

# New Hampshire School Boards Association

Excellence in Public Education Through School Board Leadership

## **Non-Public Sessions Right to Know Law Webinar**

Thursday, September 28, 2017

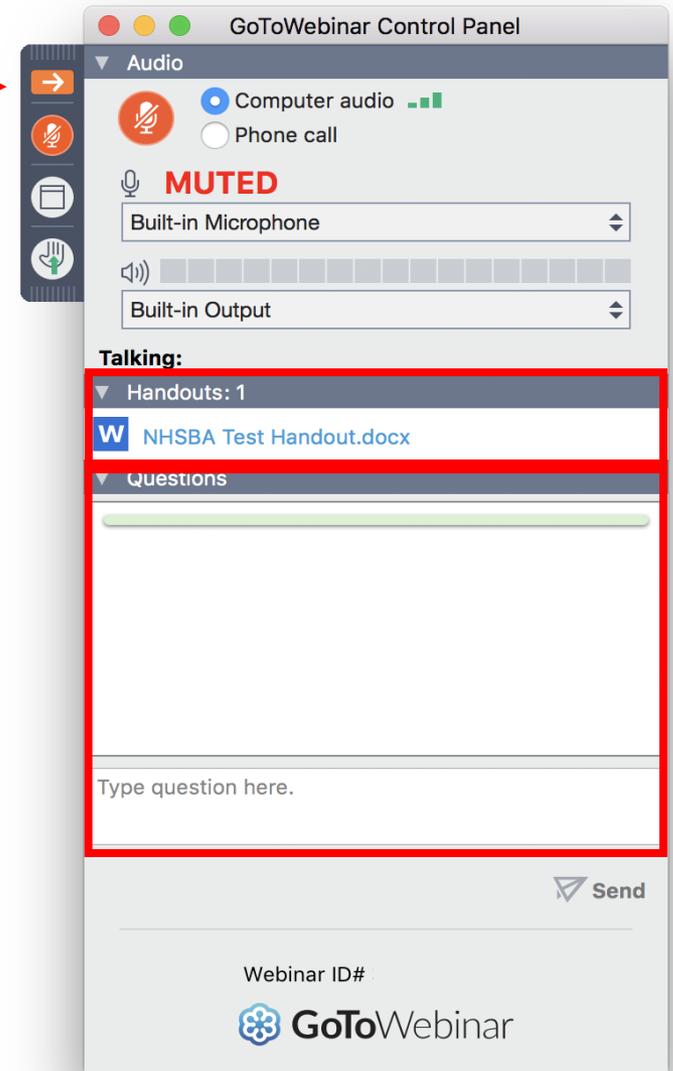
*Noon – 1:00 pm*

*Repeat 5:30 pm to 6:30 pm*

Center At Triangle Park  
Concord, NH 03301

# How to Participate

- To close or reopen your panel.
- To download today's presentation or any additional documents.
- Submit text questions.
- Q&A addressed at the end of today's session.



# Meeting Basics Under RSA 91-A:2

## *RSA 91-A:2, I*

# **Meetings**

“RSA 91-A:2 sets forth the general requirements and parameters regarding meetings by public bodies\*, including, among other things, provisions for notices and minutes, and the definition of “meeting”.

*In general, under that section, a meeting of a public body occurs when:*

- *A quorum of the body*
- *Convenes so they can communicate contemporaneously (email, telephone, etc.)*
- *To discuss or act upon something over which the public body has supervision, control, jurisdiction or advisory power.*

\*Public body includes boards, as well as any committee which a board might establish to consider any matter over the board itself has supervision, jurisdiction or advisory power.

## *RSA 91-A:2, I*

# Meeting Requirements

If it constitutes a “meeting”, then the law further requires the body (board or committee) to:

- Provide posted public notice of the meeting;
- Allow the public to attend;
- Conduct deliberations and decision making in public, unless a non-public session exception legally applies; and
- Make appropriate minutes of the meeting.

## *RSA 91-A:2, I*

# Meetings and “Non-Meetings”

*Even though a “meeting” occurs when:*

- *A quorum of the body*
- *Convenes so they can communicate contemporaneously (email, telephone, etc.)*
- *To discuss or act upon something over which the public body has supervision, control, jurisdiction or advisory power;*
- Consistent with the second and third of those points, additional language of 91-A:2 makes clear that “chance” or “social” encounters by a quorum are not meetings – even when they happen to discuss jurisdictional matters – UNLESS decisions are made.
- Additionally, 91-A:2, I also carves out four\* narrow exceptions to the definition of a meeting.

