<sup>th</sup> calendar day after school begins
- Teacher must have certification
- Only once per year
- Without loss of compensation

No challenge or appeal

Remember this when looking at resources



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**Students First Act  
\* Practical Tip \***

89

Reassignments

- Set up a reassignment process
- Don't need Board approval
- Superintendents reassign, not principals, not personnel departments not finance
- Make sure Superintendent is aware of the reasons for reassignment



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**Students First Act  
Transfer – Tenured Teacher**

90

Conditions for transfers to another school

- Employee must hold appropriate certification
- No reduction in compensation
- First 20 calendar days of school
- Only once per school year
- Must be Board approved
- If within high school feeder pattern, meeting before vote
- If outside high school feeder pattern, hearing before vote
- If only one feeder pattern = only a meeting required



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91

**Students First Act**  
**Transfer – Non-probationary Classified**

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- Can be transferred if no reduction in compensation, written notice is issued not less than 15 days before decision, and transfer is effective not less than 15 calendar days from decision
- If to a work site outside of high school feeder pattern, have opportunity to appeal in same manner as termination
- Only one transfer per year

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92

**Students First Act**  
**Transfer – Reduction-in-Pay**

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- Probationary and non-tenured employees
  - Can be transferred to position that pays less or shorter term if:
    1. Appropriate certificate
    2. Written notice is given with explanation of effect on compensation of employee
    3. Opportunity to object in writing before the vote
  - Transfer effective not less than 15 calendar days from vote
- Non-probationary and tenured employees
  - Transfers to positions with lower rate or shorter term may be challenged like a termination
- Transfers in conjunction with RIFs or made in order to comply with state or federal law are not subject to challenge or review

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93

**Students First Act**  
**System Level Decisions**

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- The following are not considered terminations or transfers
  - Reduction or modification of compensation or benefits
  - Reduction or modification of work or school year
    - IF
    - Prospective
    - Recommended by Superintendent and approved by Board
    - Applied uniformly to similarly situated employees within system, division, department, or employment classification
- Layoffs or RIFs due to decreased enrollment or shortage of revenues cannot be challenged as well

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## Notice Provisions

94

Notice by certified mail, next business day delivery (FedEx, UPS, DHL), or by physical delivery to the employee or the employee's last known address

Notice deemed received two business days after sent for mail and private delivery

The *employer* has the burden of proving service was effected, but the *employee* has the burden of proving that such service was not properly made.

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## Title VII Discrimination

- Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating in employment on the basis of:
  - Race
  - Color
  - Religion
  - Sex
  - National origin

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## Title VII of the Civil Rights Act of 1964

- Title VII makes it illegal to discriminate in any aspect of employment, including:
  - Hiring and firing;
  - Compensation; assignment or classification/segregation or employees;
  - Transfer, promotion, layoff or recall;
  - Job advertisements;
  - Recruitment;
  - Testing;
  - Use of company facilities;
  - Training and apprenticeship programs;
  - Fringe benefits;
  - Pay, retirement plans and disability leave; or
  - Other terms and conditions of employment.

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## ***Title VII of the Civil Rights Act of 1964***

- Discriminatory practices under Title VII also include:
  - Harassment on the basis of race, color religion, sex or national origin;
  - Retaliation against an individual for filing a charge or discrimination, participating in an investigation or opposing discriminatory practices;
  - Employment decisions based on stereotypes or assumptions about the abilities, traits or performances of individuals of a certain sex, race, age, religion or ethnic group and;
  - Denying employment opportunities to a person because of marriage to, or association with, an individual or a particular race or national origin.

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## ***Breaking It Down***

- EEOC Statistics & Trends
  - For the fiscal year 2014, the EEOC received almost 89,000 (down from around 94,000) individual charges of discrimination:
    - Race Discrimination – Trend ↓
      - 35% of the charges alleged race discrimination -been as low as 33.7% (2012) and as high as 37.3% (1999);
    - Sex Discrimination – Trend ↓
      - 29.3% of the charges alleged sex discrimination-been as low as 28.5% (2011) and as high as 31.5% (2000);
    - Age Discrimination – Trend ↔
      - 23.2% of the charges alleged age discrimination – been as low as 18.3% (1999) and as high as 25.8% (2011);

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## ***Breaking It Down***

- EEOC Statistics & Trends
  - Disability Discrimination – Trend ↑
    - 28.6% of the charges alleged disability discrimination -been as low as 18.9% (2003) and as high as 28.6% (2014);
  - Retaliation – Trend ↑
    - 42.8% of the charges alleged retaliation -been as low as 22.6% (1997) and as high as 42.8% (2014);
  - The remainder of the charges were made up of national origin, religion, and equal pay discrimination.

