

THE SUPREME COURT OF ALABAMA
Oral Argument Docket for November 7, 2018

Case number 1161044 was originally scheduled for oral argument on October 2, 2018, it has been rescheduled to the above date.

NOTE TO ATTORNEYS: You should report to the Clerk's office at least 15 minutes prior to the call of the docket at which time your case is set for oral argument. Julia Jordan Weller, Clerk.

9:00 a.m.

1. 1161044 **ORAL ARGUMENT LIMITED TO 20 MINUTES EACH SIDE.**

Sarah S. Swindle et al. v. Sheila Hocutt Remington.

<u>Petitioner/Appellant</u>	<u>Petitioner/Appellant</u>	<u>Respondent/Appellee</u>	<u>Respondent/Appellee</u>
David R. Boyd	Dorman Walker	Fred F. Bell	Sam H Heldman
Leura G Canary		Clinton Daughtrey	Thomas Matthew Loper
Jared Hughes Morris		Jesse Cecil Gardner	M. Vance McCrary

2. 1170706 (976) **ORAL ARGUMENT LIMITED TO 20 MINUTES EACH SIDE.**

Lead Education Foundation, et al. v. Alabama Education Association et al.

<u>Petitioner/Appellant</u>	<u>Petitioner/Appellant</u>	<u>Respondent/Appellee</u>	<u>Respondent/Appellee</u>
Michael Berson	William H. Webster	Monica Leonette Arrington	Tamika Henry Reed
Kayla Frisby		Clint Daughtrey	Victoria Denise Relf
Matthew R Jackson		G. Lane Knight	Theron Stokes
Aaron McLeod		John W. Naramore	Dorman Walker

3. 1170724 (976) **ORAL ARGUMENT LIMITED TO 20 MINUTES EACH SIDE.**

Marc Buttram, et al. v. Alabama Education Association, et al.

<u>Petitioner/Appellant</u>	<u>Respondent/Appellee</u>
Michael Berson	Clint Daughtrey
Matthew R Jackson	Tamika Henry Reed
Aaron McLeod	Theron Stokes

4. 1170737 (976) **ORAL ARGUMENT LIMITED TO 20 MINUTES EACH SIDE.**

Dr. Ed Richardson, Interim State Superintendent of Education v. Ala. Education Association, et al.

<u>Petitioner/Appellant</u>	<u>Respondent/Appellee</u>	<u>Respondent/Appellee</u>
G. Lane Knight	Monica Leonette Arrington	Victoria Denise Relf
	Clint Daughtrey	Theron Stokes
	Tamika Henry Reed	

SUPREME COURT OF ALABAMA

Wednesday, November 7, 2018

First Case

This summary is provided solely for the purpose of providing the public and any spectators in the courtroom with the general facts and issues presented in a case. It is not intended to be a reflection of all the possible issues or arguments the Court may actually consider. Nothing in this summary should be read as a predetermination by the Court of any issue or claim.

1161044 -- Swindle et al. v. Remington

Attorneys for Sarah S. Swindle and other members of the Board of the Public Education Employees' Health Insurance Program ("PEEHIP"): David R. Boyd and Leura Canary

Attorneys for Sheila Hocutt Remington: J. Cecil Gardner, M. Vance McCrary, Thomas Loper, Samuel H. Heldman, Clinton M. Daughtry, and Fred F. Bell

STATEMENT OF THE CASE AND FACTS: PEEHIP, a self-funded group health-insurance plan, provides benefits to participating teachers and public-education employees. The PEEHIP Board members are responsible for maintaining the health plan. The Board conducts a publicly noticed meeting each spring at which members of the PEEHIP staff present financial reports and updates, including information regarding projected budget shortfalls, to the PEEHIP Board.

The PEEHIP Board gave public notice with the Alabama Secretary of State of its board meeting set for April 27, 2016, at 1:00 p.m. in the board room of the RSA building. At 9:00 a.m. on April 27, the PEEHIP Board gathered in the training room of the RSA building. During the morning session, the lawyers for PEEHIP announced that no deliberation should be conducted among Board members. The staff provided the Board with large binders that included several financial documents. PEEHIP staff gave a presentation to the Board regarding proposed budgeting options and explained the information provided in financial documents. The Board members asked questions during the presentation.

