



## Board Agendas, Voting and Minutes

A school board's authority is vested in the entire board, and members of the board may not act separately or independently on behalf of the school district without express authority of the board to do so.<sup>1</sup> The only time a school board may conduct its business and take action on behalf of the district is at a public meeting properly noticed and held in accordance with Wisconsin's Open Meetings Law. School boards are required to hold meetings at least once each month and at other times as permitted by statute.<sup>2</sup> In order to meet and legally take action, a school board must appropriately post a notice of its meetings, vote only on matters properly before the board, and create a record of such action. This *Legal Comment* addresses the statutory and other authority which governs the processes required of school boards to properly notice, take, and record board action.

### Agendas

Under the Open Meetings Law, all school board meetings must be preceded by written notice to the public, any news media who have filed a written request for such notice, and the official district newspaper.<sup>3</sup> This usually takes the form of publishing

the board agenda for the meeting. The Wisconsin Department of Justice has taken the position that notice to the public is satisfied by posting in three separate locations in the district. In December 2015, the legislature amended Wis. Stat. § 985.02(2) (a) to allow for the posting of certain public notices in just one public location provided they are also posted on the district's website. It is not clear whether this amendment applies to the posting of meeting notices; however, the Wisconsin Attorney General continues to recommend that districts post their meeting notices in three locations, even if they are posted on the district's website.<sup>4</sup>

Proper notice of a meeting must be given at least 24 hours prior to the commencement of the meeting unless for good cause such notice is impossible or impractical.<sup>5</sup> When good cause can be shown, shorter notice may be given, but in no case may the notice be provided less than two hours in advance of the meeting.

The Open Meetings Law requires that notices be published for any "governmental body" and any "formal subunit of that body." This encompasses both board and board committee meetings when they meet for the purposes of "exercising the responsibilities, authority, power or

duties delegated to or vested in the body."<sup>6</sup> Notices must be published for both open and closed session meetings. Every notice must set forth the time, date, and place of the meeting, as well as the subject matter of the meeting's open or closed sessions, in a form that will give sufficient information about the business to be conducted at the meeting so that the public can make an informed decision about whether to attend.<sup>7</sup> Factors relevant to this consideration include the burden of providing such notice, whether the subject is of particular public interest, and whether the meeting involves non-routine action that the public is unlikely to anticipate.<sup>8</sup>

The responsibility for preparing the meeting agenda (which is then often used as the formal meeting notice) is typically defined by board policy. Some boards divide the agenda into different categories, including action, discussion, and information items. Boards commonly use consent agendas for items that are routine or have already been discussed and are likely to be acceptable to all members and voted on as one item. Most board procedures allow any board member to remove an item from the consent agenda for separate consideration.

In order to meet and legally take action, a school board must appropriately post a notice of its meetings, vote only on matters properly before the board, and create a record of such action.

The development of board agendas is also a matter of board policy and varies across the state. Generally, placing an item on the agenda is within the authority of the superintendent and board president. However, board policies typically contain procedures by which other board members may compel an item to be placed on an agenda, including designating how many members are needed to make such a request and the form and timing of such requests. It is also not uncommon for board agendas to include an agenda item for board members to propose future agenda topics. In some situations, state law imposes conditions which must occur prior to placement of an item on an agenda — for example, the process for formulating a budget for a common school district must include a class 1 notice prior to any public hearing.<sup>9</sup>

Once an item is placed on an agenda, consideration of that item by the board is subject to board policy. It is not unusual for boards to formally approve the agenda by means of majority vote and, if such a practice is followed, removal of items for consideration at a meeting can take place at this time. In addition, parliamentary procedure allows for tabling or referral of agenda items to other times. However, items cannot be added to the agenda at the time of the meeting under the Open Meetings Law.

