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Conducting Effective School Board  
Meetings: Listening To The Public,  
Completing Board Business,  
And Doing So Legally  
In Spite Of Controversy**

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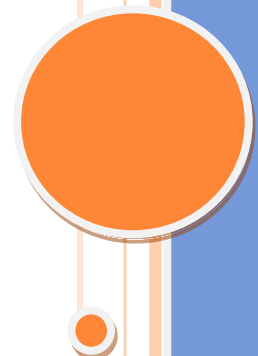
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School boards conduct the district's business at duly posted public meetings held in accordance with the Right-to-Know Law. During the declared COVID-19 emergency, the manner in which school boards conducted their meetings changed significantly. School board members and the public could all participate remotely. COVID-19, disagreements about how schools should respond to its variants, and recent legislation have produced new challenges for school boards in conducting orderly meetings.

These materials will address the school board's legal authority, issues that impact school board meetings, the status of remote meetings, public comment and First Amendment requirements, how to deal with disruptive members of the public, and the best practice procedures for non-meetings.

## **I. A SCHOOL BOARD'S LEGAL STATUS**

By definition a school board is the **governing body** of a school district. RSA 21:48 provides:

When used to refer to a municipality, and in the absence of applicable chapter or subdivision definitions, the term "governing body" shall mean the board of selectmen in a town, the board of aldermen or council in a city or town with a town council, the school board in a school district or the village district commissioners in a village district, or when used to refer to unincorporated towns or unorganized places, or both, the county commissioners.

The **legislative body** of a school district is defined in RSA 21:47:

When used to refer to a municipality, and in the absence of applicable chapter or subdivision definitions, the term "legislative body" shall mean a town meeting, school district meeting, village district meeting, city or town council, mayor and council, mayor and board of aldermen, or, when used to refer to unincorporated towns or unorganized places, or both, the county convention.

It is the school board’s duty “to provide, at district expense, elementary and secondary education to all pupils who reside in the district . . .” and the board is “responsible for establishing the structure accountability advocacy and delivery of instruction.” See RSA 189:1-a. In addition, the school board has the authority and responsibility for carrying out many duties that are spelled out in numerous state statutes.

State Education Rules set out the required duties of school boards in Ed 303 which provides in pertinent part:

- (a) Adopt policies necessary and desirable to control and effectuate the recruitment, employment, evaluation and dismissal of teachers and other employees and may delegate authority to the superintendent of schools to carry out the provisions of such policies provided that no teacher shall be employed who is not certified or who has not been nominated by the superintendent of schools and elected by the school board;
- (b) Adopt policies necessary and desirable to control and effectuate the purchase of equipment, supplies, or services and may delegate to the superintendent of schools the authority to make financial commitments in accordance with such policy;
- (c) Provide, through documented planning and public meetings and quorum votes, accommodation for all pupils in approved schools or other facilities in accordance with state law;
- (d) Provide required transportation of students consistent with these rules and provide that all school buildings and other learning environments be maintained in a manner consistent with standards of health and safety as required by these rules;
- (e) Prepare an annual budget in accordance with RSA 32 and comply with all federal and state laws and rules;
- (f) **Hold meetings for the transaction of business at least once in 2 months and require the attendance of the superintendent or designee.** The board shall cause a written record to be kept of each meeting in accordance with RSA 91-A;
- (g) In consultation with the superintendent and in accordance with statutes and rules of the state board of education, determine the educational goals of the district, develop long-range plans and identify measurable and attainable short-term objectives. The school board shall require the implementation of educational programs designed to reflect the goals and objectives and, further,

the school board shall review such programs and make public the results of such investigation;

- (h) **Exercise all powers and perform all duties vested in and imposed upon the school board by law or rules of the state board;**
- (i) Adopt a rule to ensure that there shall be no unlawful discrimination on the basis of sex, race, age, creed, color, marital status, national origin, or disability in educational programs or activities consistent with local standards which may be stricter in specific areas than the broader statewide standards;
- (j) Establish a policy on sexual harassment, written in age appropriate language and published and available in written form to all those who must comply...;
- (k) Annually evaluate the superintendent based on written criteria established by the school board(s)/SAU board;
- (l) Adopt a teacher performance evaluation system, with the involvement of teachers and principals, for use in the school district, pursuant to RSA 189:1-a, III.