At 1:00 p.m., Swindle conducted the PEEHIP Board meeting in the board room of the RSA building; the meeting was attended by members of the press and public. During the open meeting, PEEHIP staff presented the financial report concerning PEEHIP's projected budget shortfall of \$141.5 million for fiscal year 2017 and \$220 million for fiscal year 2018. The staff also presented various proposals to fill the projected shortfall. After deliberating, the Board voted seven to six to increase spousal surcharges and premiums effective October 1, 2016.

During a subsequent open meeting on December 6, 2016, a Board member moved to rescind the Board's April 27, 2016, decision to increase PEEHIP premiums and spousal surcharges. After the Board voted to waive notification of the matter, the Board voted eight to seven to reject the motion to rescind the April 2016 decision.

On May 17, 2016, Remington filed this lawsuit in her individual capacity and as president of the Alabama Education Association, asserting a violation of the Open Meetings Act and seeking declaratory and injunctive relief, including an order invalidating the premium and surcharge increases. The Montgomery Circuit Court found that the PEEHIP Board violated the Open Meetings Act by holding the morning session in private. The PEEHIP Board subsequently filed an appeal to the Alabama Supreme Court.

During an open meeting on March 6, 2018, the Board voted to approve a new premium structure that eliminated spousal surcharges for participants and reduced the total monthly costs for participants with a covered spouse and no other covered dependents effective May 1, 2018.

ISSUES AND ARGUMENTS:

1. Whether the morning gathering meets an exception under the Open Meetings Act?

The Appellants' argument: The morning session meets an exception under the Open Meetings Act set forth in Ala. Code 1975, § 36-25A-2(6)(b)(1), which

provides that the term "meeting" shall not include "[o]ccasions when a quorum of a governmental body ... attends ... training programs ... or otherwise gathers so long as the ... full governmental body does not deliberate specific matters." No "meeting" occurred because the morning gathering was a training session at which there was no deliberation.

Appellee's argument: The morning session, which was closed to the public, was part of a full-day meeting. No training occurred, the staff's presentation was for the purpose of influencing the Board's vote, and there was some deliberation, including persuasive questioning by certain Board members. Additionally, a meeting with a "governmental body" as set forth in § 36-25A-2(6)(b)(1), Ala. Code 1975, does not include a meeting of a board with its own members.

2. Whether Ala. Code 1975, § 36-25A-9(f), forecloses injunctive relief?

The Appellants' argument: Section 36-25A-9(f), Ala. Code 1975, provides that "any action taken at an open meeting conducted in a manner consistent with this chapter shall not be invalidated because of a violation of this chapter which occurred prior to such meeting." The same matters were presented at both the morning and afternoon sessions. The afternoon meeting, at which the Board voted to increase premiums, was conducted openly and in a manner consistent with the Open Meetings Act. Because the alleged violations took place before the properly noticed meeting, § 36-25A-9(f) forecloses injunctive relief.

Appellee's argument: The meeting began in the morning and lasted all day. Allowing closed meetings under the guise of a training session just before a noticed meeting would render the Open Meetings Act meaningless.

3. Whether third parties substantially relied on the Board's decision to increase premiums and spousal surcharges?

The Appellants' argument: Section 36-25A-9(f), Ala. Code 1975, provides that a governmental action should not be invalidated where the invalidation would "unduly prejudice third parties who have changed their position or taken action in good faith reliance upon the challenged action of a governmental body." The invalidation of premium-surcharge increases approved by the Board would cause projected budget deficits for future fiscal years; therefore, PEEHIP would risk becoming unable to pay for medical services and prescription drugs for its subscribers.

Appellee's argument: There is no evidence that any subscribers or vendors substantially relied on the April 27, 2016, vote or that any third parties have been unduly prejudiced by the circuit court's order. The Board could have resolved any budgeting shortfalls by other means, such as taking funds from the PEEHIP reserves.

4. Whether the issues before the Court are now moot?

The Appellants' argument: The issues were resolved by the Board's December 2016 vote not to rescind its previous vote, as well as its March 6, 2018, vote to approve a new premium structure that eliminated spousal surcharges for participants and reduced the total monthly costs for participants with a covered spouse and no other covered dependents effective May 1, 2018. As of March 6, 2018, there is no case or controversy between the parties as to the PEEHIP premium rates to apply going forward, and the claims, with the exception of Remington's claims for the invalidation and refund of the premium and spousal-surcharge rates in effect before May 1, 2018, and this case should be dismissed for lack of subject-matter jurisdiction.

