

School Law

***Alabama Association of School Business Officials
Local School Financial Management Certificate Program
November 9th, 2021***

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

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

Alabama's Ethics Law

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

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

Definitions

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

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!)

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)

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)

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)

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)

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)

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)

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)

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

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

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.

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.

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)

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)

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)

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

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”

Ethics and Schools

The Booster Club Opinion

- 1996 opinion – Coach receiving a supplement from Booster Club
- Coach could not revive 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

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

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.

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)

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)

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

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.”

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.

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

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

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

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.

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.

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

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

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

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

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

Emerging Issues

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

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
 2. Address and Zip Code
 3. Birth date
 4. Gender and job title
 5. Time and day when work week begins
 6. Hours worked each day
 7. Hours worked each week
 8. Basis for wage payment
 9. Regular hourly pay
 10. Total earnings – straight time for day or week
 11. Total overtime – week
 12. Additions/ Deductions from wages
 13. All wages in pay period
 14. Date of wage payments

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”

Copyrights

Copyrights

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

Copyrights

Must be fixed in a tangible medium of expression

AND

Original

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

Fair Use Exception

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

Fair use is essential

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

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

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

Computers and Copyright

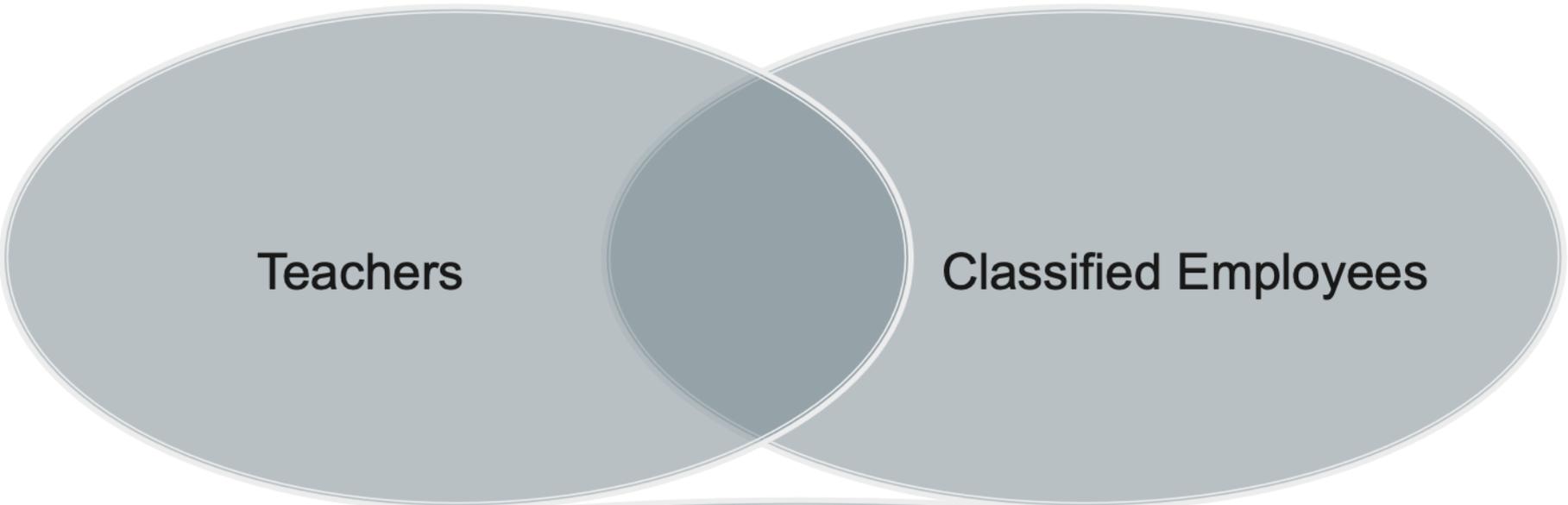
Areas of Concern

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

Students First Act and Employment Law

Students First Act

Who is Covered?