The New Hampshire Supreme Court summarized the authority of the school board in Ashley v. Rye, 111 N.H. 54 (1971) when it stated:

The members of the district school board are officers of the school district (RSA 197:14), they elect all teachers (RSA 189:39), prescribe the regulations for the management, classification and discipline of the schools and have the duty to provide, at district expense, education to all pupils residing in the district. RSA 189:1-a(supp.). **The long and short of the matter is that the school board is the managing board of the school district.**

## II. REMOTE MEETINGS

### A. Board Members Remote Participation

The Right-to-Know Law in RSA 91-A:2, III permits, but does not require, a public body to allow one or more members to participate in a meeting remotely by electronic or other means as long as the requirements in the statute are met. The Governor's COVID-19 Executive Order waived some of the requirements in RSA 91-

A:2, III so that public bodies could hold their meetings with all members participating remotely. Specifically, Executive Order #12 waived the requirement in RSA 91-A:2, III(b) that a quorum of a public body must be physically present except in an emergency. Executive Order #12 also waived the requirement in RSA 91-A:2, III(c) that there be a physical location specified in the meeting notice. When the State of Emergency was not renewed by the governor, the ability of public bodies to conduct remote meetings ended. However, the need for some school board members to participate remotely continued. Legislative efforts to allow public bodies to have the ability to conduct remote meetings were not successful. However, Chapter 163 was enacted which creates a committee to study the issue.

With the termination of the Executive Order permitting remote meetings, school boards must once again meet all the requirements of RSA 91-A:2, III for members to participate remotely. Those requirements are:

- (1) The member's attendance at the meeting location must not be reasonably practical;
- (2) Except in an emergency (see definition below), a quorum of the school board must be physically present at the meeting location;
- (3) A majority of the other members present at the meeting location must agree to allow the member to participate remotely;
- (4) The minutes must state the reason the member(s) attendance is not reasonably practical;
- (5) Each part of the meeting open to the public must be contemporaneously audible or otherwise discernible to the public at the location specified in the meeting notice;
- (6) The member(s) participating remotely must identify persons present in the location from which the member is participating;
- (7) Each member participating remotely must be able to simultaneously hear each other and speak to each other and shall be audible or otherwise discernible to the public at the meeting location; and

(8) All votes must be taken by roll call.

In an emergency, a quorum of the school board does not need to be physically present, but all the other requirements listed above must be met. An “emergency” means that the immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The Chair determines whether an emergency exists and the facts upon which the Chair made that determination must be stated in the minutes.

**B. Public’s Remote Participation**

The public has a right to participate in a public hearing held before the school board but no right to do so remotely. As a result, the school board can require participants to be present at the meeting location. Similarly, the Right-to-Know Law does not address whether the public can participate remotely in school board meetings for other agenda items including public comment now that the COVID-19 Executive Orders are no longer in effect. School boards, therefore, have discretion to permit the public to participate remotely during public comment and other agenda items. However, we do not recommend that school boards allow it. The main reason is because of the limitations of technology to facilitate remote participation by the public. The process of allowing speakers and then closing off speakers is made more difficult with an increase in the number of participants. Creating a right to participate remotely could create difficulties for the school board if there are technical glitches that make that participation impossible.

Rather, school boards should live stream meetings if they do not already do so. Many school boards have public comment sections at the beginning and end of its meetings. If so, viewers watching the live stream who want to comment can make their way to the meeting location for the public comment section at the end of the meeting.

### **III. PUBLIC COMMENT**

#### **A. Public Comment/Participation Policies**

Anyone, not just district residents, has the right to attend school board meetings. However, except for required public hearings, no one, except school board members, has the right to participate.

School boards are not required to have public comment sections in their meetings. However, most, if not all, school boards do have public comment as a part of their agenda.

School boards should have written rules for public comment and those rules must comply with the First Amendment. NYSBA Policy on public participation at school board meetings is Policy BEDH.

Courts have adopted different standards based on the type of forum to determine whether a governmental action violates the First Amendment.

School board meetings where public participation is allowed are a limited public forum. In a limited public forum, content-neutral restrictions are permitted which restrict the time, place, and manner of speech as long as the regulation is narrowly tailored to serve a significant governmental interest and leaves open alternative channels for communication. However, if a restriction is content-based, it is subject to a higher level

of scrutiny and must be narrowly drawn to achieve a compelling state interest. As a result, a content based restriction is much more likely to violate the First Amendment. For content-based restrictions, it does not matter whether there are alternative channels for communication.

