

THE ALABAMA LAWYER

NOVEMBER 2020 | VOLUME 81, NUMBER 6

*The Road goes ever on and on,
Down from the door where it began.
Now far ahead the Road has gone,
And I must follow, if I can,
Pursuing it with eager feet,
Until it joins some larger way
Where many paths and errands meet.
And whither then? I cannot say.*

—J.R.R. Tolkien, The Lord of the Rings

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EDUCATION LAW ISSUE

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A beautiful fall scene from northern Alabama

—Photo by Marie D. Ward, Lanett

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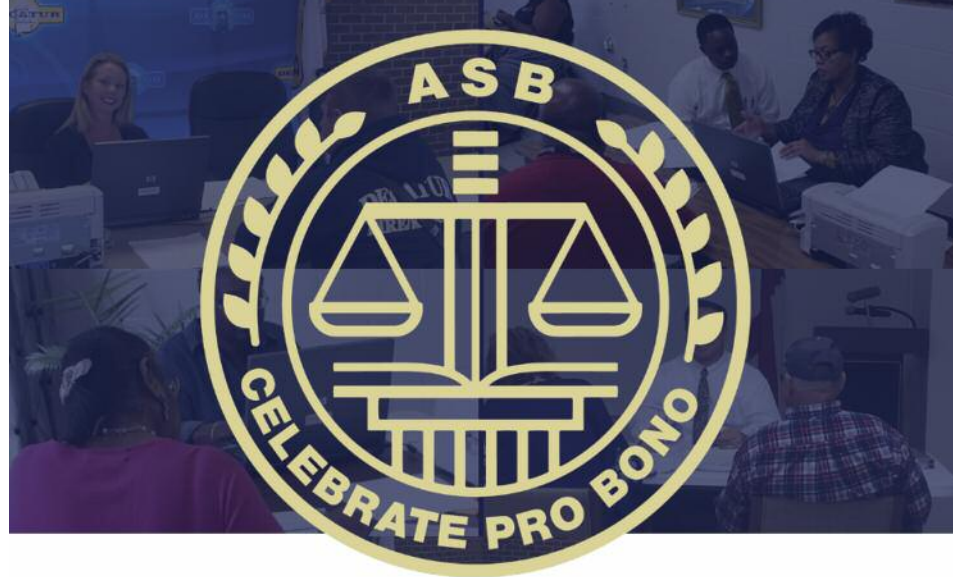
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A Time for Service

One of my goals as your president is to improve the image of lawyers among the general public by highlighting our hard work and dedication to service. As you probably noticed, your license renewal had an extra box this year, which was to estimate the number of pro bono hours that you donated in 2019. As I write this article in early October, 2,511 attorneys recorded over 125,000 pro bono hours in response. This averages out to over 50 hours of pro bono service per attorney—a number that strengthened my pride even more for our bar and its members. The total number of pro bono hours donated in 2019 will surely increase significantly over the next month as nearly one-third of our members have yet to renew their license.

Recently, Chief Justice Tom Parker gave us an overview of the pro bono service of Alabama's lawyers and how it compares nationally. In his order declaring October Pro Bono Month, Chief Justice Parker explained that, in 2019, 1,380 Alabama pro bono attorneys closed 3,300 cases for low-income Alabamians, and Alabama had more than 45 pro bono cases closed per 10,000 persons living at or below the poverty level. That latter number is almost three times higher than the national average. In fact, Alabama has one of the highest lawyer-enrollment rates in pro bono programs in the country, and we lead the nation in the number of cases closed annually. Chief Justice Parker commended these attorneys for their service and described

their commitment to public service as “one of the noblest attributes of the legal profession,” especially during the “historic challenges presented by COVID-19.” I am also grateful that we took time in October to celebrate Pro Bono Month as we have done in years past.

I titled this article “A Time for Service” because COVID-19 has greatly increased the need for pro bono services in our communities. Many individuals are facing economic challenges, which increase the demand for pro bono services. Individuals who suffered unemployment as a result of the pandemic may be dealing with the risk of eviction or foreclosure. These economic challenges are creating

additional pressures at home, increasing the number of cases related to divorce, child custody, and domestic violence. Many of our state’s volunteer lawyer programs have dedicated pages on their websites to inform citizens and attorneys about legal assistance programs for these COVID-19-specific problems. I encourage you to visit your local VLP website or contact the program to learn more about the specific needs in your area. If you do not have a program in your area, visit <https://www.alabar.org/programs/volunteer-lawyers-program/> for information about the Alabama State Bar’s Volunteer Lawyers Program.

As I write this, our colleagues in south Alabama are recovering from the destruction caused by Hurricane Sally and are preparing for Hurricane Delta to make landfall this weekend. Natural disasters create their own litany of legal needs and are another opportunity to offer our services to those affected. The South Alabama Volunteer Lawyers Program sponsored a Hurricane Sally Disaster Legal Assistance clinic in October specifically for this purpose, and the ASB Young Lawyers’ Section, in conjunction with FEMA, operates a disaster relief legal hotline anytime a natural disaster is declared within our state.



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(Continued from page 409)

I also created pro bono task forces for two groups that greatly need our assistance. The first, Helping Heroes in Healthcare, is designed to offer free legal assistance to our front-line medical personnel as a service to recognize their sacrifices during this pandemic. This task force is chaired by Emily Baggett and Devan Byrd. The second is Lawyer Voices for Survivors, our anti-human trafficking task force, which will educate the public about this alarming problem and provide free legal services to survivors of human trafficking. Our two co-chairs of this task force are

Rachel Lary and LaBella McCallum. Please reach out to Emily, Devan, Rachel, or LaBella if you want more information on these task forces or are interested in getting involved in their mission.

In addition to highlighting the pro bono efforts of lawyers in Alabama, I am committed to educating the public about the tremendous role that law firms and the court system play in Alabama's economy. Therefore, we have hired Dr. Sam Addy at the University of Alabama to conduct an economic impact study for the legal profession in

our state. From solo practitioners to large law firms, lawyers provide thousands of jobs for our citizens and spend tens of millions of dollars on goods and services that exist solely to support the legal profession. We expect that the report will show that the legal profession adds billions of dollars to the Alabama economy each year. Our unified judicial system is also one of the largest employers in the state, and the fees generated from our court system fund some of the most important programs in Alabama. Someone at your firm should have received an

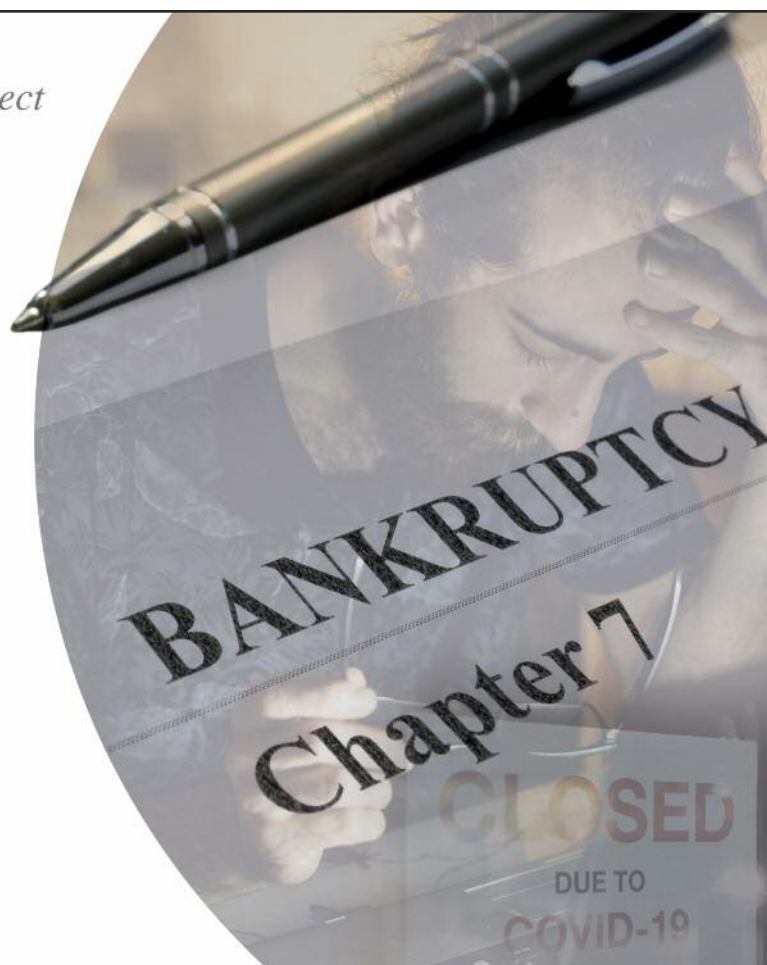
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email questionnaire from Debra McCallum at the University of Alabama requesting information for our economic impact study of the legal profession. Please take part in this study so that the results will accurately reflect the tremendous economic impact the legal profession has on the state. I look forward to sharing the results of this study with our fellow Alabamians and expect that it will demonstrate the tremendous impact our profession has on our state's economy.

Now is also a great time for us to learn and grow in our profession. The bar is continuing its mission this year to offer CLE programs to its members, and each member can now get all of their required CLE hours this year free of charge. Currently, we offer 17 free, on-demand courses, including three hours of ethics credits, at <https://alabar.prolearn.io>, and we hope to have 30 courses available by December 15. First-time users will need to create an account. Once registered, they can browse the course catalogue and complete selected courses through the My Learning tab. More detailed instructions for the platform are available in the bar's weekly email, *The Scoop*. Since this platform launched, 655 attorneys have taken advantage of this free member benefit and completed 2,304 courses with another 1,510 in progress.

In my previous article, I described my great respect for our profession and noted my faith that our bar will be instrumental in helping our communities, state, and country survive these unprecedented times. In just these first few months of my presidency, I am even more confident that our bar will meet the challenges of today and fulfill our motto "Lawyers Render Service." ▲



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EDITOR'S CORNER

W. Gregory Ward
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Education law holds deed to center stage in this edition of *The Alabama Lawyer*, which I think you will find to be bright and alive and brimming with interesting information, useful tools, and vigorous explanations.

I have long been surrounded by educators. My uncle was a superintendent of education, and several of my family members are teachers. Just like you, I logged a lot of school time en route to the diplomas that allow me to practice law. And the whole time I was in school I was oblivious that a team of lawyers was swimming beside me and enabling my education.

When we were looking for a theme for an upcoming edition, it surprised us to learn that education was an underserved topic in our magazine. Here is what we decided to do about that.

My first impulse was to call Jayne Harrell Williams. Jayne is general counsel to the Alabama Association of School Boards, and my go-to person when an education law issue stumps me. She is in

touch with the very best education lawyers, and she has the knack of knowing what is going on in the field of education. I asked if she'd be interested in helping us put together this issue. She jumped on it, and she gets all of the credit for the terrific articles inside.

We start off with Jayne's introduction, and it is worth reading (page 414). She's a delight.

Our first substantive article is Chris Pape and Zachary Roberson's treatment of First Amendment issues. Yes, that sounds dry. But it isn't. They set the stage by putting us in the middle of a fight between a mayor running for reelection on the promise that he will combine two high schools, a high schooler who opposes the move and wants to write about it in her school newspaper, and a school-employed tutor who starts a petition to have the principal fired. Squabbling ensues. Using this *mise en scene*, our authors do a terrific job exploring the various rights and responsibilities of the parties. You'll

have so much fun reading it that you'll barely notice how much you've learned (page 416).

In an entirely practical article, Melissa McKie clears the air about student records. She explains what student records are, who has access to them (the answer will surprise you), and how lawyers can go about getting them. She tells us why some information can be made public—for example, information in school yearbooks; directory information, she calls it—and what that information is. She reminds us of the 2007 Virginia Tech shootings, and how the law changed as a result of that tragedy to allow schools to supply some information about students who might be dangerous. She ends with a good explanation about school records and subpoenas. This is one you'll want to copy and hang onto (page 423).

COVID-19 has given us a lot of new personnel issues, and Anne Yuengert and Anne Knox Averitt step right into that thicket. Did you know that we now have a Families First Coronavirus Response Act (FFCRA) and that many of your educator (and non-educator) clients are covered by emergency paid sick leave (EPSL)? These two terrific authors march you safely through the brambles. Don't walk past this one (page 430).

Last but not least, Leslie Allen and Erika Perrone Tatum provide us with an incredibly useful primer on special education law. If there was ever an area of the law where up is down and down is up, it is special education law. Trying to find this stuff on your own will make you as dizzy as a 60-year-old grandfather who rode the Mad Teacup in Disney World with his grandchildren. (Not that I know anything about that). If you ever had—or if you think you ever will have—a question about the many laws surrounding special education, here is where you start (page 437).

As a bonus, we've included an article about non-disparagement agreements (NDOs). The bar is lucky to have lawyers like Will Hill Tankersley. He, along with five other authors, put together this insightful article to explain

all about agreements in which people agree not to speak ill of each other. These come up when someone leaves a job, as part of litigation, and in a thousand other contexts. We learn the current limits of NDOs, and he makes some strong suggestions on how to improve them. See what you think (page 445).

So there you have it. I can't imagine a better primer on Alabama's education


law than this issue. We hope you have as much fun reading it as we had putting it together.

Enjoy the articles. Email me at wguard@mindspring.com if you have questions or comments or want to write. Come join the fun. We are always looking for our next group of excellent writers.


And just wait till you see what we have for you in our January edition. ▲

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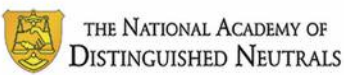

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EDUCATION LAW IN ALABAMA: Not as “Elementary” as You May Think

By Jayne Harrell Williams

In 2003, I was sitting in my office when one of the shareholders appeared at my door.

Spud Seale¹ needed help on a school board case, and I was on deck. I knew nothing about education law, but as all associates quickly learn, we go where shareholders say. Nearly two decades later, I’m glad he came to my door. Education law has become my life.

At first blush, the practice of education law may seem, well, elementary, but if you spend some

time with a school board lawyer, you quickly realize the complexities. Fifty years ago, some of this country’s most controversial legal battles were fought at the schoolhouse door. Moreover, a typical education practice will encompass countless other practice areas, including employment discrimination, real estate, bond issues, civil rights, domestic relations, personal injury, and even criminal law, to name a few. The average school system can resemble a decent size city, so “education law” is a misnomer. It’s complicated.

Public education funding in Alabama is a multi-billion-dollar-a-year industry. Our most recent Education Trust Fund (“ETF”) budget topped \$7.2 billion.² The ETF supports 138 local school systems and five charter schools which educate more than 720,000 K-12 students and employ more than 90,000 people. In fact, many school boards are their city or county’s largest employer.

But beyond the diversity of work and massive budgets, the factor that makes education law most complex is its impact on Alabama’s most precious resource—our children. While some attorneys cherish the relative quiet of tax law, and others thrive in the inevitable chaos of criminal law, our work directly impacts children. As a result, parents and community members are empowered to voice their sincere and sometimes unvarnished opinions directly to our clients, if not to us. Sometimes loudly.

Virtually every decision on which we advise—whether the issue is disciplining an employee or building a school or drafting a social media policy—will directly affect a child’s life. Emotions can run high, but we love this sometimes thankless work. While you won’t usually see us on the nightly news and we can’t command handsome hourly rates from our often cash-strapped clients, we can see and feel the effect that our work has on children. Our hope is that the impact is positive.

Fortunately, we have a faithful and enthusiastic education bar. The Alabama Council of School Board Attorneys, an affiliate of the

Alabama Association of School Boards,³ boasts over 100 attorney-members who represent nearly every school board and charter school in the state. We relish our conferences where we can gather with the only attorneys in the state who understand not only the legal implications of our work, but the political ones, too. We also enjoy an energetic listserv where we communicate and support one another in real time because there is nothing new under the sun (except COVID-19, of course), so we can always find someone who has dealt with “this issue” or “that lawyer.”

Former Montgomery Mayor Todd Strange used to say, “So goes education—so goes Montgomery.” Public education affects everyone, even those who don’t have a child in school. A strong public education system decreases crime rates, attracts industry and jobs, and enhances the general well-being of your community.

This edition of *The Alabama Lawyer* will address the laws that impact education, but because our work crosses boundaries, we hope it’s useful in your practices as well. We appreciate *The Alabama Lawyer* for dedicating an edition to such an important, but often-overlooked, area of the law. And I appreciate my partner and mentor, Spud Seale, for coming to my door. ▲

Endnotes

1. James R. Seale is a longtime education attorney at Hill, Hill, Carter, Franco, Cole & Black and past president of the Alabama State Bar.
2. Act 2020-169.
3. The Alabama Association of School Boards is the representative entity for local school board members in the State of Alabama. *Ala. Code* §16-1-6.

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You Tweeted What?

Navigating First Amendment Concerns In the Public School Setting

By Christopher M. Pape and Zachary B. Roberson

Introduction

Maybe no other area of law better captures the unique combination of political intrigue, pedagogical concerns, and practical considerations common to the education bar than speech claims under the First Amendment. This article will rely on an extended hypothetical based on some of our prior cases to describe the legal considerations for student, employee, and community member speech. Although the student speech analysis is unique to

education law, the employee and community member speech issues are applicable to other public agencies and public actors.

Setting the Stage

It's election season, and the incumbent mayor is seeking reelection. Her main campaign promise is to consolidate the town's two high schools. The plan is simple:

close the older, smaller school and transfer the students from that school into the newer, larger school.

Jenny Doe, a senior at the old high school, is the student editor of the school newspaper which is written and edited by students in the Journalism II class. Jenny drafted a scathing editorial which, while not vulgar, was highly critical of the mayor's proposal to close her school. She focused on the preservation of each school's identity and the friendly rivalry between schools. She ended her editorial by stating that "consolidating the schools would be like erasing half of our town's history."

Jenny shared the editorial with her teacher and newspaper sponsor, Mr. Smith. He felt that the editorial was too controversial for the school paper, and directed Jenny to publish something more positive about the school's history instead.

Jenny complied with Mr. Smith's directive not to publish her piece in the paper, but instead posted it on her social media. In her post, she explained that she felt compelled to share the editorial with her classmates via social media because Mr. Smith had not let her speak her mind in the school's newspaper. She explained that "as the editor of the newspaper," she would be doing her classmates a disservice by remaining quiet.

Jenny's editorial quickly circulated on social media, and when Mr. Smith saw it, he told her there would be consequences for her insubordination. Additionally, he posted a response on his own social media page arguing against Jenny's position, which he characterized as churlish and childish. He expressed his fears about the school system's dire financial straits and stated that consolidating the two schools is the only fiscally responsible way forward. He ended his post by stating that "we may be erasing half of the town's history, but if we don't, the whole school system will be history."

When word spread about Mr. Smith's post and his threat of disciplinary consequences, a community petition seeking Mr. Smith's immediate termination began to circulate. The "Mr. Smith MUST GO!" petition received more signatures than there are students

Whether and to what extent school officials may regulate student speech depends on the nature of the student's expression.



in the school. To top it all off, many parents began seeking transfers from Mr. Smith's class for their students, explaining that they don't feel he creates a safe place for his students to express themselves.

Ms. Washington, the community member who started the petition, does not have children in the system, but she employs tutors under a contract with both high schools. The school principals can cancel the contract at any time with no penalty to the school. Mr. Hamilton, the principal of the newer school, is good friends with Mr. Smith. In an effort to help his friend, Mr. Hamilton asks Ms. Washington to take down the petition. When she refuses to do so, he sends her a letter terminating the tutoring contract. Furious at receiving the letter as it will cost her a considerable amount of revenue,

Ms. Washington calls Mr. Hamilton demanding to know why he cancelled the agreement. He tells her that they can talk once the petition has been removed.

Feeling pressure from the community, Mr. Jones, the principal of the older school where Mr. Smith teaches, informs Mr. Smith that the social media post was unacceptable, and that Mr. Smith has lost the confidence of his parents. With the support of the superintendent, Mr. Smith is placed on administrative leave pending termination.

Student Speech

Students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹ Whether and to what extent school officials may regulate student speech depends on the nature of the student's expression. The U.S. Supreme Court has recognized three main categories of student speech: (1) pure student expression under *Tinker v. Des Moines Independent Community School District*;² (2) vulgar, lewd, offensive, or indecent speech under *Bethel School District No. 403 v. Fraser*;³ and (3) school-sponsored speech under *Hazelwood School District v. Kuhlmeier*.⁴

Can Mr. Smith prohibit Jenny’s editorial?

The Supreme Court has been careful to draw a distinction between the questions of whether a school board may *punish* a student for certain speech, as was the issue in *Tinker* and *Fraser*, or whether it may *avoid publicizing* certain student speech. Our first scenario falls within this second question. In that regard, the Supreme Court held in *Hazelwood* that a school board may exercise “editorial control over the style and content of student-speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁵ The Eleventh Circuit has clarified that this standard controls all student-speech that (1) bears the imprimatur of the school (*i.e.*, the school had a role in setting guidelines for and ultimately approving the speech such that a “reasonable observer” would believe it is school-sponsored)⁶ and (2) occurs in a “curricular activity.”⁷ Although seemingly tied to classroom instruction, the phrase “curricular activity” is more broadly interpreted to include any expressive activity that is (a) “supervised by faculty members” and (b) “designed to impart particular knowledge or skills to student participants and audiences.”⁸ Noticeably, there is no consideration of whether the activity is graded or earns school credit, occurs during school hours or on school campus, or is part of the school’s curriculum catalog.⁹

In our hypothetical, there is no question the school newspaper bore the imprimatur of the school and was part of a curricular activity. The newspaper was published as part of a classroom activity, was designated as the official newspaper of the school, and was supervised by a faculty member. Thus, under *Hazelwood*, the school board could prohibit Jenny from publishing her article in the newspaper. The only remaining question is whether the speech limitation was “reasonably related

to legitimate pedagogical concerns.”¹⁰ Courts give great deference to school boards and have upheld restrictions based on concerns such as avoiding debate and remaining neutral on a political or religious topic.¹¹ Ultimately, a court is likely to uphold the decision to prohibit publishing Jenny’s article based on *Hazelwood*.

Courts give great deference to school boards and have upheld restrictions based on concerns such as avoiding debate and remaining neutral on a political or religious topic.¹¹



Can Jenny be disciplined for her social media post?

