

SCHOOL BOARD STATUTORY AUTHORITY

A local school board shall have the following powers Maja konstrukcije stratukcije stratukci stratukcije stratukcije stratukcije stratukcije stratukcije s or duties:

E. have the capacity to sue and be sued

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WHAT DOES THAT MEAN?

- The Board can sue on behalf of the District. • Legally, it is the real party in interest.
- If the District is sued, the Board is named as the defendant.
- Individual officials and employees can also be sued In their official capacity
 - Personally

SAMPLE LAWSUIT CAPTION

SECOND JUDICIAL DISTRICT COURT COUNTY OF BERNALILLO STATE OF NEW MEXICO

JEAN FREDETTE AND CELESTE FREDETTE, as Parents and next of friend of COLIN FREDETTE, a minor. Plaintiffs,

vs.

D-202-CV-2015-09316

ALBUQUERQUE PUBLIC SCHOOLS, VOLCANO VISTA HIGH SCHOOL, REID FIGIEL (Individually and as Coach/Teacher) and BEN BROWN (Individually and as Athletic Director).

Defendants.



ATTORNEYS REPRESENT CLIENTS

- "A lawyer, as a member of the legal profession, is a representative of clients."
 - Preamble to the Rules of Professional Conduct
- Lawyers owe their clients duties of:
 - Loyalty
 - Confidentiality
 - Diligence
 - Communication

WHO IS THE CLIENT?

- The Board is the client.
 - Not individual Board members.
 - Not the superintendent.
 - Not other administrators.
 - Not teachers.
 - Not other district employees.

WHAT IF INDIVIDUALS ARE NAMED IN A LAWSUIT?

- Board attorneys can and usually do represent individual district defendants.
- The attorney's first duty is always to the Board.
- If the individual's interests conflict with the Board's, separate counsel must be obtained.



WHAT IS THE PRIVILEGE?

 "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made for the purpose of facilitating or providing professional legal services to that client"

– New Mexico Rule of Evidence 11-503

WHAT DOES THE PRIVILEGE DO?

- Protects confidential communications from being disclosed.
- Only covers communications related to legal services.
 Usually that means giving legal advice.

PRIVILEGE PROTECTS COMMUNICATIONS WITH WHO?

- The Board as a whole
- Individual Board members
- "Managerial" employees
 - Definitely superintendents and principals
 - Usually authorized administrators like Assistant Superintendents or Directors of Special Education
 - Maybe lower level administrators
 - Becomes less likely the further you move down the chain of command

LOTS OF THINGS ARE NOT PRIVILEGED

- Billing recordsExcept detailed billing entries
- Facts included in a communication
- Business advice
- Anything that is not confidential

CONFIDENTIALITY IS EASILY LOST

- Privilege can be waived by:
 - Including third parties in formal communications
 Meetings, email, letters, etc.
 - Talking where others can overhear
 Watch out in elevators, hallways, restaurants, offices, etc.
 - Otherwise disclosing a communication to third parties
 - Publicly claiming that actions are on advice of counsel

EXAMPLE OF WAIVER

- Board member is preparing a letter to legal counsel.
- He scans a draft and emails it to himself, with no subject line or message.
- He then sends the letter to the Board attorney.
- The District gets an IPRA request for all Board emails.
- The original email sent to himself is not privileged.
- Solution: The original message should have been sent with the subject line such as "For Attorney Review."

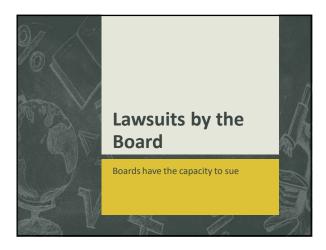
ADVICE OF COUNSEL WAIVER

- Don't ever say you are doing something "on the advice of counsel" or because "your attorneys said" to do it.
- The other party then gets to question you and your attorney on the advice.
- Reason: You can't use privilege as both a sword and a shield.



NOBODY ELSE IS ALLOWED TO WAIVE PRIVILEGE

- Not the Board's attorneys
- Not individual Board members
- Not the Superintendent
- Not any other employee
- Waiver is a breach of duty to the Board and can make the person waiving potentially liable



WHAT MIGHT A BOARD SUE FOR?