### **Voting**

In order to conduct business, including voting, a quorum of the board must be present at the meeting (*i.e.*, one-half of the board membership, plus one). Generally, board actions must be approved by a majority of those voting, unless a statute or board policy provides otherwise. For example, a vote to employ or dismiss a teacher requires a majority of the full board membership.<sup>10</sup> A board must vote in open session unless the vote is clearly an integral part of deliberation authorized to be conducted in closed session. A board can vote in closed session if voting in open session would compromise the need for a

closed session.<sup>11</sup> For example, if a board convenes in closed session to determine its bottom-line price for the sale of district property, the board can and should vote in closed session to set that price and authorize the administration to negotiate for the sale subject to that limit. Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other board decision except the election of the board officers.<sup>12</sup> Any board member may require that a vote be taken in such a manner that the vote is ascertained and recorded, commonly referred to as a roll call vote.<sup>13</sup> In instances where a statute does not require a roll call vote or a member does not request one, action may be by voice or hand vote.

The proliferation of video and audioconferencing technology provides boards with the ability to meet with some members not physically present at the location of the meeting. While there has not been definitive guidance on this issue, a common-sense reading of the statutes appears to permit a board to conduct a meeting during which board members appear electronically. In order to do so, a quorum of the board must still be physically present at the location noticed for the meeting.<sup>14</sup> There is considerable doubt as to whether board members participating electronically can vote on a matter before the board at such meeting. The law makes no provision for voting by proxy or for having an absent board member's vote recorded as a result of a written or oral communication to the board requesting the member's vote be recorded in a certain way.

The order of voting is determined by board policy or practice. Board presidents are authorized to vote on every motion presented for action. No statute specifically requires a board member to vote on every motion before the board; however, the statutes do express a legislative policy favoring the accountability of board members for their actions. Routine abstention from voting by a board member may

be a breach of that responsibility. Abstention is appropriate in circumstances in which a board member has a conflict of interest, such as a direct financial interest in the outcome of the vote. An abstention is not counted towards the vote and, in such cases, a vote can be deemed passed when a plurality of votes are cast in the affirmative.<sup>15</sup> For example, if a seven-member board has a quorum of six members present with one member abstaining, a 3-2 vote in favor of a motion will prevail even though it is not a majority of those present.

### **Minutes**

Generally, the school clerk is responsible for recording the minutes of all board meetings, including both open and closed sessions, and for entering the minutes of the meetings into the board record.<sup>16</sup> In the clerk's absence, the board may select another school board member to act as clerk of the meeting.<sup>17</sup> Minutes are the presumptive evidence of official board action and should reflect the "substance of every official action" taken by the board in both open and closed session.<sup>18</sup> "Substance" is defined as "an intelligible abstract of synopsis of the essential elements of official action taken by a local governing body, including the subject matter of a motion, the persons making and seconding the motion and the roll call vote on the motion."<sup>19</sup> Minutes are not required to reflect what was said by individual board members or reflect the clerk's or anyone else's opinion on anything said or done at the meeting.

Motions and roll call votes of each meeting must be recorded, preserved, and open to public inspection in compliance with the Public Records Law.<sup>20</sup> This applies to open and closed sessions. Minutes of closed session should only reflect the statutory basis for entering into closed session, who made and seconded the motion to go into closed session, the time the board went into closed session, the fact that discussion occurred with respect to the statutory basis for being in closed session, any motions and roll call

votes, the motion and second to return to open session or adjourn, and the time of return to open session or adjournment.

The “proceedings” of a board meeting must be published within 45 days after the meeting as a Class 1 notice in a newspaper published in the district or publicized by a district-wide distribution prepared and directed by the board and paid out of school funds.<sup>21</sup> For purposes of the publication, the proceedings must include the substance of every official action taken by the board and a statement of receipts and expenditures. Meeting minutes usually constitute such proceedings and are typically approved at the next board meeting.

The Attorney General has taken the position that these publication requirements apply to proceedings conducted in open and closed session meetings. Closed session minutes may also be approved in open session; however, the Attorney General has advised that boards should publish the proceedings of a closed session in a manner that preserves the confidentiality of closed session if the public interest still weighs in favor of keeping the proceedings confidential.<sup>22</sup> Accordingly, as long as the need for confidentiality exists, it is advisable for the board to approve such closed session minutes in closed session and to withhold publication of such closed session proceedings.