The question remains whether the school board could punish Jenny for publishing her editorial on social media as Mr. Smith threatened. In *Tinker*, the Supreme Court held that students cannot be punished for the mere expression of their personal views *on school grounds* unless the school board has reason to believe that such personal expression will cause a substantial interference with the work of the school or infringe on the rights of other students.¹²

While *Tinker* requires a *substantial* interference or disturbance in order to regulate student expression, a school board need not wait until a disruption actually occurs.¹³ Instead, the school board may regulate student expression if it can reasonably anticipate that the expression will cause substantial disruption or material interference with school activities.¹⁴ This disruption must be more than a *de minimis* impact or theoretical possibility of discord.¹⁵ For example, student expression may not be suppressed if it only gives rise to mild curiosity, discussion, comments, or even hostile remarks by some students.¹⁶

But what about off-campus student speech? Addressing this issue for the first time in *Doe v. Valencia College*, the Eleventh Circuit concluded that, “*Tinker* teaches that conduct by the student, in class or out of it that results in the invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”¹⁷ Although the Court

greatly limited its holding, stating only that, “*Tinker* does not foreclose a school from regulating all off-campus conduct[,]” it did not provide a detailed standard for punishment of such speech.¹⁸

Courts outside the Eleventh Circuit most commonly address punishment of off-campus speech by requiring the school system to first satisfy some threshold test, and if met, to then satisfy *Tinker*’s substantial interference standard. The threshold test used varies by jurisdiction, but the most common test analyzes whether there existed a “reasonably foreseeable risk” that the speech would reach the school or come to the attention of school officials.¹⁹ Other tests focus on whether a sufficient nexus exists between the school’s interests and the speech.²⁰ While several approaches are viable, the safest path in our Circuit is likely to follow the Ninth Circuit and consider both threshold tests: (1) whether there exists a sufficient nexus between the speech and the school, and (2) whether there exists a reasonably foreseeable risk that the speech would reach the school or school officials.²¹ Then, if *both* threshold tests are met, apply the *Tinker* standard and analyze whether the speech “might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities.”²² Alternatively, if the speech interferes with another student’s right to feel secure, the school may regulate the speech regardless of any threshold considerations.²³

In our hypothetical, it seems likely that Jenny’s editorial would satisfy any of the threshold tests. It is foreseeable—and Jenny’s intention—that the editorial would reach the school or school officials, and there is a clear nexus between the editorial and her school. While the threshold test is met, facts are lacking that would meet the *Tinker* substantial disruption standard. Of course, the school did experience a disruption, but the facts in our hypothetical tend to show that Mr. Smith’s post, not Jenny’s, was the cause of the disruption. The school could attribute the disruption to Jenny or argue that her post would likely cause a future substantial disruption based on its controversial nature and relevance to the students.

However, forecasting a substantial disruption is always risky, and with weak evidence of a substantial

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disruption or material interference with school activities, the school should avoid disciplining Jenny for the post until there are facts to prove substantial interference.

Attempting to circumvent the First Amendment framework by instead punishing Jenny for failing to follow Mr. Smith’s directive is also risky. A school cannot prohibit a student from exercising a constitutional right by merely telling the student not to do so.²⁴ A school board cannot punish a student indirectly, through the guise of insubordination, for what it cannot punish directly.²⁵

Employee Speech

Like student speech, government employee speech rights are limited. Despite this similarity—and the prohibition against retaliation—there is very little overlap between the considerations when responding to disruptive speech of an employee and a student.²⁶ The First Amendment rights of public employees, such as teachers, must be analyzed using the *Pickering-Connick* test.²⁷ This balancing test examines whether (1) the employee was speaking as a citizen on a matter of public concern; (2) the employee’s speech interests outweighed the employer’s interest in effective and efficient fulfillment of its responsibilities; and (3) the speech played a substantial part in an adverse employment action. If the employee establishes these three prongs, the burden shifts to the employer to show that it would have made the adverse employment decision even in the absence of the protected speech.²⁸

Was Mr. Smith speaking on a matter of public concern?

Addressing the first *Pickering-Connick* prong, in *Garcetti v. Ceballos*, the Supreme Court held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²⁹ Post-*Garcetti*, the Eleventh Circuit reformulated the first *Pickering-Connick* prong³⁰ into a two-step, legal inquiry that considers whether: (1) the speaker was speaking as an employee or citizen, and (2) the speech addressed the mission of

the government or a matter of public concern.³¹ This reformulated first step acts as a First Amendment “threshold layer” based on the role that the employee occupied when speaking and the content of the speech.³²

To resolve the “citizen” component of the *Garcetti* threshold issue, courts examine whether the speech stems from the employee’s official, professional duties.³³ Other relevant considerations may be whether the employee’s speech advanced official duties or was made pursuant to them, or whether the employee used the employer’s official authority or workplace resources as part of the speech.³⁴ Notably, a citizen’s speech does not become “employee” speech merely because the individual’s speech included information learned during the course of public employment.³⁵ Instead, the critical difference between speaking as a citizen and an employee is whether the speech fits within the scope of the individual’s official duties.³⁶

To evaluate the “matter of public concern” component, courts must determine whether the speech related to “any matter of political, social, or other concern to the community.”³⁷ Both the content and context of the speech matter. For example, a criticism that would constitute a matter of public concern if made publicly may not rise to that level if made solely to the employee’s supervisors.³⁸ Not all comments made outside of the workplace constitute speech as a citizen on a matter of public concern, but speech made to the general public weighs in favor of it being on a matter of public concern.³⁹ In contrast, workplace grievances are not matters of public concern.⁴⁰

It is impossible to provide a comprehensive list of matters of public concern as any number of policy issues could qualify.⁴¹ However, publicly speaking about “corruption in a public program and misuse of state funds . . . obviously involves a matter of significant public concern.”⁴² Similarly, the *Pickering* Court explained that “[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.”⁴³

Under our fact pattern, Mr. Smith can make a strong argument that he was a citizen speaking on a matter of public concern. While his speech was motivated

primarily by information he learned as the newspaper sponsor, his response to Jenny did not use a school platform and was not within his official duties. Additionally, under *Pickering*, it is likely that Mr. Smith’s comments are matters of public concern because they focus on how limited educational funds are spent.

Pickering-Connick Balancing

Next, we must balance the speech interests of the employee against the employer’s interests. However, courts do not consider speech in a vacuum.⁴⁴ The context, circumstances, and impact, or potential impact, of the speech are relevant.⁴⁵ A governmental employer will have a difficult time establishing that non-disruptive expression—even if uncomfortable—sufficiently outweighs the speaker’s rights.⁴⁶ In contrast, an employer’s interest in disciplining an employee whose speech is vulgar and insubordinate may outweigh the speaker’s right, even if the speech is otherwise protected.⁴⁷ At this step, context is critical because an employee’s speech could be “protected had he confined his complaint to the proper time, place, and manner. . . . [but it may not be protected because he] chose to spend [employer] time broadcasting his rancor.”⁴⁸

Most cases will fall between the two extremes. In those cases, the court will consider if the speech disrupts harmony in the workplace, damages critical relationships, or prevents the regular operation of the employer.⁴⁹ The relationship component is especially critical for an “employee serv[ing] in a sensitive capacity that requires extensive public contact.”⁵⁰ Lastly, while the mere likelihood of a disruption can be sufficient, the existence of an actual disruption is persuasive evidence in favor of the employer’s interest.⁵¹

The balancing test is where Mr. Smith’s case will falter because there was actual disruption. Parents have requested mid-year transfers, and the administrative burden of handling those requests weighs in favor of the board. Additionally, Mr. Smith may have damaged sensitive relationships with students and

A governmental employer will have a difficult time establishing that non-disruptive expression—even if uncomfortable—sufficiently outweighs the speaker’s rights.⁴⁶



parents that are critical to the school’s success.

Community Member Speech

Ms. Washington’s speech—the petition—poses another unique issue. To allege a successful First Amendment claim, she must show that she (1) engaged in constitutionally protected speech; (2) suffered a consequence that would objectively deter a person from engaging in such speech; and (3) her speech was causally related to the consequence.⁵² Ms. Washington’s speech, like Mr. Smith’s, likely involves a matter of public concern. Speech “on matters of public concern. . . is at the heart of

the First Amendment’s protection[,] occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”⁵³

Assuming her speech is protected, we then consider whether she suffered a consequence that would deter a “person of ordinary firmness” from speaking.⁵⁴ This test is not onerous and has been shown through consequences such as retaliatory issuance of parking citations, a pattern of police harassment, or being denied the option to select one’s preferred legal name on a driver’s license.⁵⁵ Importantly, because this test is not subjective, it does not matter if Ms. Washington was actually deterred.⁵⁶ The loss of the contract likely establishes the second prong.

To show a causal connection, Ms. Washington must show that Mr. Hamilton was subjectively motivated to cancel her contract because of her exercise of free speech.⁵⁷ If she does that, the burden shifts to Mr. Hamilton to show that he would have canceled her contract even without her speech.⁵⁸ Clearly, Mr. Hamilton’s actions were subjectively motivated by Ms. Washington’s exercise of her speech. Barring additional facts, it is unlikely that Mr. Hamilton can defeat Ms. Washington’s claim.

Conclusion

Social media creates new platforms for speakers, and a school board must consider a variety of legal frameworks as its stakeholders react to these platforms. As the barriers to publicly sharing one's thoughts continue to diminish, the legislature, courts, and school boards will struggle to keep up. ▲

Endnotes

1. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).
2. 393 U.S. 503 (1969).
3. 478 U.S. 675 (1986).
4. 484 U.S. 260 (1988).
5. *Id.* at 273.
6. *Bannon v. School District of Palm Beach County*, 387 F. 3d 1208, 1214 (11th Cir. 2004).
7. *Id.* While *Hazelwood* appears to exist outside the traditional forum analysis used by courts for other non-school First Amendment free speech claims, the Eleventh Circuit has clarified that the *Hazelwood* test is the same as the standard for speech regulation in a non-public forum. Thus, under *Hazelwood*, like non-public forums, viewpoint discrimination is not allowed. See *Searcey v. Harris*, 888 F. 2d 1314, 1319 n.7 (11th Cir. 1989).
8. *Bannon*, 387 F. 3d at 1214.
9. *Id.* at 1215.
10. *Hazelwood*, 484 U.S. at 271-73.
11. *Corder v. Lewis Palmer School District*, 566 F. 3d 1219, 1228-29 (10th Cir. 2009); *Curry ex rel. Curry v. Hensinger*, 513 F. 3d 570, 579 (6th Cir. 2008); *Axson-Flynn v. Johnson*, 356 F. 3d 1277, 1290-93 (10th Cir. 2004); *Bannon*, 387 F. 3d at 1217.
12. *Tinker*, 393 U.S. at 509.
13. *Heinkel ex rel. Heinkel v. School Board of Lee County, Fla.*, 194 Fed. Appx. 604 (11th Cir. 2006).
14. *Id.* at 4.
15. *Holloman ex rel. Holloman v. Harland*, 370 F. 3d 1252, 1271-72 (11th Cir. 2004).
16. *Id.*
17. 903 F. 3d 1220, 1231 (11th Cir. 2018).
18. *Id.*
19. *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F. 3d 771, 777 (8th Cir. 2012); *D.J.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F. 3d 754, 766 (8th Cir. 2011); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F. 3d 34, 38 (2nd Cir. 2007).
20. *Kowalski v. Berkeley Cty. Sch.*, 652 F. 3d 565, 576-77 (4th Cir. 2011); see also *Bell v. Itawamba Cty. Sch. Bd.*, 799 F. 3d 379, 396 (5th Cir. 2015).
21. *C.R. v. Eugene Sch. Dist. 4J*, 835 F. 3d 1142, 1145, 1150 (9th Cir. 2016).
22. *Tinker*, 393 U.S. at 506.
23. *Doe*, 903 F. 3d at 1231.
24. *Holloman*, 370 F. 3d at 1276.
25. *Id.*
26. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987).
27. See *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).
28. *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F. 3d 1313, 1318 (11th Cir. 2005).
29. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
30. *D'Angelo v. School Bd. of Polk County, Fla.*, 497 F. 3d 1203, 1209 (11th Cir. 2007).
31. *Boyce v. Andrew*, 510 F. 3d 1333, 1342 (11th Cir. 2007) (citing *D'Angelo*, 497 F. 3d at 1209).
32. *Alves v. Bd. of Regents of the Univ. Sys. of Georgia*, 804 F. 3d 1149, 1160 (11th Cir. 2015).
33. *Alves*, 804 F. 3d at 1161-62 (citing *Moss v. City of Pembroke Pines*, 782 F. 3d 613, 618 (11th Cir. 2015); *Abdur-Rahman v. Walker*, 567 F. 3d 1278, 1283 (11th Cir. 2009); *Boyce*, 510 F. 3d at 1342)).

34. *Fernandez v. Sch. Bd. of Miami-Dade Cty., Fla.*, 898 F. 3d 1324, 1332 (11th Cir. 2018), cert. denied, 139 S. Ct. 1345 (2019).
35. *Lane v. Franks*, 573 U.S. 228, 240 (2014).
36. *Id.*
37. *Alves*, 804 F. 3d at 1162 (quoting *Connick*, 461 U.S. at 146).
38. *McShea v. Sch. Bd. of Collier Cty.*, 58 F. Supp. 3d 1325, 1339 (M.D.Fla. 2014) (citing *Mpoy v. Rhee*, 758 F. 3d 285, 291-94 (D.C. Cir. 2014)).
39. *Leslie v. Hancock Cty. Sch. Dist.*, 994 F. Supp. 2d 1339, 1351 (M.D.Ga. 2014) (citing *Boyce*, 510 F. 3d at 1344-45).
40. *Garcetti*, 547 U.S. at 420 (quoting *Connick*, 461 U.S. at 154).
41. See, e.g., *Belyeu v. Coosa Cty. Bd. of Educ.*, 998 F. 2d 925, 927-28 (11th Cir. 1993) (agreeing with district court that an employee spoke on a matter of public concern when she advocated for Black History Month programming at a PTA meeting).
42. *Lane*, 573 U.S. at 241.
43. *Pickering*, 391 U.S. at 572.
44. *Rankin*, 483 U.S. at 388.
45. *Id.*
46. See, e.g., *Belyeu*, 998 F. 2d at 929-30.
47. *Morris v. Crow*, 117 F. 3d 449, 458 (11th Cir. 1997); see also *Jackson v. State of Alabama State Tenure Comm'n*, 405 F. 3d 1276, 1285-86 (11th Cir. 2005).
48. *Bryson v. City of Waycross*, 888 F. 2d 1562, 1567 (11th Cir. 1989).
49. *Rankin*, 483 U.S. at 388.
50. *Sims v. Metro. Dade Cty.*, 972 F. 2d 1230, 1237 (11th Cir. 1992).
51. *McCullars v. Maloy*, 369 F. Supp. 3d 1230, 1240 (M.D.Fla. 2019); see also *Cochran v. City of Atlanta, Georgia*, 289 F. Supp. 3d 1276, 1291 (N.D.Ga. 2017).
52. *Castle v. Appalachian Tech. Coll.*, 631 F. 3d 1194, 1197 (11th Cir. 2011) (citing *Bennett v. Hendrix*, 423 F. 3d 1247, 1250 (11th Cir. 2005)).
53. *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011) (internal citations omitted).
54. *Bennett*, 423 F. 3d at 1254.
55. *Id.* at 1255 (citing *Garcia v. City of Trenton*, 348 F. 3d 726, 729 (8th Cir. 2003)); *Abella v. Simon*, 522 Fed. Appx. 872, 874 (11th Cir. 2013); *Wall-DeSousa v. Fla. Dept of Highway Safety & Motor Vehicles*, 691 Fed. Appx. 584, 590-91 (11th Cir. 2017).
56. *Id.* at 590.
57. *Castle*, 631 F. 3d at 1197.
58. *Id.*

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The ABCs of Education Records and Student Privacy

By Melissa B. McKie

“This is going on your permanent record!”

For generations, that threat has been used by parents and teachers on television shows and in movies to warn misbehaving students that a written record of their misdeeds would haunt them for the rest of their lives. In the real world, most people never think about what is in their or their child’s K-12

school file, and the parameters of the law governing the confidentiality of those records are not widely known outside the education community.

However, over the past decade, the number of subpoenas that school board clients receive seeking student records (and subsequently the appearance of school employees to certify the records at trial) has increased exponentially. Most of those requests are made by family law attorneys seeking

educational records of children involved in custody cases. Occasionally, attorneys defending clients in criminal matters seek those records for myriad purposes, including to help make the case that their client's IQ precludes a punishment of death. In addition, some parents and advocacy groups have recently become more concerned about the privacy of education records.

With that in mind, this article will address the basics of the law governing education records and how attorneys can save themselves time and frustration when obtaining those records for use in litigation, address parental concerns regarding the confidentiality of education records, and ease the administrative burden that requests for records too often present to school systems.

Education Records Defined

The Family Educational Rights and Privacy Act ("FERPA") is the federal law that governs the confidentiality of education records.¹ FERPA applies to educational agencies or institutions that receive funds from programs administered by the U.S. Department of Education, including public schools, school districts, and postsecondary institutions, such as colleges and universities.² While the U.S. Supreme Court has ruled there is no right to sue under FERPA,³ schools that fail to comply risk losing federal funds.

FERPA defines education records as records that are (1) directly related to a student and (2) maintained by an educational agency or institution or a party acting for or on behalf of the agency or institution.⁴ Examples of education records include grades, transcripts, class lists, student course schedules, health records (at the K-12 level), and student discipline files which may exist in various formats.⁵ This definition is broad, but FERPA does contain notable exceptions regarding what constitutes an education record.⁶

For instance, FERPA does not protect information obtained through personal knowledge or observation even if a record containing the information exists. However, if a school official had an "official role in making a determination maintained in the education records about

the student" such as a disciplinary action, that information remains protected by the law.⁷ FERPA also exempts "records which are kept in the sole possession of the maker of the records and are not accessible or revealed to any other person except a temporary substitute for the maker of the records."⁸ This rule allows school officials to keep records that serve as "a 'memory jogger' for the creator of the record" (e.g. notes regarding telephone or face to face conversations).⁹

Given the widespread awareness of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") which protects health information, questions sometimes arise regarding the protections afforded medical information in student files, which routinely include immunizations and records obtained or created by the school nurse. However, HIPAA rarely applies to K-12 schools because most schools are not HIPAA-covered entities, and those that are only maintain health records that are considered education records under FERPA and not "protected health information" under HIPAA.¹⁰

FERPA itself does not require a school to maintain any particular information about a student, and it does not address how long the school system must retain records. The decision as to what information should be maintained in the student's educational record and for how long is determined by applying other federal and state statutes. The only retention requirement in FERPA states that the school cannot destroy education records if there is an outstanding request to inspect the records by the parent or eligible student.¹¹

Access to Records

FERPA requires that schools provide parents¹² and eligible students¹³ (must be 18 or older or attending a postsecondary education institution) the opportunity to inspect and review the student's education records upon request within a reasonable time period, but not more than 45 days after the school receives the request. Interestingly, the right of parents and eligible students to inspect and review a student's education records is the only type of disclosure mandated by FERPA, but there are limitations on the disclosure.¹⁴ "If the education records of a student contain information on more than one student, the parent or eligible

student may inspect and review or be informed of only the specific information about that student.”¹⁵

Family law attorneys should note that physical or legal custody of a child does not control which parent may access a student’s records. FERPA requires that the school give “full rights under the Act to either parent, unless the [school] has been provided with evidence that there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.”¹⁶ In other words, the non-custodial parent may still access their child’s education records unless a divorce, custody, or other order specifically revoking those rights exists. In addition, “a stepparent may be considered a ‘parent’ under FERPA if the stepparent is present on a day-to-day basis with the natural parent and child and the other parent is absent from that home.”¹⁷ Likewise, a “grandparent or other caregiver who is acting in the absence of the parent(s) may also be considered a ‘parent’ under FERPA.”¹⁸

Therefore, attorneys representing a parent who is concerned that the ability of the other parent or stepparent to access school records could create problems should ensure that they obtain a court order or other legally-binding document that specifically revokes the other parent’s right to the records and provide the order to the school. Parents should not rely on school officials to make that determination. In addition, attorneys serving as guardian ad litem who want to review the student’s school records should obtain an order allowing them to access those records and provide it to the school.

As a practical matter, information regarding school activities are typically sent to the parent who enrolled the student as they control what contact information is provided to the school. Sometimes, that parent may neglect or refuse to provide the other parent with information regarding school activities, so the other parent may make a standing request to be provided information regarding their child and school activities. However, FERPA does not require a school to “honor standing requests, to provide immediate access to records, or to send out grades to parents at the end of marking periods.”¹⁹ Nor does it require the provision of documents “such as school calendars, updates, or notices of parent/teacher conferences” or information

“about school plays, spelling bees, or sporting events in which their children may be participating.”²⁰ Therefore, while schools may try to keep both parents abreast of school activities, FERPA does not require a school to do so, and disagreements about a custodial parent’s failure to keep the other parent informed regarding school activities are more appropriately addressed through other channels.

While many school systems routinely provide copies of education records to parents or eligible students upon request, FERPA does not require that they do so. “If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student’s education records, the school can either provide a copy of the records requested or make other arrangements for the inspection and review of the requested records.”²¹

Confidentiality

FERPA generally provides that a school may not disclose a student’s education records to a third party without written consent from the student’s parent or guardian or the eligible student. A consent for disclosure of education records must be signed and dated, specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom the disclosure may be made.²² However, FERPA contains several exceptions to that requirement that allow, but do not require, school systems to share information from a student’s education record without written consent.²³ The most common exceptions are discussed below.

Directory Information

The most commonly used FERPA exception allows schools to disclose “directory information” about students. Every time you open the program for a school play and see the names of the lead actors, look at the pictures of your child’s classmates in the yearbook, or read an athlete’s height and weight in the newspaper, it is the directory information exception to FERPA that allowed the school to release that information. FERPA defines “directory information” as information in the education records of a student that would not generally be considered harmful or an invasion of privacy if disclosed,²⁴ but

the regulations allow each school system to define for itself what information will be included in “directory information” in their system.²⁵ Most school systems use the sample definition provided by the U.S. Department of Education and designate the following items as directory information:²⁶

- Student’s name
- Address
- Telephone listing
- Electronic mail address
- Photograph
- Date and place of birth
- Major field of study
- Dates of attendance
- Grade level
- Participation in officially recognized activities and sports
- Weight and height of members of athletic teams
- Degrees, honors, and awards received
- The most recent educational agency or institution attended
- Student ID number, user ID, or other unique personal identifier used to communicate in electronic systems but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user’s identity, such as a PIN, password, or other factor known or possessed only by the authorized user.
- A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user’s identity, such as a PIN, password, or other factor known or possessed only by the authorized user.