- Breach of contract
 construction defect
- Restraining order
- keep someone off propertyEviction
 - district provides rented mobile home space
- Laws or regulations
- state funding, charter school waiver
- Counterclaim

 in defense of a lawsuit

How Does a Board Initiate a Lawsuit?

By Vote In Closed Session

DOESN'T THAT VIOLATE THE OPEN MEETINGS ACT?

■ No

- Sessions can be closed for meetings "pertaining to pending or threatened litigation." – Section 10-15-1(H)(7)
- That means the Board "could properly discuss and decide to file suit . . . in a closed session."
 - Board of County Commissioners, Luna County v. Ogden, New Mexico Court of Appeals, 1994-NMCA-010, ¶ 16.

DON'T GET SLAPP'ED!

- SLAPP = Strategic Lawsuit Against Public Participation
- "Baseless civil lawsuits seeking or claiming millions of dollars have been filed against persons for exercising their right to petition and to participate in quasi-judicial proceedings before governmental tribunals."
- "Such lawsuits... may chill and punish participation in public affairs and the institutions of democratic government."
 - New Mexico's Anti-SLAPP statute, Section 38-2-9.2

RISK OF ANTI-SLAPP CLAIM

- If you sue, you can face an anti-SLAPP lawsuit.
- Biggest risk is suing for activities before the Board.
- Applies when the lawsuit seeks money damages.
- Penalties
 - Expedited motion to dismiss Board's lawsuit.
 - Costs and attorney's fees.

ANTI-SLAPP CASE

- Parent files and then withdraws recall petition against Board member.
- Board member sues for malicious abuse of process.
- Parent's petition was protected speech.
- Parent and others asking for \$180K in attorney's fees plus interest.
- Hearing set for March 2, 2018.

SPEAKING OF ATTORNEY'S FEES . . .

- Normally you can't recover your attorney's fees if you sue and win.
- Exceptions:
 - Allowed by statute (very rare).
 - Allowed by contract (make sure contract includes fees provision).
- Insurance doesn't pay for you to sue . . .
 - . . . and it may not pay if you are countersued.



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Torts	Property
Employmen	t Injunctions
Education	Copyright
Contracts	IPRA

WHAT IS A TORT?

- Negligence that causes harm
- Personal injury
- Assault, battery
- Failure to follow or enforce policies
- Emotional distress
- Lawful, but unjustifiable harm (prima facie tort)

DOESN'T THE TORT CLAIMS ACT PROTECT US?

- Probably not
- Allows lawsuits for "damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees . . . in the operation or maintenance of any building."
- The New Mexico Supreme Court interprets "operation or maintenance of any building" very broadly.
- Plus there are usually alternative, non-tort theories.

WHAT IS EXCLUDED BY THE TORT CLAIMS ACT?

- Not much
- Negligent supervision
 - But it has never been defined and never successfully argued by schools.
- Emotional distress when there is no physical injury.
- Prima facie tort.

TORT CLAIMS ACT NOTICE REQUIREMENT

- Plaintiff must send Superintendent written notice of potential claim within 90 days of incident.
- Lawsuit must then be filed within 2 years of the incident.
- Notice requirement doesn't apply to minors.

THE TORT CLAIMS ACT ONLY PROVIDES IMMUNITY FOR TORTS

- Even if an exclusion applies, you can still be sued.
- There is usually an alternative, non-tort action.
- Example
 - Student claims district employee made inappropriate sexual remarks to her.
 - That could be a tort claim.
 - But it is also a civil rights claim.

WHAT TO DO AFTER RECEIVING A LAWSUIT

- Plaintiff files complaint in court.
- Plaintiff serves complaint on the district, usually to the Superintendent's office.
- Complaint should be given to Board attorneys.
- Board attorneys send it to insurer for coverage decision.
- If covered, insurer assigns defense counsel.

INITIAL STEPS IN DEFENSE

- Respond to complaint within 30 days
 - Remove to federal court, Move to dismiss, or

 - File answer
- Answer must include counterclaim, if any
 - A counterclaim is a lawsuit by the Board Board must vote if it wants to counterclaim
- Within 10 days of filing answer
 - Decide whether to excuse judge
 - Decide whether to ask for jury and number of jurors

MOTIONS

- Requests to the Court to
 - Dismiss some or all claims
 - Limit evidence that may be used
 - Various other things
- Usually decided in a hearing after both sides submit written arguments
- Clients usually do not attend hearings
- Have to respond Plaintiffs can use to drive up fees

DISCOVERY

- Written requests from one party to the other
 Interrogatories: Questions
 - Requests for production: Documents
- Depositions
 - Opposing attorney asks questions of witnesses, on the record
- Investigation
 - Background checks, internet research, interviews, etc.