Frequently, the charges allege more than one type of discrimination.

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## Title VII Discrimination

- A plaintiff/complainant must file a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act.
- The EEOC issues a Right to Sue letter. Title VII requires that the plaintiff file a civil action within 90 days after receipt of the EEOC Right to Sue letter.
- "Direct evidence" of discrimination (*i.e.*, you can have the promotion because I do not like working with women).

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## Title VII Discrimination

- Most cases are "circumstantial" cases, which means that based on all the facts, it would seem that discrimination was the reason for an employment decision. In these cases, to establish a prima facie case under Title VII, the Plaintiff must prove the following:
  - belong to a protected class
  - was qualified for the position they applied or held
  - they were subjected to an adverse job action
  - they were replaced by someone outside the protected group

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## Title VII Discrimination

- The burden shifts to the defendant to articulate some legitimate non-discriminatory reason for the employment decision. If a legitimate, non-discriminatory reason is established by the employer, the burden shifts back to the employee to prove that the alleged legitimate reason is a front or pretext to hide discrimination.
- Referred to as the *McDonnell-Douglas* burden shifting analysis

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## ***Equal Pay Act***

- No employer shall discriminate between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex, for equal work on jobs which require equal skill, effort, and responsibility, and which are performed under similar working conditions.

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## ***Equal Pay Act***

- The EPA permits difference in wages when such difference is based upon
  - seniority system
  - merit system
  - a system which measures earnings by quantity or quality of production
  - differential based on any other factor other than sex

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## ***Equal Pay Act***

- A plaintiff must show equal works on jobs requiring:
  - Equal skill
  - Effort
  - Responsibility
  - Performed under similar work conditions
  - Jobs must be substantially equal, not identical
  - Actual job requirements are determinative, not job titles or classifications
  - Overall job forms basis of comparison, not individual segments
  - Requirements of equal skill, effort, and responsibility cannot be aggregated to establish equal work

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## Age Discrimination

- The Age Discrimination in Employment Act (“ADEA”) was enacted by Congress with the express intent to prohibit arbitrary discrimination in employment and to promote employment of America’s older population based on ability rather than age.

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## Age Discrimination

- The current law protects all employees over the age of 40 who are employed by an employer subject to the ADEA. The law generally prohibits an employer from compelling an employee to retire due to age subject to a very narrow exception.

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## Age Discrimination

- To establish a claim under the ADEA, a plaintiff must prove the following:
  - membership in the protected class (*i.e.*, over the age of 40);
  - the employee was qualified or performing up to the employer’s expectations, but nevertheless was either not hired or was subjected to an adverse personnel action;
  - job was given to a younger employee or a younger employee was treated more favorably; and
  - the plaintiff had the same qualifications as the younger employee.

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## Americans With Disabilities Act

- The ADA protects employees and prospective employees with disability from discrimination by employers based on their disabilities. All boards of education in Alabama are subject to the ADA since all boards have more than fifteen employees.
- The ADA prohibits employers from engaging in discriminatory and other unlawful practices in the hiring, managing and termination process of disabled individuals and imposes an affirmative obligation on employers, in some instances, to reasonably accommodate disabled applicants and employees.
- Employee must request the accommodation.
- To fall within the scope of the ADA, a person must have a disability and be a qualified employee or applicant.

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## Americans With Disabilities Act

- "Disability" is defined as follows:
  - a physical or mental impairment that substantially limits one or more major life activities;
  - a record of such impairment; or
  - being regarded as having an impairment.

In addition, the employee or applicant must be capable of performing the essential job functions with reasonable accommodations if necessary.

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## Americans With Disabilities Act

- In pre-employment inquiries, the employer is
  - prohibited from asking questions concerning an individual's disability or questions likely to illicit information about an individual's disability.
  - The employer is permitted to determine whether the employee can perform the functions of the job. Focus should be on the specific job related functions when interviewing applicants.
  - The ADA permits an employer to establish job related qualifications standards, but those standards must not screen out or tend to screen out individuals on the basis of a disability unless they are job related and consistent with business necessity.

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## Americans With Disabilities Act

- What are Major Life Activities?
  - Major life activities are those basic activities that the average person in the general population can perform with little or no difficulty. These include caring for one's self, performing manual tasks, walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, learning, working, thinking, concentrating and interacting with other people. More recently, the Supreme Court has determined that the "ability to procreate" is a major life activity.

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## Americans With Disabilities Act

- The employer has a duty to reasonably accommodate an employee.
- The duty to accommodate is subject to exceptions and is excused when it imposes an "undue hardship on the employer."

