

Open Meetings Compliance in the COVID-19 Era - A Continuing Challenge

On March 18, 2020, we posted a School Law FYI on Remote Participation at School Board Meetings. As school boards work to find the safest and most efficient ways to conduct their meetings during Wisconsin's Safer at Home order, we offer the following brief checklist of steps to implement and administer a policy for virtual meetings, and a further analysis of the unique issues boards now face when deciding whether and how to make use of the virtual meeting process.

CHECKLIST TO DEVELOP AND IMPLEMENT POLICY FOR REMOTE MEETINGS

Regardless of the method by which a board elects to adopt a Virtual Meetings Policy, the following brief checklist applies to the adoption and implementation of a policy to allow for virtual meetings:

1. Review all applicable Board policies that address how, where and when board meetings are called and held. Determine which existing policies may conflict with the Board's plan to immediately adopt a virtual meetings policy, and take steps to suspend or repeal those policies as part of your adoption process. Examples:
 - Policies that create timelines for the creation and approval of new policies, including a requirement for multiple readings prior to final approval
 - Policies that prohibit or restrict participation of board members unless they are physically present in the physical meeting location
 - Policies that require a public comment period during the meeting, which complicates the process of public access. Such policies could be suspended or repealed; there is no statutory requirement that the public have an opportunity to comment or participate at a board or committee meeting.
 - Be sure to note whether suspension or repeal of your policies requires more than a simple majority of the board members present (i.e., 2/3 majority vote rather than simple majority vote). If not in conflict with your own Board policies and/or bylaws, Robert's Rules of Order may be applicable here.
2. Determine what process will work best for the Board to allow for remote participation by the board members and the public. There are various approaches a board may choose to adopt. In addition, the Board should consider the following:
 - Who will be present in the physical location of the meeting? Having some individuals physically present to address technical issues is probably best (perhaps the board president, the district administrator, and the district's technical expert). (See below for a further analysis of the legal issue of whether a quorum of Board members must be physically present to constitute a valid board meeting.)
 - How will you provide the required access by members of the public? Options include broadcasting the meeting on a virtual platform, supplemented by telephone access for those without internet access, and/or allowing

members of the public to come to a physical location in the district where the meeting can be broadcast live while allowing for appropriate social distancing. Examples of locations: the library media center, distance learning lab, cafeteria, etc. You may also want to have a district employee present to help members of the public observe proper social distancing procedures.

- How will you provide for the security and confidentiality of closed sessions? Very recently, the FBI has issued warnings as to some of the free virtual meeting platforms available on the internet, and the successful efforts of hackers to participate in meetings that were intended to be confidential or nonpublic. Meeting organizers should be careful not to post or publicize the access information for virtual meetings at which all or some portion of the meeting will be conducted in closed session. Developers of these platforms are aware of the issues and are working on “fixes,” which may require boards to pay for software upgrades.

At a minimum, the policy should provide a process by which each participant in the virtual closed session affirmatively states that no unauthorized person is present with the participant, either in person or virtually, who can hear or see what is happening, and each participant should also affirmatively state that the participant will maintain confidentiality and prohibit access to the closed session.

3. Draft a policy that addresses the issues above and includes contingencies and catch-all provisions to maximize flexibility if circumstances change, while still maintaining legal compliance. This short checklist does not attempt to address all items that should be considered in drafting a new policy that comprehensively addresses the issues raised by a remote meetings policy in the COVID-19 era. We are available to advise clients on all of the issues related to the drafting of your new policy, and related questions on conducting virtual meetings in this unprecedented time.
4. Be sure your policy addresses the additional notice requirements referenced in the Wisconsin Attorney General’s guidance issued in March 2020 (available at https://www.doj.state.wi.us/sites/default/files/news-media/3.20.20_OOG_Final.pdf). The notice should:
 - alert the public to the change in the Board’s meeting method.
 - provide instructions for the process by which the public may access the remote meeting (i.e., telephone conference call, video conference call, remote public viewing area).
 - provide the telephone number, video conference link, and any other information needed to observe the meeting remotely. (Districts should be conscious of the need to keep such information confidential for any closed session - see below).
 - provide a contact number for further assistance or answers to questions about the new process.

One way to provide this information is through an attachment or addendum to the usual Board agenda that the district posts for open meetings purposes. Be sure the addendum or attachment accompanies all electronic and/or physical postings of the meeting currently required by the district’s policy.

5. Once adopted, training of the Board members on the operation of the new Virtual Meetings policy is a good idea. Conducting the training at a properly noticed open board meeting will also provide the public with training on the new procedure.

OTHER LEGAL REQUIREMENTS REMAIN UNCHANGED

The basic requirements of compliance with the Open Meetings Law remain unchanged:

- Boards must properly post all meetings at least 24 hours prior to the meeting start time, unless an emergency situation arises that qualifies for the exception permitting only two hours’ notice under the statute. Generally speaking, the question of whether an emergency exists must be determined on a case-by-case basis. The existence of the COVID-19 pandemic does not, in and of itself, create an “emergency” under the Open Meetings Law.

- Boards must still have a valid reason and a properly noticed agenda item to conduct a closed session under Wisconsin's Open Meetings Law.
- Some meetings may still need to be conducted in person, while also allowing for proper social distancing. Some functions of the board simply do not lend themselves well to the virtual meeting approach. Hearings where the subject of the hearing has a right to due process generally require board members to make credibility determinations about witnesses who often present competing testimony. That is very hard to assess at a virtual meeting. Examples of such due process hearings include termination or suspension of certain employees and expulsion of students. Also, meetings that require the ability to see documents, drawings, models, or other things that would be difficult to review remotely may require an in-person meeting.

MAY A BOARD LAWFULLY CONDUCT A VIRTUAL MEETING WITHOUT A QUORUM PHYSICALLY PRESENT?

As we explained in our March 2020 FYI on this issue, our analysis of the statutory requirements of a valid school board meeting has led us to conclude that the most cautious approach would be to continue to have a quorum of school board members physically present at the Board's meeting place for any meeting. (<https://www.boardmanclark.com/publications/school-law-fyi/remote-participation-in-school-board-meetings>) However, as we work with our client school boards, we recognize that the need to observe social distancing and eliminate any unnecessary contact with individuals not in one's immediate household has created great pressure to offer board members and the public the safest way to continue the public business of the boards. While we continue to believe that there is risk in not having an in-person quorum, we have also reached the practical conclusion that school boards should individually weigh those risks and decide whether to adopt a policy that allows the school board to conduct virtual meetings without a quorum of the school board physically present.

School boards without any type of policy allowing for remote participation, as well as those with policies that prohibit or restrict remote participation, must also make a decision whether to take the necessary actions to adopt such a policy at a meeting held virtually. Again, the more cautious approach would be to have a quorum of the board gather physically (while observing appropriate social distancing) at a properly noticed meeting, and have the quorum suspend, repeal, and/or adopt the necessary policies to allow the board to then continue with that meeting in a virtual format, by having

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