However, parents and eligible students do maintain control over the release of this information, because

the school must give notice to parents regarding what information it has designated as directory information and provide parents and eligible students with the right to opt out of disclosure of their information.²⁷ Most school systems provide instructions for opting out in the school’s student handbook and require a parent to submit the opt-out request at the beginning of the school year.

Opt-outs are rare as most parents want their child’s picture to appear in the yearbook and for their achievements to be shared with the school community. However, attorneys who represent parents and children escaping an abusive situation may want to ensure that their clients understand that they need to review the FERPA notification provided by the school. If release of the listed information might affect their ability to keep themselves safe, they should make a timely opt-out to prevent disclosure of their information.

Health and Safety Emergency

After the Virginia Tech shooting in 2007, it came to light that several educators and school employees had concerns about the shooter, but many did not feel empowered to share the information more widely due to confidentiality concerns. That resulted in renewed attention to the FERPA exception that allows schools to release information from student records without consent in a health and safety emergency, and in 2009, the FERPA regulations were softened to give schools broader discretion to do so.

FERPA allows a school “to disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.”²⁸ “This exception to FERPA’s general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of information from a student’s education records. Rather, these disclosures must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease.”²⁹

When determining whether a health or safety emergency exists, the school may consider “the totality of

the circumstances pertaining to a threat to the health or safety of a student or other individuals.”³⁰ If the school “determines there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals.”

The phrase “articulable and significant threat” means that a school official is able to explain, based on all the information available at the time, what the significant threat is . . . when he or she makes and records the disclosure. For instance, if a school official believes that a student poses a significant threat, such as a threat of substantial bodily harm to any person, including to the student, then, under FERPA, the school official may disclose personally identifiable information (PII) from the student’s education records without consent to any person whose knowledge of the information will assist in protecting a person from that threat. This is a flexible standard under which school administrators may bring appropriate resources to bear on the situation.³¹

In the aftermath of Virginia Tech, the U.S. Department of Education clarified that if, based on the information available at the time of the determination, there was a rational basis for the determination, the Department will not substitute its judgment for that of the school as to whether a health or safety emergency existed.³²

Litigation Involving the School System

FERPA also allows student records to be disclosed by the school system in litigation involving a parent or student. If the school system sues a parent or student or if a parent or student sues the school system, the school “may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the school system to proceed with the legal action as plaintiff”³³ or any records “needed to defend itself.”³⁴

Subpoenas or Court Orders

Another commonly used FERPA exception is for subpoenas and court orders. Most attorneys incorrectly

assume that issuing a subpoena or court order to a school for educational records means they may immediately obtain a copy of the requested records. However, FERPA requires that the subpoena be “lawfully issued” and that the school make a “reasonable effort to notify” the parent or eligible student of the order or subpoena before complying.³⁵ The purpose of the notification is to provide the parent or student with sufficient time to move for an order to quash the subpoena.

Therefore, school systems need time to review the subpoena to ensure that it is lawfully issued and to provide the required notice before responding to the subpoena. Neither FERPA nor its implementing regulations define what constitutes a sufficient time to allow a parent to move to quash a subpoena, and the Student Privacy Policy Office,³⁶ the federal agency tasked with overseeing FERPA, has declined to provide schools with a bright line rule for notification. However, the agency has issued guidance that its review of whether a school complied with the notification requirement is a “case-by-case” determination that considers “the totality of the circumstances” and that schools should “strive to provide a sound and sensible time period to allow a parent or eligible student to take action to quash a subpoena, particularly where a subpoena duces tecum has been issued by a court from a state other than the one in which the parent or eligible student resides.”³⁷ The agency has also suggested that schools should strive to provide notice quickly by attempting to reach the parent [or student] via telephone to let them know about the subpoena and to discuss the best method for providing them written information regarding the subpoena.³⁸

Unfortunately, schools are often served subpoenas at the last minute and are forced to scramble to reach the parent or eligible student to provide notice and confirm that they will not move to quash the subpoena. Where the notice cannot be achieved in time, schools are sometimes forced to file their own motion to quash, which costs the school system additional time and money.

Subpoenas can also create additional administrative and monetary burdens on schools when the subpoena seeks not only records, but also the appearance of a school employee to deliver the records to court on the day of the hearing or trial. Those requests are often made of classroom teachers, which results in the necessity of hiring a substitute teacher and students

missing out on instruction from their regular teacher. Often, the teacher ends up merely providing the requested documents or is not called to testify at all. Furthermore, those interruptions and costs are exacerbated when the hearing or trial in question is continued, because the school has to plan in advance for a teacher's absence to ensure that someone will be available to supervise the classroom and may end up with the burden of paying for substitutes for several days for one hearing.

Attorneys representing parents or eligible students in matters where student records might come into play should speak with their client regarding what information the client already has access to before issuing a subpoena. Most, if not all, K-12 school systems in Alabama provide parents with the ability to access a student database online and download grades, attendance, and other information.

In addition, because FERPA defines the term "education records" broadly, some students have voluminous records. Therefore, attorneys seeking specific information regarding a student such as their grades or attendance records should carefully define the records they are seeking rather than merely requesting "any and all student records" the school may have in its possession. Doing so will not only save the requesting attorney and the school time and effort, it will increase the likelihood the attorney will receive the information he or she is seeking and decrease the likelihood that the school will waste time pulling together records that are unnecessary for the case.

One caveat: the requirement that a school notify a parent or eligible student it has received a subpoena for student records does have limited exceptions. Notification is not required when the disclosure is in compliance with a federal grand jury subpoena or a law enforcement subpoena, and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.³⁹ In addition, the Uninterrupted Scholars Act amended FERPA to allow schools to disclose a student's education records under a judicial order without additional notice when a parent is a party to a court proceeding involving child abuse and neglect (as defined in section 3 of the Child Abuse Prevention and Treatment Act (42 U.S.C. § 5101)) or dependency matters, and the order is issued in the

context of that proceeding.⁴⁰ If an attorney is serving a subpoena and the court has ordered that the existence of contents of the subpoena not be disclosed, it is highly recommended that the attorney make that clear in a cover letter or when the subpoena is served.

Tips for Obtaining Education Records

If an attorney is seeking education records, taking the following steps will not only help attorneys receive requested documents promptly, it will help ease the administrative burden on schools:

- Ask the parent what records they already have access to online and consider having the parent request a copy of any additional records before resorting to issuing a subpoena.
- Include information with a subpoena showing that the subpoena was lawfully issued.
- If seeking a particular document or information (e.g. attendance/tardy records), include a specific request for those documents in the description of the requested documents.
- Serve the subpoena with enough lead time for the school to provide the required notice of the subpoena to the parent or eligible student and for a motion to quash to be filed.
- Carefully consider whether it is necessary to subpoena a teacher to produce records and appear—each hour a teacher sits in the courthouse is an hour of lost instruction for their students.
- Consider allowing the school to provide a written certification that the student records are true and correct copies instead of requiring a school employee to leave work merely to deliver and validate the records in open court.
- If subpoenaing a teacher to appear at trial, consider placing them "on call" to minimize their absence from the classroom.

Conclusion

Implementation of FERPA and its regulations can be a surprisingly complex endeavor. School officials who receive subpoenas for records or who become embroiled in battles between parents regarding who is entitled to information from the school often spend inordinate time and effort addressing those matters. Attorneys who provide school officials with plenty of lead time to respond to subpoenas, provide adequate information to show the subpoena is lawfully issued, and specifically define which records they need can save themselves and school officials an enormous amount of time and stress. In addition, family law attorneys who address issues regarding access to school records and information when custody arrangements are being finalized can help their clients avoid future frustration and avoid school officials from becoming the accidental arbiters of these disputes. ▲

Endnotes

1. 20 U.S.C. § 1232g; 34 C.F.R. Part 99.
2. While FERPA applies to postsecondary institutions, this article focuses on its application in the K-12 context.
3. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002) (holding no individual cause of action was created under FERPA or was enforceable under 42 U.S.C. § 1983 for alleged wrongful disclosure of education records).
4. 34 C.F.R. § 99.3.
5. <https://studentprivacy.ed.gov/faq/what-education-record> (last accessed on August 25, 2020).
6. For a complete list of those exceptions, see 34 C.F.R. § 99.3(b).
7. <https://studentprivacy.ed.gov/faq/are-there-any-limitations-sharing-information-based-personal-knowledge-or-observations> (last accessed on August 25, 2020).
8. <https://studentprivacy.ed.gov/faq/what-records-are-exempted-ferpa> (last accessed on August 25, 2020).
9. *Id.*
10. Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to Student Health Records, U.S. Dep't of Health and Human Services and U.S. Dep't of Education (December 2019 Update), available at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/2019%20HIPAA%20FERPA%20Joint%20Guidance%20508.pdf (last accessed on August 25, 2020).
11. 34 C.F.R. § 99.10(e).
12. 34 C.F.R. § 99.3 ("Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.").
13. 34 C.F.R. § 99.3 ("Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.").
14. 34 C.F.R. § 99.31(c).
15. 34 C.F.R. § 99.12.
16. 34 C.F.R. § 99.4.
17. <https://studentprivacy.ed.gov/faq/can-stepparents-grandparents-and-other-caregivers-be-considered-parents-under-ferpa> (last accessed on August 25, 2020).
18. *Id.*
19. Letter to Parent from Family Policy Compliance Office (August 20, 2004), available at https://studentprivacy.ed.gov/sites/default/files/resource_document/file/hastings82004_0.pdf (last accessed on August 25, 2020).
20. *Id.*
21. 34 C.F.R. § 99.10(d).
22. 34 C.F.R. § 99.30.
23. 34 C.F.R. § 99.31 contains a complete list of the exceptions.
24. 34 C.F.R. § 99.3.
25. 34 C.F.R. § 99.37.
26. Family Educational Rights and Privacy Act (FERPA) Model Notice for Directory Information available at <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html> (last accessed on August 25, 2020).
27. 34 C.F.R. § 99.37(a).
28. 34 C.F.R. § 99.36(a).
29. <https://studentprivacy.ed.gov/faq/when-it-permissible-utilize-ferpa%E2%80%99s-health-or-safety-emergency-exception-disclosures> (last accessed on August 25, 2020).
30. 34 C.F.R. § 99.36(c).
31. <https://studentprivacy.ed.gov/faq/what-does-%E2%80%99Carticulate-and-significant-threat%E2%80%9D-mean> (last accessed on August 25, 2020).
32. 34 C.F.R. § 99.36(c).
33. 34 C.F.R. § 99.31(a)(9)(iii)(A).
34. 34 C.F.R. § 99.31(a)(9)(iii)(B).
35. 34 C.F.R. § 99.31(a)(9)(ii).
36. This office was formerly known as the Family Policy Compliance Office.
37. Letter to Cochran from Family Policy Compliance Office (February 16, 1999), available at https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/youngstown_oh.html (last accessed on August 25, 2020).
38. *Id.*
39. 34 C.F.R. § 99.31(9)(ii)(A)-(C).
40. 20 U.S.C.A. § 1232g(b)(2)(B).

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LESSONS FROM THE 2020 PANDEMIC: Navigating Employee Leave, Accommodations, and Preventative Health Measures in Schools

By Anne R. Yuengert and Anne Knox Averitt

COVID-19 has rocked our world and changed the landscape of workplaces everywhere—including in schools.

While we've navigated short-term emergency legislation and (we hope) short-term virtual learning arrangements in 2020, we have learned lessons for navigating Family and Medical Leave Act¹ ("FMLA") and Americans with Disabilities Act² ("ADA") issues

that will remain useful for years to come. Remote work has become commonplace in 2020 to an extent we have not seen previously, and we can anticipate that employees' expectations to take leave or be accommodated with remote work will increase as well. We are also seeing an uptick in mental health issues and expect that trend to continue when the pandemic has past. Below is an overview of applicable federal legislation and considerations for accommodations.

The Families First Coronavirus Response Act And the Family And Medical Leave Act

The Families First Coronavirus Response Act³ (“FFRCA”) took effect April 1, 2020 and will remain effective until December 31, 2020. The FFRCA provides paid, job-protected leave for employees if they are away from work because of specified COVID-19-related reasons. Employers must post a notice issued by the U.S. Department of Labor informing employees of their rights to leave in the workplace (with the other federally-required posters like equal employment opportunity and the FMLA). The FFRCA expressly provides that it does not preempt existing state or local paid sick leave entitlements, and this paid leave is in addition to leave available under existing employer policies. Significantly, employers cannot require employees to exhaust sick or paid time-off benefits before accessing this new paid leave. A violation of the law is considered a minimum wage violation under the Fair Labor Standards Act. With FFRCA-provided leave or traditional FMLA, school boards must generally return employees to the same or substantially equivalent position.

A. Emergency Paid Sick Leave (“EPSL”)

Government employers, like school boards, and other employers (including private employers)⁴ with fewer than 500 employees, must provide full-time employees with up to 10 days (80 hours) of paid sick leave for specific circumstances related to COVID-19. Those reasons generally fall into three categories: (1) the employee has, is quarantined because of, or is experiencing symptoms and seeking a medical diagnosis for COVID-19; (2) the employee is caring for family members who are subject to quarantine requirements or recommendations related to COVID-19; or (3) the employee is caring for children whose school or daycare is closed, or whose childcare provider is unavailable, due to COVID-19. EPSL is available to employees who cannot come to work and cannot work remotely. Whether remote work is an option is up to the employer.

EPSL is available to employees regardless of length of employment. As noted, an employee gets up to 10 days (80 hours) of leave, so someone who works less than a 40-hour workweek gets leave based on his or her workweek. Employees who work irregular schedules get EPSL equal to the number of hours they worked, on a daily average, over the last six months (or if they have not been employed that long, based on the number of hours they would have reasonably expected to work).

The amount the employee is paid depends on the reason for the leave. For absences related to the employee’s own condition, EPSL is the greater of the employee’s regular rate of pay or the applicable minimum wage, but it is capped at \$511 per day (\$5,110 total). If, however, the absences are to care for others (either because they are sick or school/childcare is not available because of COVID-19), EPSL is the greater of two-thirds of the employee’s regular rate or the applicable minimum wage, not to exceed \$200 per day (\$2,000 total).

EPSL is not a renewable benefit. Accordingly, an employee who takes 80 hours of EPSL because he tests positive for COVID-19 will not have an EPSL available if a family member later tests positive and needs care. In that case, the employee will have to take other paid or unpaid leave. If, however, the employee later needs leave to care for a child whose school or daycare is closed, there is another type of paid leave available (addressed below).

B. Expanded Family and Medical Leave (“EXFMLA”)

The FFRCA created a new, limited paid FMLA that schools and other government employees (and private employers with fewer than 500 employees) must provide. EXFMLA is only available to an employee who needs leave to care for a child whose school, daycare, or childcare is unavailable because of COVID-19. This new paid FMLA is not available for an employee’s own sickness or a family

member's sickness—only for child-care needs caused by COVID-19. Also, EXFMLA is not in addition to FMLA the employee has already taken. For example, if an employee took four weeks of FMLA in January, she only has eight weeks of FMLA available for the remainder of the year (assuming his employer uses the calendar year for FMLA purposes), whether that is traditional FMLA or EXFMLA.

Employees who need this leave and cannot work remotely can take up to 12 weeks of job-protected EXFMLA. The first 10 days are generally unpaid, but during that period, the employee may use accrued personal or sick leave (including EPSL outlined above), but the employer cannot require employees to do so. After the first 10 days, the employee must be compensated in an amount that is not less than two-thirds of the employee's regular rate of pay for the remaining time of protected leave, capped at \$200 per day (\$10,000 total). To qualify for this expanded leave, an employee must have worked for the employer for at least 30 calendar days (although there is no minimum number of hours required). The leave is not available if the employee is able to telework, but whether an employee is "able" to telework will undoubtedly be subject to debate.

As noted earlier, the FFCRA paid leave provisions will expire at year's end unless Congress takes action to extend them.

C. Traditional FMLA Protections

For employers with 50 or more employees, do not forget about traditional FMLA obligations. If an employee has worked for his current employer for at least 12 months



The leave is not available if the employee is able to telework, but whether an employee is "able" to telework will undoubtedly be subject to debate.

and has worked 1,250 hours in the 12 months preceding the leave, he may be eligible for up to 12 weeks of unpaid FMLA leave.

In some situations, COVID-19 cases may also trigger obligations under the traditional FMLA. However, merely testing positive for COVID-19 does not automatically mean that employees are eligible for traditional FMLA protections. The condition must still be considered a "serious health condition" as defined by the FMLA.

Historically, employers have navigated this issue with regard to the seasonal flu, which has only been classified as a "serious health condition" after causing three full days of incapacity and continued treatment. Given many people's experience with COVID-19, this may not be a high bar, so we can expect COVID-related complications to cause an uptick in traditional FMLA requests. Unlike the

EXFMLA, traditional FMLA remains available only to eligible employees (i.e., someone who has worked for the school system for at least 12 months, has worked at least 1,250 hours in the last 12 months, and works at a site with at least 50 employees). Also, remember that employees may seek traditional FMLA leave to take care of a sick family member.

If an employee exhausts leave available under the EPSL and she is still unable to return to work due to a COVID-related illness (either his or her own illness or that of a qualifying family member), consider whether traditional FMLA is available. Depending on the employer's policy, an employee may be required to use any paid leave benefits concurrently with FMLA leave. If that is the case, the FMLA leave should begin before an employee exhausts paid benefits.

Remember that the obligation to offer FMLA is on the employer. If an employee indicates her or she needs leave but does not mention FMLA, the employer must still offer it. When an employee needs leave, follow the normal FMLA process: (1) determine if the employee is eligible and whether the reason qualifies under the FMLA, (2) obtain the necessary medical certifications, (3) track the leave, and (4) reinstate the employee into his or her prior position. Also, needing to be home with a child whose school or daycare is closed due to COVID-19 is not a qualifying reason to take traditional FMLA.

Regardless of the reason, an employee is entitled to a total of 12 weeks of leave under the FMLA in a 12-month period. Thus, if an employee took six weeks of FMLA leave in early 2020 for the birth of

a child, and three weeks of EXFMLA due to a daycare closure in April 2020, he would only have three weeks of either FMLA leave available for the remaining 12-month period, even if he would otherwise be eligible.

Americans with Disabilities Act Considerations

School boards, like other employers, must navigate multiple fronts under the ADA, both in terms of preventative measures and as they consider accommodations for employees with disabilities. Moreover, there are important lessons that will apply to telecommuting as an accommodation, which we can anticipate will be requested with greater frequency.

A. Implementing Preventative Measures

In general, the ADA does not prohibit employers from implementing preventative measures for the sake of public health, but there are certain matters about which employers should be cautious. The ADA (1) prohibits discrimination on the basis of an employee's disability, (2) requires employers to provide reasonable accommodations for an employee's disability that enable the employee to perform the essential functions of a position unless it would be an undue hardship or a direct threat in the workplace, and (3) prohibits employers from making medical inquiries with limited exceptions. While it has remained in full force and effect during the pandemic, the Equal Employment Opportunity Commission ("EEOC")

has made clear that the ADA does not interfere with, or prevent employers from, following relevant guidelines from the Center for Disease Control ("CDC"), state and local health departments, and other applicable authorities intended to prevent and curtail the spread of COVID-19.⁵

The EEOC's guidance states that COVID-19 meets the ADA's "direct threat" standard, meaning that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, in the workplace. The EEOC has also provided guidance that the following types of preventative measures are permissible during the COVID-19 pandemic and do not violate the ADA:

- Employees may be sent home if they display possible COVID-19 symptoms.
- Employers may take employees' temperatures. Generally, employers cannot take temperatures as it is considered a medical examination. However, given the nature of the pandemic and because a fever is a symptom of COVID-19, employers may conduct temperature screenings so long as the results are maintained as confidential medical records separate from the regular personnel file. It is worth noting, however, that not all COVID-confirmed patients run a fever, and temperature screenings do not guarantee the prevention of COVID-19 exposure in the workplace.
- If an employee reports feeling sick at work or calls in sick, employers may ask questions about his or her particular

symptoms. The EEOC guidance states that employers may ask about symptoms (i.e., fever, chills, sore throat, cough, shortness of breath, loss of taste or smell, etc.) for the purpose of determining if the employee may have COVID-19.

- Employers can ask questions about COVID-19 exposure, including travel and known contact with individuals with confirmed or suspected COVID-19.
- Employers may require a doctor's note certifying fitness for duty for employees returning to work following COVID-related illness.
- Employers may conduct COVID-19 screenings after making a job offer, so long as the screening is performed in a non-discriminatory manner for all employees entering the same type of job (i.e., all school nurses in the system, etc.).
- Employers may require employees to wear personal protective equipment including masks and gloves and adopt heightened hygienic practices.
- Employers may inquire about secondary job exposure that might carry risk to the primary employer's workplace. For example, systems may want to revisit policies about their employees' second jobs based on risk of COVID-19 exposure (i.e., a school employee who also works part-time in a restaurant or bar may carry a heightened risk of contracting and spreading COVID-19 in the school setting).

- Under the ADA, employers may notify employees of exposure to a coworker who has tested positive for COVID-19. In fact, the Occupational Safety and Health Administration has issued requirements that employees be notified of exposure in the workplace. In these notifications, however, the employer may not disclose the infected employee's name to other employees without that employee's permission. The infected employee should be asked (1) to identify other employees with whom she had close contact (i.e., within six feet for 15 minutes) over the preceding 14 days; and (2) if it is permissible to tell the exposed coworkers her identity. If the infected employee wishes to remain anonymous, respect that wish and notify exposed employees only that they have been in close contact with a person who has tested positive for COVID-19.

B. Avoiding Prohibited Preventative Measures

Despite the unusual circumstances of 2020, certain preventative measures are still prohibited under the ADA.⁶

- Employers may not ask employees to disclose whether they have an underlying medical condition that the CDC has identified as high risk for COVID-19 complications. Even if the purpose is to protect vulnerable employees, such inquiries are impermissible. If an employee discloses that he is high risk, only then the employer can determine whether a reasonable accommodation is appropriate.

- Employers cannot require an employee to get a COVID-19 antibody test, and once a vaccine is developed, they probably cannot require all employees to be vaccinated. The rules on vaccines will probably follow the guidance on flu shots and have exceptions for disabilities, underlying medical conditions, and religious objections.

