

**YOU HAVE THE CAPACITY TO SUE AND BE SUED.  
WHAT NOW?**

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**SCHOOL BOARD STATUTORY AUTHORITY**

▪ A local school board shall have the following powers 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

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**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.

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**Attorney-Client  
Relationship**

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**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

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## 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.

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## 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.

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## Attorney-Client Privilege

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### 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

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### WHAT DOES THE PRIVILEGE DO?

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

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### 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

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## LOTS OF THINGS ARE NOT PRIVILEGED

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

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## 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

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## 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."

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### 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.

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### WHO IS ALLOWED TO WAIVE PRIVILEGE?

**The Board**

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### 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

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**Lawsuits by the Board**

Boards have the capacity to sue

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**WHAT MIGHT A BOARD SUE FOR?**

- Breach of contract
  - construction defect
- Restraining order
  - keep someone off property
- Eviction
  - district provides rented mobile home space
- Laws or regulations
  - state funding, charter school waiver
- Counterclaim
  - in defense of a lawsuit

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**HOW DOES A BOARD INITIATE A LAWSUIT?**

**By Vote**  
**In Closed Session**

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## 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.

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## 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

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## 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.

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## 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.

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## 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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## Lawsuits Against the Board

You have the capacity to be sued

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## WHAT MIGHT A BOARD BE SUED FOR?

- Almost anything

Torts	Property
Employment	Injunctions
Education	Copyright
Contracts	IPRA

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## 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)

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## 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.

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### 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.

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### 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.

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### 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.

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## 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.

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## 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

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## 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

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## 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.

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## 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

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## BOARD'S ROLE IN MEDIATION

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

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## 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

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## 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.

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## 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

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## 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.

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## Hearsay

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## WHAT IS HEARSAY?

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

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## 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.

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## 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!

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## 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.

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## 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.

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## 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.

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## 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.

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### 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!

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### 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.

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*The information in this presentation was prepared by Walsh Gallegos Treviño Russo & Kyle P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.*



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