

Serving on the Local School Board: An Overview of the Legal Responsibilities of a Board Member

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A Word of Caution

No two legal matters are exactly alike. This material is designed to provide School Board members with a broad understanding of the law pertaining to the School Board. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

OVERVIEW

The purpose of this material is to review the unique legal responsibilities that are assumed by members of a local school board. The goal of this material is to provide the board member with the tools necessary to meet their legal obligations and maximize their effectiveness as a board member.

I. The General Legal Framework for a Local School Board

The State Constitution, the State Legislature, the State Department of Education, our Court system, Congress, and the School Board itself, all have had a hand in defining the entity known as the School Board. The purpose of this section is to understand the role that each of these legal bodies have played in defining the role of the local school board.

A. The State Constitution

Part 2, Article 83 of the New Hampshire Constitution provides that:

[k]nowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people. . . .

Based on this language, the State Supreme Court concluded in the case of Claremont School District v. Governor, 138 NH 183 (1993), that Part 2, Article 83 imposes a duty on the State to provide a constitutionally adequate education to every educable child and to guarantee adequate funding. The right to an adequate education was identified by the Court as, “*at the very least an important, substantive right.*” Id. at 192.

Practice Pointer: The constitutional duty of every board member is to ensure that

students within the District receive their constitutional entitlement to an adequate education.

B. The State Statutory Framework

Common sense dictates that if the State Constitution requires that our legislators cherish and perpetuate education, they will express this duty through the body of law known as statutory law. The local school board is an extension of the State of New Hampshire, and is one of the primary vehicles for furthering the value of education.

1. Local School Boards and the Question of Educational Quality

NH RSA 21-N:1 states as a matter of public policy that:

[t]he general court finds that the students, parents, general citizenry, local school teachers and administrators, local governments, local school boards, school administrative units, and state government have a joint and shared responsibility for the quality of education delivered through the public education system in the state of New Hampshire.

(emphasis added). NH RSA 21-N:1 (II)(c) reiterates the constitutional duty of the state: “[t]he paramount goal of the state shall be to provide an adequate education for all school age children in the state, consistent with RSA 193-E.”

NH RSA 193-E echoes the concept of local and state partnership and provides further definition to the concept of an “adequate education.” According to NH RSA 193-E:1 (II), the legislature desires to “*provide an adequate education through an integrated system of shared responsibility between state and local government.*” The statute elaborates on this “integrated system,” observing that, “[i]n this system, the state establishes, through school approval and student proficiency standards and curriculum guidelines, the framework for the delivery of educational services at the local level. School districts then have flexibility in implementing diverse educational approaches tailored to meet student needs.” Id.

NH RSA 193-E:2 sets forth criteria for an adequate education, and NH RSA 193-E:2-a sets forth the substantive educational content for an adequate education. A copy of those criteria are attached as Appendix A.

Practice Pointer: The local school board legally shares responsibility for educational quality in the District. Put another way, the state sets the standard and the local school district does the heavy lifting.

2. State Authority over the Local School Board

There is a common misunderstanding that the local school board answers solely to the local constituents. In fact, NH RSA 21-N:1 (II)(a) provides that: “[t]he [state] department [of education] shall have the dual role of providing regulatory direction and instructional assistance to public elementary and secondary schools.” This regulatory direction manifests itself in NH RSA 21-N:9 (II) which provides that: “[t]he board of education shall adopt rules . . . relative to . . . (b) The duties of school boards.”

Lest there be any question as to who the local board answers to, NH RSA 186:5 provides that: “[t]he state board shall have the same powers of management, supervision, and direction over all public schools in this state as the directors of a business corporation have over its business, except as otherwise limited by law. . . . It shall be the duty of school boards and employees of school districts to comply with the rules and regulations of the state board.”

Practice Pointer: The local school board is subject to the regulatory authority of the state and the state department of education.

3. The Local School District as a Statutory Creation

The local school district, and hence its board, is a creature of statute. NH RSA 194:2 provides that, “[a]ll districts legally organized shall be corporations, with power to sue and be sued, to hold and dispose of real and personal property for the use of the schools therein, and to make necessary contracts in relation thereto.”

Practice Pointer: You serve in a capacity as a director of a public corporation.