Board minutes must be retained for a minimum of seven years, except as otherwise provided by the Public Records Board.<sup>23</sup> Tape recordings used for the purpose of preparing minutes may be destroyed no sooner than 90 days after the minutes have been approved and published.<sup>24</sup> The best practice, however, is to retain board meeting minutes permanently. With respect to student expulsions, the board is required to keep written minutes of the entire expulsion hearing, which become part of the student’s confidential student record.<sup>25</sup>

Meeting minutes for both open and closed session are considered public records and must be maintained and disclosed in accordance with provisions of the Wisconsin Public Records Law. Before the minutes are approved, however, the minutes may be considered “drafts” and, as a result, they are not a “record” subject to disclosure. Once approved, the minutes are then likely “records” which must be provided to members of the public subject to analysis under the “balancing test.” Generally, open session minutes are subject to disclosure without limitation. Minutes from closed sessions are not exempt simply because the meeting occurred in a valid closed session. However, the records custodian may refuse to permit inspection of closed session minutes if the need for confidentiality continues and if sufficient reason is given consistent with the law. In many cases, the need to keep closed session minutes confidential may not extend beyond the closed meeting itself. In other cases, confidentiality may be required indefinitely, for example, in the case of minutes which refer to pupil records. Certain segments of closed session minutes may be properly open to public inspection, while other segments retain their confidential nature. As such, the custodian may have to review the minutes and block out certain portions prior to their disclosure.

## Conclusion

Because school boards are governing bodies of public entities, public policy requires that board action take place in a manner which advises the public in advance of contemplated action, be conducted in accordance with appropriate process, notifies the public of the actions taken, preserves the records documenting such action, and allows for subsequent public inspection of those records. This requires boards to follow specific procedures some of which arise statutorily. However, a significant amount

of board practice involving agenda-making and board action is left for boards to determine through policy. Accordingly, boards should review their practices regarding agendas, voting, and minutes to make sure they not only comply with the statutes, but also are consistent with board policy. ■

## End Notes

1. 2 *Education Law* § 3.04[2](Matthew Bender, 2015).
2. Wis. Stat. §§ 120.11, 120.43.
3. Wis. Stat. §19.84(1)(b).
4. March 14, 2016 letter from Assistant Attorney General Paul M. Ferguson to Daniel J. Mallin.
5. Wis. Stat. § 19.84(3).
6. Wis. Stat. § 19.82(2).
7. Wis. Stat. §19.84(2).
8. *Buswell v. Tomah Area Sch. Dist.* 2007 WI 71, ¶ 28, 301 Wis. 2d 178, 732 N.W.2d 804.
9. Wis. Stat. § 65.90(3)(a)3.
10. Wis. Stat. §§ 118.22(2).
11. *State ex. rel. Cities S.O. Co. v. Bd. of Appeals*, 21 Wis.2d 516, 538-39, 124 N.W.2d 809 (1963).
12. Wis. Stat. § 19.88(1).
13. Wis. Stat. § 19.88(2).
14. Wis. Stat. § 120.11 (1).
15. *State ex. rel. Burdick v. Tyrell*, 158 Wis. 425, 434, 149 N.W. 280 (1914).
16. Wis. Stat. §§ 120.11(1), 120.17(3), and 120.44(2).
17. Wis. Stat. § 120.11.
18. Wis. Stat. § 120.11(4).
19. Wis. Stat. § 985.01(6).
20. Wis. Stat. §19.88(3).
21. Wis. Stat. §§ 120.11(4) and 120.43(4).
22. Office of the Attorney General, Informal Correspondence to Jon Litscher (March 30, 1981).
23. Wis. Stat. § 19.21(6).
24. Wis. Stat. § 19.21(7).
25. Wis. Stat. §120.13(1)(c)3.

For additional information on related topics, see WASB *School News*, “Minutes of School Board Meetings” (May 2009); “Board Member Voting” (April 2007); and “Disclosure of Closed Meeting Minutes” (July 1981).

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