



NHSBA

NEW HAMPSHIRE SCHOOL BOARDS ASSOCIATION

Right to Know Law Webinar

**UPDATED Emergency Meetings and
Electronic Participation During the
Coronavirus Crisis**

Tuesday, March 24, 2020

9:30-10:30am

Presentation Outline

- 1. The Norm: 91-A:2 – Meetings and Emergency Meetings**
- 2. Declaration of Emergency, 91-A Memorandum and Emergency Order #12**
- 3. 91-A:2 Procedural Requirements for Emergency Meetings & Practice Tips**



The Norm: 91-A:2 – Meetings and Emergency Meetings



91-A:2, I

Meeting Defined

“Meeting” (*defined in 91-A:2, I*) means:

- quorum of the body
- Ability to communicate contemporaneously (in person or otherwise);
- To discuss or act upon official or jurisdictional matters.

Right To Know Law Basics

Meeting Requirements

If/when the elements of a meeting are present relative to board communication, then – unless and to the extent a basis exists for a non-public session - the Right-to-Know law requires:

- Posted notice (24 hours, absent an emergency);
- **Availability for the public to physically attend** (subject to 91-A:3);
- Board deliberations and decisions in public;
- **Physical presence of a quorum at the location specified in the meeting notice (absent an emergency);** and
- Appropriate minutes.

Emergency Meetings

Two separate paragraphs of 91-A:2 address emergency meetings, with similar but different definitions:

- 91-A:2, II carves out an exception to the 24 hour dually posted notice requirement in the presence of an emergency.

As an exception:

*“An emergency shall mean a situation where **immediate undelayed action is deemed to be imperative** by the chairman or presiding officer of the public body....”*

- 91-A:2, III (b) pertains more to the requirement that a quorum of the body be present at the meeting location.

*An emergency means “**immediate action is imperative, and the physical presence of a quorum is not reasonably practical within the time requiring action.**”*

Emergency Meetings

Under the two emergency provisions of 91-A:2:

- Emergency can impact the time required for a notice before a meeting can be called (91-A:2, II and III(b)).
- Emergency may impact whether or not a quorum need be present at a meeting location (91-A:2, III(b))
- *Neither provision dispenses with requirement for no physical meeting location available to the public, absent need for action of the public body is so imperative that there is no time for notice and no other choice.*
- General advice under normal circumstances: If immediate board action is not imperative, is not justified, and a quorum cannot attend in person, the meeting should be re-scheduled.

Declaration of Emergency, 91-A Memorandum, and Emergency Order #12



Declaration of Emergency

- Governor Sununu issued the current Declaration of Emergency due to Novel Coronavirus (COVID-19) on March 13. Executive Order 2020-04.
- Item 8 of the Declaration stated that “local government bodies are permitted and encouraged to utilize the emergency meeting provisions of 91-A to conduct meetings.”
- The Executive Order, however, did not change the “emergency meetings provisions” of 91-A.

Emergency Orders & 91-A Memorandum

- On March 16, the Governor and the Attorney General issued a memorandum (with the subject line: “*Compliance with New Hampshire’s Right to Know Law (RSA 91-A) in light of COVID-19 Concerns and issuance of Executive Order 2020-04*”) (the “Memorandum”).
- Most significantly, the Memorandum identified COVID-19 as a basis for holding an emergency meeting without the physical presence of a quorum.

Emergency Orders & 91-A Memorandum

- The Governor's Emergency Order #2 (March 16, 2020) banned gatherings of over 50 people, and the CDC's current guidelines recommend limiting gatherings to 10 or fewer.
- On March 23, the Governor issued Emergency Order #12, titled *Emergency Order #12 Pursuant to Executive Order 2020-04 Temporary modification of public access to meetings under RSA 91-A*. (Referred to hereafter as Order #12).

Emergency Orders & 91-A Memorandum

- Paragraph 4 of Order #12 specifically “suspends” the physical quorum requirement of 91-A:2, and also “waives” the requirement under 91-A:2, III (b) that a physical meeting location be available to the public,

“...as long as the public body:

- a) Provides public access to the meeting by telephone, with additional access possibilities by video or other electronic means;
- b) Provides public notice of the necessary information for accessing the meeting;
- c) Provides a mechanism for the public to alert the public body during the meeting if there are problems with access; and
- d) Adjourns the meeting if the public is unable to access the meeting.”

91-A:2 Procedural Requirements for Emergency Meetings and Practice Tips



Emergency Meeting Procedural Requirements and Practice Tips

➤ **Overriding Takeaways:**

- All meetings allowing remote participation shall comply with “all of the requirements of [91-A] relating to public meetings, and shall not circumvent the spirit and purpose of this chapter...” 91-A:2, III (d)
- **Take whatever reasonable measures that are available to assure the board’s proceedings are open to the public.**
- Conduct business on an “as needed” basis. *

Emergency Meeting Procedural Requirements and Practice Tips

- **Overriding Takeaways (continued):**
 - The presiding officer/minutes should articulate why board action is needed at that time
 - Even ordinary business becomes imperative if delayed long enough.

