

Top Ten Things New Board Members Need to Know

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1. Know the Legal Limits of Board Authority so that You Can Stay in Your Lane

- ❑ Scenario:
 - ❑ After having received several complaints from community members about a principal, Board Member starts contacting teachers and union leaders to get their opinions of the principal.



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Superintendent Powers and Duties

- ❑ NMSA 1978, § 22-5-14(A)
 - ❑ "The local superintendent is the chief executive officer of the school district."
- ❑ NMSA 1978, § 22-5-14(B)
 - ❑ "The local superintendent shall:
 - (1) carry out the educational policies and rules of the state board [department] and local school board;
 - (2) administer and supervise the school district;
 - (3) employ, fix the salaries of, assign, terminate or discharge all employees of the school district; ...



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Superintendent Powers and Duties

- ❑ NMSA 1978, § 22-5-14(B)
 - ❑ "The local superintendent shall:
 - ...
 - (4) prepare the school district budget based on public schools' recommendations for review and approval by the local school board and the department. The local superintendent shall tell each school principal the approximate amount of money that may be available for his school and provide a school budget template to use in making school budget recommendations; and
 - (5) perform other duties as required by law, the department or the local school board."



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Board Authority (NMSA 1978, § 22-5-4)

- ❑ Local school boards shall:
 - A. Develop educational **policies** for the school district;
 - B. Employ and set the salary for the **superintendent**;
 - C. Review and approve annual school district budget;
 - D. Acquire, lease and dispose of property;
 - E. Have capacity to sue and be sued;
 - F. Acquire property through eminent domain;
 - G. Issue general obligation (GO) bonds of the school district;
 - H. Provide for the repair of and maintain all property belonging to the school district;



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Board Authority (NMSA 1978, § 22-5-4)

- ❑ Local school boards shall:
 - I. Subpoena witnesses and documents in connection with a hearing concerning any powers or duties of the local school board;
 - J. Except for salaries, contract for the expenditure of money according to the Procurement Code;
 - K. Adopt rules pertaining to the administration of all powers or duties of the local school board;
 - L. Accept or reject any charitable gift, grant, devise or bequest which shall be considered an asset of the receiving school district or public school;



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Board Authority (NMSA 1978, § 22-5-4)

- ❑ Local school boards shall:
 - M. Offer and pay rewards for information leading to the arrest and conviction or other appropriate disciplinary disposition by the courts or juvenile authorities of offenders for theft, defacement/destruction of school district property;
 - N. Give prior approval for any educational program in a public school in the school district that is to be conducted, sponsored, carried on or caused to be carried on by a private organization/entity.



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Stay In Your Lane (6.29.1.9 NMAC(A))

- ❑ Among the enumerated list, the local board of education shall:
 - ❑ Employ and evaluate the local superintendent;
 - ❑ Delegate administrative and supervisory functions to the local superintendent;
 - ❑ Refrain from involvement in delegated administrative functions.



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How Should the Board Member Respond?

- ❑ Check Board policies regarding chain of command and follow it.
 - ❑ See for example, NMSBA Policy BHC: "... The Board requires all employees to follow the proper channels of authority in reporting or attempting to resolve problems. It is considered to be insubordination whenever an employee knowingly circumvents the proper 'chain of command'. ..."
- ❑ Advise constituents to follow the chain of command.
- ❑ Tell your Superintendent about the concern.
- ❑ As part of the evaluation process, make sure the Board evaluates the Superintendent's management and supervisory skills.
- ❑ Encourage your Superintendent to share with the Board how he/she is addressing personnel issues, as permitted under OMA, and support his/her growth in this area.



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2. Do Not Trample on First Amendment Rights During Public Comment

- ❑ Scenario:
 - ❑ During public comment, Mary Jane Public addresses the Board, praising the elementary school principal for her anti-bullying and suicide prevention efforts. John Naysayer gets up and begins to criticize the superintendent for his decision to require all students and staff to wear masks regardless of vaccination status, and further accuses the superintendent of knowingly allowing teachers to teach critical race theory. Mr. Naysayer criticizes the Board, calling out specific members, for being a rubber stamp and not holding the superintendent accountable.



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Creating a Limited Public Forum

- ❑ If a Board by policy or practice permits public comment during a board meeting, that portion of the meeting is considered a “limited public forum” for speech by members of the public.
- ❑ In a limited public forum, a Board may restrict speech if the restrictions are:
 - ❑ Viewpoint neutral, and
 - ❑ Reasonable in light of the purpose served by meetings of the Board.