4. The Board’s Duty to Provide an Education

NH RSA 189:1-a defines the scope of the board’s duty to provide an education. It states that, “[i]t shall be the duty of the school board to provide, at district expense, elementary and secondary education to all pupils who reside in the district until such time as the pupil has acquired a high school diploma or has reached age 21, whichever occurs first. . . .”

Practice Pointer: The Board’s duty to educate includes all residents up to age 21.

5. The Board’s Duty to Provide Equality of Educational Opportunity

The local board is statutorily required to provide “standard schools” for “at least”

180 days in each year, or the equivalent number of hours as required in the rules of the department of education. In addition, the board shall “give to all the pupils within the district as nearly equal advantages as are practicable.” NH RSA 189:1.

Practice Pointer: A local board must make decisions in a manner that equitably allocates resources throughout the district.

6. The Statutory Duty to Feed Students

NH RSA 189:11-a(l) provides that “each school board shall make a meal available during school hours to every pupil under its jurisdiction.”

7. The Board’s Duties with Regard to Teacher Dismissal

Only the local board has the authority to dismiss a teacher. NH RSA 189:13 states that: “[t]he school board may dismiss any teacher found by them to be immoral, or who has not satisfactorily maintained the competency standards established by the school district, or one who does not conform to regulations prescribed; provided, that no teacher shall be so dismissed before the expiration of the period for which said teacher was engaged without having previously been notified of the cause of such dismissal, nor without having previously been granted a full and fair hearing.”

Practice Pointer: As a board member you will have a duty to afford teachers with a “full and fair hearing” prior to any dismissal decision.

8. The Board’s Role in Teacher Nonrenewal

State law also addresses the local board’s role in a superintendent’s decision to nonrenew a teacher. A tenured teacher with five (5) or more consecutive years (or three consecutive years before July 1, 2011) of service is entitled to request an explanation of the reasons for their nonrenewal and is entitled to a hearing before the school board. See NH RSA 189:14-a(l)(c). The State Department of Education has established regulations for the conduct of a nonrenewal hearing. See Ed 204.02 Hearing Procedure for Teacher Nonrenewal. If a teacher is aggrieved by the board’s decision he/she may either appeal the decision to the State Board of Education, or request arbitration under the terms of a collective bargaining agreement pursuant to RSA 273-A:4, if applicable, but not both. See NH RSA 189:14-b.

Practice Pointers: Tenured teachers have the right to an explanation of reasons for their nonrenewal and a fair hearing before the board.

9. Right to Establish Certain Local Regulations

NH RSA 189:15 permits a school board, unless otherwise provided by statute or state board regulations, to establish local regulations for:

- Student attendance;
- Management of schools;
- Classification of schools; and
- Discipline of schools.

These regulations become “binding upon pupils and teachers” when recorded in the official records of the school board. See NH RSA 189:15.

Practice Pointer: Local boards have authority to set local policy, but must do such in accord with state law.

10. Building and Maintaining Schools

State law sets forth a process for the building of schools. The district “may decide upon the location of its schoolhouses by vote or by a committee . . . , provided, however that all plans, specifications, and the selection of site for any new school buildings for any school district shall be approved by the school board of the district in which it is proposed to construct such a building.” NH RSA 199:1. “If the district does not agree upon a location for a schoolhouse, or upon a committee to locate the same, or if the same is not located by such committee within 30 days after its appointment, the school board, upon petition of 10 percent or more of the voters, shall determine the location.” NH RSA 199:7. There are also provisions pertaining to relocation of school buildings. NH RSA 199:8-9

11. Duty with Regard to Long-term Suspensions and Expulsions

The board is required to hear all appeals of long-term suspensions. In addition, any and all expulsion decisions must be made by the board after a hearing. See NH RSA 193:13. The School Board may delegate that authority to a subcommittee in accord with NH RSA 193:13(VII).

12. Bullying Appeals

NH RSA 193-F, known as the “Pupil Safety and Violence Prevention Act”

requires that school districts have a policy in place prohibiting bullying, allowing for reporting of incidents of bullying and requiring a post-report investigative process. The goal of this “anti-bullying legislation,” is to reduce bullying both on campus and off campus. This legislation extends broadly and prohibits forms of bullying that occur through digital media as well as traditional forms of bullying. The State Department of Education maintains the position that parents have the right to appeal the results of a bullying investigation to the Superintendent and ultimately to the local school board. At the local school board level, the obligation of the board is to afford due process to the appealing party and to reach a decision based on the evidence presented to the board by the parents and the administration. The local school board’s decision is subject to appeal to the State Board of Education.