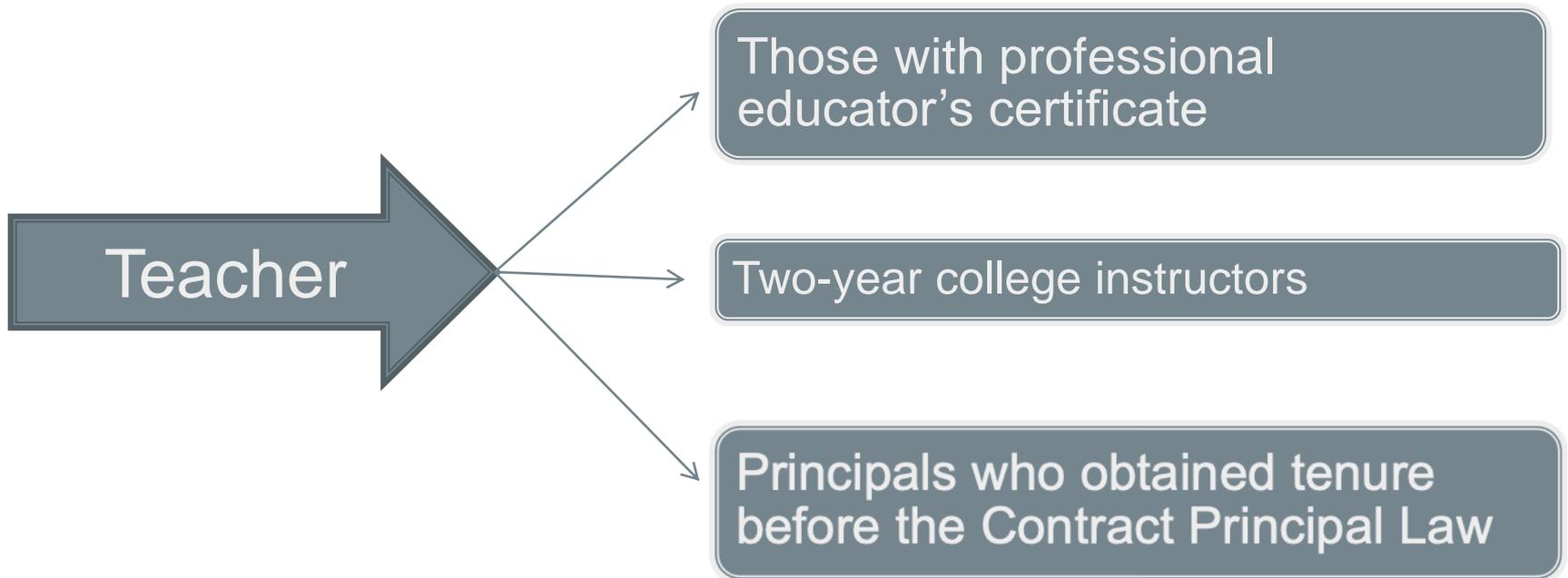
Teachers

Classified Employees

An employee has to meet either the definition of “teacher” or “classified employee” or he or she is not covered by the Act.