Shero v. City of Grove, Oka., 510 F.3d 1196 (10th Cir. 2007).



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What is Viewpoint Neutral?

- ❑ A Board’s policy is not viewpoint neutral if it permits praise and neutral feedback, but not criticism.
- ❑ In this case, the court concluded, “the Board's policy is viewpoint-based because it ‘permits praise and neutral feedback, but not criticism of both government employees and worse, [the Board] itself.’ [citations omitted.]”

MacQuigg v. APS, Civ. No. 12-1137 (D.N.M. 2015).



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What is Reasonable in Light of the Purpose Served by Board Meetings?

- ❑ “The Court concludes as a matter of law that given the Board’s limited direct authority over personnel issues, the prohibition on the discussion of personnel issues furthers a legitimate interest of the Board in confining matters addressed during the public comment segment to matters within the Board’s purview.”
- ❑ “[W]ith the exception of comments on the Superintendent’s performance, the personnel issues policy operates as a reasonable, viewpoint-neutral restriction on speech, and therefore, is not facially invalid.”

MacQuigg v. APS, Civ. No. 12-1137 (D.N.M. 2015).



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3. Stick to the Agenda During Open and Closed Meetings

- ❑ Scenario:
 - ❑ The Board has as a standing item on the Board agenda, a Superintendent’s report. During the Superintendent’s report, New Board Member asks the Superintendent to respond to Mr. Naysayer’s allegations that that he is permitting teachers to teach critical race theory. The Superintendent assures the Board that CRT is not being taught in any classroom. The Board President asks every Board member to state whether they oppose CRT being taught in the schools. When each so states their opposition, the Board President asks the Superintendent to ensure CRT is not being taught in the schools and discipline any teacher who is found teaching it.



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The Open Meetings Act and Compliance Guide

- ❑ The Open Meetings Act is located at NMSA 1978, Sections 10-15-1 to 10-15-4.
- ❑ The New Mexico Open Meetings Act Compliance Guide is published by the NM Attorney General. The 2015 edition is available at:

<http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Open%20Meetings%20Act%20Compliance%20Guide%202015.pdf>.



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Specificity of Agenda Items

- ❑ "The requirement for a list of specific items of business ensures that interested members of the public are given reasonable notice about the topics a public body plans on discussing or addressing at a meeting." OMA Guide, page 17.
- ❑ "A public body should avoid describing agenda items in general, broad or vague terms, which might be interpreted as an attempt to mislead the public about the business the public body intends to transact. This is an especially important consideration when a public body intends to act on an agenda item." OMA Guide, page 17.



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4. Know When to Disclose and Recuse Yourself

- ❑ Scenario
 - ❑ New Board Member's sister owns a fencing company (Janet's Fencing). The district has several fences that need repairing. In the past, the district has used Janet's Fencing to do these kinds of repairs. Now that New Board Member has been elected to the Board, the district is wondering whether the district can still contract with Janet's Fencing.



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Applicable Laws

- ❑ Governmental Conduct Act (GCA)
- ❑ Procurement Code

Stapleton focus of kickback probe
 BY MIKE GALLAGHER / JOURNAL INVESTIGATIVE REPORTER
 PUBLISHED: WEDNESDAY, JULY 28TH, 2021 AT 8:49AM
 UPDATED: THURSDAY, JULY 29TH, 2021 AT 7:56AM

AG documents incriminate legislative, education leader Sheryl Williams Stapleton
 Sherry Robinson All She Wrote
 Published 9:58 a.m. MT Aug 3, 2021

"OK to pay," the search warrant of Sheryl Williams Stapleton
 POLITICS - GOVERNMENT



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Guiding Principle of the GCA

- ❑ "Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service."

NMSA 1978, § 10-16-3(C).



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Relevant Provisions of the GCA

- ❑ "Family" means "an individual's spouse, parents, children or siblings, by consanguinity or affinity." NMSA 1978, § 10-16-2(E).
- ❑ "A public officer or employee shall not sell, offer to sell, coerce the sale of or be a party to a transaction to sell goods, services, construction or items of tangible personal property directly or indirectly through the public officer's or employee's family or a business in which the public officer or employee has a substantial interest, to an employee supervised by the public officer or employee. ..." NMSA 1978, § 10-16-13.2(A).