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## Americans With Disabilities Act

- Reasonable accommodation does not include
  - hiring additional employees;
  - creating a new job;
  - reallocating the "essential functions" of the job;
  - reallocating duties to other employees so they must work harder or longer than the impaired employee;
  - allowing indefinite light duty; and
  - allowing an indefinite leave of absence.

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## **Americans With Disabilities Act**

- What constitutes Undue Hardship?
  - Undue hardship is a defense generally defined as "requiring significant difficulty or expense." The criteria for establishing this defense include the:
    - Size of the company;
    - Size of the company's budget;
    - Nature of the company's operation;
    - Number of employees;
    - Composition and structure of the workforce; and
    - Nature and cost of the accommodation.

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## **Americans With Disabilities Act**

- What constitutes "Undue Hardship"?
  - Undue hardship refers not only to financial difficulty, but to accommodations that are unduly extensive or disruptive, or to those that would fundamentally alter the nature or operation of the business.

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## **Title IX and Sexual Harassment**

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**Sexual Harassment**  
*Three Areas Where it is a Concern*

1. Teacher/Student Interaction

2. Student/Student Interaction

3. Co-employee Interaction

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118

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**Sexual Harassment**  
*Prohibited by . . .*

Title IX – Students and Employees	Title VII – Employees Only
State Law – Both (individual liability)	Civil Rights Laws – Students and Employees

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**Title IX**

No person in the United States shall on the basis of sex be excluded from participation in, be denied the benefit of or be subjected to discrimination under any education program or activity receiving federal financial assistance. 20 U.S.C. §1681 (1990).

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**Title IX**

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Programs and Activities

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“All the operations of . . .” the school board  
if federal financial assistance is received.

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**Title VII / Title IX  
Differences**

Title VII	Title IX
<ul style="list-style-type: none"> <li>▪ EEOC Charge</li> <li>▪ Applies to employees only</li> <li>▪ EEOC/court enforcement</li> </ul>	<ul style="list-style-type: none"> <li>▪ No procedural prerequisites</li> <li>▪ Employees and students</li> <li>▪ OCR and court enforcement</li> </ul>

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**Sexual Harassment  
What is it?**

- Unwelcome sexual advances
- Requests for sexual favors
- Other verbal and physical conduct if . . .
  - Submission to conduct is made a term or condition of employment or educational benefits (either explicitly or implicitly)
  - Submission to or rejection of conduct factors into employment discrimination or educational benefits
  - Conduct unreasonably interferes with individual's job school-related performance or creates an intimidating, hostile, or offensive working or educational environment

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## ***Nature of Conduct***

- Conduct must be unwelcome
- Conduct must be sexual or gender based
- Not limited to touching, "dirty talk," or improper propositions
- May be subtle
- Not dependent on the gender of harasser or the person being harassed

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## ***What Types of Conduct are we Talking About?***

- Physical Contact
  - Sexual touching
  - Sitting in laps
  - Back and shoulder rubs
  - Kisses and hugs
  - Other touching

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## ***What Types of Conduct are we Talking About?***

- Inappropriate language
  - Overtly sexual language
  - Suggestive language, innuendo
  - Discussions about sex or relationships
  - Anatomical discussions
  - Whistling, hooting
  - Expressions
  - Notes, gestures

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## ***Title IX***

Teacher-on-Student Harassment

Peer (student-on-student) Harassment

Co-employee Harassment

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## ***Title IX - Liability***

**Good news for school boards**

**There has to be knowledge  
and deliberate indifference  
or it is not liable**

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## ***Title IX - Liability***

- In employment context, will analyze using Title VII template
- In student context, the standards are different, and notice and quick action is essential

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## ***Title IX - Liability***

Unwelcomeness will always be presumed

- Can't rely on Faragher defense
- BUT
- Aren't responsible for what you didn't know  
(blissful ignorance doesn't count)

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## ***Sexual Harassment of Students A Serious Matter with Serious Consequences . . .***

1. Loss of job
2. Loss of certification
3. Loss of reputation
4. Loss of family
5. Civil liability
  - no insurance coverage
6. Criminal Liability
  - jail, sex offender registration

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## ***HIPPA, FERPA and Privacy***

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## **The Family Educational Rights and Privacy Act (“FERPA”)**

FERPA is a federal law that protects the privacy of student educational records

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## **The Family Educational Rights and Privacy Act**

- FERPA defines an “educational record” as one directly related to a student and maintained by an educational agency or institution or person acting for such an agency or institution.
- The term “educational record” does not include a record that is kept in the sole possession of the person who made it, is not accessible or revealed to anyone except a temporary substitute for the record's maker.
- Educational records include records, files, documents and other materials that contain personally identifiable information concerning the student.