MEDIATION

- Settlement discussion led by mediator
- Usually ordered by the Court
- Most productive when discovery is complete or nearly complete
- 95% of cases end with mediation or post-mediation settlement

BOARD'S ROLE IN MEDIATION

- Pre-Mediation closed session meeting
 - Appoint representative
 - Board memberSuperintendent
 - Give him or her settlement authority
- Post-Mediation closed session meeting

Approve settlement

INSPECTION OF PUBLIC RECORDS ACT (IPRA)

Can be sued for

- Failing to respond to records request
- Responding late
- Wrongfully withholding records
- Plaintiff can be awarded
 - Statutory fees up to \$100/day
 - Attorney's fees
 - Actual damages

INJUNCTIONS OR RESTRAINING ORDERS

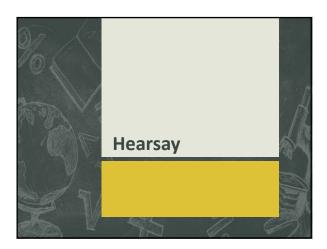
- Plaintiffs can ask the Court to order the Board to do something or not do something.
- Requires little or no notice to the Board.
- Judges usually grant a temporary restraining order, followed by a hearing on an injunction.
- Board can move to dissolve the order or wait to defend at the injunction hearing.

CONTRACTS

- Lawsuit must be based on a written contract.
 Limited exception for implied employment contracts.
- Lawsuit must be filed within two years of breach.Private contracts are allowed six years.
- Contracts often require arbitration.
 - School Personnel Act
 - Most construction contracts

STATUTORY VIOLATIONS

- May still be good immunity for these claims.
- Example
 - Little Miller Act requires district to insure general contractor gets payment bond on construction contracts.
 - Insures subcontractor is paid.
 - Government cannot be sued by subcontractors for failure to insure payment bonds were obtained.



WHAT IS HEARSAY?

An out-of-court statement offered to prove the truth of the matter asserted in the statement.

BUT, HEARSAY IS NOT AN EXCUSE

- Don't say you can't act on a statement because it is hearsay.
- What was heard may not be hearsay.
- Even if it is, it doesn't matter.

SCENARIO 1

- Gloria: Principal Starr, come quick, John is beating up Paul in the cafeteria!
- [They run to the cafeteria.]
- Principal Starr: I don't see anything.
- Gloria: But they were right here!

IS THAT HEARSAY?

- Can Gloria's statement be used to prove that John was beating up Paul?
- It is hearsay.
- But it can be used for proof.
 - Excited utterance.
 - Present sense impression.

HEARSAY EXCEPTIONS

- Not everything that sounds like hearsay is hearsay.
- 8 types of out-of-court statements are defined as not hearsay.
- 23 exceptions allow hearsay when the declarant is available.
- 5 exceptions allow hearsay when the declarant is not available.
- The judge can allow hearsay if it appears trustworthy.

SCENARIO 2

- [Gloria is sitting in Principal Starr's Office]
- Gloria: I saw John beating up Paul in the cafeteria last week.
- Principal Starr: I can't do anything about that, it is hearsay.

IS THAT HEARSAY?

- Can Gloria's statement be used to prove that John was beating up Paul?
- Probably not.
- Can it be used to prove that Principal Starr did not take proper action?
- Yes the statement is offered to show its effect on Starr, not to prove that a fight occurred.

SCENARIO 3

- [Principal Starr is in a disciplinary hearing with John.]
- Principal Starr: Gloria told me you beat up Paul last week. I am going to suspend you.
- John: You can't do that! It's hearsay!

IS THAT HEARSAY?

Yes.

- But it doesn't matter.
- Hearsay is a rule of evidence that applies to judicial proceedings.
- You can make your own judgments about credibility outside of a court, in administrative matters.
 - By statute, the rules of evidence do not apply to hearings under the School Personnel Act.

CONTACT

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