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Relevant Provisions of the GCA

- ❑ “Unless a public officer or employee has disclosed the public officer's or employee's substantial interest through public notice and unless a contract is awarded pursuant to a competitive process, a local government agency shall not enter into a contract with a public officer or employee of that local government agency, with the family of the public officer or employee or with a business in which the public officer or employee or the family of the public officer or employee has a substantial interest.” NMSA 1978, § 10-16-7(A).
- ❑ “Substantial interest” means “an ownership interest that is greater than twenty percent.” NMSA 1978, § 10-16-2(L).



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How to Address?

- ❑ New Board Member should disclose the relationship even before anything comes before the Board since the district does do business with Janet's fencing.
- ❑ Even if the fence repair is considered a small purchase under the Procurement Code that does not require the contract be bid, the district must award the contract through a competitive process.
- ❑ New Board Member should recuse herself from any aspect of that process including any Board discussions or actions.
- ❑ New Board Member should not disclose any confidential information she receives as a board member with her sister that could be used for private gain.



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5. Be a Good Steward of District Resources

- ❑ Scenario:
 - ❑ Business Manager has been an upstanding citizen in the community for many years. She is well known and respected. The district's most recently published annual audit reflects a lack of basic internal controls including regarding timely deposits, maintaining a proper cash record, and expenditures exceeding budgeted authority without budget adjustment requests (BARs). New Board Member has read the published audit report. When he has tried to ask questions of the Business Manager during Board meetings, the Business Manager becomes very defensive. New Board Member is not sure what to do.



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The Fraud Triangle



Association of Certified Fraud Examiners, located at: <http://www.acfe.com/fraud-triangle.aspx>



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What is the Fraud Triangle?

- ❑ “The fraud triangle is a model for explaining the factors that cause someone to commit occupational fraud: (1) perceived unshareable financial need; (2) perceived opportunity; and (3) rationalization.”

Association of Certified Fraud Examiners <http://www.acfe.com/fraud-triangle.aspx>



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Finance Subcommittee

- ❑ Each local school board shall appoint at least two members of the board as a finance subcommittee to assist the board in carrying out its budget and finance duties.
- ❑ The finance subcommittee shall:
 - (1) make recommendations to the local school board in the following areas:
 - (a) financial planning, including reviews of the school district's revenue and expenditure projections;
 - (b) review of financial statements and periodic monitoring of revenues and expenses;
 - (c) annual budget preparation and oversight; and
 - (d) procurement; and
 - (2) serve as an external monitoring committee on budget and other financial matters.

NMSA 1978, § 22-8-12.3



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Board Audit Committee

- ❑ "Except as otherwise provided in this section, each local school board shall appoint an audit committee that consists of two board members, one volunteer member who is a parent of a student attending that school district and one volunteer member who has experience in accounting or financial matters. The superintendent and the school district business manager shall serve as ex-officio members of the committee. A local school board with more than five members may appoint more than two board members to its audit committee. The audit committee shall..."

NMSA 1978, § 22-8-12.3(D).



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Board Audit Committee

- ❑ The audit committee shall:
 - 1) evaluate the request for proposal for annual financial audit services;
 - 2) recommend the selection of the financial auditor;
 - 3) attend the entrance and exit conferences for annual and special audits;
 - 4) meet with external financial auditors at least monthly after audit field work begins until the conclusion of the audit;
 - 5) be accessible to the external financial auditors as requested to facilitate communication with the board and the Superintendent;



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Board Audit Committee

- ❑ The audit committee shall:
 - 6) track and report progress on the status of the most recent audit findings and advise the local school board on policy changes needed to address audit findings;
 - 7) provide other advice and assistance as requested by the local school board; and
 - 8) be subject to the same requirements regarding the confidentiality of audit information as those imposed upon the local school board by the Audit Act [12-6-1 through 12-6-14 NMSA 1978] and rules of the state auditor.

NMSA 1978, § 22-8-12.3



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School District Budget and Financial Management

- ❑ Superintendent prepares the school district budget for review and approval by the local school board and the department. NMSA 1978, § 22-5-14 (B)(4).
- ❑ Finance subcommittee makes recommendations to the board regarding annual budget preparation and oversight. NMSA 1978, § 22-8-12.3 (C)(1)(c).
- ❑ Board reviews and approves the annual school district budget. NMSA 1978, §22-5-4 (C); 6.29.1.9 NMAC (A)(10).