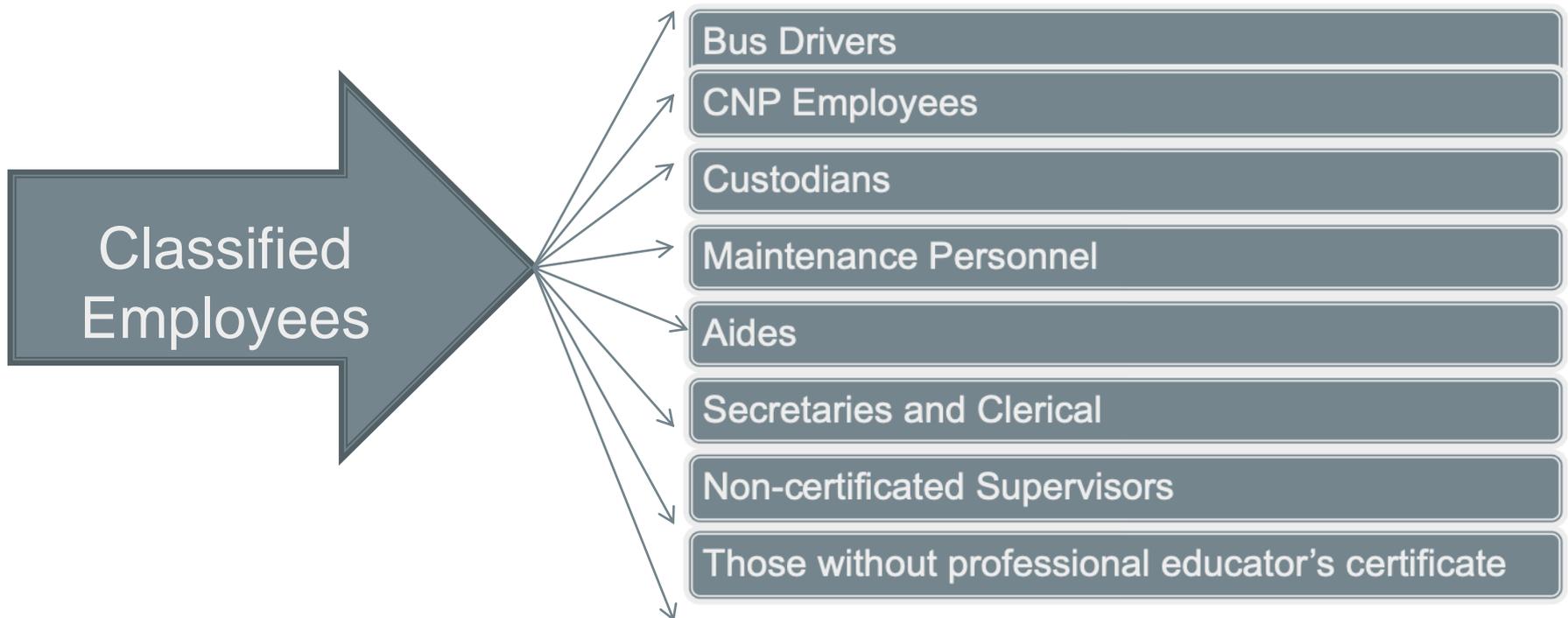
Students First Act

Who is Covered?



Students First Act

Who is Covered?



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

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

Students First Act

Earning “Tenure” & “Nonprobationary Status”

- Three consecutive complete school years
- Complete school year is anytime before October 1st through end of year
 - If hired after October 1st, 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 15th following that third year (except for 1st year of legislative quadrennium, then June 30th).

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

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

Students First Act

Earning “Tenure” and “Nonprobationary Status”

Tenure is not earned in:

Position

Rank

Title

Work Site

Location

Assignment

or Rate of Compensation

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

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 15th 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

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

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)

Students First Act

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

Students First Act

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

Students First Act 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

Tenured and Nonprobationary Employees Appeal of Board Decision

- 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

Students First Act

Tenured and Nonprobationary Employees

Suspensions

- 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

Students First Act

Reassignments and Transfers

Reassignments

Within same
school or
campus

Transfers

Between
schools

Students First Act

Teachers

Reassignments

Superintendent can reassign

- Within same school, campus, or facility
- By 20th 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

Students First Act

** Practical Tip **

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

Students First Act

Transfer – Tenured Teacher

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

Students First Act

Transfer – Non-probationary Classified

- 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

Students First Act

Transfer – Reduction-in-Pay

- **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

Students First Act System Level Decisions

- 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

Notice Provisions

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.

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

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.

Title VII of the Civil Rights Act of 1964

- Discriminatory practices under Title VII also include:
 - Harassment
 - Retaliation
 - 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
 - Denying employment opportunities to a person because of marriage to, or association with, an individual or a particular race or national origin.

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’t have the promotion because I do not like working with women).

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

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

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.

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

Equal Pay Act

- A plaintiff must show equal work 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

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.

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.

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.

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.

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.

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.

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.”

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.

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.