Employers must remain diligent to not selectively apply measures and protocols to members of certain protected classes or allow disparate treatment of employees in light of federal anti-discrimination statutes. For example, there has been much discussion about older faculty and pregnant school employees being high risk for COVID-related complications. Regardless, employers (school boards and otherwise) must wait for those employees to seek accommodations or leave based on their individual circumstances rather than making assumptions or preemptive reassignments for those employees.

C. COVID-19-Related Requests For Accommodations

A short-term illness (i.e., the flu) does not constitute a disability under the ADA. We are seeing, however, that COVID-19 can result in lasting effects that may “substantially limit or impair an individual’s major life activities” and thus could trigger the ADA. Whether a COVID-19 infection amounts to a disability will depend on the length, severity, and physical effects that the illness has on the individual, and whether as a result, the individual suffers a physical or mental impairment that substantially limits one or more major life activities.

1. A Refresher on the Interactive Process

If an employer receives a request for an ADA accommodation, whether or not related to COVID-19, they must engage in the interactive process in good faith.

Consider the following steps:

- Is the employee disabled? Under the ADA’s interactive process, the employer should discuss the employee’s limitations, requirements, and job responsibilities—focusing on the employee’s abilities and job duties. The employer can request documentation or input from a healthcare provider to substantiate the condition.
- Is the condition temporary or long term? The feasibility of a particular accommodation may depend on how long the accommodation will be necessary. An employee who needs a change in work hours for a few weeks may be easier to accommodate than an employee who needs a permanent change in work hours.
- What are the essential functions of the employee’s job? Remember that essential job duties need not be removed to provide a requested accommodation. Further, courts have held that only the employer, not the employee, gets to determine what job functions are essential. Because a job’s specific requirements will be examined closely, it is a good idea to regularly review and update job descriptions to fully reflect the current duties. Written job descriptions, along with statements from the employer, will

be considered as evidence of a job’s essential functions.

- Are there other options besides the particular accommodation being requested by the employee? For example, if telecommuting is the employee’s preference but is not a viable option, would moving the employee to another location at work, restructuring the job, or providing a modified work schedule solve the problem? Notably, even the *EEOC acknowledges* that an employer does not have to allow telecommuting if there are other reasonable, equally effective accommodations available, even if telecommuting is the employee’s preferred choice.
- Don’t forget to consider a transfer to a vacant job. If the employer can’t provide the requested accommodation, consider whether there may be a vacant position the employee can perform, with or without an accommodation. If there are no vacancies, the employer has no obligation to create one.

2. Accommodations for Preexisting Conditions

More employers are beginning to receive requests for preventative accommodations related to preexisting health conditions that render employees at high risk for COVID-19 complications. These employees are seeking a variety of accommodations, ranging from modified workspaces (i.e., moving from the front office to another, low-traffic location or the installing plexiglass barriers) to staggered schedules (to reduce

exposure to others) to virtual teaching assignments or telework, as discussed further below. As schools have reopened, some of these protective measures have been preemptively implemented to prevent outbreaks, so schools should look for ways to piggyback requested accommodations on measures that are already being implemented.

3. Accommodations from Personal Protective Equipment

Some employees have disabilities (physical or mental) that make wearing Personal Protective Equipment, such as a mask, impossible. Other employees have sought religious accommodations related to masks, claiming that it could interfere with other religious face coverings. If an employee seeks a reasonable accommodation from a mask requirement, it should be handled like any other accommodation request—engage in the interactive process in good faith.

4. Mental Health-Related Accommodations

Beyond the widespread physical illness, the pandemic has ushered in an era of increased mental health concerns due to isolation, uncertainty, gaps in childcare, and significant economic strain on households. Consequently, employers are seeing increased requests for accommodations related to mental health concerns. Beyond 2020, we anticipate that ADA accommodations related to mental health will continue to increase, and it is worth a refresher on this topic generally.

If an employer is reading this and thinking “that won’t happen to me—all of my staff is well-adjusted,” they should think again.

The experts tell us that, prior to the pandemic, *one in five adults* was living with a mental illness, and *18 percent of adults* in the U.S. suffer from an anxiety disorder. Therefore, if an employer has yet to have an employee disclose a mental disability, it is probably just a matter of time. Once an employee says she is suffering a mental disability and needs an accommodation, the employer should engage in the interactive process in good faith as they would with any other disability.

5. Telework as an Accommodation

Teleworking has likely been the most widely-sought accommodation during the pandemic. In spring 2020, schools closed altogether and implemented virtual learning. Many offices also closed and facilitated a remote work setup for many employees at a level the economy had not previously seen.

Even as the economy and schools have slowly reopened, we have seen and expect to continue seeing an increase in requests for telework as an accommodation, not only given the pandemic, but also given the new perception that it is possible to telework for jobs where this had not previously been permitted or even envisioned.

For this reason, telework as a possible accommodation deserves special attention. School jobs, like most jobs, have historically involved attendance and teamwork as essential functions, which make teleworking challenging. More employers have allowed telework in light of the pandemic, however, and most employees have welcomed the opportunity. This is an issue that continues to gain traction, and employers need to keep

an eye on it, even after the pandemic is behind us.

Regardless of whether the employer offered a remote work setup to all (or almost all) employees in the spring, the employer should realistically examine whether a telework accommodation actually works for a particular employee. Are physical presence, in-person communication, and teamwork essential functions of the job? Does the employee have the technological infrastructure at home (computer, dependable Internet access, printer, etc.) to do the job? Does the employer have the Internet technology capabilities and resources to make the arrangement viable? How about work-related travel for the employee? Are there confidentiality concerns if the employee's job requires the handling of sensitive or proprietary information outside the workplace?

Whether physical presence is an essential requirement of the position—a *fundamental duty as opposed to a marginal duty*—will be a critical determination. Remember that an employer does not have to remove any essential job duty to allow an employee to work at home. Further, courts have held that only the employer—not the employee—gets to determine what job functions are essential.⁷

Employers should carefully assess whether teleworking resolves the workplace issue and if it is the only accommodation available, or there are other reasonable and equally effective accommodations. If working from home is the only possible reasonable accommodation, the employer will have to determine whether physical presence in the workplace is an essential function of the job. If telecommuting is not a viable accommodation,

the employer should consider whether there is a vacant position the employee can perform, with or without an accommodation.

Although teleworking may not be possible in the employee's current position, consider whether there may be vacancies (even at lower pay) that would permit it.

B. Association with a Disabled Individual

One last point to remember is that employers cannot discriminate against someone because of their association with someone with a disability. Throughout the pandemic, employers have dealt with numerous employees who have said they cannot come back to work because their spouse or child is immuno-compromised and a doctor has directed the employees to stay at home for the family member's sake. While an employer may offer to accommodate the employee, there is no requirement under the ADA to accommodate an employee based solely on the disability of a family member.

Conclusion

The word “unprecedented” keeps popping up in discussions surrounding employee management during the pandemic for a reason—we've never been here before. While understanding the various legal requirements must be the first step, it is also imperative that employers be as flexible as possible during this time. Also, everything should be documented so if there is a challenge, there will be a record of the decisionmaker's rationale. Nobody is going to get this exactly right, but the ability to work with employees, get creative with solutions, and document that

process is critical—not just to a school system's day-to-day operations but also to limiting liability in the process. ▲

Endnotes

1. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2006).
2. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2013).
3. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 281 (2020).
4. Most private employers are eligible for tax credits to offset the cost of leave provided under the FFCRA. Public entities, including school boards, are not.
5. See <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.
6. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
7. See, e.g., *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000) (citing 42 U.S.C. § 12111(8)).

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FUNDAMENTALS OF SPECIAL EDUCATION LAW:
**Legal Requirements for Serving
 Students with Disabilities in
 Public Schools**

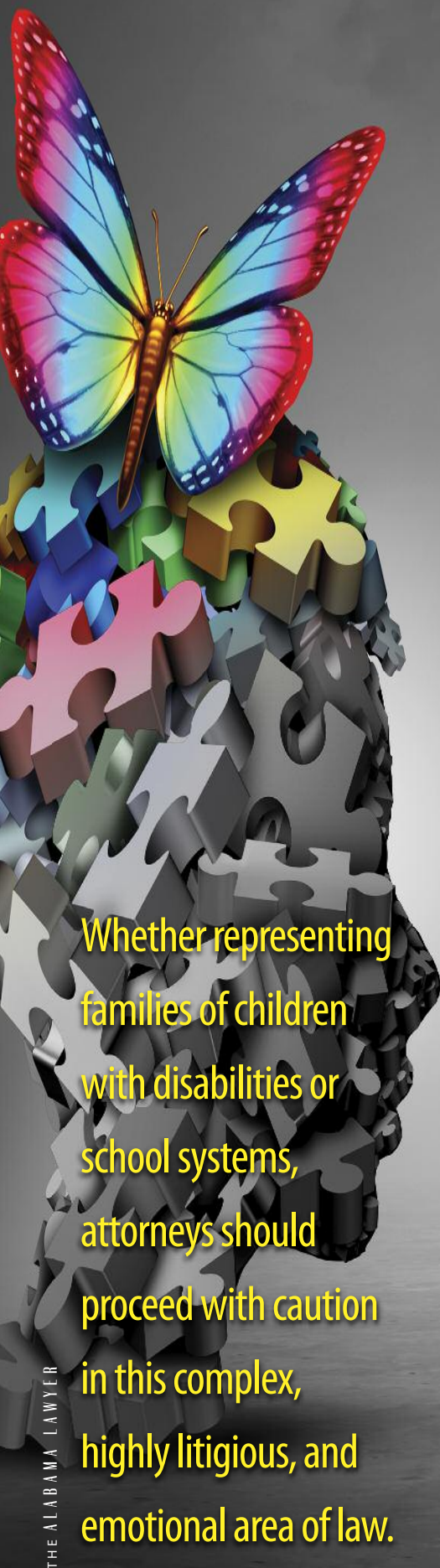
By Leslie A. Allen and Erika Perrone Tatum

**Special education law is a
 specialized practice area**

involving the educational rights of students with disabilities in public schools and the legal requirements for educating these students. This article provides an overview of the rights and requirements for lawyers who may not routinely practice special education law.

Parents in special education matters require both an advocate and

an objective advisor to help them navigate both the procedures required to develop and implement a child's educational program and the legal process if disputes with the school system arise. Unfortunately, lawyers representing these families may find that some of the very legal protections designed to include parents as important, equal participants in the special education process can instead leave them feeling overwhelmed, "left out," or even "ganged up on." The many



Whether representing families of children with disabilities or school systems, attorneys should proceed with caution in this complex, highly litigious, and emotional area of law.

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acronyms and technical terminology of special education law, often second nature to educators, may confuse parents. And parents, justifiably, are emotionally invested in ensuring their child receives the educational services that parents believe the child needs.

On the other hand, lawyers representing school systems may have clients who feel the deck is stacked against them in special education cases. School districts must meet extensive legal requirements and obligations, while parents are vested with a multitude of legal rights and entitlements. It is difficult for school systems to “get it right” all the time for all students, despite their best efforts. Like parents, educators are also emotionally invested and can feel personally attacked if a child’s educational services and progress are challenged.

Whether representing families of children with disabilities or school systems, attorneys should proceed with caution in this complex, highly litigious, and emotional area of law. It is a different animal from most other areas of civil practice, and the laws surrounding it are not always intuitive.

Overview of Federal Laws Governing the Education of Students with Disabilities

Special education lawyers must know—and understand the interplay of—the federal laws and regulations

designed to ensure that students with disabilities receive educational services which are reasonably calculated to help them make appropriate progress.

The primary laws governing the educational programs for and the educational rights of public school students with disabilities include:

The Individuals with Disabilities Education Act (“IDEA”)¹

The IDEA is the primary vehicle for the provision of special education and related services to students with disabilities. It is an amended version of a federal law passed in 1975, originally known as the Education for All Handicapped Children Act. Part B of IDEA is applicable to preschool, elementary, and secondary schools and contains provisions for educating children with disabilities between ages three and 21.

IDEA establishes the minimum requirements schools must satisfy in educational programs for students with disabilities in order to receive federal funding. States may exceed IDEA requirements by providing additional services, but cannot offer fewer services or have regulations or practices contradicting IDEA standards. In Alabama, the State Department of Education has established rules and regulations in the Alabama Administrative Code (“AAC”)² implementing IDEA.

The cornerstone of IDEA is the school district’s obligation to provide a free appropriate public education (“FAPE”) to students with disabilities, documented in an Individualized Education Program (“IEP”)³ and determined by a team of school staff and a child’s parents (“IEP Team”). Contrary to

stereotypes, special education students do not receive their services segregated from the general student population. Rather, IDEA ensures that each child with a disability has access to a collection of supports and services in the least restrictive environment appropriate for the child's individual needs.

Section 504 of the Rehabilitation Act of 1973 ("Section 504")⁴

Section 504 prohibits discrimination against a person with a disability by an agency receiving federal funds, which includes school districts. Enforced by the Office for Civil Rights ("OCR") within the U.S. Department of Education, Section 504 is intended to provide equal access and opportunity for students with disabilities to the same degree afforded students without disabilities. Students who are not eligible for special education and related services under IDEA nevertheless are entitled to protection against disability discrimination if they meet Section 504's broader definition of a "disability."⁵ Additionally, a 504 student may receive accommodations and related services documented in a 504 Plan, if the student needs those in order to have his/her educational needs met as adequately as the needs of students without disabilities are met.

The Americans with Disabilities Act ("ADA")⁶

The ADA was enacted to protect people with disabilities from discrimination in the workplace and the community generally. It is enforced by the U.S. Department of Justice ("DOJ") and it protects against disability discrimination in places of public accommodations

and in the provision of state and local government services, including public education. The ADA is generally considered the "sister statute" of Section 504 because OCR takes the position that the ADA's educational requirements also apply under Section 504. ADA claims are typically brought in tandem with claims under Section 504, with the same relief available.

Principal IDEA Concepts and Definitions

An understanding of key concepts and definitions in Part B of IDEA is crucial for an attorney practicing special education law. Some of the most important are:

"FAPE" is a term of art meaning a free appropriate public education. Every child with a disability under IDEA is entitled to FAPE, which is defined as special education and related services that:

- Are provided at public expense, under public supervision and direction and without charge to the parents (excluding incidental fees normally charged to nondisabled students or their parents as part of the regular education program);
- Meet state standards, as determined by the state department of education;
- Include an appropriate pre-school, elementary school, or secondary school education in the state; and
- Are provided in conformity with the student's IEP.⁷

"Special education" is defined generally as specially designed instruction at no cost to parents, to meet the unique needs of a child with a disability. Instruction may be conducted in the classroom, home, hospitals and institutions, and other settings, and instruction in physical education.⁸

"Specially designed instruction" means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to:

- Address the unique needs of the child resulting from the disability; and
- Ensure access of the child to the general curriculum, for the child to meet the same educational standards of the school district that apply to all children.⁹

A cornerstone of IDEA's FAPE requirement, specially designed instruction generally involves intensive, structured, appropriately paced instruction provided in small groups, with frequent monitoring of each student's progress.¹⁰

The term "related services" includes a lengthy, non-exhaustive list of support services a child's IEP Team decides are needed to assist the child in benefitting from special education. More specifically, "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and it includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation,

early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. “Related services” also include school health services and school nurse services, social work services in schools, and parent counseling and training. The term does not include a medical device surgically implanted, or the replacement of such device.¹¹

The Supreme Court’s Seminal FAPE Cases

The Supreme Court’s first case to address IDEA’s FAPE standard

was *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The parents of a hearing-impaired child argued that IDEA’s FAPE standard required school districts to provide the best education possible to maximize the potential of children with disabilities. The child was performing well in the general education classroom with some accommodations and speech therapy. The *Rowley* Court rejected a maximization standard for FAPE, instead holding that school districts are required to provide an educational program with “some educational benefit.”

Subsequent federal courts gave various interpretations to *Rowley*’s “some educational benefit” standard, creating an apparent split in the circuit courts regarding how much benefit was required for FAPE. In 2017, the Supreme Court revisited *Rowley*’s FAPE standard in *Endrew F. v. Douglas County School District*, 137 S. Ct. 988 (2017). *Endrew F.* involved a child with deficits and needs more complex than the child in *Rowley*: he was described as having autism, attention deficit hyperactivity disorder (“ADHD”), exceedingly low cognitive skills, serious behavior problems, and pronounced sensory issues. Indeed, the child in *Endrew F.* had complicated, multi-faceted needs that educators are frequently charged with appropriately serving in today’s special education programs.

Prior to the Supreme Court’s review, the Tenth Circuit Court of Appeals affirmed a lower court’s ruling that the school district afforded FAPE to the student, applying an interpretation that required

“merely more than *de minimis* benefit” for FAPE. The Supreme Court unanimously rejected that standard as setting the FAPE bar too low, explaining that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.”¹² The Court clarified the FAPE standard from *Rowley*:

To meet its substantive obligation under IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress in light of the child’s circumstances.¹³

The Court declined to elaborate on what “appropriate” progress would look like from case to case, concluding that “[i]t is the nature of [IDEA] and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances for whom it was created.”¹⁴ Importantly, the Court also noted that “any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.”¹⁵ Thus, as in *Rowley*, the Court in *Endrew F.* rejected a maximization standard.¹⁶

When the Supreme Court granted *certiorari* in *Endrew F.*, special education lawyers, parents, and educators anticipated the case would finally resolve the question of how much educational benefit is required to satisfy IDEA’s FAPE requirement. Instead, *Endrew F.* created new language about which lawyers still argue, and FAPE litigation remains alive and well.

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Who is entitled to FAPE?

In general, IDEA’s FAPE requirement applies to an eligible “child with a disability,” defined as a child who meets the evaluative requirements for one of the statute’s specified disabilities and who, by reason of the disability, needs special education and related services. The disabilities covered under IDEA include intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), developmental delay, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities.¹⁷

The FAPE requirement also extends to students placed in private schools by the school system. Moreover, students with disabilities who are properly expelled or suspended long-term in accordance with IDEA’s discipline provisions remain entitled to FAPE, albeit under a modified standard.¹⁸

The “Child Find” Duty: Evaluations And Eligibility

IDEA’s Child Find duty refers to the obligation of school systems to develop and implement procedures to identify, locate, and evaluate children with disabilities who need special education and related services, regardless of the severity of the child’s disability, within the

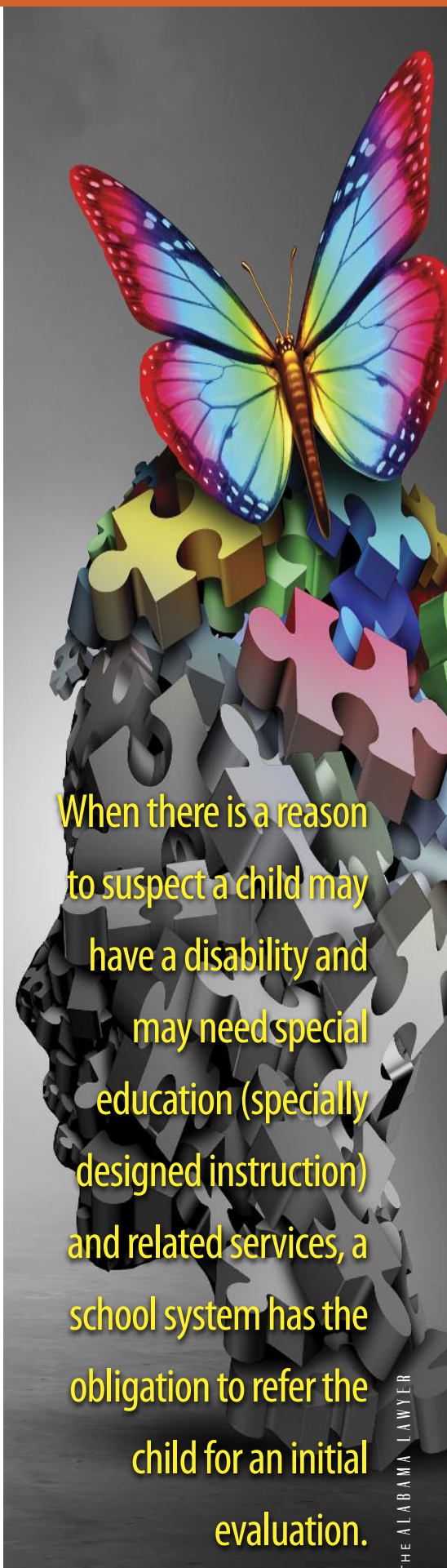
school system’s geographical boundaries.¹⁹

Child Find is an affirmative duty of school districts. When there is a reason to suspect a child may have a disability and may need special education (specially designed instruction) and related services, a school system has the obligation to refer the child for an initial evaluation. The fact that a parent has not requested an evaluation is not a defense to a Child Find claim.

An IDEA “evaluation” refers to the procedures to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.²⁰ If the duty to evaluate is triggered, the Child Find duty requires a comprehensive evaluation of a student in all suspected areas of need. Parents are not responsible for obtaining educationally relevant evaluations; that obligation rests solely with the school district. Nevertheless, the school district must receive parental consent to evaluate the child.

The initial evaluation must be completed within 60 days after a school system receives written parental consent. Once eligible for services, a child must be reevaluated at least once every three years, or more often if conditions warrant.²¹ Once the initial evaluation is complete, the IEP Team, including the parents, meets to determine eligibility. Importantly, a doctor’s diagnosis is not sufficient for IDEA eligibility.²² To be an eligible child with a disability under IDEA, a student must meet three criteria:

- The child must satisfy the evaluative components of at least one of the specified disabilities in IDEA;



When there is a reason to suspect a child may have a disability and may need special education (specially designed instruction) and related services, a school system has the obligation to refer the child for an initial evaluation.

- The disability must adversely affect educational performance; and
- The adverse effect must be to the degree that the child needs specially designed instruction.²³

The definition of “educational performance” in Alabama is broader than academic performance alone and means “academics, social/emotional, and/or communication skills.”²⁴

Individualized Educational Program

An IEP is a written statement for a child with a disability developed, reviewed, and revised pursuant to IDEA and its implementing regulations.²⁵ The IEP is the “center-piece,” “primary vehicle,” and “modus operandi” of IDEA’s education delivery system for children with disabilities.²⁶ In short, an IEP is the contract that obligates the school district to provide the student with FAPE by implementing the goals and services in the IEP.