13. Miscellaneous Duties Imposed by State Law on the Board

There are a number of miscellaneous duties imposed by state statute on the local school board. These include, but are not limited to:

- The Board shall see that the studies prescribed by the state board are “thoroughly taught, especially physiology, hygiene, and health and physical education as they relate to the effects of alcohol and other drugs, child abuse, [HIV]/[AIDS], and sexually transmitted diseases on the human system” and that “health education and physical education are taught . . . as part of the basic curriculum.” NH RSA 189:10.
- The Board shall see that regular courses of instruction in the history, government and constitutions of the United States and New Hampshire, including the organization and operation of New Hampshire municipal, county and state government and of the federal government, are taught. NH RSA 189:11.
- The Board may provide the services of a “learning disability teacher”. NH RSA 189:11-b.
- The Board shall adopt a teacher performance evaluation system, with the involvement of teachers and principals, for use in the District. NH RSA 189:14-a, V (effective September 22, 2013, N.H. Laws of 2013, Ch. 243).
- The Board “may” purchase accident and injury insurance covering all students while participating in any school activity, or may offer the same to parents/guardians at their expense. NH RSA 189:15-a.

- The Board shall purchase textbooks and supplies, and loan them to students. NH RSA 189:16.
- The Board shall supply a United States and New Hampshire flag and shall prescribe rules and regulations for the proper care and custody of the district's flags. NH RSA 189:17.
- The Board shall submit data on "average daily membership" to the Department of Education. NH RSA 189:28 (I).
- The Board shall establish a records retention and disposition schedule for all official records of the district. NH RSA 189:29-a.
- The Board shall appoint truant officers for the district. NH RSA 189:34.
- After nomination by the Superintendent, the Board shall elect all teachers employed by the district. NH RSA 189:39.
- The Board may provide "child benefit services." NH RSA 189:49.
- The Board shall hear appeals of school assignments or changes of school assignments. NH RSA 193:3.
- The Board may consent to allow a nonresident to attend school in the district on such terms as its local attendance and admission on nonresidents policy may provide. NH RSA 193:12.
- The Board may allow a meals program for the elderly. NH RSA 199:22-a.
- The Board must make any necessary changes ordered by the local board of health to its school buildings. NH RSA 200:13.
- The Board must adopt written policies for "the purpose of providing immediate and adequate emergency care for students and school personnel who sustain injury or illness during school hours, or during scheduled school activities."

NH RSA 200:40.

14. Indemnification

All school districts and school administrative units are **required to “indemnify and save harmless any person employed by it and any member or officer of its governing board, administrative staff, or agencies, including but not limited to. . . school board members, . . . and superintendents of schools from personal financial loss and expense including reasonable legal fees and costs, if any, arising out of any claim, demand, suit, or judgment by reason of **any act or omission constituting a violation of the civil rights** of an employee, teacher or student, or any other person under any federal law if such act or omission was **not committed with malice, and if the indemnified person at the time of such act or omission was acting within the scope of employment or office.**”** NH RSA 31:106 (emphasis added).

State law also provides that a “school district, . . . [or] school administrative unit . . . **may by a vote of the governing body indemnify and save harmless for loss or damage occurring after said vote any person employed by it and any member or officer of its governing board, administrative staff or agencies including but not limited to . . . school board members . . . and superintendents of schools from personal financial loss and expense including reasonable legal fees and costs, if any, arising out of any claim, demand, suit, or judgment by reason of **negligence or other act resulting in accidental injury to a person or accidental damage to or destruction of property if the indemnified person at the time of the accident resulting in the injury, damage, or destruction was acting in the scope of employment or office.**”** NH RSA 31:105 (emphasis added).