Appellee's argument: The vote not to rescind is invalid and therefore does not render the claims before this Court moot because the matter was not placed on the agenda and the public did not receive notice before the December 2016 open meeting. With respect to the March 2018 meeting, the meeting occurred after the case was filed; therefore, the results are not before this Court. Even if the issues were resolved by the March 2018 meeting prospectively, the issues concerning the rates in effect between spring 2016 and May 1, 2018, have not been resolved.

SUPREME COURT OF ALABAMA

Wednesday, November 7, 2018

Second Case

This summary is provided solely for the purpose of providing the public and any spectators in the courtroom with the general facts and issues presented in a case. It is not intended to be a reflection of all the possible issues or arguments the Court may actually consider. Nothing in this summary should be read as a predetermination by the Court of any issue or claim.

1170706 Lead Education Foundation, Inc. ("LEAD") v. Alabama Education Association ("AEA") et al.

1170724 Marc Buttram et al. v. AEA et al.

1170737 Dr. Ed Richardson v. AEA et al.

Attorneys for LEAD: Kayla Frisby and William H. Webster

Attorneys for AEA, Vicky Holloway, and Felicia Fleming: Monica L. Arrington, Clint Daughtry, John W. Naramore, Tamika Henry Reed, Victoria Denise Relf, and Theron Stokes

Attorneys for Marc Buttram and other members of the Alabama Public Charter School Commission: Michael Berson, Matthew Jackson, and Aaron G. McLeod

Attorneys for State Superintendent of Education: G. Lane Knight and Dorman Walker

STATEMENT OF THE CASES AND FACTS: In December 2017, LEAD submitted an application to the Alabama Public Charter School Commission ("the Commission"), seeking to open a public charter school for the 2018-19 school year. On February 12, 2018, the Commission conducted an open meeting at which 7 out of 9 Commission members were present. The Commission normally consists of 10 members; however, at that time, the 10th member had resigned, and there was no lieutenant governor to appoint a new member. One member declined to vote due to a conflict. After the Commission asked LEAD several questions about its efforts to comply with recommendations from the National Association of Charter School Authorizers, the Commission voted 5-1 to approve LEAD's application.

On March 5, 2018, the AEA, Holloway, and Fleming filed a complaint seeking declaratory and injunctive relief against the members of the Commission, Dr. Richardson as the interim Superintendent of the Alabama Department of Education, and LEAD. On March 7, 2018, the Montgomery Circuit Court issued a temporary restraining order, ordering that no public funds be obligated or expended for contracts related to staff employment, student registration, or the purchase of a building. On March 15, 2018, the Commission adopted a resolution approving LEAD's application. On April 30, 2018, the circuit court conducted oral argument on several of the pending dispositive motions. On May 1, 2018, the circuit court found that the individual plaintiffs had taxpayer standing to challenge the proposed expenditure. The circuit court entered a summary judgment in favor of the AEA, Holloway, and Fleming, specifically interpreting § 16-6F-6(c)(3), Ala. Code 1975, as requiring a majority vote of the Commission in its entirety and finding that the number of votes was insufficient to approve LEAD's charter-school application.

ISSUES AND ARGUMENTS:

1. Whether Holloway, Fleming, and AEA have standing?

Arguments of Dr. Richardson and the Commission: The plaintiffs do not have standing as taxpayers or in the name of the State. Holloway and Fleming do not allege that the opening of a charter school will require taxpayers to incur a liability to replenish public funds. In addition, the individual plaintiffs may not pursue this case in the name of the State, because this type of standing is applicable only in mandamus cases seeking to compel the performance of a public duty, and this case is not before the Court on a petition for a writ of mandamus. AEA has no basis for associational standing because nothing indicates that Holloway and Fleming are AEA members. Moreover, AEA has an inherent conflict of interest with its own members related to the opening of a charter school.

Arguments of Holloway, Fleming, and the AEA: The individual plaintiffs have standing in their capacities as citizens and taxpayers of Montgomery County and the State of Alabama, as well as employees of the Montgomery County Board of Education, to challenge the Commission's decision to grant LEAD's application for a public charter school. Individual taxpayers have standing to challenge the unlawful disbursement of public funds. Because a majority of the Commission was not present to vote on the application for a public charter school, the vote was invalid; therefore, any disbursement of funds would be unlawful. Consequently, Holloway and Fleming have standing to challenge the Commission's decision. In addition, the AEA has associational standing because of the impact on its members and because charter-school teachers are not afforded the same legal protections regarding job security as other public-school teachers. The plaintiffs also have standing because they brought suit in the name of the State "on relation of" the plaintiffs. Thus, they have standing to bring "ex rel." claims based on the great public interest in this case.