Key IEP components include:

- Present levels of academic achievement and functional performance;
- Measurable goals;
- Special education, related services, and supplementary aids and services; and
- Participation in general education and activities.²⁷

IDEA mandates extensive procedural requirements pertaining to IEPs, including:

- Requirements for IEP Team members;²⁸
- Requirements pertaining to convening IEP meetings, occurring at least annually or more frequently if circumstances warrant and with notice to the parents; and
- Parent participation requirements.

Decisions pertaining to a child’s IEP must be made by the IEP Team, which must include the parents as a fundamental partner. IEP decisions occurring outside the IEP Team likely may result in a denial of FAPE in violation of IDEA.

Determining Whether the IEP Is Legally Appropriate

Although the questions of whether the school district has developed an appropriate IEP and implemented it in a consistent manner are central to IDEA compliance, the term “appropriate” is not defined in IDEA, its regulations, or the AAC. The 1982 *Rowley* decision established a two-pronged test for determining appropriateness:²⁹

- Has the school district complied with the IDEA’s procedural requirements?
- Is the IEP reasonably calculated to enable the child to receive educational benefits?

Notably, *Rowley* was not overruled by the Supreme Court’s *Endrew F.* decision. Rather, the

“some educational benefit” substantive piece of the FAPE standard—the second prong of the *Rowley* appropriateness test—was only clarified by the Court in *Endrew F.*

Both cases emphasize a fundamental tenet of IDEA: FAPE must be assessed based on the individual needs of the particular child. What may be a meaningful benefit/progress for one child may not be for another, depending on the nature and severity of the child’s disabilities and circumstances. Moreover, factors unrelated to a child’s individual needs, no matter how relevant as a practical matter, are not appropriate considerations when making IEP decisions. For example, the availability of programs or services within a district cannot be considered by the IEP Team when making educational decisions. As impossible as it may seem, an IEP Team must write an IEP “without regard to the availability of services.”³⁰ Likewise, costs and lack of personnel are not proper justifications for failing to provide services needed for FAPE.³¹

Dispute Resolution And Relief

IDEA’s extensive procedural safeguards include the availability of dispute resolution options: procedures for mediation, an administrative due process hearing (and subsequent judicial review via a civil action), and a state complaint with the state department of education.³² A parent or a school system can file a due process complaint “with respect to any

matter relating to the identification, evaluation, or educational placement of the child, or the provision of [FAPE]. . . .”³³ An individual or organization can file a state complaint regarding any violation of a requirement of Part B of the IDEA.³⁴ The mediation process is available for disputes, regardless of whether a complaint has been filed.³⁵

IDEA compliance is critically important because violations that deny FAPE impact the quality of a child’s educational program and, therefore, the child’s educational outcome. Additionally, IDEA grants courts and hearing officers broad discretion to order relief deemed appropriate.³⁶ Common remedies for IDEA violations by school systems are detailed below.

“Appropriate relief” under the IDEA includes compensatory education “as an equitable remedy to be granted upon finding that a child has been denied FAPE.”³⁷ Compensatory education addresses an eligible student’s entitlement to services that should have been provided by the school system in the past. The form or amount of a compensatory education award requires a case-by-case determination, but, when ordered, is provided in addition to a student’s IEP services.

Reimbursement of private school tuition costs can be awarded if parents prove that the school district failed to offer FAPE and private school placement was appropriate.³⁸ IDEA permits reimbursement to be limited or denied, however, if parents fail to provide notice of the student’s private school enrollment in a timely manner, fail to make the student available for an evaluation, or act unreasonably in

the course of the IEP’s development.³⁹ Lawyers must carefully research these requirements if advising a parent who is withdrawing a student from public school for a private school placement and seeking reimbursement from the school system. Other reimbursement or prospective funding of private evaluations are additional relief available for IDEA violations.

Monetary damages are not generally considered an available remedy under IDEA by the majority of courts, and the Eleventh Circuit Court of Appeals has rejected monetary damages as a remedy.⁴⁰ Monetary damages may be awarded, however, under other federal statutes, such as Section 504 and/or the ADA for violations involving a school system’s intentional, willful or deliberately indifferent conduct or a pattern or practice of violations.

IDEA includes a fee-shifting provision allowing a prevailing parent of a child with a disability to recover reasonable attorney fees from the school district, subject to certain limitations.⁴¹ Consequently, settlements of special education matters may include payment of reasonable fees to the parent’s attorney.

Still, depending on the fee arrangement with the client, parents’ attorneys risk no payment for unsuccessful cases, requiring they carefully assess claims before filing. For a school system, the cost of paying its attorney to defend a dispute and the possibility of paying a prevailing parent’s attorney fees make this litigation potentially risky. Although special education services may be costly, a school district lawyer should assist systems in assessing potential costs



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THE ALABAMA LAWYER

and risks involved if denying those services is challenged in a hearing or in court. Attorneys representing school systems must also evaluate the strengths and weaknesses of a case early on (and continue analyzing as the case progresses to hearing) to properly advise the district and avoid potentially costly litigation and adverse decisions.

Although special education law is intense, it can be very gratifying to resolve differences between parents and school districts and ensure students with disabilities receive appropriate educational services. ▲

Endnotes

1. 20 U.S.C. § 1400 *et seq.*
2. Ala. Admin. Code Chapter 290-8-9.
3. IEPs will be discussed *infra*.
4. 29 U.S.C. § 794.
5. A Section 504 disability is a physical or mental impairment that substantially limits one or more major life activities. Although Section 504's regulations applicable to education use the outdated term "handicap," the statute uses the politically correct, person-first term, "disability."
6. 42 U.S.C. § 12101 *et seq.*
7. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.
8. 34 C.F.R. § 300.38(a)(1).
9. 34 C.F.R. § 300.38(a)(3).
10. Kauffman, J. M., & Hallahan, D. P. (2005). *Special education: What it is and why we need it*. Boston: Allyn & Bacon.
11. 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34.
12. *Andrew F., supra*.
13. *Andrew F., supra*.
14. *Andrew F., supra*.
15. *Andrew F., supra*.
16. The Supreme Court in *Andrew F.* did not actually decide whether Andrew received FAPE. Rather, the Court vacated and remanded the case for the lower courts to analyze the facts applying the clarified FAPE standard. On February 12, 2018, the district court re-visited the initial decision in favor of the school district and found that, in light of the Supreme Court's rejection of the "merely more than *de minimis*" standard, the school district had not provided Andrew with FAPE. *Andrew F. v. Douglas Co. Sch. Dist. RE-1*, 71 IDELR 144, 290 F. Supp.3d 1175 (D. Colo. 2018). In essence, the district court found that, while the "minimal progress" Andrew made in his educational program provided by the school district may have been sufficient under the Tenth Circuit's former standard, it was clearly not sufficient in light of the Supreme Court's new one.
17. 20 U.S.C. § 1401(3).

18. Discipline of students with disabilities is a broad, complex area of special education law that is beyond the scope of this article. Suffice it to say, Congress has chosen to maintain a dual-disciplinary system, providing different rules of discipline removals for students with disabilities than non-disabled students. Additionally, there are protections for IDEA students (and many of those protections also apply to students protected under section 504) and a technical, often confusing process that must be followed prior to a disciplinary "change of placement" for these students.
19. 20 U.S.C. § 1412(a)(3).
20. 34 C.F.R. § 300.15.
21. 42 U.S.C. § 1414(a)(2).
22. *See, e.g., Lauren C. v. Lewisville Indep. Sch. Dist.*, 70 IDELR 63 (E.D. Tex. 2017), *aff'd*, 72 IDELR 262, 904 F.3d 363 (5th Cir. 2018).
23. *See Durbrow v. Cobb Co. Sch. Dist.*, 72 IDELR 1, 887 F.3d 1182 (11th Cir. 2018).
24. AAC Rule 290-8-9.00(4).
25. 20 U.S.C. § 1401(14); 34 C.F.R. § 300.22.
26. *Rowley, supra*.
27. 34 C.F.R. § 300.320.
28. Under IDEA and the AAC, the school district must ensure that the IEP team for each child with a disability includes (1) the parents of the child (must be invited); (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or if appropriate, at least one special education provider of the child; (4) a representative of the public agency who (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general curriculum; (iii) is knowledgeable about the availability of resources of the public agency; and (iv) has the authority to commit agency resources and be able to ensure that IEP services will be provided; (5) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team already described; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) if the purpose of the meeting is to address post-secondary transition goals or services, the child (must be invited). *See Ala. Admin. Code R. 290-8-9.05(3)*. Several courts have found a denial of FAPE based on a process mistake, where all mandatory members were not present at an IEP meeting.
29. *Rowley, supra*.
30. *LeConte*, 211 EHLR 146 (OSEP 1979).
31. *Letter to Anonymous*, 30 IDELR 705 (OSEP 1998).
32. 20 U.S.C. § 1415(b)(5)-(8), 34 C.F.R. § 300.151.
33. 20 U.S.C. § 1415(b)(6)(A).
34. 34 C.F.R. § 300.153(b)(1).
35. 20 U.S.C. § 1415(e)(1).
36. 34 C.F.R. § 300.516(c)(3).
37. *See, e.g., Diatta v. District of Columbia*, 41 IDELR 124, 319 F. Supp. 2d 57 (D.D.C. 2004).
38. 34 C.F.R. § 300.148(c).

39. 34 C.F.R. § 300.148(d).
40. *Ortega v. Bibb County Sch. Dist.*, 42 IDELR 200, 397 F.3d 1321 (11th Cir. 2005).
41. 34 C.F.R. § 300.517(a)(1)(i).

Leslie A. Allen



Leslie Allen is a partner in the Birmingham office of Resolutions in Special Education, Inc., also known as "RISE," founded by Julie J. Weatherly. She graduated from the University of Alabama and Georgetown University Law Center in Washington, D.C. and is admitted to practice in Alabama and Georgia state and federal courts, as well as before the United States Supreme Court. Her practice is focused exclusively on representing and advising public school districts and other education agencies in special education law matters, and she is also the parent of a child with a disability.

Erika Perrone Tatum



Erika Perrone Tatum is a graduate of Florida State University and Cumberland School of Law and licensed in Alabama and Georgia. She is a shareholder at Hill, Hill, Carter, Franco, Cole & Black in Montgomery where she represents boards of education throughout the state on issues related to students with disabilities. She practices extensively in all aspects of the Individuals with Disabilities Education Improvement Act, Section 504 of the Rehabilitation Act, and the Family Educational Rights and Privacy Act. In addition to providing legal opinions and litigation services to boards of education, she conducts seminars and training, consults with special education directors and Section 504 coordinators, attends IEP and Section 504 meetings, and handles investigations conducted by the Office for Civil Rights and Alabama State Department of Education.

For example, what if a dean of a major university and the university parted company after stories about alleged comments made by the dean were published in the national media? Assume that the matter did not devolve into litigation, but, instead, was negotiated by the parties. Also assume that the separation agreement gave the dean received a substantial (six-figure) structured set of payments. Finally, assume that the parties agreed to the following NDO:

The dean further agrees that he will not directly or indirectly make, communicate, post, or otherwise publish any disparaging, degrading, critical, or otherwise negative remark, comment, opinion, or statement regarding any of the Released Entities, unless compelled to do so by a court of competent jurisdiction.

As NDOs go, this one is more robust than many which say no more than, “The parties shall not disparage one another.”

Still, there are many gaps that it would have been helpful to fill with this NDO:

- Is the dean restricted from “communicating” complete, truthful, and widely known information about the university?
- What recourse does the dean have to seek judicial clarification of this NDO without arguably violating the NDO?
- What recourse does the university have to seek judicial enforcement of the NDO without making things worse? What if the court

Instead, potential litigants seeking to clarify or enforce an NDO are like the hungry driver who goes to the drive-in window and is only allowed to say, “Give me what you got.”

holds that sealing the pleadings is not appropriate given the press coverage associated with the separation of the dean and the university.

- Is the dean restricted from speaking negatively about the university to law enforcement or regulators?
- If the dean inadvertently violates the NDO, what are his defenses or opportunities for a cure? Indeed, what is his incentive to do effect a cure?

None of these questions are answered by the Alabama law. Instead, potential litigants seeking to clarify or enforce an NDO are like the hungry driver who goes to the drive-in window and is only allowed to say, “Give me what you got.”

There have been multiple high-profile stories around the nation about poorly or maliciously crafted NDOs:

- For years, a medical technology company allegedly

concealed from law enforcement, regulators, investors, and the public the fact that the company could not deliver on its representation that it had the technology to perform a full blood scan from a single drop of blood. After billions of dollars of lost investment dollars and a *Wall Street Journal* exposé (and later best-selling book), the medical technology company allegedly used contractual obligations to silence current and former employees.

- A former executive allegedly caused disruption in his former employer’s efforts to take the company public by claiming that the company disfavored subscribers from a “poor” country. The company tried to enforce its NDO in court only to find that the judge would not keep the pleadings under seal. Instead of stopping the alleged disparagement, the enforcement action only amplified it.
- Increasingly, regulators are viewing NDOs as being used to impair regulatory enforcement. For example, the Securities Exchange Commission has imposed enforcement penalties of \$130,000, \$265,000, and \$180,000 for NDOs that the SEC deemed allegedly discourage whistle blowers—even though there were no specific instances cited where this actually happened. <https://abovethelaw.com/2017/04/the-sec-doesnt-like-your-employment>

-agreements/; https://sec whistleblowerinformation.com/sec-whistleblower-protections/sec-whistleblower-protection-rules/impeding-sec-whistleblowers/; https://www.jdsupra.com/legalnews/non-disparagement-clauses-in-cross-35572/

NDOs are a vital part of the exercise of contractual parties disentangling from one another. An NDO that has a clear contractual (or as this article advocates, a statutory) scope could go a long way to keeping the parties from stumbling into a follow-on dispute while at the same time making it clear that NDOs are not meant to impede regulators, law enforcement, the courts, or a confidential, privileged communication. Some states have sought to address these issues with “transparency” statutes. So far, two states have passed such “transparency” statutes (and others are considering such statutes):

- Illinois (“Workplace Transparency Act”) (<http://ilga.gov/legislation/fulltext.asp?DocNum=1829&DocTypeID=SB&GAID=11&SessionID=84>) (Defines disparagement as any “negative statement,” makes prior NDOs voidable, and imposes sexual harassment reporting and training requirements).
- Oregon (“Workplace Fairness Act”) (Limits confidentiality in sexual harassment (and other) settlement agreements; extends the statute of limitation for harassment claims, and requires a written policy about how the employer will address claims of

harassment; also, NDOs are only permitted in harassment settlement claims if the employee “asks” for it.) <https://www.littler.com/publication-press/publication/oregons-new-workplace-fairness-act-limits-use-nondisclosure-agreements>

In 2018, the Alabama Law Institute (“ALI”) began looking at Alabama’s law on NDOs. Although the ALI has been in existence for

An NDO that has a clear contractual (or as this article advocates, a statutory) scope could go a long way to keeping the parties from stumbling into a follow-on dispute while at the same time making it clear that NDOs are not meant to impede regulators, law enforcement, the courts, or a confidential, privileged communication.

over 50 years, some Alabama lawyers are not aware of the extensive work sponsored by the ALI. It was created by the Alabama legislature in 1967 with a purpose “to clarify and simplify the laws of Alabama, to revise laws that are out-of-date and to fill in gaps in the law where there exists legal confusion.” The ALI is now the Law Revision Division of the Legislative Services Agency (“LSA”). The ALI works closely with the legal division of LSA in the yearly placing of acts passed by the legislature within the Code of Alabama for proper placement and codification. The legal division prepares the vast majority of bills for each session for the legislature; however, major code revision work, such as revisions of an entire section of law, are handled by the ALI. The ALI has, over its history, shepherded more than 100 projects from consideration to passage starting with Alabama’s adoption of its first comprehensive criminal code. Recent projects by the ALI include the replacement of the Alabama Limited Liability Company Law and the Business Corporation Act.

The ALI receives project recommendations from members of the legislature, state government, the judiciary, and the Alabama State Bar. The ALI also may initiate the study itself when revisions are needed. The membership of the ALI is limited to a maximum of 150 members of the Alabama State Bar elected for fixed terms; the judges of the Alabama Supreme Court, courts of appeals, and circuit courts; federal judges domiciled in Alabama; full-time law faculty members of Cumberland Law School and the University of Alabama School of Law; and all lawyer members of the legislature licensed to practice in Alabama. The ALI is governed by a

council comprised of six practicing lawyers elected from each congressional district as well as a number of ex officio members representing the legislature, judiciary, the bar, and the state's law schools.

The ALI has a set process for considering new projects and drafting proposed legislation. The ALI first considers suggestions from legislators, judges, practicing attorneys, and others on inconsistencies in current law and opportunities for improvement. The director of the ALI then submits these suggestions to the council (the ALI's governing board), which selects a limited number of suggestions to pursue as projects.

The council then selects an advisory committee composed of experts on the subject to be responsible for drafting the proposed act or revision or determining that no such change is necessary. The advisory committee leadership begins the drafting process by preparing a draft of the proposed legislation and presenting this draft with commentary to the full advisory committee for comments, criticisms, and revisions. The advisory committee considers each section of the draft individually and makes such changes as it deems appropriate before approving a final draft, which is submitted to the ALI council.

In 2018 and the beginning of 2019, the ALI vetted the NDO project in the manner set forth above. In early 2019, the ALI commissioned a group of Alabama lawyers to study this issue ("ALI NDO Committee"). Once the project was approved, the ALI NDO Committee was formed comprising practitioners (and a judge) from various counties around the state with a balance of plaintiffs and defense lawyers. After months of study and

meetings, this ALI committee produced a draft act. (Some of the authors of this article are some of the members of this ALI NDO Committee.) In addition to addressing the concerns outlined above, the ALI NDO Committee wanted it to be clear that the proposed act would only define contractual obligations and would not be a new tort cause of action.

It was important to the ALI NDO Committee that NDOs be more than a "hurt feelings" act. To that end, an enforcement action under the ALI NDO Act has to include the following elements:

- 1) An NDO must be expressly created by a signed contract supported by adequate consideration,
- 2) An objectively injurious statement is made in a manner prohibited by the contract and, based upon objective facts, is reasonably expected to cause harm, and
- 3) The objectively injurious statement results in specific loss to the plaintiff.

An *injurious statement* is one that falsely discredits another, discredits another by disclosing truthful but private or proprietary information, or is knowingly or recklessly made by a party with information that it is false or unreasonably incomplete and likely to cause specific loss.

Also included in the act is a protocol for initial filings to be under seal along with guidance to the court about the circumstances under which the seal is to be lifted or kept in place; notices that remind the parties that the NDO will not be used to impair regulators, law enforcement, the judicial process, or confidential privileged communications;

an incentive to meaningfully cure a violation of the NDO; and the opportunity for parties to create their own NDO if the statutory framework is not to their liking.

The ALI NDO Act was introduced in the 2020 session as SB170 and HB 206. The ALI NDO Act received comments from interested parties that were incorporated into the language of the legislation. Unfortunately, the COVID-19 crisis derailed the act (along with much else). The agenda for the 2020 legislative session changed, but the need for an NDO Act did not.

To answer the question posed by the title of this article ("Why Alabama Needs a Non-Disclosure Obligation Act), here is the answer: Parties need to know what they are getting with an NDO without fear of being accused of being involved in a cover-up. Parties need the ability to seek judicial enforcement or clarification of NDOs without making things worse. Finally, parties need a third option (a meaningful cure) so that they are not confronted with expensive litigation or suffering in silence as their only option.