C. The State Regulatory Framework

The state board of education has not shrunk from its mandate to regulate the local school board. Ed 303.01 sets forth the “substantive duties” of the local school board. These duties include the following:

- Adopt policies “necessary and desirable” to control and effectuate the recruitment, employment, evaluation, and dismissal of teachers and other employees. The Board may delegate this authority to the superintendent, except that the Board has the nondelegable duty to elect teachers nominated by the superintendent.
- Adopt policies as necessary and desirable to control and effectuate the purchase of equipment, supplies or services, and may delegate this duty to the superintendent;
- Provide, through documented planning and public meetings and

quorum votes, accommodation for all pupils in approved schools or other facilities in accord with state law;

- Provide required transportation;
- Provide safe and healthy school buildings and learning environments;
- Prepare an annual budget;
- Comply with all federal and state laws and rules;
- Hold meetings at least once every 2 months, requiring the superintendent or designee to attend;
- Maintain a record of all meetings in accord with the “Right-to-Know Law;”
- Consult with the superintendent and in accord with statutes and state board regulations to determine the educational goals of the district, and develop long-range plans and identify measurable goals and short-term objectives;
- Require the implementation of educational programs designed to reflect the board’s goals and objectives, reviewing such programs and making public the results of its investigation;
- Exercise all powers and duties required by law;
- Adopt a rule to ensure that there is no unlawful discrimination;
- Establish a policy on sexual harassment;
- Establish written criteria for evaluating the superintendent; and
- Annually evaluate the superintendent.

Practice Pointer: The state imposes clear regulatory obligations on a school board to form educational policies.

The state board of education is also required to adopt rules pertaining to the duties of superintendents. NH RSA 21-N:9 (II)(p); NH RSA 186:8. The state board has done so in Ed 302.01-302.02. The superintendent’s duties include, but are not limited

to:

- Serving as the executive officer of the districts within the SAU;
- Responsibility for the overall administrative and leadership services of the SAU;
- Performing the duties set forth in Ed 302.01-02;
- Responsibility for planning and managing the administration and leadership services of the districts within the SAU subject to statutory requirements, rules, and policies of the local districts;
 - Local district services include, but are not limited to:
 - Personnel
 - Finance
 - Communication/community relations
 - Student services
 - Maintenance/capital improvement
 - Curriculum
 - Instruction
 - Assessment
 - Short and long range planning
 - Governance for student achievement
 - Policy research
 - Implementation and review
 - Overall leadership on educational issues
- Developing and maintaining a system of public schools, staffed by certified educators, qualified professionals, and persons providing support services, subject to statutory requirements, rules, and policies of the local districts;
- Providing, developing, and implementing procedures to achieve educational objectives within the districts in the SAU;
- Being directly responsible to the districts within the SAU;
- May nominate for SAU board appointment one or more assistants, including assistant superintendents and business administrators;
- May assign duties for the efficient management of the SAU;

- Nominating all certified staff and appointing other employees in accord with state law, rules, and board policies;
- Directing and supervising the work of all employees of the districts within the SAU;
- Having all powers necessary to make direction and supervision of employees effective, including the ability to delegate powers and duties to other personnel;
- Responsibility for developing and recommending to the boards within the SAU the annual budget;
- Responsibility for developing and maintaining an accounting system and financial reporting procedures for all funds;
- Responsibility for developing an educational plan including curriculum, instruction, and assessment programs for the districts and for recommending a program of studies suitable to the needs of the pupils and the community;
- Removing a teacher or other employee in accord with RSA 189:31;
- Recommending the dismissal of certified staff to the board;
- Providing for temporary staff to fill vacancies;
- Providing supplies immediately needed for the operation of schools;
- Responsibility for maintaining records and filing reports as required by the state board and local boards;
- Admitting pupils to the resident district in accord with state law, rules, and local policies;
- Directing pupils to assigned classes and grades, consistent with local policies;
- Maintaining a safe environment for pupils free of hazardous conditions;
- Responsibility for evaluating personnel and programs;

- Responsibility for implementing state board rules, which apply in the area of superintendent jurisdiction;
- Responsibility for developing and recommending to the boards within the SAU an annual maintenance program and long-term capital improvement plan;
- Responsibility for implementing and recommending to boards within the SAU a community relations and communications program; and,
- Responsibility for implementing and reviewing district policies.

Practice Pointer: The regulations make clear that the Board adopts educational policies, and the Superintendent is responsible for implementing those policies. District policy BDD, Board-Superintendent Relationship is consistent with the regulations. It states that the Superintendent is responsible for the execution of Board decisions, the operation of school programs, the administration of Board policies, and for keeping the Board informed about school operations and issues.