# Non-Meetings Under 91-A:2, I

*RSA 91-A:2, I*

**Meeting shall also not include:**

*(a) Strategy or negotiations with respect to collective bargaining.*

- This non-meeting exception applies equally to:
  - strategy discussions by the board, the board's negotiating team (e.g. committee), and
  - negotiations with the union.
- It is also NHSBA's opinion that this exception:
  - is not limited to boards which specifically employ the employees of the Union (e.g., an SAU board for which constituent member districts are negotiating CBA's), and
  - the strategy session could include other participants at the pleasure of the board committee chair.

*RSA 91-A:2, I*

## **Meeting shall also not include:**

*(b) Consultation with legal counsel*

- This non-meeting exception only applies when the attorney is either present, or at the very least able to participate in a “contemporaneous exchange of words” with the public body. *Ettinger v. Town of Madison Planning Board*, 162 N.H. 785 (2011)
- The contemporaneous exchange language of *Ettinger* is widely understood to allow for telephone conferences with the attorney, whether the board members themselves are in one location or not.
- Any discussion of advice from the board’s attorney when the attorney is not so “present”, may occur in non-public session, provided the circumstances satisfy the requirements of 91-A:3, II (1) – discussed later.

*RSA 91-A:2, I*

**Meeting shall also not include:**

*(c) A caucus consisting of elected members of a public body of the same political party who were elected ... on a partisan basis by a town or city which has adopted a partisan ballot system...*

- This provision does not apply to school districts or their boards.

## *RSA 91-A:2, I*

# **Meeting shall also not include:**

*(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting...*

- Seems simple, right? Maybe, but extra caution is important here.
- Assume the Board makes a decision, or gives general instructions to the a board member or the superintendent about a letter or other written document (e.g., a vendor contract). The board member then circulates the draft. While that act simply memorializes the decision the Board had already made, once any of the members start suggesting substantive edits, the exception no longer applies. A practice suggestion would be to indicate in the original transmittal email/cover sheet, that if any member has suggested substantive edits, then he/she should indicated that further Board discussion is needed.

*RSA 91-A:2, I*

## **We Definitely have a Meeting!**

- Once you determine that a quorum of the public body is/has convened to discuss or act upon something over which the public body has supervision, control, jurisdiction or advisory power, and there is no “non-meeting” exception, then the subject matter must be discussed at a public meeting.
- However, although all such discussions must occur at a public meeting, some matters may be discussed in non-public session.

# Acceptable Reasons to Enter Non-Public Sessions

## *RSA 91-A:3, II*

# **Non-Public Sessions – General Principles**

- Under 91-A:2, I, all “meetings” are public.
- Under exceptions set out at 91-A:3, a board may enter non-public session to discuss and potentially act certain limited matters.
- Most non-public sessions occur as part of a regular public meeting.
- However, a public meeting can be held solely for the purpose of going into a non-public session – with no other discussion of business in the public session of the meeting.
- Either way, the board must first meet in public and then vote to enter the non-public session (procedures are discussed later).
- Unlike a “non-meeting”, the notice and minute requirements of a public meetings apply to any public meeting that includes a non-public session.

## ***RSA 91-A:3, II***

### **A board may enter non-public session to consider or act on:**

*(a) dismissal, promotion, compensation or disciplining of any public employee, or the investigation of any charges against him or her, unless that employee has a right to an open meeting and requests the meeting be open;*

- This language does not create a right to an employee to have or even attend a non-public session concerning him or her. Such a right typically would derive from a CBA, statute, Board policy or other such source (e.g., board level grievance hearing, non-renewal hearing under RSA 189:14-a, individual contract, etc.)
- As to such hearings, even when an employee requests an open hearing, the board may go into non-public for those parts of the hearing which concern specific students, or impacts the reputation of one or more persons (other than a member of the board itself)

## *RSA 91-A:3, II*

### **A board may enter non-public session to consider or act on:**

#### *(b) The hiring of any person as a public employee.*

- This only applies to employees, and does not apply to appointed positions, whether board created (e.g., ad hoc committees as committee members), or not (board member vacancies). In those instances, one might look instead at the next exception regarding reputation.
- When considering appointments to non-employee positions, a board could conduct the interviews and general fact of potential appointees, and then consider whether to enter non-public under the reputation exception (91-A:3, II(c)).