In 2015, in a challenge to a municipal sign ordinance, the United States Supreme Court broadly defined when speech is considered content-based. Specifically, the Court found that content-based restrictions are restrictions targeted at a specific subject matter even if it does not discriminate among viewpoints within the subject matter. Reed v. Town of Gilbert, 576 U.S. 155 (2015). Content-based restrictions include those that apply to particular speech because of the topic discussed or idea or message expressed. Facially content-neutral laws are considered content-based regulations if an individual must refer to the content of the regulated speech to determine whether it is permitted.

Courts have consistently found that the First Amendment permits public participation policies that limit the amount of time an individual can speak (time, place and manner restriction not based on content) and policies that limit public comment to agenda items only (content restriction but one narrowly tailored to focus on issues) being discussed by the board. However, there must be a mechanism for individuals to place items on the agenda that does not provide "unbridled discretion" to either the Superintendent or Board.

Most courts have also found that policies which prohibit public criticism of employees in public violate the First Amendment. For instance, federal district courts in California have found school board policies which prohibited comments in public portions of meetings which criticized or complained about public employees violated the



First Amendment. Baca v. Moreno Valley Unified District, 936 F.Supp. 719 (C.D. Cal. 1996); Leventhal v. Vista Unified School District, 973 F.Supp. 951 (S.D. Cal. 1997).

The Courts found the policies were content-based and subject to the highest level of scrutiny which required the Districts to demonstrate that the policies served a compelling state interest. The Courts rejected the Districts' arguments that the policies served the compelling state interest of protecting the privacy interests of public employees. The Baca Court stated the District's interest in protecting the rights of its employees is an interest it holds as an employer, not as a government entity. At its meetings, the District acts as a governmental entity and not an employer. The Leventhal Court noted that the District when it provides a forum at Board meetings for critical comments is not endorsing, sanctioning or acting upon those comments at the public meeting. Therefore, the public statements cannot as a matter of law provide the insulted employees with claims against the District for defamation or violation of due process. The Courts found that privacy rights of the District's employees "pale in comparison to the expressive rights of the public."

Similarly, New Mexico Courts have found that members of the public have a First Amendment right to speak negatively about personnel or staff in the public portion of meetings. The Tenth Circuit Court of Appeals rejected a County's claim that individuals did not have the right to speak on personnel and litigation matters in the public portion of the meeting but must speak in non-public. Mesa v. White, 197 F.3d 1041 (10<sup>th</sup> Cir. 1999). The Tenth Circuit rejected the County's claim that a significant interest justifying the policy was that personnel or litigation matters under the open meetings law are discussed in non-public. The Court found the restriction on members of the County

commissioners discussing personnel or litigation matters in public did not apply to members of the public. A New Mexico federal district court also found that a Village's policy which forbid speakers from making "any negative mention . . . of any Village, personnel, staff or of the Governing Body" during the public input portion of the meetings was unconstitutional. Griffin v. Bryant, 30 F.Supp.3d 1139 (D.N.M. 2014).

In contrast, the Fifth Circuit Court of Appeals has found that a school district policy with a process to refer complaints in the public comment period to the appropriate administrative channels for resolution did not violate the First Amendment. Fairchild v. Liberty Independent School District, 597 F.3d 744 (5<sup>th</sup> Cir. 2010). The Fifth Circuit found that public comment was a time for the public to air concerns about the Board's business and not to resolve personal disagreements with employees. Those grievances needed to proceed through an alternative process.

We encourage districts with public comment periods that are open to issues beyond the agenda to make it clear that there is a process for handling personnel complaints that requires the complainant first address the issue with the employee's supervisor and then with the superintendent or designee before the matter is brought to the school board. Following this process helps avoid personal attacks at meetings but also serves an important governmental function by preserving the board's authority to serve as impartial hearing officers if an employee is disciplined or non-renewed and appeals the action to the board.