Practice Pointer: The Superintendent also serves as the conduit for communication between the Board and other District employees. See District Policy BHC, Board-Employee Communication.

D. The Judicial Framework

From time to time the Courts have occasion to interpret the role of a school board and a school district. Our State Supreme Court has consistently interpreted the function of a school board in a manner that preserves its fiscal autonomy. As observed in the case of Baker v. Hudson School District, 110 NH 389, 392 (1970), “[t]he New Hampshire cases have recognized a policy favoring financial independence for school districts wherever possible.” Similar sentiments were expressed by the State Supreme Court in Franklin v. Hinds, 101 NH 344, 345 (1958), “[u]nder no circumstances however, will municipal officers be permitted to exercise any greater control over school finance than that clearly intended by the legislature.”

E. The Family Educational Rights and Privacy Act (“FERPA”)

As implied by the title, FERPA addresses the **privacy** and **access** rights of parents and adult students in their educational records. Under FERPA, schools are required to protect the privacy rights of parents and adult students

through the limitation of disclosure and to further the access rights through the opportunity to inspect, review and seek to amend student records. 20 U.S.C. 1232g.

FERPA defines educational records as: “those records, files, documents, and other materials which:

- i. Contain information directly related to a student; and
- ii. Are maintained by a school district or by a person acting for a school district.”

20 U.S.C. 1232g(a)(4)(A).

FERPA enumerates a number of rights that Parents and adult students (students 18 years of age and older) have with regard to student records. These rights include:

- The right to inspect, review and access education records;
- The right to challenge the content of education records; and,
- The right to consent to the disclosure of education records.

1. The right to inspect, review and access education records

Parents have the right to inspect and review the education records of their children. When the data pertains to more than one child the parent has the right “to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.” The privacy rights of other students are implicated in these circumstances, and the District is required to redact the names and other personally identifiable information about other students that may be included in the child’s education records.

The regulations require that when a parent makes a request to inspect and review his or her child’s education records the District must provide the parent with access within 45 days of the request. The best practice however, is not to delay disclosure. When a parent has made a request, the District should promptly allow access.

The right of access includes the right to request copies of education records. The District has a duty to provide copies to parents, but may charge a reasonable duplication fee for those copies.

2. The right to challenge the content of education records

A parent/adult student has the right to challenge the content of their education records

Upon receipt of a challenge, the District has a choice:

- To agree to amend the record; or
- To offer the student a hearing on the request if it decides not to amend the record in accord with the request.

If after a hearing, the District still is of the mind not to permit amendment, the District is required to offer the parent the right to place a statement in their child's record, which will be kept and disclosed with the record in question. A District that fails to offer a policy allowing parents a hearing when it refuses to amend a record is considered ineligible for federal funds.

3. The Right to Consent to the Disclosure of Education Records

The parent/adult student retains the right to consent to the release/disclosure of education records. FERPA creates a general presumption that a school district may not release the education records of a student without **the prior written consent** to the disclosure. This general presumption is ameliorated by two concepts: the concept of **directory information** and the concept of certain **exceptions to the prior written consent rule**.

Directory information is defined as information that a district may release, after public notice, provided that the parent/adult student has not refused the release of the information. Directory information may include the student's:

- name;
- address;
- telephone listing;
- date and place of birth;
- major field of study;
- participation in officially recognized activities and sports;
- weight and height, if a member of an athletic team;
- dates of attendance;
- degrees and awards received;
- the most recent previous educational institution attended.

In order for a District to be free to release directory information without prior written consent, the District must provide public notice of the areas of information that it has designated as “directory information,” and allow a reasonable time for parents to refuse to allow release of directory information without prior written consent.

Practice Pointer: Board members should preserve the confidentiality of all student educational information.

The Individuals with Disabilities Education Act (“IDEA”) also requires that all information pertaining to a student’s educational disability remain confidential.

Practice Pointer: Board members should refrain from any discussion regarding a student’s educational disability, and should never reveal the fact that a student has an educational disability.