## ***RSA 91-A:3, II***

### **A board may enter non-public session to consider or act on:**

*(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the school board itself, unless such person requests an open meeting;*

- This exception is likely the most common reason used for non-public.
- The reputation section applies to almost all matters concerning specific students.
- Most municipal and school attorneys maintain that the last clause does not give the person whose reputation is at stake the right to request the discussion be open unless the person otherwise has a right to a hearing (manifest hardship, 193:13, etc.).

## ***RSA 91-A:3, II***

### **A board may enter non-public session to consider or act on:**

*(d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.*

- This exception allows discussion of things such as sale price range, or various other issues involved in either general listing, or specific offers.
- The exception only applies to contracts involving sale/lease of property. The exception does not allow non-public discussion of any other type of contract, such as transportation, fuel supply, etc.

## ***RSA 91-A:3, II***

### **A board may enter non-public session to consider or act on:**

*(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed by or against the public body or any subdivision thereof, or by or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled....*

- The main requirement here is that the litigation has to have risen to the document stage, either by threat, or actual filing.
- As a result of an amendment in 2015, the exception no longer applies only to situations where the board/district/member would be defendant(s)
- Counsel does not need to be present, or even retained yet.

## ***RSA 91-A:3, II***

### **A board may enter non-public session to consider or act on:**

*(i) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.*

- This exception only applies to threats of **deliberate** conduct intended for widespread injury or property damage – e.g., terrorist acts
- Not generally applicable to schools, but in certain instances it could apply (lock down procedures and drills, specific threats, etc.).

## ***RSA 91-A:3, II***

**A board may enter non-public session to consider or act on:**

*(j) Consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding pursuant to RSA 541 or RSA 541-A.*

- 91-A:5, IV exempts various categories of documents from the public record disclosure requirement; the examples of the categories exempt under this section include records concerning: internal personnel practices, test questions, scoring keys, data used for academic exams, personnel ... files whose disclosure would constitute an invasion of privacy.
- This would only apply when the public body is convening a hearing under RSA 541 or 541-A. Examples include most hearings before a school board, e.g., non-renewal, etc., but not hearings which arise only under a grievance provision of a CBA.

## ***RSA 91-A:3, II***

### **A board may enter non-public session to consider or act on:**

*(k) Consideration of entering into a tuition contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations.*

- The language does not allow for non-public sessions to discuss existing contracts.
- The exception allows joint discussion by boards negotiating an agreement.
- Before final approval by the District, the proposed contract, all proposals, all non-public minutes, and certain other documents shall be made public.
- Also, final approval of the contract by a school district shall occur only at a meeting open to the public at which, or after which, the public has had an opportunity to participate.

## ***RSA 91-A:3, II***

### **A board may enter non-public session to consider or act on:**

*(1) Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.*

- This exception was added in 2016 in response to a 2011 Supreme Court decision indicating that a board could not discuss legal advice outside of the public view unless the board had the ability to “have a contemporaneous exchange of words” with the attorney.
- New paragraph (1) allows not only discussion of advice in writing, but also advice given orally to at least one member of the body.

The list found in 91-A:3, II for acceptable purposes of non-public sessions is exclusive. Unless one or more of those exceptions applies to a particular topic, or the topic is properly considered in a non-meeting under 91-A:2, I, a quorum of a board or committee may only discuss the topic during the public part of a public meeting.

# Procedures Required for Non-Public Sessions

## *RSA 91-A:3, I*

# Entering Non-Public Sessions

- Requirements to enter non-public session:
  - A motion properly made and seconded occurring during public session\*;
  - The motion must state the specific exemption under 91-A:2, III which allows a non-public session;
  - Vote on the motion shall be by roll call vote; and
  - With approval of a majority of those present.
  - All of the above must be reflected in the public minutes.
- A motion may include more than one statutory basis per item, and more than one matter. However, each separate matter must have at least one independent basis.
- No specific procedure is required for exiting a non-public session.