It is time for parties to an NDO to have greater certainty about NDOs and to end the current practice of having to go to the court and say, "Give me what you got." ▲

Will Hill Tankersley



Will Hill Tankersley is a partner at the Montgomery office of Balch & Bingham LLP and a member of the Alabama Law Institute. He co-wrote this article with

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NOTICE

DISCIPLINARY NOTICES

- ▲ Reinstatement
- ▲ Transfer to Inactive Status
- ▲ Disbarments
- ▲ Suspensions
- ▲ Public Reprimand

Reinstatement

- On July 22, 2020, the Alabama Supreme Court entered an order reinstating former Mobile attorney **Michael Bruce Smith** to the practice of law in Alabama, with conditions, based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar. Smith had been on inactive status since December 1, 2014. [Pet. No. 2019-1456]

Transfer to Inactive Status

- Montgomery attorney **Elizabeth Vickers Addison** was transferred to inactive status, effective February 25, 2020, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the February 25, 2020 order of Panel III of the Disciplinary Board of the Alabama State Bar in response to Addison's petition submitted to the Office of General Counsel requesting she be transferred to inactive status. [Rule 27(c), Pet. No. 2020-291]

Disbarments

- Birmingham attorney **Charles Todd Henderson** was disbarred from the practice of law in Alabama by order of the Alabama Supreme Court, effective July 15, 2020. The Alabama Supreme Court entered its order based on the Disciplinary Board's order accepting Henderson's consent to disbarment, in which Henderson had pending formal charges in ASB No. 2016-666. Additionally, Henderson was convicted of perjury in the first degree in the Jefferson County Circuit Court. [Rule 23(a), Pet. No. 2020-639; ASB No. 2016-666]
- Birmingham attorney **Edward Eugene May** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective July 15, 2020. The Supreme Court of Alabama entered its order following affirmance of an appeal filed by May to the Supreme Court of Alabama. The Supreme Court of Alabama's order affirmed the Disciplinary Board's order of disbarment filed on April 11, 2019, finding May guilty of violating Rules 5.5 [Unauthorized Practice of Law] and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. May had previously been suspended from the practice of law in Alabama in April 2018 for 91 days by the Supreme Court of Alabama for repeatedly violating the terms of his probation in another disciplinary matter. While suspended, May appeared on behalf of a client before the Alabama State Board of Medical Examiners and filed legal pleadings on his client's

(Continued from page 449)

behalf with the Board of Medical Examiners. Additionally, in August 2018, May also appeared on behalf of another client for an examination under oath of the client by a representative of American Resources Insurance Company for an incident relating to arson of the client's restaurant. During the transcribed interview with the representative, the client indicated May was representing him on related criminal charges. At no time did May disclose he was suspended from the practice of law. [ASB No. 2018-903]

- Opelika attorney **Wanda Marler Rabren** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective July 15, 2020. The Supreme Court of Alabama entered its order based on the order of the Disciplinary Commission of the Alabama State Bar, disbaring Rabren after she was convicted on November 1, 2019 for unlawful distribution of a controlled substance and promoting prison contraband III. Rabren attempted to smuggle suboxone strips, an opioid, to her

son while he was incarcerated at the Covington County Jail. [Rule 22, Pet. No. 2020-151; ASB No. 2017-1392]

Suspensions

- The Alabama Supreme Court issued an order suspending McCalla attorney **Cynthia Vines Butler** from the practice of law in Alabama for 91 days, effective July 20, 2020. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order, wherein Butler admitted to violating Rules 1.5 [Fees], 1.7 [Conflict of Interest: General Rule], 1.8 [Conflict of Interest: Prohibited Transactions], 1.15 [Safekeeping Property], and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. Butler represented a client in matters relating to a wrongful death case and an estate. Butler was named as trustee and given sole discretion to determine how much of the net income and principal of the trust to distribute to her client. A total of \$1,007,443.63 was collected and placed into trust. Butler opened a bank account for the trust, and all monies were deposited into the trust. However, Butler failed to immediately remove her earned fees from the account. Butler had the client open a personal account at the same bank so that the distributions from the trust could be transferred directly into the client's personal account. Butler was placed on the account as a joint owner with rights of survivorship. Butler distributed approximately \$33,000 from the trust into the client's personal bank account. Butler inadvertently used the majority of the funds to pay personal credit cards and/or make payments on her behalf. While acting as trustee, Butler collected an excess fee of approximately \$42,610.04. Butler later repaid a portion of the excess fees. Additionally, Butler failed to maintain all trust account records, as required by Rule 1.15 [Safekeeping Property], Alabama Rules of Professional Conduct. Butler is required to repay \$13,000 to the trust and complete the Practice Management Assistance Program. [ASB No. 2018-1154]
- Arab attorney **Mark Edgar Johnson** was summarily suspended pursuant to Rule 20a, Ala. R. Disc. P., from the practice of law in Alabama by the Supreme Court of Alabama, effective July 8, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Johnson be summarily suspended for failing to respond to requests for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2020-717]
- The Alabama Supreme Court issued an order suspending Clanton attorney **Angie Avery Mayfield** from the practice

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of law in Alabama for 91 days, effective August 6, 2020. The Alabama Supreme Court entered its order based on Mayfield's consent to the revocation of her probation. On October 30, 2018, the Disciplinary Commission ordered that Mayfield be suspended from the practice of law in Alabama for 91 days, with the suspension to be held in abeyance. Mayfield was placed on a two-year probationary period, effective October 30, 2018. On January 21, 2020, the Office of General Counsel filed a petition to revoke probation, requesting the Disciplinary Commission revoke Mayfield's probation. The bar's petition to revoke probation was based on Mayfield violating the terms of her probation by committing additional violations of the Alabama Rules of Professional Conduct. On July 7, 2020, Mayfield consented to the revocation of her probation. The Disciplinary Commission subsequently issued an order on July 7, 2020, revoking Mayfield's probation and imposing the 91-day suspension. [ASB No. 2018-780]

- Haleyville attorney **Jerry Dean Roberson** was intermily suspended from the practice of law in Alabama pursuant to Rules 8(c) and 20(a), Ala. R. Disc. P., by order of the Disciplinary Commission of the Alabama State Bar, effective July 15, 2020. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel. Since April 16, 2019, Roberson has been ordered held in contempt at least seven times by both circuit and district courts in Winston County. The most recent contempt order entered against Roberson, issued on February 20, 2020, ordered Roberson incarcerated in the Winston County jail for five days. The court made the determination that Roberson submitted, for the second time, a forged, altered, or fraudulent document to the court in an effort to secure the release of a client from Winston County jail. [Rule 20(a), Pet. No. 2020-311]

Public Reprimand

- A former Mobile attorney was issued a public reprimand without general publication on August 11, 2020, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 5.3 [Responsibilities Regarding Nonlawyer Assistants] and 5.4 [Profession Independence of a Lawyer], Alabama Rules of Professional Conduct. The attorney failed to properly supervise a non-lawyer employee of his law group, which was formerly located in Mobile, after he moved to Ohio. In doing so, the attorney failed to make reasonable efforts to ensure that the non-lawyer employee's conduct was compatible with the professional obligations of a lawyer. In addition, the attorney improperly shared legal fees with the non-lawyer employee. [ASB No. 2018-798] ▲

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The Study of Effectiveness And Efficiency in State Government

The right services, to the right people, in the right way, at the right time. This is the mantra of the critical review of one of Alabama's newest state entities: the Alabama Commission on the Evaluation of Services ("ACES"). This innovative group is tasked with looking at services provided across state government and seeking to answer these questions. The key is what types of outcomes are we getting, and are we getting them efficiently and effectively?

Background and History

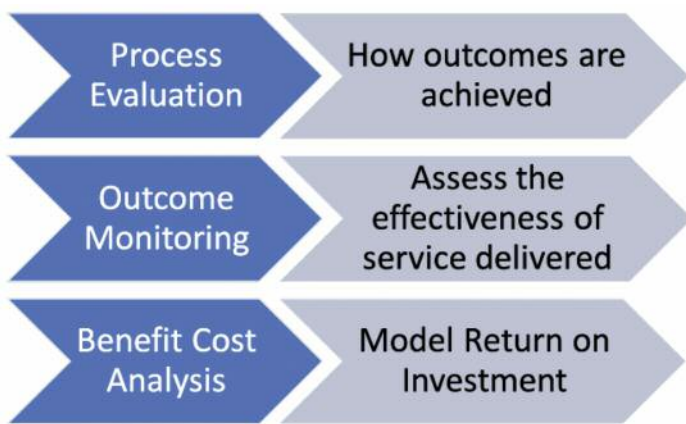
The effort culminating in the creation of ACES through Act 2019-517 was borne out of the state budget struggles of 2015 and 2016. Fiscal leaders in the legislature were seeking more and better information to inform what were very difficult budget decisions. The truth is that prioritizing spending decisions across a very broad array of different services provided across state government can be a daunting task. The goal was to try and identify a process to look at those services and their delivery, and come up with a replicable review process that measures the efficiency and effectiveness of the work being done.

The Legislative Services Agency undertook the task at first by shepherding a pilot project with the help of outside consultants to do a deep dive on the work of the Alabama Department of Public Health. That project generated a wealth of information that was helpful and interesting, but the process itself proved to be more cumbersome and strenuous than was likely to be replicated across a spectrum of agencies in a realistic time frame.

What was borne out of the ADPH pilot project though was a dedicated team of professionals within LSA: the Alabama Support Team for Evidence-Based Practices ("ASTEP"). This team was tasked with focusing on where and how evidence-based practices are used, inventorying those practices, and looking for how to improve outcomes using better practices. A strategic partnership with the Pew-MacArthur Results First Initiative ("RFI") was a critical step in this process. Over the course of the next couple of years, ASTEP did tremendous work in creating a program inventory of services across state government culminating in a report on the effectiveness of 52 mental health programs.

During the 2019 legislative session, it was time to stand up this group as an independent agency working as a partnership between the legislative and executive branches of government. Thus, the passage of Act 2019-541, sponsored by Senator Arthur Orr and Representative Rich Wingo. While many states use an evidence-based framework, the Alabama approach is unique in that it is envisioned as a true partnership between the executive and legislative branches. The act created a 14-person commission comprised of six legislators and six gubernatorial appointees along with the state finance director and LSA-fiscal deputy director as non-voting members. The chair of the commission is Senator Arthur Orr, the vice-chair is Liz Filmore, deputy chief of staff to Governor Kay Ivey, and the director is Marcus Morgan.

The Work of the Commission



Strategic evaluation is a systematic approach to looking at programs and services from multiple perspectives. The importance of strategic evaluation rests in the ability to identify the efficiencies and effectiveness of achieving a desired outcome. This type of evaluation allows for performance benchmarking, measuring performance across time and jurisdiction, analyzing results, and taking action to improve the results.

The first step is conducting a service assessment. During a service assessment a detailed inventory of services is built with specific service-level data attributed to the targeted outcomes. The inventory is organized by policy area, outcome, and target population and is matched to the best available evidence.

In order to assess whether a service is effective, one must first determine its intended purpose. Process evaluation provides service information related to who, what, when, where, and why questions. The results of a process evaluation will allow better reporting on the service, comparing the service to similarly situated services, and provide information that can be used to improve future activities and inform further evaluations through outcome monitoring and benefit-cost analysis.

Once a service's intended purpose is defined, there is a need to measure a service's performance against the established quality standards and outcome benchmarks. This includes comparing results across time and jurisdiction, analyzing efficiencies and effectiveness, and performing periodic reviews of

similarly situated services. Outcome monitoring and oversight help ensure that services are efficiently meeting their purpose.

The Pew-MacArthur RFI and Model provides ACES with a resource to help determine the economic benefits of a service versus its delivery cost. By leveraging high quality research studies, the tool also helps to estimate the impact of various programs using Alabama specific economic attributes.

While the return on investment in and of itself is very rarely a sole determinant of government services, policymakers and program managers can consult this tool before implementing a service to determine the break-even cost of delivering a service. Benefit Cost Analysis is especially useful in identifying impacts from multiple perspectives. It also provides the capability to evaluate the risk or likelihood of a return on investment of a service with proven impacts on outcomes.

The Goal

The end goal of this very important work is to align the limited resources of state government, as much as is possible, with services designed to generate the best results. While there are many functions that must be performed despite the fact that they are inherently inefficient or costly, we can and must focus our energy and resources to achieve the best results possible. Through this important work, Alabama has taken the first steps to developing a process for evaluation and building capacity for evidenced-based policy making. Now we must have the patience and diligence to see it through.



Conclusion

More information on this every important work can be found at <https://evidence.alabama.gov> or by contacting Marcus Morgan, director, at mmorgan@aces.alabama.gov. Additionally, several members of this bar are active participants in this effort: Commissioners Arthur Orr, Norris Green, and Cam Ward, as well as Assistant Director Patrick Dean. ▲



OPINIONS OF THE GENERAL COUNSEL

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The Unbundling of Legal Services and “Ghostwriting”

QUESTION:

May a lawyer participate in the “unbundling” of legal services? Must a lawyer who only “ghostwrites” a pleading or complaint on behalf of a pro se litigant reveal his involvement to the court?

ANSWER:

Rule 1.2, Ala. R. Prof. C., allows a lawyer to limit the scope of his representation and, thereby, the services that he performs for his client. As such, a lawyer may participate in the “unbundling” of legal services. Ordinarily, a lawyer is not required to disclose to the court that the lawyer has drafted a

pleading or other legal document on behalf of a pro se litigant provided the following conditions are met:

- 1) The lawyer and client have entered into a valid limited scope of representation agreement consistent with this opinion and the drafting of legal documents on behalf of the pro se litigant is intended to be limited in nature and quantity.
- 2) The issue of the lawyer’s involvement in the matter is not material to the litigation.
- 3) The lawyer is not required to disclose his involvement to the court by law or court rule.

DISCUSSION

In recent years, the practice of offering clients “unbundled” legal services has grown in popularity. “Unbundled” legal services are often referred to as “a la carte” legal services or “discrete task representation” and involve a lawyer providing a client with specific and limited services rather than the more traditional method of providing the client full representation in a legal matter. The unbundling of legal services falls into three general categories: consultation and advice; limited representation in court; and document preparation. For example, the client and lawyer may agree that the lawyer will be available for consultation on an hourly basis regarding a specific matter, but the lawyer will not undertake to represent the client in the matter or file a notice of appearance in the case. Sometimes, the lawyer may agree to make a limited appearance on behalf of the client at a hearing, but will not represent the client in the actual trial of the matter. Most often, however, the lawyer agrees to prepare an initial complaint for a client that the client will then file pro se. In that instance, the lawyer’s drafting of the complaint is most often referred to as “ghostwriting.”

The rationale behind offering clients the option of unbundled legal services is two-fold. First, the unbundling of legal services is viewed as a means of helping clients control the cost of litigation by allowing the client to pick and choose which services the lawyer will actually provide. Advocates of the unbundling of legal service contend that such limited representation provides lower- and middle-income individuals greater access to legal assistance than they would normally be able to afford. Advocates argue that many such individuals do not have the financial means to employ a lawyer under the more traditional full representation approach. Another proposed benefit is that the unbundling of legal services allows a lawyer to provide limited assistance to individuals when the lawyer may not have the time or resources to undertake full representation.

The offering of unbundled legal services is implicitly authorized under Rule 1.2(c), Ala. R. Prof. C., which provides as follows:

RULE 1.2 SCOPE OF REPRESENTATION

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

Moreover, the Comment to Rule 1.2, Ala. R. Prof. C., provides in pertinent part as follows:

Comment

Services Limited in Objectives or Means

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are



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made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

As such, the Disciplinary Commission holds that a lawyer may limit the scope of his representation, and thereby, the services that he performs for his client in a specific matter. In doing so, the lawyer must be careful not to agree to or allow his representation to be limited to such an extent that the lawyer cannot provide competent representation as mandated by Rule 1.1, Ala. R. Prof. C. Additionally, any agreement by a lawyer and his client to limit the scope of representation or the services to be performed by the lawyer should be reduced to a written document signed by both the client and the lawyer.

As discussed earlier, there are three general categories of unbundled legal services: consultation and advice, limited representation in court, and document preparation. Under the first two categories, disclosure to the court of the lawyer's involvement is not required or will otherwise be readily apparent to the court. Generally, whether an individual has sought the advice of an attorney is protected by the attorney-client privilege and Rule 1.6 of the Alabama Rules of Professional Conduct. As such, a lawyer who merely provides advice to a client appearing pro se is not required to disclose to the court or the opposing party his consultation with the client. Where a lawyer makes a limited notice of appearance on behalf of a client, the lawyer should simply advise the court and opposing party of the nature of his limited appearance.

The more difficult question is whether a lawyer must disclose his assistance to the court when the lawyer prepares or drafts pleadings on behalf of a pro se litigant. In reviewing the opinions of other state bar associations, there appear to be

varied opinions regarding whether the lawyer must disclose his assistance. Some states require lawyers to identify any documents that they prepare on behalf of a pro se litigant by including a statement on the document that the document was prepared by the lawyer.¹ Other states require a lawyer to include a statement on the document that indicates that the document was prepared with the assistance of counsel. However, the lawyer is not required to personally identify himself.²

These states have held that such disclosure is mandated by a duty of candor to the court. In addition, some courts have also held that a lawyer has a duty to disclose to the court the fact that the lawyer has drafted pleadings on behalf of the client. In *Duran v. Carris*, the Tenth Circuit held as follows:

Ethics requires that a lawyer acknowledge the giving of his advice by the signing of his name. Besides the imprimatur of professional competence such a signature carries, its absence requires us to construe matters differently for the litigant, as we give pro se litigants liberal treatment, precisely because they do not have lawyers. See *Haines*, 404 U.S. at 520-21.

We determine that the situation as presented here constitutes a misrepresentation to this court by litigant and attorney. See *Johnson*, 868 F.Supp. at 1231-32 (strongly condemning the practice of ghost writing as in violation of Fed. R. Civ. P. 11 and ABA Model Code of Professional Responsibility DR 1-102(A)(4)). Other jurisdictions have similarly condemned the practice of ghostwriting pleadings. See, e.g., *Ellis v. Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971) (finding that a brief, "prepared in any substantial part by a member of the bar," must be signed by him); *In re Ellingson*, 230 B.R. 426, 435 (Bankr. D. Mont. 1999) (finding "[g]hostwriting" in violation of court rules and ABA ethics); *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 885-86 (D. Kan. 1997) (expressing legal and ethical concerns regarding the ghost writing of pleadings by attorneys); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F.Supp. 1075, 1077 (E.D. Va. 1997) (finding it "improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as pro se"); *United States v. Eleven Vehicles*, 966 F.Supp. 361, 367 (E.D. Pa. 1997) (finding that ghost writing by attorney for pro se litigant implicates attorney's duty of candor to the court, interferes with the court's ability to supervise the litigation, and misrepresents the litigant's right to more liberal construction as a pro se litigant).

We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney

amounts to “substantial” assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial and must be acknowledged by signature.[footnote omitted] In fact, we agree with the New York City Bar’s ethics opinion that “an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney’s assistance to the court upon filing.” *Rothermich, supra* at 2712 (citing Committee on Prof’l and Judicial Ethics, Ass’n of the Bar of the City of New York, Formal Op. 1987-2 (1987)). We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. *See Id.* at 2711-12. We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved.

238 F.3d 1268, 1271-72 (10th Cir. 2001) While the court in *Duran v. Carris* requires lawyers to disclose their involvement in the drafting of legal briefs for pro se litigants, Alabama courts have yet to issue such a rule or opine on the issue of disclosure.

Further, a number of bar associations, including the American Bar Association, have concluded that no such duty of disclosure exists.³ In ABA Formal Opinion 07-446, the American Bar Association framed the issues as follows:

Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure independently) depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1.2(d), 3.3(b), 4.1(b), or 8.4(c).

The American Bar Association then concluded that, absent a law or local court rule requiring disclosure, the fact that a lawyer drafted the legal documents for a pro se litigant is “not material to the merits of the litigation” and does not need to be disclosed to the court. In essence, the American Bar Association held that the duty of candor to the court does not impose an affirmative duty on a lawyer to disclose to the court that he drafted a particular legal document for a client. Moreover, the ABA commented that, more often than not, the fact that a document filed by a pro se litigant was drafted by a lawyer will be readily apparent to the court and opposing party. If either the court or the opposing party believes that whether a document was ghostwritten is a material issue to the litigation, then they may raise the issue with the pro se party.

In Alabama, the duty of candor to the court is encompassed within Rule 3.3, Ala. R. Prof. C., which provides as follows:

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
- (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Upon review of Rule 3.3, the Disciplinary Commission finds that, ordinarily, the drafting of a legal document by a lawyer for filing by a pro se litigant does not constitute a false statement of material fact. As such, a lawyer is not required to disclose to the court that the lawyer has drafted a pleading or other legal document on behalf of a pro se litigant provided the following conditions are met:

- 1) The lawyer and client have entered into a valid limited scope of representation agreement consistent with this opinion and the drafting of legal documents on behalf of the pro se litigant is intended to be limited in nature and quantity.
- 2) The issue of the lawyer’s involvement in the matter is not material to the litigation.
- 3) The lawyer is not required to disclose his involvement to the court by law or court rule.

[RO 2010-01] ▲

Endnotes

1. See Kentucky Bar Assoc., Ethics Op. E-343; Connecticut Bar Assoc., Ethics Op. 98-5; Colorado Bar Assoc. Ethics Op. 101; New York State Bar Assoc. Ethics Op. 613; and Delaware Bar Assoc. Ethics Op. 1994-2.
2. Florida Bar Assoc. Ethics Op. 79-7; Iowa Op. 98-1; Kansas Bar Assoc. Ethics Op. 09-01; and Massachusetts Bar Assoc. Ethics Op. 98-1.
3. See Arizona State Bar Assoc. Ethics Op. 06-03 and Maine Ethics Op. 89.



MEMORIALS

- ▲ Bailey Kincey Green, Jr.
- ▲ Alyson Marie Webb Mathews
- ▲ Martha Jane Patton
- ▲ Philip Henry Pitts, V
- ▲ Lee Hale Stewart

Bailey Kincey Green, Jr.

Kincey Green, age 69, a resident of Selma, passed away on Tuesday, September 1, 2020. He was born in Selma on February 28, 1951 to Bailey Kincey Green and Anna Norris Green. He was preceded in death by his parents and numerous beloved aunts and uncles. He is survived by his wife of 48 years, Joy Edwards Green, his daughter, Katherine Kincey Green Robertson (Ryan); his grandson, Townsend Kincey Robertson; his sisters, Linda Green King (Andy) and Leila Green Harris (Bill); and his brother, Norris Walton Green (Cathy).



He graduated from Parrish High School in 1969 and from the University of Alabama in 1973, where he was a member of the Kappa Alpha Order and received his masters of business administration. He received his Juris Doctor from the University of Alabama School of Law in 1977.

He spent his career practicing with Reeves & Stewart, alongside Edgar A. Stewart, Archibald T. Reeves, Jr., Mortimer Ames, and later Allen S. Reeves. He served as president of the Dallas County Bar Association and chair of the Dallas County Law Library. He was appointed Deputy Attorney General for the Alabama Historical Commission, a position he held for decades. As a lifelong student of Alabama history, one of his proudest legal accomplishments was helping to preserve Old Cahawba, Alabama's first state capital.

He faithfully served his community on the board of directors for Alabama Teen Challenge-Selma, the Salvation Army, the Leukemia Society, the American Heart Fund, the Sturdivant Museum Association, the YMCA, and the Selma-Dallas County Chamber of Commerce. He was a deacon and Sunday School teacher at Shiloh Baptist Church, and quietly assisted numerous faith-based missions and individuals in need. His legacy of public service continues through his daughter, Katherine, who serves as chief counsel to Alabama Attorney General Steve Marshall.

—Katherine G. Robertson, Montgomery

Alyson Marie Webb Mathews

Alyson Mathews, age 48, died on August 31, 2020 from Covid-19 and the complications of this horrible disease. Alyson was exceptionally kind, with an irreverent sense of humor and an infectious smile. She was smart, witty, and did not suffer fools. Alyson was dedicated to her family, friends, patients, and her faith in God. Alyson was preceded in death by her beloved father, Darryl Lee Webb, a former member of the Alabama State Bar, and her adored nephew, Jeffrey Todd Webb, Jr.



Alyson was a true native of Tuscaloosa, born on Christmas Eve, December 24, 1971, and was a 1990 graduate of Central High School. Following the Webb tradition, Alyson attended and graduated from the University of Alabama, and after finding her way through her many interests and majors, she completed her degree in social work and was a member of Phi Alpha Social Work Honor Society. Following the lead of her father and oldest brother, Alyson continued her studies in the law, graduated from the Birmingham School of Law with a Juris Doctorate degree, and became a member of the Alabama State Bar in 2011.

Rather than practicing law, Alyson served as a social worker for the Glen Haven Health and Rehabilitation System for nearly two decades and was dedicated to her many patients. She was the consummate professional, and her caring personality and genuine affection for people suited her perfectly in her chosen career.

When Alyson met Timothy Mathews, she found her soul mate and best friend. After an appropriate 18-year courtship, Alyson and Tim were married in November 2011, at her parents' home. They loved one another fiercely, and shared many happy times, with laughter and good humor. They even survived Tim's unfortunate support of Auburn's football team and the time he accidentally cut down her favorite hydrangea bush. Alyson and Tim enjoyed spending time with family, and traveled extensively in the country, driving from Tuscaloosa cross-country to California, and along the east coast to New England, seeing family members along the way.