- **Board Chair/Presiding Officer:** The chair/presiding officer is the person empowered to declare an “emergency” both as to suspending 24-hour notice requirement under 91-A:2, II, and for purposes of declaring an emergency relative to the quorum presence requirement. 91-A:2, III (b). The emergency for the quorum purposes, however, exists per Emergency Order #12.

Emergency Meeting Procedural Requirements and Practice Tips

- **Board Chair/Presiding Officer (continued):**
 - The chair should consult with the Superintendent to assure available technology.
 - A quorum of the board could have communications regarding the logistical details of a virtual meeting/remote participation.

- **Meeting Notice:** Unless the chair determines that “undelayed action is deemed imperative”, 24-hour notice is required, with minimum of dual posting.

Emergency Meeting Procedural Requirements and Practice Tips

➤ **Notice (continued):**

- If chair determines that such “undelayed” action is imperative, then notice must be posted “as soon as practicable, and shall employ such other means as are reasonably available to inform the public that a meeting is to be held.”
- In either event, the notice should identify not only the physical location at which the public may “attend”, but also the means by which the public may observe virtually. *See Concord School District sample notice.*

➤ **Physical Location – Public Access:** Emergency Order #12 suspend the need for a physical location. Meeting logistics must comply with the conditions of para. 4 of the Order. (Slide 12).

Emergency Meeting Procedural Requirements and Practice Tips

- **Additional Statutory Requirements:** 91-A:2, III has several specific procedural requirements specific to emergency meetings (or remote participation by less than a quorum):
 - The “discussions” of all meeting participants must be contemporaneously “audible or otherwise discernible” to each other, and to *members of “the public in attendance at the meeting’s location”*. 91-A:2, III (c).
 - Each member participating remotely must identify those present at the location from whence that member is participating. 91-A:2, III (c).
 - The public must be able to “hear, read, or otherwise discern meeting discussion contemporaneously ~~at the meeting location specified in the meeting notice.~~” 91-A:2, III (c).
 - Roll call for all votes, 91-A:2, III (e).

Emergency Meeting Procedural Requirements and Practice Tips

- **Non-public Sessions:** Non-public sessions are permitted but must also adhere to the requirements of 91-A:3.
 - We can't address the various technological aspects as there are at least 5-6 platforms/combinations districts are using. General approaches might include:
 1. Zoom “breakout rooms”;
 2. When entering non-public, announce a specific time the open session will recommence, with a separate link if necessary; if there is a time lapse, recess the public as soon as you come out of non-public;
 3. Use separate links, and a tele-conference for the NP, with recess as with number 2.

Emergency Meeting Procedural Requirements and Practice Tips

➤ **Non-public Sessions - Confidentiality:**

- As with all non-public sessions, the content of the non-public during an emergency meeting must remain confidential and is subject to the oath each member takes.
- Members participating remotely have the additional personal responsibility to assure that no other person in the location of the member are privy to the non-public discussion or materials.

➤ **Public Comment:**

- A board may suspend its public comment policy or may modify to meet the demands of the board's business.

Emergency Meeting Procedural Requirements and Practice Tips

➤ Public Comment (continued):

- A board may suspend its public comment policy or may modify to meet the demands of the board's business.
- If a board chooses to continue public comment, the board can modify general rules, e.g.,
 - replacing a 3-minute limitation with a 75-word written comment limit;
 - written comments must be submitted in advance to be read into the minutes;
 - written comments will not be read into the minutes but will be published as part of the minutes.
- If public comment is suspended, the board should provide an explicit alternative channel. (E.g., email to Superintendent.)

Emergency Meeting Procedural Requirements and Practice Tips

- **Emergency Meeting Minutes:** In addition to the ordinary content requirements for minutes, meetings at which any member participates remotely, whether emergency or otherwise, must also include:
 - The basis for the emergency meeting;
 - The reason each member participated remotely;
 - Recorded roll call vote for all votes.
 - Sample minute entry: Due to the state of emergency declared by the Governor regarding the COVID-19 outbreak, and subsequent Emergency Order #12, the Board Chair determined that the physical presence of a quorum within the time required for board action is not reasonably practical, and therefore...

Emergency Meeting Procedural Requirements and Practice Tips

➤ Emergency Meeting Minutes (continued):

...authorized participation of board members via Zoom and teleconference. The following members participated remotely:..... Member John Smith was absent.

The Zoom link and the teleconference number were published in the meeting notice, along with general instructions for the public to participate.

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