II. The Oath of Office and Board Member Authority

A. The Oath of Office

Board members are bound to follow and uphold the law as part of the oath of office taken by a school board member. N.H. R.S.A. 92:2 requires public office holders who are required to take an oath to “*make or subscribe the oath or declaration as prescribed by Part 2, Article 84 of the Constitution of New Hampshire.*” This statute further provides that “*any person who violates said oath after taking the same shall be forthwith dismissed from the office or position involved.*”

The Constitutional oath requires, in part, that the board member “*swear and affirm that [he or she] will faithfully and impartially discharge and perform all the duties incumbent upon [a school board member] according to the best of [his or her] abilities, agreeably to the rules and regulations of [the] constitution and laws of the state of New Hampshire.*”

Thus, the oath of office requires board members to adhere to and uphold the District’s policies and New Hampshire law governing the conduct of school boards, including any business conducted in a nonpublic session of the board.

The District’s policies include a code of ethics. See Policy BCA, Ethics Policy Statement; Policy BCA-R, School Board Member Ethics. The code of ethics indicates that each Board Member will strive to improve public education and will:

- Remember that my first and greatest concern must be the educational

welfare of the students attending the public schools;

- Attend all regularly scheduled Board meetings insofar as possible, and become informed concerning the issues to be considered at those meetings;
- Recognize that I should endeavor to make policy decisions only after full discussion at publicly held Board meetings;
- Render all decisions based on the available facts and my independent judgment, and refuse to surrender that judgment to individuals or special interest groups;
- Encourage the free expression of opinion by all Board members, and seek systematic communications between the Board and students, staff, and all elements of the community;
- Work with other Board members to establish effective Board policies and to delegate authority for the administration of the schools to the Superintendent of Schools;
- Communicate to other Board members and the Superintendent expressions of public reaction to the Board policies and school programs;
- Inform myself about current educational issues by individual study and through participation in programs providing needed information, such as those sponsored by my state and national school boards associations;
- Support the employment of those persons best qualified to serve as school staff, and insist on a regular and impartial evaluation of all staff;
- Avoid being placed in a position of conflict of interest, and refrain from using my Board position for personal or partisan gain; and,
- Take no private action that will compromise the Board or administration, and respect the confidentiality of information that is privileged under applicable law or is received in confidence or executive session.

See Policy BCA-R, School Board Member Ethics.

B. Board Member Authority

The Board acts by a vote of the body as a whole. Individual board members do not have the authority to bind the Board or the District. Policy BBAA, School Board Member Authority, embodies this premise. It states that “[A]ll powers of the School Board lie in its action as a corporate body. Individual board members may not exercise authority over District affairs. An individual board member, including the chairperson, has power only when the Board by vote has delegated authority to him or her. No legal action can be taken except at a duly warned meeting of the Board and by a quorum acting as a unit. The decisions of the Board shall be binding until rescinded by the Board at a duly called regular or special meeting.”

III. The “Right to Know” Law NH RSA 91-A

The School Board is considered a public body and as such is subject to the Right to Know Law set forth in NH RSA 91-A. The preamble to the Right to Know Law observes that, “[o]penness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.” The meeting of the School Board is considered a public proceeding. See NH RSA 91-A:1-a (VI)(d); NH RSA 91-A:2 (I).

A. The General Presumption of Openness

There is a general presumption that all meetings of the School Board are open to the public. A meeting is defined as, “*the convening of the quorum of the membership of a public body . . . whether in person, or by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, . . . for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power.*” See NH RSA 91-A:2 (I).

The Right to Know Law creates a general presumption that “*all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public.*” NH RSA 91-A:2 (II).

Practice Pointer: Board members should model civic responsibility, ethical standards, and the same healthy dialogue that they expect from students and staff.

B. Defining a Meeting

There are certain activities that do not include a meeting. A meeting does not include: (a) A chance, social, or other encounter not convened for the purpose of discussing or acting upon matters over which the public body has supervision, control, jurisdiction, or advisory power if no decisions are made regarding such matters;¹ (b) strategy or negotiations with respect to collective bargaining; (c) consultation with legal counsel; (d) a caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis; or (e) circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting.² NH RSA 91-A:2 (I).

The New Hampshire Supreme Court has held that the attorney-client privilege protects written legal advice. Society for the Protection of New Hampshire Forest v. Water Supply and Pollution Control Commission, 115 NH 192 (1975). However, NH RSA 91-A:2(I)(b) does not permit a public body to read a letter from counsel and discuss its contents in a private session without an attorney at the meeting. Etinger v. Town of Madison Planning Board, 162 N.H. 785 (2011). The Court noted that for NH RSA 91-A:2(I)(b) to apply, an attorney needed to be physically present or present telephonically, so that the attorney was able to participate in the public body's discussion.