Alyson embraced the best in contradictions—she loved classic purses, pearl earrings, good shoes, and Ina Garten and cooking, and collected antiques, tableware, and Le Creuset cookware, while being a passionate sports enthusiast and ardent fan of both the Alabama Crimson Tide football team and NASCAR racing, and particularly racer Tony Stewart. She was open-minded and believed in equality, fairness, and the progressive values of the Democratic party. For Alyson, the table was vast enough for everyone to pull up a chair. When needed, she

could deliver a “set down” that would make Julia Sugarbaker proud, with fiery passion and conviction. She enjoyed both family lunches at The University Club and fall Saturdays spent watching her Crimson Tide.

Alyson was a devoted wife, mother, daughter, sister, aunt, and friend who deeply loved her family and God and her Savior, Jesus Christ. She was blessed to have many loving friends and will be so missed by all who knew her and loved her. I will miss our many legal conversations, but I firmly believe that Alyson is having them now, with our father, Darryl.

—Jeffrey Todd Webb, Montgomery

Martha Jane Patton

When Birmingham attorney Martha Jane Patton lost her battle with cancer on July 27, 2020, we lost one of those people about whom pages of information could be written describing what she did without really getting to the truth of just who she was. We could list her awards, her accomplishments, and her memberships, and we would miss what was the most important thing about her: Martha Jane could see something wrong and not just complain; she would do something to fix it.



Photo by Steven Aha

Martha Jane's work to eliminate race discrimination began when she was editor of her Decatur High School newspaper in the early 1960s. She wrote controversial editorials, participated in interracial church youth activities, and was one of several students who picketed George C. Wallace at the Decatur airport. A few years after graduating from Birmingham Southern College, Martha Jane began working on the Selma Inter-Religious Project which worked to empower African Americans in Alabama's Black Belt. Through that project, she became close to the women of the Freedom Quilting Bee in Wilcox County. She named one of her sons after the Episcopalian martyr who was murdered in Lowndes County in 1965. She was proud of having spent a night in jail for “parading without a permit.”

Like many women who came of age in the '60s and '70s, Martha Jane did not dream of being a lawyer or a women's rights advocate. While the list of the organizations for which she was a founding mother is a long one (including the Alabama Women's Political Caucus, the Birmingham Bar's Women Lawyers Section, and the Alabama State Bar's Women's Section), Martha Jane acknowledged that she would never have gone to law school but for the encouragement she received from two pioneer women law school professors, Marjorie Fine Knowles at the University of Alabama and Annette Dodd at Samford University's Cumberland School of Law. She graduated from Cumberland in 1978. In her 20 years of private practice, Martha Jane represented many clients who had difficulty obtaining affordable counsel, some of whose causes were not

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popular. Her specialty became adoptions. In 1998, she accepted the job that became her true calling, as executive director of the Birmingham Legal Aid Society.

Martha Jane was a person of faith. She joined St. Andrews Episcopal Church in 1988. There she was a faithful member of the choir, served three terms as senior warden, and as a frequent delegate to the Alabama Episcopal Diocesan Convention, helped to select five bishops, including the first female bishop for the Diocese of Alabama. She was serving as a facilitator for "Sacred Conversations About Race" until a few weeks before her death. She also practiced her faith in more private ways, including guiding a young friend on his spiritual journey to become a monastic in the Episcopal Order of the Holy Cross.

On Twitter, Martha Jane described herself as "Champion of the Underdog." Her 18-year tenure as executive director of the Legal Aid Society of Birmingham bears out the description as does her work with Alabama Arise. Of her view that those in poverty should not be blamed for their status, Martha Jane once said, "If I can turn that light bulb on for anybody the way it has been turned on for me, I certainly intend to continue doing that."

Martha Jane received numerous awards and accolades during her life. Among the more meaningful were the L. Burton Barnes Public Service Award from the Birmingham Bar Association, the Maud McLure Kelly Award from the Women's Section of the Alabama State Bar, and the Distinguished Alumna Award from Birmingham Southern College. She was a member of Leadership Birmingham, the Alabama Law Foundation Fellows, and the Birmingham Bar Foundation Fellows, and served on the board of the National Conference of Women's Bar Associations.

Martha Jane and her late husband, Lynn Daniels, lived and raised their sons, Jonathan and William, in the Forest Park neighborhood in Birmingham and sent the boys to public school, even when they were practically the only white children attending there. Avondale Park was in her neighborhood, and it had become so neglected that children at Avondale School and many people in the surrounding neighborhood did not go there. Through her leadership, the Friends of Avondale Park was formed and began working to revitalize the park. For several years the FOAP sponsored an event called the "Catfish Rodeo." Martha Jane was the rodeo marshal and would show up to preside over the festivities wearing a cowboy hat and sheriff's badge.

Music was one of the loves of Martha Jane's life. In addition to singing in her church choir, she was a member of the Magic City Choral Society. After she retired, she fulfilled a dream by traveling to Austria to hear the Vienna Opera on

New Year's Eve. She ended the evening dancing with other guests in the hotel lobby. She dances to celestial music now.

—Carolyn L. Duncan, Anne W. Mitchell, and Hon. Caryl P. Privett, Birmingham

Philip Henry Pitts, V

Henry Pitts died May 20, 2020. He had just turned 81 years of age the day before. Henry graduated from Albert G. Parrish High School in Selma, the University of Alabama, and the Alabama School of Law.

Upon his graduation from law school, he joined his father, William McLean Pitts, who had practiced with his father, Arthur M. Pitts, in the firm of Pitts & Pitts. He served as president of the Dallas County Bar Association as well as commissioner for the 4th Circuit with the Alabama State Bar. For 18 years he served as city attorney under Mayor Joe T. Smitherman. It is doubted that Mayor Smitherman was aware of Henry's full name as the mayor was said to be "suspicious of lawyers who had numbers after their names." For some years, he was attorney and agent for former Alabama and Oakland Raider quarterback Kenny Stabler.

While doing all of the above, Henry maintained a highly active trial practice throughout the 4th Circuit and beyond, often in a most colorful manner. He loved competition, whether on the golf course or in the courtroom. Whether it was a car wreck, a divorce, or a criminal defense case, it made no difference to him. He gave every case he accepted his undivided attention and expert efforts. He was particularly adept at cross examination.

It must have been a lawyer like Henry that Ralph Waldo Emerson wrote about when he said:

"The good lawyer is not the man who has an eye to every side and angle of contingency and qualifies all his qualifications, but throws himself on your part so heartily, that he can get you out of a scrape."

Surviving family members include his widow, Mary Rose "Sister" Pitts; his sons, Phillip Henry Pitts, VI and William McLean Pitts II; his daughters, Mary Kathryn Allen and Margaret Grey Lee; 11 grandchildren; and three great-grandchildren.

—J. Garrison Thompson, Selma



Lee Hale Stewart

Lee Stewart passed away unexpectedly at his home on August 15, 2020. He was our law partner, but just as importantly, he was our dear friend.

Lee was born August 8, 1968 in Mayfield, Kentucky. Following a successful high school athletic career, Lee graduated from the University of Kentucky and from Cumberland School of Law at Samford University. As a civil defense litigator, Lee was named to the list of “most prolific trial attorneys” numerous times. His clients held him in the highest regard, as did his adversaries. Lee was easy to work with, and his unassuming intellect and calm under pressure made him the consummate litigator.

If you ever met Lee, you knew he loved Kentucky basketball, a good bourbon, and spending time with his friends and family. In fact, Lee’s love of Kentucky basketball and bourbon were surpassed only by his love for his wife, Claire, and their three daughters, Avery, Molly, and Sidney. We’d often joke about how he was outnumbered by women, both at home and sometimes at the office, but Lee wouldn’t have had it any other way. He adored his family, and they adored him as well.



Lee had one of the strongest work ethics of anyone we’ve known, but he always kept his work in perspective with family time. He loved coaching youth basketball and keeping up with his three girls and their activities in school—he made time for them and his wife above all else. Lee was an active member of Vestavia Hills United Methodist Church and a member of the national board of directors for the University of Kentucky National Alumni Association, as well as past president of the Greater Birmingham University of Kentucky Alumni Association. To say his time-management skills were exceptional is an understatement.

Despite a busy schedule and a hefty caseload, Lee was always one of the first to chime in when an attorney needed advice or a sounding board. He was a mentor and an example to our younger lawyers, and he was never too busy for a question from anyone. Lee’s opinions were valued, and his word was as good as gold. As on the basketball court, Lee was the consummate teammate in our law practice.

In his “spare time,” Lee’s dry wit and seemingly endless basketball knowledge morphed into a Twitter account that took on a life of its own. Started as an outlet to converse about his beloved Wildcats, Lee’s “Not Jerry Tipton” account grew into a well-regarded forum (although perhaps not to rival Louisville fans) of almost 77,000 followers.

God truly broke the mold after Lee came along. We will miss him greatly, for more reasons than we could ever list.

—Ralph D. Gaines, III; Ronald J. Gault; Tracy N. Hendrix; and Julie D. Pearce, Vestavia ▲

Apolinsky, Harold Irwin

Birmingham
Admitted: January 1, 1960
Died: July 29, 2020

Baker, Beverly Poole

Helena
September 27, 1985
Died: July 20, 2020

Ball, Franklin Donnel

Birmingham
Admitted: September 23, 2010
Died: July 31, 2020

Bell, Richard Warren

Birmingham
Admitted: April 6, 1972
Died: May 11, 2020

Conner, Neal Presley

Decatur
Admitted: April 28, 1987
Died: July 3, 2020

Denson, William Taylor

Birmingham
Admitted: September 16, 1968
Died: June 23, 2020

Edington, Robert Sherard

Daphne
Admitted: January 1, 1956
Died: July 26, 2020

Faulk, Winn Seaborn

Montgomery
Admitted: April 4, 1978
Died: December 17, 2019

Griswold, Emmett O’Neal, Jr.

Samson
Admitted: September 22, 1977
Died: July 11, 2020

Jones, Judith Albright

Montevallo
Admitted: April 10, 1975
Died: June 22, 2020

Lattof, Mitchell George, Sr.

Mobile
Admitted: February 14, 1952
Died: August 4, 2020

Maxwell, Robert Hamilton

Attmore
Admitted: June 20, 1951
Died: April 6, 2018

Moncus, Claude McCain

Birmingham
Admitted: September 8, 1967
Died: July 15, 2020

Pate, Robert Gordon

Birmingham
Admitted: November 15, 1974
Died: June 27, 2020

Pool, Hon. Benjamin Erwin

Pike Road
Admitted: April 6, 1972
Died: August 3, 2020

Ramsey, Aubrey Allen

Birmingham
Admitted: August 6, 1971
Died: July 25, 2020

Self, Ronald Wayne

Columbus, GA
Admitted: September 28, 1976
Died: July 3, 2020

Wright, Leslie Stephen, Jr.

Columbiana
Admitted: September 7, 1966
Died: July 21, 2020



Wilson F. Green

Wilson F. Green is a partner with *Fleenor & Green LLP* and practices in Tuscaloosa and Birmingham. He is a *summa cum laude* graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at his alma mater, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation.



Marc A. Starrett

Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

GALs, Reasonableness of Attorneys' Fees

***Ex parte Shinaberry*, No. 1180935 (Ala. July 31, 2020)**

Insufficient evidence supported GAL fee, both with respect to hourly rate approved by the court and the time expended. Fee awarded was almost twice the damages awarded the minor plaintiffs and almost twice the fee awarded the attorneys who represented the plaintiffs.

Respondent Superior; Negligent Hiring

***Synergies3 Tec Services, LLC v. Corvo*, No. 1170765 (Ala. August 21, 2020)**

(plurality panel opinion): (1) plaintiff's insurer was not real party in interest on claims against third party arising from property loss, because policy simply provided for right of reimbursement; (2) despite there being substantial evidence of conversion by alleged agent, alleged principals were entitled to JML on *respondent superior* theory, because agent's theft was so unusual a deviation from the employee's duties, the employer benefitted in no way, and there was no evidence that employer ratified alleged agent's conduct; (3) substantial evidence supported negligent hiring claim, given agent's prior criminal theft history.

Estates

***Holt v. Holt*, No. 1190025 (Ala. August 21, 2020)**

Circuit court never obtained jurisdiction over probate proceeding removed under Ala. Code § 12-11-41, due to circuit court's failure to enter order of removal.

Estates; Administrators Ad Litem

***Ex parte Stephens*, No. 1190457 (Ala. August 28, 2020)**

Petitioner challenging *inter vivos* transfer of funds by holder of power of attorney (who was appointed PR of estate) was entitled to order appointing administrator ad litem of estate under Ala. Code § 43-2-250 regarding the transfers, because PR had a conflict of interest regarding the issue.

Necessary Parties

***Capitol Farmers Market, Inc. v. Delongchamp*, No. 1190103 (Ala. August 28, 2020)**

Adjacent landowner potentially subject to restrictive covenants involved in litigation was a necessary party under Rule 19(a); remand was required for trial court to consider, in the first instance, whether landowner can be joined in the action.

“Protective Services;” Immunity

Ex parte Smith, No. 1180834 (Ala. Sept. 4, 2020)

DHR employees were entitled to immunity under the Protective Services Act, Ala. Code § 38-9-11, because they had exercised their duties in “good faith” and in compliance with the DHR Adult Policy Services Manual; the statute is not confined to situations in which investigations of abuse reports are at issue and thus extended to decision regarding placement in group home.

“As Is” Clauses; Caveat Emptor

Kidd v. Benson, No. 1190413 (Ala. Sept. 4, 2020)

Despite the doctrine of *caveat emptor* in real estate sales contracts (which is often contractually grafted into transactions with “AS IS” clauses, as in this case), Alabama law has recognized three exceptions: (1) if a fiduciary relationship exists between buyer and seller; (2) seller must disclose material defects affecting health or safety not known to or readily observable by buyer; and (3) seller has a duty to disclose if buyer inquires directly about a material defect or condition of the property. The plurality (three justices) concluded that “under Alabama law, when a buyer elects to purchase real property subject to an “as is” clause in the purchase agreement and neglects to inspect the property, the buyer cannot take advantage of any exceptions to the doctrine of *caveat emptor*.”

Open Meetings

Casey v. Beeker, No. 1190400 (Ala. Sept. 4, 2020)

Hearing presided over by an ALJ at the direction of the PSC under Ala. Code § 37-1-89 was not a “meeting” under the Open Meetings Act, even though the PSC commissioners themselves attended the hearing. Whether a “meeting” occurred at the hearing depends on whether the commissioners “deliberated” a matter at the hearing, which requires that information was exchanged “among” the commissioners. Ala. Code § 36-25A-2(1)

Medical Liability

Spencer v. Remillard, No. 1180650 (Ala. Sept. 4, 2020)

Circuit court erred by granting JML to defendant doctor at the close of plaintiff’s case: (1) the requirement in § 6-5-548(c)(4) that an expert must have “practiced in this specialty” in the year preceding the alleged breach of the standard of care refers to the actual practice of the specialty, not the exact setting in which the defendant doctor practices the specialty; (2) plaintiff’s causation expert’s testimony, viewed in its entirety, was sufficient to establish a probability “that [decedent’s] cancer had not metastasized in 2009, and probability, not certainty, is what is required to present substantial evidence of causation under the AMLA.”

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(Continued from page 463)

“Good Cause” for Amendments

Ex parte Gulf Health Hospitals, Inc., No. 1180596 (Ala. Sept. 4, 2020)

Mandamus review is not available for review of trial court’s order allowing amendment to complaint for “good cause” to allege additional specific facts against the original defendant; appeal is an adequate remedy.

Venue; PEEHIP Program

Ex parte Blue Cross and Blue Shield of Alabama, No. 1190232 (Ala. Sept. 4, 2020)

Under Ala. Code § 16-25A-7(e), Montgomery Circuit Court is exclusive venue for action arising from denial of health insurance benefits under PEEHIP program covering public education employees.

Public Employment; Immunity

Anthony v. Datcher, No. 1190164 (Ala. Sept. 4, 2020)

Instructors at junior college brought action challenging the classification of their positions for salary and credentialing. Among other holdings: (1) agency’s interpretation of its own regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation, as long it is not plainly erroneous; (2) notwithstanding *Barnhart v. Ingalls*, 275 So. 3d 1112 (Ala. 2018), claims for back pay were not barred by state immunity, because the plain meaning of the existing policies required the plaintiffs to be classified in Group A, and thus they were entitled to Group A pay because there was no discretion to classify them otherwise.

Insurance; Contract Interpretation; UIM Coverage; “Stacking”

Mid-Century Ins. Co. v. Watts, No. 1180852 (Ala. Sept. 18, 2020)

Vehicle’s insurance policy provided UM coverage of \$50,000 per person and \$100,000 per “accident.” Five vehicles were covered under the policy, and the policy contained a provision allowing stacking of benefits. Nine plaintiffs traveling in insured vehicle brought claims after accident (case involved four deaths and five injuries). Insurer contended that because the policies allowed the stacking of up to three UIM coverages, the maximum available coverage was \$300,000 (\$100,000 per accident). Injured parties contended that each of the nine occupants of the vehicle was involved

in an “accident,” and thus was entitled to \$150,000 for each occupant (\$50,000 stacked three times) for a total coverage limit of \$1.35 million. The trial court denied insurer’s motion for partial summary judgment on the issue and certified the issue under Rule 5. The supreme court held: (1) Rule 5 certification was proper; the controlling question of law was a matter of contract interpretation and the contract’s construction in a manner consistent with Ala. Code § 32-7-6(c), and there was substantial ground for difference of opinion because the question was one of first impression; (2) On the merits, the court held that under § 32-7-6(c). “when two or more persons are injured or killed in an accident, the per accident limit of liability contained in the policy is the proper coverage limit to be applied.” Thus, per accident limit of \$100,000 applied, and the permissible stacking created aggregate coverage of \$300,000.

Rule 19; Indispensable Parties

Ex parte Advanced Disposal Services South, Inc., No. 1190148 (Ala. Sept. 18, 2020)

City of Tallassee (potential joint tortfeasor with Advanced) was not an indispensable party to action regarding effluent emissions pending in Macon County. Considering each of the Rule 19 factors (prejudice to the existing parties from a judgment rendered in the city’s absence, the potential for avoiding prejudice in the city’s absence, whether a judgment rendered in the city’s absence would be adequate, and the adequacy of any remedy in the event the case is dismissed), landowner plaintiff (who sued to challenge the legality of effluents into water) had an interest in proceeding in the chosen forum. Advanced did not demonstrate that the other factors weighed so heavily in favor of outright dismissal that the existence of an alternative forum should be controlling.

Insurance; Material Policy Misrepresentations

Protective Life Ins. Co. v. Apex Parks Group, LLC, No. 1180508 (Ala. Sept. 18, 2020)

The court reversed and rendered judgment for insurer on contract claim arising from failure to pay on \$10 million “key man” policy issued to company on life of executive. CEO failed to disclose all aspects of cardiac history at the time the application was finalized, which rendered certifications of accuracy and completeness of health information false.

UM Coverage; Policy Interpretation

Nationwide Prop. & Cas. Ins. Co. v. Steward, No. 1190011 (Ala. Sept. 18, 2020)

Accident occurring in a public ATV park occurred on a “public road” per the policy.

Jefferson County Probate Practice; ALAA

McDorman v. Moseley, No. 1190819 (Ala. Sept. 18, 2020)

(1) Section 4 of the Jefferson County Local Act under which probate courts have equity jurisdiction, which provides for appeals within 30 days, was repealed by implication through Ala. Code § 12-22-21, under which a 42-day appeal time applies; (2) probate court lacked jurisdiction to award attorney fees in a related case filed in the circuit court; (3) ALAA award of attorneys’ fees incurred for defending an agreement to which the litigating party was a party was justified and adequately supported by probate court’s findings.

ERISA Preemption

Hendrix v. United Healthcare Ins. Co., No. 1190107 (Ala. Sept. 18, 2020)

ERISA preempted claim that health insurer in employee benefit plan refused to pay a course of medical treatment recommended by treating physician which led to death of insured.

State Agents; Foreseeability

Bryant v. Carpenter, No. 1180843 (Ala. Sept. 18, 2020)

Plurality opinion; because detainee had no history of suicidal tendencies, and there was no evidence he manifested any such tendencies in the jailers’ presence, detainee’s death by suicide was not foreseeable and thus not actionable.

Principal/Agent

QHG of Enterprise, Inc. v. Pertuit, No. 1181072 (Ala. Sept. 25, 2020)

In action by nurse against hospital for staff hospitalist’s accessing nurse’s records in Alabama Prescription Monitoring Drug Program, there was insufficient evidence of control or ratification to support liability of hospital on *respondeat superior* theory. Actions were not in the scope of hospitalist’s employment and were unrelated to his employment. Ratification requires “full knowledge of the facts,” which could not be imputed to the hospital. Claims of negligent hiring, training, and supervision were also lacking in evidence; there was no evidence indicating that hospital had notice that hospitalist might inappropriately access information in the PMDP database. The court expressed no opinion as to the viability of common law claims which seek to incorporate the privacy provisions of HIPAA.

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(Continued from page 465)

Medical Liability; Experts

Hannah v. Naughton, No. 1190216 (Ala. Sept. 25, 2020)

Trial court properly excluded testimony of plaintiff's expert; Ala. Code § 6-5-548(c)(3) does not allow testimony from a proffered expert who "was" once board certified in the same specialty as the defendant health-care provider but who was no longer so certified at the time the proffered expert testified.

Trusts

Parris v. Ballantine, No. 1180908 (Ala. Sept. 25, 2020)

Issue: "whether, under the terms of a particular trust instrument, a person adopted as an adult is considered a 'lineal descendant[]' of a beneficiary of the trust and, thus, a beneficiary." Held: because "the law at the time the 1971 trust was executed did not allow adult adoption, [adult's] adoption as an adult in 2016 did not make him a 'lineal descendant' as that term is defined in the 1971 trust."

Oral Trusts

Ledbetter v. Ledbetter, No. 1180200 (Ala. Sept. 30, 2020)

Proponents of an oral trust are required to prove its creation and terms by clear and convincing evidence. Ala. Code § 19-3B-407. In this case, there was substantial evidence to support the existence of an oral trust, based on (1) testimony by an attorney with whom the settlor visited regarding his consistent use of oral trusts in preparing clients to apply for life insurance.; (2) settlor's life-insurance application specified that beneficiary was to be the beneficiary of the insurance "as trustee," and (3) an unsigned trust document stated that it reflected an oral agreement between settlor and trustee.