\*The notice for the public meeting does not require reference to a non-public session.

# Attending Non-Public Sessions

Who may attend a non-public session?

- The public body's own members;
- Typically the Superintendent, and with some matters, the Business Administrator;
- When warranted, essential staff and/or guests may attend the nonpublic session.
  - In non-public sessions regarding specific individuals, such as hearings, the persons in attendance frequently changes. For instance, a witness to an event that is the subject of a discipline hearing, would only be present during his or her testimony.
- Although most boards use either one of the members or even the Superintendent to take minutes, a board could use its typical minute taker, provided there was a high level of confidence in that person's ability to keep matters confidential.

*RSA 91-A:2, II and A:3, III*

## **Minutes of Non-Public Sessions**

- Minutes are required for all non-public sessions.
- Non-Public Session minutes must include:
  - For all actions taken, a recorded roll call vote for each action taken (the statute merely requires that the minutes reflect the “manner” in which each member voted, accordingly, if unanimous, a statement to that effect will suffice);
  - The names of each member participating;
  - The name of anyone else attending or appearing before the board in the non-public session;
  - A brief description of the subject matter discussed; and
  - Any final decisions/actions taken.
- Notwithstanding whether minutes are sealed, what is discussed in non-public must remain confidential.

## *RSA 91-A:3, III*

# Sealing Non-Public Minutes

- Unless sealed, such minutes must be disclosed within 72 hours (3 days) of the meeting. For minutes of public sessions, the requirement is 5 days.
- Sealing minutes (i.e., non-disclosure) of non-public minutes requires:
  - a recorded vote;
  - in public session;
  - of 2/3 of the members present that divulgence of the minutes:
    - Likely would adversely affect the reputation of someone other than a board member;
    - render the proposed action ineffective; or
    - pertain to efforts to thwart terrorism.

### *RSA 91-A:3, III*

# **Additional Requirements/Guidelines for Non-Public Minutes**

- A motion to seal\* non-public minutes should be the first item considered upon exiting the non-public session.
- If no motion is made, or, if made, fails to obtain 2/3 approval, then the minutes are public by default, and must be “disclosed” within three days (72 hours).
- The board should consider in its motion the duration that the minutes should be subject to non-disclosure. For instance, reputation matters may be perpetual, while the other reasons may be shorter lived (e.g., authorized range in price relative to sale of a parcel of property).

\*91-A does not refer to “sealing”. Rather, it merely requires that non-public minutes be disclosed unless a contrary vote is taken. Sealing is the term used almost uniformly by boards in NH.

## *RSA 91-A:3*

# **Additional Requirements or Guidelines Regarding Non-Public Sessions and Minutes When More Than One Topic is Considered**

- Frequently, school boards have occasion in the same meeting to consider more than one topic in non-public.
- A board could opt to enter and exit non-public for each separate matter.
- Most boards, however, consider multiple items in the same non-public session.
- Each item considered must have been the subject of a proper motion to enter non-public.
- Each matter considered in non-public should have its own minutes.
- The presiding officer (and the minute taker) must be disciplined in separating the different subjects, and making clear when discussion of one topic ends and another begins.

*House Bill 460*  
*Amends RSA 91-A:2, adding a new paragraph II-a*  
**Objections in Non-Public Sessions**

The new law, effective January 1, 2018, allows a board member to object when he/she is concerned that the discussion in non-public session is straying beyond the purpose or scope of the non-public session which was announced when the Board voted to go into non-public session.

The Board should discuss the objection, and if necessary reviewing the pertinent section of the Right-to-Know law. The Board can then:

- Continue the discussion if a majority believes the discussion is proper under the Right-to-Know law; or
- Discontinue the discussion

If the Board discontinues the discussion, it can go back into public session, and take a new vote to re-enter non-public with a motion stating the correct statutory exception.

*House Bill 460*  
*Amends RSA 91-A:2, adding a new paragraph II-a*

## **Objections in Non-Public Sessions**

*Continued....*

If the Board continues the discussion:

- The objecting member may request the objection be noted in the minutes;
- The objecting member may participate in the discussion; and
- If in non-public session, a summary of the objection shall be added to the public meeting minutes.

*Note: the amendment does not require notation of the objection in the minutes unless the objecting member requests the notation.*

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