1. Participation in the Meeting

The school board may allow one or more of its members to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body. If the board chooses to allow this type of participation, it must comply with the following:

- A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. The reason(s) that attendance is not reasonably practicable shall be stated in the minutes of the meeting;
- Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this section, an emergency "*means that*

¹ No such chance or social meeting shall be used to circumvent the spirit of the Right to Know Law. RSA 91-A:2-a (II).

² This subsection does not alter or affect the application of any other section of the Right to Know law pertaining to said documents or related communications. NH RSA 91-A:2 (I)(d).

immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action.” The determination that an emergency exists shall be made by the chairperson or presiding officer of the public body, and the facts upon which that determination is made shall be included in the minutes of the meeting;

- Each part of the meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting’s location. Any member participating electronically or otherwise shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice;
- Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of the Right to Know Law, and shall not circumvent the spirit and purpose of the Right to Know Law; and
- A member participating in a meeting by electronic or other means is deemed to be present at the meeting for purposes of voting. All votes taken during the meeting shall be by roll call vote.

NH RSA 91-A:2, III.

2. Public Participation in Board Meetings

The Board has adopted a policy encouraging the citizens of the District to attend its meetings. It has adopted the following procedures and rules pertaining to public participation at Board meetings:

1. Any individual desiring to speak shall give his or her name, address, and the group, if any, that is represented.
2. The presentation should be as brief as possible. Written remarks are encouraged.
3. Speakers may offer comments on such school operations and

programs as concern them. In public session, however, the Board will not hear personal complaints of school personnel or complaints against any person connected with the school system. Other channels are provided for Board consideration and disposition of legitimate complaints involving individuals, which should be referred to the Superintendent for appropriate action.

See Policy BEDH, Public Participation at Board Meetings. The policy goes on to state that the “Board vests in its Chairperson or other presiding officer authority to terminate the remarks of nay individuals when they do not adhere to the rules established above as to content or time limitation.” Id.

In the event a member of the public directs a question to an individual Board member, the policy also provides that the answer must be deferred pending consideration by the full Board. Id.

The agenda of a regularly-scheduled board meeting “shall always allow suitable time for the remarks of the members of the public who wish to speak briefly before the Board. The agenda for workshop sessions may or may not, at the discretion of the Superintendent and Chairperson, contain time for remarks by members of the public.” See Policy BEDB, Agenda Preparation and Dissemination.

C. Protections Afforded to the Public

In order to ensure openness, the public is afforded certain protections. These are as follows:

- Except as provided in RSA 91-A:3, all meetings must be open to the public;
- No vote in open session may be taken by secret ballot;
- People are permitted to record meetings and to use all forms of recording devices;
- Minutes of all meetings are to be promptly recorded and open to public inspection within 5 business days after the meeting;
- Minutes are to be treated as permanent records of the School Board;
- Except in an emergency, notice of the time and place of each meeting, including a non-public session, shall be posted in two appropriate public

places one of which may be the public body's website, or shall be printed in a newspaper of general circulation at least twenty-four (24) hours, excluding Sundays and legal holidays, prior to the meeting; and

- Even in an emergency, the chairperson or presiding officer of the public body must post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held.

NH RSA 91-A:2 (II).

D. The General Presumption Against Non-public Sessions

In order to further openness, the Right to Know Law sets forth a general presumption against non-public sessions. NH RSA 91-A:3 (I). Unless the subject matter fits within certain statutory exceptions, a board is required to meet in public session. Further safeguards are afforded by requiring that the Board may not enter into non-public session except pursuant to a motion properly made and seconded. Moreover, any motion to enter non-public session must state on its face the specific reason for the non-public session. The vote on a motion to go into non-public session must be by roll call vote and requires a vote of the majority of the members present. All discussions held, and decisions made, during non-public session must be confined to the matters set out in the motion. NH RSA 91-A:3 (I)(a)-(c).