Some public participation policies prohibit slanderous and defamatory remarks. However, a Massachusetts trial court found that a school committee's public participation policy that prohibited defamatory remarks violated the First Amendment. Specifically,

the Court found that until a court finds that the speech is defamatory, it is entitled to constitutional protection. Spaulding v. Town of Natick School Committee, Middlesex County Superior Court, Docket No. 2018-01115 (November 21, 2018).

It is often difficult for school board members to listen to individuals who attack them and district employees. However, the school board should not prevent individuals from speaking based on the content of their speech unless it threatens physical harm, is obscene, or unlawful. The board can instead remind public participants at its meetings of the district's procedures for filing a personnel complaint and request that the citizen follow that process prior to addressing the board and "request" the complainant follow that process.

Increasingly, school boards are confronted at their meetings with people from other states or towns who want to express their opinions on issues to be decided by the school board such as wearing masks and transgender policies. Some school boards are revising their public participation policies to limit public comment to employees of the district, residents of the district and residents of towns tuitioning their students to district schools. Those policies are reasonable time, place, and manner restrictions. Any change in the policy should comply with the rules the school board has adopted to revise the policy. The new rules should also be announced and made available before the meeting at which they will be applied.

Every policy or rule on public comment must also be applied consistently and in a manner so that it does not discriminate based on the content of speech. If, for example, the school board limits public comment to residents, it must apply that policy consistently. If the school board does not apply the resident only limitation consistently,

it cannot invoke the policy to prohibit comment by non-residents on controversial topics such as transgender, masks or divisive concepts and critical race theory.

**B. Order and Control at School Board Meetings**

One of the responsibilities of the school board chair is to preside over the school board's meetings and proceed through the agenda. Increasingly, school board meetings have become a battleground for competing viewpoints. The school board chair should have a plan for how to run the meetings to maintain order and to deal with individuals who ignore the board chair, refuse to comply with public comment rules, and disrupt the meeting. If the school board has agenda items that are controversial, it should arrange to have a police officer present.

At the beginning of the meeting or before public comment, the chair should explain the rules for public comment and that the rules will be strictly enforced. It is also a good idea to include a summary of the rules on the posted meeting notice for the meeting. The school board chair's focus must be the disruption to the meeting and not the content of the individual's speech. While the chair can inform speakers of the district's procedures for handling personnel complaints, the school board chair cannot stop an individual from criticizing the board, administration or staff because that would violate the First Amendment. The school board chair cannot stop an individual from speaking because of any disagreement with the viewpoint of the speaker or the identity of the speaker.

As the New Jersey Supreme Court has stated in a First Amendment public comment case:

For public officials, particularly those who may be subject to vehement, caustic, and sometimes unpleasantly sharp attacks, free speech is not for the fainthearted. Such officials must be thick-skinned enough to tolerate the uninhibited and robust debate on public issues that the First Amendment demands.

Besler v. Board of Education of West Windsor-Plainsboro Regional School District, 201 N.J. 544, 575, 993 A.2d 805, 823 (2010) (citation and quotation omitted).

If an individual refuses to follow the rules or is disruptive, the chair should tell the individual that he or she is disrupting the board's business and meeting and remind the individual of the rules and ask that the individual comply. If the individual continues to disrupt the meeting, the chair should recess the meeting.

The chair has authority to have an individual removed from the meeting if the individual is disorderly. RSA 644:2, III(b) and (c) prohibit "Disrupting the orderly conduct of business in any public or governmental facility" or "Disrupting any lawful assembly or meeting of persons without lawful authority."

In State v. Dominic, 117 N.H. 573 (1977), the New Hampshire Supreme Court upheld the conviction of one selectman for disorderly conduct who had continued to disrupt the meeting and ignore the chair. The Court found:

[T]he issue before us is whether Chairman Clairmont could lawfully order defendant's removal from the selectmen's meeting. As presiding officer of the board of selectmen, Chairman Clairmont had the responsibility of conducting the meeting in an orderly manner . . . When defendant continued to interrupt Mr. Wuelper, who had the floor according to the chairman's ruling, and when defendant continued to argue with the chairman and refused to come to order, the chairman had the authority to order him from the room . . .

The actions of the chairman and of Officer Bennett in ordering defendant's removal from the meeting did not violate his right to freedom of speech under the United States and New Hampshire Constitutions. The district court found that defendant, by his conduct, had prevented the selectmen from continuing their meeting. The chairman was acting to maintain order, as was his duty, and to protect the rights of others to speak in an orderly manner as well as those of the

defendant. Such reasonable regulation of the manner in which one may speak does not violate any right to freedom of expression . . . (Id at 575-576) citations omitted).