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## **The Family Educational Rights and Privacy Act**

- Examples of Educational Records:
  - Date and place of birth
  - Parent(s) and/or guardian addresses and where parents can be contacted in emergencies
  - Grades, test scores, courses taken
  - Academic specialization and activities
  - Special education records
  - Disciplinary records
  - Medical and health records
  - Documentation of attendance, schools attended, courses taken, awards conferred and degrees earned
  - Personally identifiable information- information that would make it easy to identify or locate a student such as
    - Student ID numbers/codes
    - SSN
    - Picture

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## ***The Family Educational Rights and Privacy Act***

- FERPA allows parents to inspect and review a student's educational records upon written request.
- The parent is not entitled to access to records of other children, even if the information regarding other children is part of a document containing information concerning their own child.
- A non-custodial parent would have the same right of access as the custodial parent.
- A school system must allow the parents an opportunity to inspect their children's records within 45 days after the school receives the request.

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## ***The Family Educational Rights and Privacy Act***

- In the event a parent believes with the contents of a student's educational records are inaccurate or misleading, the parent can request that the records be amended.
- If the school does not amend the records, the parent can request a hearing to challenge the content of the educational records.

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## ***The Family Educational Rights and Privacy Act***

- Generally schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records WITHOUT CONSENT, to the following parties or under the following conditions:
  - School Officials with legitimate educational interest;
    - A legitimate educational interest = a need to review the record in order to fulfill his or her professional responsibility.
  - Other schools to which a student is transferring;
  - Specified officials for audit or evaluation purposes;
  - Appropriate parties in connection with financial aid to a student;

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## ***The Family Educational Rights and Privacy Act***

- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena (Must provide parents with notice of subpoena before responding).
- Appropriate officials in cases of health and safety emergencies;
- State and local authorities, within a juvenile justice system, pursuant to a specific State law; and
- Pursuant to No Child Left Behind Act and the National Defense Authorization Act for Fiscal Year 2002 - Student's name, addresses, and telephone numbers to military recruiters, when requested – unless parent "opts out"
- Directory information.

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## ***The Family Educational Rights and Privacy Act***

- What is "Directory Information"?
  - Student's name
  - Address
  - Telephone number
  - Email address
  - Date and place of birth
  - Information typically found in school yearbooks or athletic programs (i.e., names, pictures of participants in various extra curricular activities, receipts of awards, grade level, pictures of students, height and weight of athletes)

Annually, school must notify parents of types of personally identifiable student information the district has designated to be directory information, and provide an opportunity for parent to opt-out of disclosure of some or all of their child's directory information

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## ***The Family Educational Rights and Privacy Act***

- The regulations for FERPA require the school district to make annual notification to parents and students over the age of eighteen concerning their rights with regard to the student's educational records. The notice must include information regarding the following:
  - The right to inspect and review a student's records within forty-five days of the date the request for the review is received.
  - The right to request the amendment of a student's educational records that the parent or eligible student believes are inaccurate or misleading.

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## **The Family Educational Rights and Privacy Act**

- The right to consent to disclosure of personally identifiable information contained in the student's educational records, except to the extent that FERPA authorizes disclosure without consent.
- The right to file a complaint with the U.S. Department of Education concerning alleged failures by the school district to comply with the regulations under FERPA.
- Including the FERPA notice in the Code of Student Conduct or student handbook is recommended.

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## **The Family Educational Rights and Privacy Act**

- Model notices written by U.S. Department of Education can be found here:  
<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html>  
<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html>

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## **The Family Educational Rights and Privacy Act**

- There is no private right of action for a violation of FERPA
- The Family Policy Compliance Office receives and investigates complaints regarding violations of FERPA

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## HIPAA

Health Insurance Portability & Accountability Act

- Provides protection for personal health information held by covered entities
- Ordinarily, school district not considered a "covered entity" as not a healthcare provider

BUT

- If district employs nurses, doctors, psychologists, or other healthcare providers and bills for services (Medicaid reimbursement), then can be

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## HIPAA

- Health records maintained as part of education records are considered education records covered by FERPA, not HIPAA
- Still have to be careful whenever disclosure of medical records involved, prudent to review guidelines

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## HIPAA

- Employment records are not covered by HIPAA
- Medical information included in employment records is not covered

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QUESTIONS... ?

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148

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149

Whit Colvin  
205.251.2881  
205.254.3987 fax  
wcolvin@bishopcolvin.com

**BishopColvin**  
BISHOP, COLVIN, JOHNSON & KENT, LLC

1910 First Avenue North  
Birmingham, Alabama 35203  
www.bishopcolvin.com

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