E. The Circumstances Under Which a Board May Go Into Non-public Session

A board may go into non-public session to consider or act upon the following matters:

- The dismissal of an employee;
- The promotion of an employee;
- The compensation of an employee;
- The disciplining of an employee;
- The investigation of any charges against an employee;
- The hiring of an employee;

- Matters which if discussed in public would likely affect adversely the reputation of any person other than a Board member unless that person has requested an open meeting;
- 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;
- Consideration of pending claims or litigation which has been threatened in writing or filed against the Board or any subdivision thereof or against any member of the Board because of his membership in the Board, until such time as the claim for litigation has been fully adjudicated or otherwise settled; and
- Negotiation of pending claims or litigation which has been threatened in writing or filed against the Board or against any member thereof because of his membership on the Board, until the claim or litigation has been fully adjudicated or otherwise settled.

NH RSA 91-A:3, II.

Discussion of the dismissal, promotion, or compensation of a public employee, or the disciplining of such employee, or the investigation of charges against that employee will occur in public session if the employee: (a) has a right to a meeting; and (b) requests that the meeting be open, in which case the request must be granted. NH RSA 91-A:3 (II)(a). District employees may have assertable rights which can result in a personnel matter being heard in a public session.

F. Minutes of Non-public Sessions

The law requires that minutes of non-public sessions be kept and further that a record of all actions taken in non-public session be promptly made available for public inspection unless the Board has properly voted to seal the minutes. Minutes and decisions reached in non-public session must be publicly disclosed within seventy-two (72) hours of the meeting unless by a recorded two-thirds vote of the members present it is determined that divulgence of the information:

- Likely would affect adversely the reputation of any person other than a member of the Board; or
- Render the proposed action ineffective.

G. Public Access to Minutes and Records

Suffice it to say citizens have a right to access the minutes and records of the Board during the regular business hours of the District. Citizens are explicitly given a right to access records of all payments made to public employees.

H. Privacy Rights and Student Records

The following records of the District are exempt from the Right to Know Law:

- Personal school records of pupils;
- Records pertaining to internal personnel practices;
- Test questions;
- Scoring keys;
- Other student examination data;
- Personnel files;
- Medical files;
- Teacher certification records;
- Unique pupil identification information collected in accord with RSA 193-E:5;
- Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of the Board.

NH RSA 91-A:5.

IV. *Robert's Rules of Order, Revised*

Robert's Rules of Order ("Rules") exist to facilitate order in the business of the Board. Properly utilized, the Rules ensure due process and fairness in the conduct of a board meeting. However, a board member who is unfamiliar with the Rules can quickly find themselves outmaneuvered through procedural tactics. Therefore, every board member is encouraged to familiarize themselves with the general Rules. The following

information is not considered a substitute for understanding the Rules but is simply provided to initiate the educational process with regard to the Rules.

A. The Role of the Chair

Under Robert's Rules the chair presides over the meeting. The chair is responsible for ruling on points of order and for maintaining order in accord with Rules.

B. The Motion

Business is accomplished through the process of advancing a main motion. Simply put, *“A motion is a formal proposal by a member, in a meeting, that the assembly take certain action. The proposed action may be of a substantive nature, or it may consist in expressing a certain view, or directing that a particular investigation be conducted and the findings reported to the [board] for possible further action, or the like.”* See *Robert's Rules of Order, Newly Revised*, Ninth Edition (1990), p. 26. A motion requires a second. To the extent necessary, the chair will then state the motion for the benefit of the board. At that point, the motion is deemed to be pending before the Board and is open to debate and discussion.

C. The Consideration of A Motion

Once the prior motion is before the board, the members are permitted to debate and discuss the motion. It is the practice of this board to manage all debate and inquiry through the chair. When the debate and discussion appears to have closed, the chair will then put the question to a vote. It is the practice of the board to initially take a voice vote. Upon conclusion of the voice vote, or by request of any member, a roll call vote may take place. The matter is concluded by the chair announcing the vote result.

D. Motions for Reconsideration

Motions for reconsideration are not uncommon in the conduct of a public meeting. Motions for reconsideration are frequently misunderstood. The Rules make it very clear that a motion for reconsideration may only be brought by a member who voted in the affirmative on the underlying motion and who now wishes to reconsider the matter.

E. Motions to Table

On occasion, members may wish to table a pending motion. A motion to table a matter halts consideration of a question and is not debatable. A motion to lay on the table does not permanently dispose of a matter and any member has, at a subsequent

point, the right to move to take a question from the table. A motion to table can only be applied to a matter that is actually pending before the board and must be seconded.