From the Court of Civil Appeals

Default Judgment; Service of Process

Slocumb Law Firm, LLC v. Greenberger, No. 2190038 (Ala. Civ. App. July 24, 2020)

Although process server testified that person at law firm's office at which service was made informed the process server that she could accept service for the law firm, the evidence demonstrated that the person was never employed by the law firm, and secretary of state's records confirmed

that the registered agent of the law firm was not the person receiving service. Service was therefore improper and would not support a default judgment.

Appeals; Rule 60

Thompson v. State, No. 2180977 (Ala. Civ. App. August 28, 2020)

Filing of notice of appeal before trial court's ruling on Rule 60 motion divested the circuit court of any jurisdiction to rule on Rule 60 motion; appeal was therefore dismissed.

From the United States Supreme Court

The Court is in recess.

From the Eleventh Circuit Court of Appeals

Qualified Immunity

Williams v. Aguirre, No. 19-11941 (11th Cir. July 13, 2020)

The Court rejected the "any-crime rule," under which an officer is not liable for false arrest or malicious prosecution in the § 1983 context so long as probable cause existed to arrest the suspect for some crime (carrying a concealed firearm in this case), even if it was not the crime the officer claimed had occurred (an attempted murder in this case). Substantial evidence therefore supported § 1983 malicious prosecution claim based on attempted murder charges based on demonstrably false affidavits of officers.

Maritime Law; Negligence

Tesoriero v. Carnival Corp., No. 18-11638 (11th Cir. July 14, 2020)

District court properly granted summary judgment to Carnival in action by passenger for negligence arising from broken

cabin chair which caused her tennis elbow. The Court held: (1) Tesoriero failed to show Carnival had actual or constructive notice that the chair was broken; (2) even if *res ipsa* applied, that doctrine cannot cure a defect in notice; (3) even assuming the chair itself could have provided evidence of notice, Carnival's failure to preserve the chair was not shown to be in bad faith and is therefore not sanctionable.

Appellate Jurisdiction; Motions for Reconsideration

Corley v. Long-Lewis, Inc., No. 18-10474 (11th Cir. July 16, 2020)

(1) Order granting a voluntary dismissal without prejudice is a final decision for appellate jurisdiction purposes; (2) Court had territorial jurisdiction, 28 U.S.C. § 1294, to review an interlocutory decision by an out-of-circuit district court that merged into the final judgment of a district court in this Circuit; (3) appellant has standing to appeal from a final judgment accompanying an order granting his motion for a voluntary dismissal in order to obtain appellate review of previous interlocutory rulings; (4) district court was within its

discretion in refusing to consider an argument made for the first time on motion for reconsideration.

Rational Basis Review; Standing

Georgia Electronic Life Safety & System Assn v. City of Sandy Springs, No. 19-10121 (11th Cir. July 17, 2020)

Municipal ordinance subjecting alarm companies to fines when a false alarm is sounded at one of the properties they service were rationally related to a legitimate interest of the city. Plaintiff alarm companies lacked standing to pursue procedural due process claim, based on insufficient procedural safeguards in the ordinance's appeal process, because plaintiffs never lost an appeal under the ordinance and never attempted one.

Eighth Amendment

Mosley v. Zachary, No. 17-14631 (11th Cir. July 24, 2020)

Prison official, for purposes of an Eighth Amendment deliberate indifference claim, upon being informed of an inmate's threat to kill a fellow inmate, is not required immediately to place the at-risk inmate in protective custody; it is a fact-intensive determination.

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Voting Rights Act

Greater Birmingham Ministries v. Secretary of State of Alabama, No. 18-10151 (11th Cir. June 21, 2020)

The Court upheld Alabama's 2011 Photo Voter Identification Law, codified at Ala. Code § 17-9-30, requiring all Alabama voters to present a photo ID when casting in-person or absentee votes. Plaintiffs alleged that the law has a racially discriminatory purpose and effect that violates the United States Constitution and various provisions of the Voting Rights Act.

Social Security

Goode v. Commissioner, No. 18-14771 (11th Cir. July 28, 2020)

Vocational expert testimony, upon which ALJ relied in finding applicant not disabled, was not reliable for using the wrong SOC group code to determine job potentials, thus causing a substantial overstatement of potentially available jobs.

Class Actions; Arbitration

Lavigne v. Herbalife, Ltd., No. 18-14048 (11th Cir. July 29, 2020)

Downstream distributors sued Herbalife and a number of upstream "top distributors" ("Tops"), asserting RICO and other claims arising from the conducting of "Circle of Success" events which downstream distributors attended based on representations from Tops and Herbalife regarding how their attendance could facilitate their advancement within the organization. Herbalife and Tops moved to compel arbitration, which the district court denied. The Eleventh Circuit affirmed, holding (1) the clauses themselves did not cover claims against the Tops, and under the controlling California law applicable to the agreements, "one must be a party to an arbitration agreement to be bound by it or invoke it;" (2) because there was no contract between Tops and the downstreams, the arbitration agreement's invocation of AAA Commercial Rules, and those rules' allowing the arbitrator to determine the arbitrator's jurisdiction (*First Options* language), did not render the question of arbitrability one for an arbitrator—the question was for the court; and (3) because the complaint did not depend on any specific terms of the Herbalife contract, principles of equitable estoppel did not require arbitration of the claims by the downstreams—"it is not enough that the alleged misconduct is somehow connected to the obligations of the underlying agreements; the misconduct must be founded in or inextricably bound up with such obligations."

Employment

Gogel v. Kia Motors Mfg. of Georgia, Inc., No. 16-16850 (11th Cir. July 29, 2020) (en banc)

Gogel managed the team relations department of Kia, and in that capacity heard many complaints about how women and Americans were treated. One of her job duties was to protect Kia from litigation by working to resolve internal discrimination complaints made by employees. When she experienced similar treatment herself and, in her view, had been denied a promotion because she is a woman and an American (non-Korean), she filed her own EEOC charge. Subsequent to her charge, another Kia employee, Ledbetter, filed her own charge based on national origin and gender discrimination. After learning of Ledbetter's charge, Kia came to believe that Gogel had "encouraged or even solicited" Ledbetter to file her charge. Kia admits it fired Gogel for that reason. Gogel sued Kia for gender and national origin discrimination and retaliation under Title VII, as well as race and alienage discrimination and retaliation under section 1981. The District Court granted summary judgment to Kia.

On original submission, a divided panel reversed as to Gogel's retaliation claims under Title VII and § 1981. On rehearing, the *en banc* court affirmed summary judgment on the retaliation claims. Gogel's recruitment of Ledbetter to sue Kia was not itself protected activity under the opposition clause of Title VII's retaliation provision; by attempting to recruit another employee to sue Kia, Gogel's action so conflicted with her responsibilities as team relations manager that it cannot be considered to constitute protected activity.

Federal Jurisdiction

Patel v. Hamilton Medical Center, No. 19-13088 (11th Cir. July 30, 2020)

Plaintiff cannot create federal-question jurisdiction by seeking a declaration that a federal defense does not protect the defendant.

Issue Preclusion; Choice of Law

Sellers v. Nationwide Mut. Fire Ins. Co., No. 18-15276 (11th Cir. Aug. 7, 2020)

When determining the preclusive effect of an earlier judgment rendered by a federal court exercising diversity jurisdiction, federal common law requires the court to adopt the rules of issue preclusion applied by the state in which the rendering court sits.

Transgender Rights; Schools

Adams v. School Board of St. Johns County, FL, No. 18-13592 (11th Cir. Aug. 7, 2020)

Transgender high school student socially transitioning from female to male was prohibited by public high school from using the boys' restroom; instead, student was required to use either the girls' restroom or a single-stall unisex bathroom, which student found isolating and degrading. Student, through his mother, sued, claiming that denial of access to boys' restroom violated student's Title IX and equal protection rights. After a bench trial, the district court found for plaintiff student. The Eleventh Circuit affirmed in a 2-1 decision authored by Judge Martin, in which Judge Jill Pryor joined. The majority opinion reasoned that heightened scrutiny applied to the board policy, and that although protecting the bodily privacy of young students is undoubtedly an important government interest, the school board failed to demonstrate a substantial relationship between excluding Mr. Adams from the communal boys' restrooms and protecting student privacy. Chief Judge William Pryor authored a lengthy dissent, arguing that the majority's analysis dismissed any sex-specific interest in bathroom privacy and jettisoned ground rules of statutory interpretation. This case appears destined for *en banc* review.

Excessive Force; Deliberate Indifference

Patel v. Lanier County, No. 19-11253 (11th Cir. Aug. 11, 2020)

Although plaintiff's detention for two hours in a van on a hot day could constitute excessive force under the facts, law was not sufficiently "clearly established" as to that claim. However, officer's failure to take action after the onset of serious adverse effects of the heat could support a deliberate indifference claim, and the law was sufficiently clearly established to support that claim.

Damages (Personal Injury); Maritime Law

Higgs v. Costa Crociere SPA Co., No. 19-10371 (11th Cir. Aug. 14, 2020)

Appropriate measure of medical damages in a maritime tort case is that reasonable value determined by the jury upon consideration of any relevant evidence, including the amount billed, the amount paid, and any expert testimony and other relevant evidence the parties may offer. "[T]he district court improperly reduced Higgs's damages by applying a bright-line rule that would categorically limit medical damages to the amount actually paid by an insurer[.]"



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Qualified Immunity; Fourth Amendment

Laskar v. Hurd, No. 19-11719 (11th Cir. August 28, 2020)

Regarding the favorable adjudication element of common-law malicious prosecution in the context of a section 1983 claim, a number of circuits require that favorable terminations “indicate the innocence of the accused.” The Court disagreed with seven sister circuits, holding that the “favorable termination” element of malicious prosecution does not have to indicate innocence of the accused, as long as the dismissal is not inconsistent with the accused’s innocence—and thus a dismissal based on untimeliness qualifies for malicious prosecution.

Judgment Collection (Alabama Law)

WM Mobile Bay Env. Center, LLC v. City of Mobile Solid Waste Authority, No. 19-10239 (11th Cir. August 26, 2020)

The Court certified to the Alabama Supreme Court whether Alabama law permits a judgment creditor to execute on certain real property owned by an Alabama solid waste disposal authority—whether such property is exempt from execution under Ala. Code § 6-10-10 of the Alabama Code or, alternatively, Alabama common law.

Bankruptcy

In re Guillen, No. 17-13899 (11th Cir. August 25, 2020)

Bankruptcy courts are not required to find some change in circumstances before permitting debtors to modify confirmed plans under 11 U.S.C. § 1329.

FTCA; Controlled Burns

Foster Logging, Inc. v. USA, No. 18-15033 (11th Cir. August 24, 2020)

Foster sued USA under the FTCA, alleging negligence in the failure to control a controlled burn occurring on Fort Stewart, which then spread to Foster’s land and damaged and destroyed timber. The district court dismissed the complaint based on discretionary function immunity, and the Eleventh Circuit affirmed, reasoning that the observation, monitoring, and maintenance of the controlled burn (1) involved an element of judgment or choice; and (2) was susceptible to policy analysis, which does not require actual policy analysis be undertaken.

ERISA

Hill v. Employee Benefits Admin. Comm. of Mueller, Inc., No. 18-14026 (11th Cir. August 24, 2020)

Plaintiffs who were neither laid off nor fired were not entitled to Special Early Retirement (“SER”) benefits for situations

where employees are laid off or terminated by a permanent plant shutdown before their normal retirement age.

CERCLA

Santiago v. Raytheon Corp., No. 18-15104 (11th Cir. August 31, 2020)

CERCLA’s tolling provision for state-law based actions regarding exposures to hazardous substances does not apply to claims brought as a public liability action under the Price-Anderson Act, Pub. L. 85-256, 71 Stat. 576 (1957), as amended in 1988. See 42 U.S.C. §§ 2014(hh), 2210(n)(2). Such actions borrow their “substantive rules for decision” from the state where the incident occurred, including state statutes of limitation.

Eighth Amendment

Hoffer v. Secretary, Fla. Dept. Corr., No. 19-11921 (11th Cir. Sept. 1, 2020)

Eighth Amendment does not require Florida prison officials to treat all inmates with chronic Hepatitis C—including those who have only mild (or no) liver fibrosis—with expensive, state-of-the-art “direct acting antiviral” (DAA) drugs.

Defamation; Limited Purpose Public Figure

Berisha v. Lawson, No. 19-10315 (11th Cir. Sept. 2, 2020)

Son of former Prime Minister of Albania, who was allegedly defamed in a book that accused him of being involved in an elaborate arms-dealing scandal in the early 2000s, was at the very least a limited purpose public figure, thus requiring “actual malice” be shown by clear and convincing evidence was required to sustain a defamation claim.

Qualified Immunity

Cantu v. City of Dothan, No. 18-15071 (11th Cir. Sept. 3, 2020)

Officer who shot and killed decedent being arrested for (at worst) driving without a license while dropping off a stray dog at an animal shelter, and who was not resisting arrest violently, was not entitled to qualified immunity at summary judgment. Even without a case directly on point, the constitutional violation was apparent: the use of lethal force was so obviously excessive that any reasonable officer would have known that it was unconstitutional, even without pre-existing precedent involving materially identical facts.”

Voting Rights

Jones v. Governor of Florida, No. 20-12003 (11th Cir. Sept. 11, 2020) (en banc)

In 2018, Florida voters amended the state's constitution to abrogate its historic ban on felon disenfranchisement, and to allow certain felons (excluding felons convicted of murder or sexual offenses) to be re-enfranchised "upon completion of all terms of sentence including parole or probation." The Florida Legislature passed a statute implementing this "Amendment 4" which required that "all terms of sentence" include all LFOs—legal financial obligations—including payment of court fines, costs, and restitution ordered by the criminal court. Ex-felon applicants sued, challenging the requirement that they pay their fines, fees, costs, and restitution before regaining the right to vote. The district court had granted a preliminary injunction (which was affirmed) and then, after an eight-day bench trial, found for plaintiffs. The Eleventh Circuit took the case immediately *en banc* and held that there was no equal protection violation. The only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not. This classification does not turn on membership in a suspect class: the requirement that felons complete their sentences applies regardless of race, religion, or national origin. Because this classification is not suspect, it was reviewed for a rational basis only.

FCRA; "Legitimate Business Purpose"

Domante v. Dish Networks LLC, No. 19-11100 (11th Cir. Sept. 9, 2020)

Dish had a "legitimate business purpose" under FCRA when it obtained Domante's consumer report, after an identity thief fraudulently submitted some of Domante's personal information to Dish, thus did not violate FCRA § 1681b.

Amendments to Pleadings; Conformity to Evidence

John Doe #6 v. Miami-Dade County, No. 19-10254 (11th Cir. Sept. 9, 2020)

District court's denial of Rule 15(b) motion for plaintiffs to assert as-applied theory of unconstitutionality when facial challenge was pleaded was not an abuse of its discretion. Plaintiffs did not give fair notice to the county of their as-applied theory of relief.

Class Action Settlements; Incentive Awards; Notice

Johnson v. NPAS Solutions, LLC, No. 18-12344 (11th Cir. Sept. 17, 2020)

(1) District court's preliminary approval order schedule for class settlement violated Fed. R. Civ. P. 23(h) by requiring class members to file objections before class counsel was required to file fee petition, but that error was harmless on the facts; (2) under pre-Rule 23 precedent, incentive awards to class representatives are not permitted in class action cases, though they have become ubiquitous in modern class-action practice; (3) district court's final approval order was not sufficiently specific.

Arbitration; Post-Arbitral Relief

Gherardi v. Citigroup Global Markets, Inc., No. 18-13181 (11th Cir. Sept. 17, 2020)

Arbitrators did not exceed their powers under FAA § 10(a)(4) in arguably construing parties' agreement.

Qualified Immunity; Appellate Jurisdiction

Hall v. Flournoy, No. 18-13436 (11th Cir. Sept. 17, 2020)

There is no appellate jurisdiction over an interlocutory appeal concerning the application of qualified immunity which does not present a legal question and instead challenges only the sufficiency of evidence.

Qualified Immunity

Luke v. Gulley, No. 20-11076 (11th Cir. Sept. 15, 2020)

In Fourth Amendment malicious prosecution claim, plaintiff had reached a compromise with the DA to obtain dismissal of underlying criminal charges. District court granted summary judgment to accusing officer, holding that underlying state court proceedings did not terminate in plaintiff's favor given the compromise. Held: disposition of the state court proceeding was not inconsistent with the plaintiff's innocence, and thus could support a Fourth Amendment malicious prosecution claim.



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Section 1983; Private Probation Services

Harper v. Professional Probation Services, Inc., No. 19-13368 (11th Cir. Sept. 25, 2020)

Plaintiff adequately stated a claim, for Rule 12 purposes, that private probation company under contract with municipal court could be liable under § 1983 for due-process violations in unilaterally extending durations of probation, unilaterally increasing fines beyond what was ordered, and unilaterally imposing additional conditions of probation. Allegations were that PPS was not disinterested due to a financial incentive to charge more probation fees to probationers, and that it was performing a judicial function in the imposition of probation times and fines. Under facts as alleged, PPS violated duty of judicial impartiality.

RECENT CRIMINAL DECISIONS

From the Alabama Supreme Court

Terry Stops

Ex parte Gardner, No. 1190172 (Ala. Sept. 28, 2020)

Officer's seizure of contraband during Terry stop, discovered by a "grabbing" and manipulation of the material while in the pocket of the defendant, contravened the "plain feel" doctrine, under which the object detected by a pat-down must be immediately apparent as being contraband.

From the Court of Criminal Appeals

Sanctions

State v. Stafford, CR-19-0187 (Ala. Crim. App. Sept. 11, 2020)

Circuit court improperly dismissed assault charge arising from DFS's destruction of BAC results; "extreme sanction" of dismissal was not warranted where the potential prejudice from the loss of the evidence could be remedied by lesser

means. There was no showing that the state acted in bad faith or that the defendant's trial would be rendered fundamentally unfair without the evidence.

Rule 404(b)

Horvat v. State, CR-18-1118 (Ala. Crim. App. Sept. 11, 2020)

Evidence that defendant had entered the child victim's bedroom and bed on several occasions before the offenses took place was properly admitted to prove motive.

Consent

S.M.B. v. State, CR-18-1129 (Ala. Crim. App. Aug. 14, 2020)

The court rejected juvenile's contention that victim consented to sexual intercourse, noting that other, lesser sexual activity to which the victim consented did not negate the state's evidence that she did not consent to intercourse.

Rule 32

Ex parte Mays, CR-19-0104 (Ala. Crim. App. Aug. 14, 2020)

Trial court improperly rejected (on successive petition grounds) defendant's sixth petition where it raised a jurisdictional substantive-competency claim different than what had been alleged in a prior petition.

Ineffective Assistance

Coan v. State, CR-19-0138 (Ala. Crim. App. Sept. 11, 2020)

Petition failed to show that counsel rendered ineffective assistance by "promising" the jury during opening statements that he would testify but ultimately resting the defense's case without his testimony, because no specific claim of prejudice was raised.

Split Sentence

Smith v. State, CR-19-0621 (Ala. Crim. App. Sept. 11, 2020)

Rule 32 granted on defendant's claim that he had been erroneously sentenced under the Split Sentence Act, Ala. Code § 15-18-8; trial court was required by § 15-18-8(a)(2) to impose three-year split terms on his 20-year sentences rather than five-year split terms.

Constructive Possession

Brooks v. State, CR-18-1171 (Ala. Crim. App. Sept. 11, 2020)

Defendant's close proximity to a cigarette pack containing illegal drugs within a vehicle, without more, was insufficient to show his constructive possession of the drugs.

Hearsay; Probation Revocation

Nguyen v. State, CR-19-0450 (Ala. Crim. App. Aug. 14, 2020)

Hearsay evidence may not form the sole basis for revocation.

From the Eleventh Circuit Court of Appeals

Fifth Amendment

McKathan v. US, No. 17-13358 (11th Cir. Aug. 12, 2020)

McKathan faced a “classic penalty situation” under *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984), when his probation officer asked him to answer questions that would reveal he had committed new crimes. Such a “classic penalty situation” arises when a person must choose between incriminating himself, on the one hand, or suffering government-threatened punishment for invoking his Fifth Amendment privilege to remain silent, on the other. In those circumstances, the statements are inadmissible in a subsequent prosecution for the crimes confessed, because in such circumstances the Fifth Amendment privilege is “self-executing.” ▲

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Please email announcements to
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About Members

Jessie Keating Hardy announces the opening of **J. Hardy Family Law LLC** at 200 Office Park Dr., Ste. 310, Mountain Brook 35223. Phone (205) 545-7445.

Hill Hill Carter Franco Cole & Black PC announces that **Paul A. Clark** joined the firm's Birmingham office.

Huie, Fernambucq & Stewart LLP of Birmingham announces that **Andrew Edge** and **Maya Hoyt** joined as associate attorneys.

Among Firms

The **Supreme Court of Alabama** announces that **Jessica Parker-Kelly** joined as a central staff attorney and that **Whitley D. Hall** was promoted to assistant clerk.

Magic City Law LLC announces that **Margaret Jameson** joined as an associate, and that the firm's new address is 3918 Montclair Rd., Ste. 218, Mountain Brook 35213. Phone (205) 582-2832.

Balch & Bingham announces that **James M. Robertson** joined as of counsel in the Birmingham office.

Marsh, Rickard & Bryan announces that **Rhonda Chambers** joined as an appellate attorney and that **Dylan Scilabro** joined as an associate.

Ball, Ball, Matthews & Novak PA of Montgomery announces that **Sydney K. Brasfield** joined as an associate.

Morris Cary Andrews Talmadge & Driggers LLC announces the opening of an office in Birmingham and that **Tracy W. Cary** will be a partner there.

Blount Hughes LLC of Trussville announces that **Sharon D. Davis** joined the firm.

Morris Haynes Attorneys at Law announces that **Amanda Luker** and **Clay Hornsby** joined the firm's Alexander City office.

Bradley Arant Boulton Cummings LLP announces that **Zachary P. Martin** joined the firm's Birmingham office as an associate.

Silver, Voit & Thompson Attorneys at Law PC of Mobile announces the firm's name is now **Silver, Voit & Garrett Attorneys at Law PC**.

The **Harris Firm LLC** announces that **Sherice Curtis** joined the Birmingham office as an associate, **AnnaCarrol Arnold** joined the Anniston office as an associate, and the opening of a Tuscaloosa office at 2805 7th St. 35401.

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