2. Whether the issues presented by these appeals are now moot?

Arguments of Holloway, Fleming, and the AEA: The case is now moot because LEAD failed to execute a charter contract within the time allowed by law from approval

of the application. Section 16-6F-7(e)(1), Ala. Code 1975, permits a public-charter-school applicant no more than 60 days from the Commission's approval to execute a contract. Because LEAD did not execute the contract, the merits of the dispute do not affect the rights of the parties. In addition, the circuit court did not have the legal authority to stay or extend deadlines related to the execution of the contract.

Arguments of LEAD and the Commission: The circuit court's injunction, which was requested by the plaintiffs, is the reason for any delay in executing the contract. A mootness argument is inappropriate where a party uses litigation for the purpose of manipulating the court's jurisdiction. Moreover, this Court should reach the merits of the case because the opening of public charter schools is a matter of broad public interest. Thus, the public-interest exception to the mootness doctrine applies.

3. Whether the Commission violated the Alabama School Choice and Student Opportunity Act, Ala. Code 1975, § 16-6F-1 et seq. ("the ASCSOA")?

Arguments of Holloway, Fleming, and the AEA: The Commission violated the majority-vote requirement of the ASCSOA. A majority vote of the Commission, consisting of 11 members, was necessary for the passage of an action authorizing the charter school as required by § 16-6F-6(c)(3)&(9), Ala. Code 1975. Because the Commission failed to include an 11th member from the local school board and did not receive a majority vote from the Commission as a whole, the action authorizing the charter school was void.

Arguments of the Commission and LEAD: A reading of the plain language of the ASCSOA indicates that the Commission may transact business by a majority vote of a quorum of its members. In addition, the Commission interpreted the statute as requiring an 11th member only when the local school board has registered as an authorizer pursuant to § 16-6F-6(d), Ala. Code 1975.

4. Whether Holloway, Fleming, and the AEA failed to exhaust their administrative remedies under the Alabama Administrative Procedure Act, Ala. Code 1975, § 41-22-1 et seq. ("the AAPA")?

Argument of LEAD: LEAD contends that the plaintiffs failed to properly invoke the jurisdiction of the circuit court by exhausting their remedies under the AAPA. Specifically, LEAD contends that the plaintiffs should have petitioned to become parties by filing a motion to intervene during the Commission's open meeting or shortly thereafter. LEAD contends that the plaintiffs should have provided notice to the Commission that they were "aggrieved" by its decision before seeking judicial review.

Arguments of Holloway, Fleming, and the AEA: The AAPA is not applicable because the application for a public charter school does not involve a "contested case" as set forth in the statute. The AAPA is appropriate for adversarial proceedings, which include evidentiary hearings with discovery, testimony, and cross-examination. The ASCSOA, however, calls for written applications, interviews, and a public forum and requires the authorizer to base its decision on "documented evidence collected through the application process," § 16-6F-7(b)(2), Ala. Code 1975. Thus, the AAPA is not applicable to the Commission's actions in this case because the proceeding was neither litigation-based nor adversarial.

5. Whether the Commission violated the Open Meetings Act?

Arguments of Holloway, Fleming, and the AEA: The Commission violated the Open Meetings Act because a majority of the Commission did not vote in favor of granting the application and the Commission should have consisted of 11 members. Specifically, the Commission violated the Act by failing to adhere to its own adopted parliamentary procedures, which require a vote by a "majority of the entire commission" pursuant to § 36-25A-5(a) and -9, Ala. Code 1975. Moreover, even if the Court were to presume that the plaintiffs failed to exhaust their remedies with respect to their claim that the Commission violated the ASCSOA, their claim regarding violations of the Open Meetings Act is separate from, and not governed by, the ASCSOA.

Argument of the Commission: The plaintiffs' challenge to the proceedings on the basis of the Open Meetings Act is premised on the idea that six votes were required to approve LEAD's application. No error occurred because a majority vote of a quorum of the Commission is all that is required.