An arrest or removal of a person from a meeting regardless of whether it is authorized is likely to result in a civil action against the district. See, e.g., Spaulding v. Town of Newport, et al., United States District Court for the District of New Hampshire, No. 94-316-SD; Clay v. Town of Alton, et al., United States District Court for the District of New Hampshire, No. 15-CV-279; Baer v. James Leach, United States District Court for the District of New Hampshire, No. 15-CV-065-JD. The goal, therefore, should be to adopt procedures and enforcement tools, that when coupled with strategic recesses, avoid the need to have citizens removed from a meeting.

### C. Meeting Tips

Tips for helping to assure a productive school board meeting:

1. Remember, that except for required public hearing, a public comment period is not required.
2. If the board allows for a public comment period, have a clearly defined, time limited public comment period with time limits for speakers as well. Enforce the time limits consistently. The board can always vote to extend the comment period if desired.
3. Consider a policy restricting public comment to board agenda items. But if you do, make sure to adopt a process for citizens to request an item on the agenda or for citizens to provide their input on matters not appearing on the agenda.

4. Develop a practice of reviewing the rules for public comment at each meeting where public comment is allowed.
5. Make it a practice to require a board motion and vote to open the comment period.
6. During the public comment, do not engage in debate with speakers. Listen to the input. If questions are asked of the board or administration, remind the questioner that public comment is the public's opportunity to comment. Since public comment is time limited, write down the questions whenever possible and answer them when public comment has ended.
7. When time for public comment has expired, have the board formally vote to close the public comment.
8. Once public comment has been closed:
  - a. answer questions that have been asked;
  - b. ask administrations to get answers to questions for which there is no quick answer; and, above all
  - c. do not continue to allow public input or public questions once the public comment period has been closed so the board can complete the rest of its business.
9. Consider adopting a consent agenda. Make sure all time sensitive routine matters (manifest approval) appear first on the agenda. If the first order of business is the consent agenda, all "required" work of the district will be accomplished, even if there are disruptions that interfere with the meeting later and cause the meeting to be adjourned.

#### **IV. NON-MEETINGS**

The Right-to-Know Law permits school boards to discuss certain designated matters without the public present. Those matters include nonmeetings as defined in RSA 91-A:3, I and nonpublic meetings as defined in RSA 91-A:3. Non-meetings are defined to include school board discussions on strategy or negotiations with respect to collective bargaining, or consultation with legal counsel. There is a procedure detailed in RSA 91-A:3, I to enter nonpublic session. That procedure requires: (1) a motion properly made and seconded stating the specific exemption in RSA 91-A:3, II; and (2) a roll call vote by an affirmative vote of the majority of members present.

However, the Right-to-Know Law does not establish any procedures for entering into a non-meeting during a public meeting. Non-meetings do not need to be held at the same time as a regular school board meeting. Non-meetings do not need to comply with the posting or minutes requirements of the Right-to-Know Law.

Many times school boards do schedule non-meetings in conjunction with its regular board meetings.

If the school board has a non-meeting during one of its regular meetings when the public is present, the school board needs to follow a procedure to begin the non-meeting. That procedure needs to explain to the public why the school board will be discussing matters without the public present.

The New Hampshire Attorney General's March 20, 2015 Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A, p. 72, suggests that boards use the following process:



**Example (three member public body):**

Member 1: “Mr. Chairman I move that we temporarily adjourn this meeting for the purpose of consulting with legal counsel.”

Chair: Is there a second?

Member 2: “Mr. Chairman, I second the motion.”

Chair: “All in favor say: ‘Aye.’”

Members: All vote “Aye.”

Chair: “The motion passes. We will now adjourn this public meeting for the purpose of consulting with legal counsel. The public must leave the meeting room and the door will be closed. We expect this to take about 15 minutes and we plan to reconvene the public meeting as soon as we are done consulting with our attorney.”

School boards could use other procedures such as approving a motion to enter into a non-meeting for consulting with legal counsel or discussing CBA strategy or negotiation. A vote on that motion does not need to be by roll call.

The best practice, however, is to use the process suggested by the Attorney General’s Office.