

Board Roles and Limitations in the Covid Era

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GOAL OF THE PRESENTATION

- Compare board member roles with those of administrators in areas that touch on Covid needs and restrictions.
- Determine how the roles complement each other.
- Discuss risks for boards and the frontier of new legal challenges



Role of Counsel

- Based on years of watching boards and superintendents do things well and do things poorly
 - Combination of statute, policy, and “best practices”
- Board counsel. That can mean talking about limitations for boards as a way of avoiding legal problems, as well as avoiding internal strife (conflicts with the administration)
- Trying to advise you of risk where the exposure issues are still very new.



What are the lawful and appropriate roles for the Superintendent as they relate to Covid?

- Section 22-5-14 of the New Mexico Statutes: Superintendent Authority
 - Chief Executive Officer
 - Administer and supervise the school district
 - Employ, fix salaries, assign, terminate and discharge



Board Roles: What are appropriate roles for board members in Covid?

- Section 22-5-4 of the New Mexico Statutes defines the scope of Board Authority:
 - Focuses on setting policy direction
 - Budgets
 - Collective Bargaining
 - *Limited* role in employment matters as a reviewing body
 - Except for salaries, contract for expenditure of money



New Legal Threats: How will you be sued?

- Legal Mechanisms:
 - Tort Claims Act: maintenance and operation of a public building;
 - Section 1983, deliberate indifference
 - SPED claims
- Illness claims: Difficult to prove because of community spread
- Expensive Nevertheless
 - Settlements
 - Attorney fees
 - Little willingness from the legislature to bar such claims

*Board role: are you responsive to complaints; checking in with administration about compliance?



New Legal Threats: Waivers

- Can Districts get waivers of liability from parents if they want their children to physically attend school?
 - Not sure a waiver of this nature is enforceable.
 - However, I do like “notice” types of documentation
 - Unlikely either will stop a lawsuit because a district is ultimately responsible for its own negligence and that of employees.
- *Boards: focus on compliance, not shields

New Legal Threats: Whistleblower

- WPA: bars a public body from retaliating against an employee for reporting waste/fraud/abuse or participating in investigations of such issues.
- I expect claims from employees for whistleblowing about district non-compliance with safety standards
- Boards:
 - treat every complaint as serious
 - Insist on compliance with chain of command; do not be the “complaint department”

Employment Challenges

- Always remember, the Board's employee involvement is minimal. Employment issues generally belong to the superintendent. But for boards:
 - Help the superintendent anticipate problems
 - Be the “ears and eyes” of the district, not the legs, hands, and mouth.
 - Do not directly communicate with employees or community members regarding confidential problems or issues that fall within the chain of command
 - Remember that the superintendent is your CEO; all information should flow through him/her.
 - Don't assume a new policy is your best response.

Employment Challenges

- Inevitably, some Board policy impacts employment matters.
 - Return to hybrid status or staying on remote can impact employee leave and discipline.
 - Policies on return will impact disability related claims
 - Union matters: terms and conditions of employment; Memorandum of Understanding.
 - Testing/Vaccines.
- *Best practice: communicate with superintendent on how the board can assist



The Board's “Power of the Purse”

- Authority to enter contracts other than employment contracts.
- For Covid, that may mean:
 - Cleaning services
 - Testing/PPE purchases
 - Air filters
 - MOU's with the Unions
 - Legislative action
 - Incentive Pay:
 - Retention pay
 - Physical Presence Pay (?)

New Covid Challenges: Board and Community Issues

- Speaking with members of the public or the press
- OMA compliance
- Professionalism
- Remote meeting participation and attendance
- Anger in the community



COVID Board/Superintendent Issues

- Almost all COVID “action” is administrative, day-to-day operations
 - Teachers/union
 - This includes complaints and concerns
 - Cleaning/facilities
 - Equipment/Access
 - Food service
 - Health/Safety compliance
 - Administrative directives

Quiz Question on Roles: The Community Complaint

- Board Member receives a complaint from a community member that staff is not wearing their masks at a particular site.
- What questions should be asked before acting?
 - Proper process?
 - How does the board member respond to this person?
 - What is his/her role in any investigation?
 - What must a board member do?



Quiz Question on Proper Roles: Information Requests

- Board member continuously asks principals, associate superintendents, and superintendent for reports and information on Covid matters.
- What should this board member be asking himself?
 - Do I have authority to require this on my own?
 - Am I following the correct chain of command?
 - Am I placing improper pressure on staff?
 - How do these demands effect the smooth operation of the District?



Quiz Question on Board Roles: Authority Over the Superintendent

- A new board member asks the superintendent to handle return to hybrid learning a particular way.
- What questions does that board member need to ask?
 - Do I individually have the authority to request such a change?
 - Where do statute and regulation place the authority for accomplishing this change?
 - What might be the best way to raise this issue?
 - Am I placing improper pressure on my superintendent?



Quiz Question:

Board Self-Governance In Practice

- A board member is going to schools within his district to inspect Covid protocol compliance.
 - Whose job is it to correct this practice?
 - How do you do it?



Questions

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