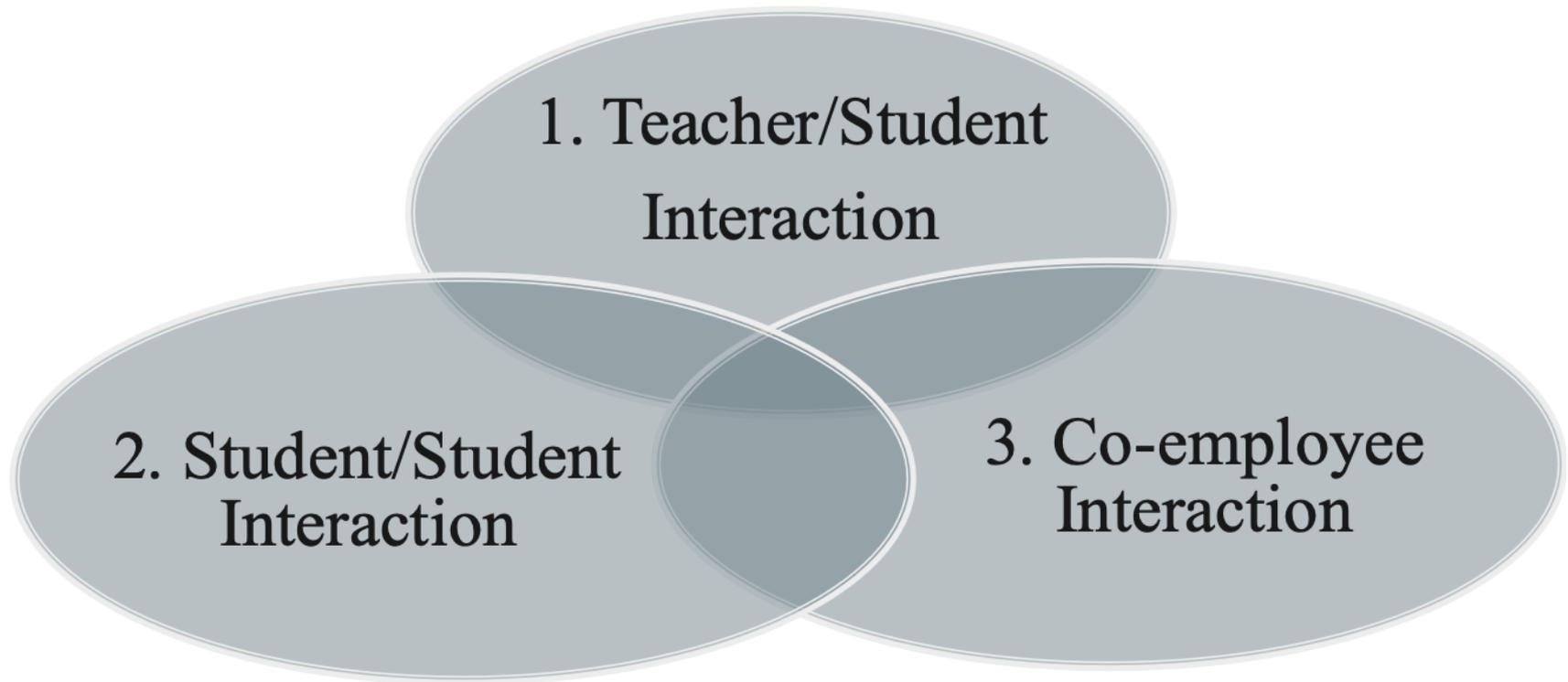
Americans With Disabilities Act

- 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.

Title IX and Sexual Harassment

Sexual Harassment

Three Areas Where it is a Concern



Sexual Harassment

Prohibited by . . .

Title IX –
Students and
Employees

Title VII –
Employees Only

State Law –
Both (individual
liability)

Civil Rights
Laws –
Students and
Employees

Title VII / Title IX Differences

Title VII

- EEOC Charge
- Applies to employees only
- EEOC/court enforcement

Title IX

- No procedural prerequisites
- Employees and students
- OCR and court enforcement

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

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

What Types of Conduct are we Talking About?

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

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

Title IX

Teacher-on-Student Harassment

Peer (student-on-student) Harassment

Co-employee Harassment

Title IX - Liability

Good news for school boards

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

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

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)

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

HIPPA, FERPA and Privacy

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

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

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.

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

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.

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.

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;

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.

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

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.

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.

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/fpc/ferpa/lea-officials.html>

<http://www2.ed.gov/policy/gen/guid/fpc/ferpa/mndirectoryinfo.html>

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

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

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

HIPAA

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

QUESTIONS... ?

Whit Colvin

205.251.2881

205.254.3987 fax

wcolvin@bishopcolvin.com



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