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School District Budget and Financial Management

- ❑ Board provides oversight of revenue and expenditures within the district budget. 6.29.1.9 NMAC (A)(11).
- ❑ Board ensures that district funds are appropriately managed and disbursed in accordance with laws, regulations and terms of grants. 6.29.1.9 NMAC (A)(9).
 - ❑ Superintendent is accountable for budget management and expenditure of funds. 6.29.1.9 NMAC (C)(2).



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Practical Suggestions for New Board Member

- ❑ The Board has one employee, the Superintendent, so direct your questions to the Superintendent unless the Superintendent has clearly delegated the role of answering finance questions to the Business Manager in the Board meeting.
- ❑ If you are on the Finance Committee, reserve your in-depth questions for the Finance Committee meeting.
- ❑ Be courteous but do not relinquish your duty of oversight because someone is defensive. Remember the Fraud Triangle.
- ❑ If you are unable to get your questions answered through the Superintendent or his/her delegee, then raise it with the Superintendent privately and as part of the superintendent evaluation process.
- ❑ Examine Board policies involving fiscal management; request the Board review and update as needed.



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6. Know the Board's Role with the Union

- ❑ Scenario:
 - ❑ The Union and the District bargaining team have been negotiating for several months and do not seem to be making progress. The union president, who is also a friend of your family invites you to lunch and starts talking about negotiations. She asks you to talk to the bargaining team about giving more concessions at the table, including agreeing to a bigger pay raise than what was appropriated by the legislature.



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Collective Bargaining Negotiations

- ❑ Collective bargaining negotiations are Confidential under two separate sources of law:
 - ❑ Public Employee Bargaining Act: The following sessions shall be closed:
 - (1) meetings for the discussion of bargaining strategy; and
 - (2) collective bargaining sessions. NMSA 1978, § 10-7E-17(J)
 - ❑ Open Meetings Act:
 - ❑ Meetings for the discussion of bargaining strategy and meetings between the negotiating teams (when they include the School Board) NMSA 1978, §10-15-1(H)(5).



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Roles Established by Law and CBA

- ❑ Approval of the Collective Bargaining Agreement (Ratification)
 - ❑ NMSA 1978, §22-5-4(A), (C), and (J): A local school board shall have the power to approve school district budget, contract for expenditure of money.
 - ❑ *Alarcon v. Albuquerque Pub. Schs. Bd. Of Educ.*, 2018-NMCA-012
 - ❑ Ultimate decision makers on the part of the District.
 - ❑ Ratify and sign on behalf of the District.
- ❑ Grievance Procedures to determine if CBA was followed.
 - ❑ Most CBA's will list the School Board as one of the appeal decision makers.



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7. Protect Confidential Information Including Attorney-Client Privileged Communications

- ❑ Scenario:
 - ❑ The Superintendent asks the District's legal counsel for an opinion regarding whether the District's website, which was developed and is maintained by a third party, complies with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The attorney writes a letter that is shared with the Board, which states her belief that the website is not accessible, and gives recommendations for dealing with the concern. At the next Board meeting, when the motion to terminate the third party contract fails, one Board member complains that the Board is not following the advice of legal counsel and reveals the contents of the letter.



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Duty of Confidentiality

- ❑ Code of Ethics for NM School Board Members:
 - ❑ "I will ... respect the confidentiality of information that is privileged under applicable law."



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How Does the Board Communicate with its Attorney?

- ❑ Boards may communicate with their attorney in a properly noticed closed meeting that is "subject to the attorney-client privilege pertaining to threatened or pending litigation in which the public body is or may become a participant." NMSA 1978 § 10 -15-1 (H)(7).
- ❑ Board policies usually address who in the district can access legal counsel on behalf of the district. Typically, it is the board president, superintendent (and superintendent's designees).



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How Else Does the Board Communicate with Its Attorney?

- ❑ "Aside from discussions with its attorney that are otherwise excepted from the Act, the public body will either have to hold discussions with its attorney in an open meeting or rely on other means to protect its communications with its attorney that do not violate the Act. For example, the attorney might communicate with each member of the public body individually through one-on-one conversations or letters. Keep in mind, however, that if the attorney's advice is discussed among a quorum of the public body's members-in person, by e-mail, by telephone or otherwise-the discussion must be conducted in accordance with the Act, including the requirements for a public meeting, unless it falls within one of the Act's exceptions." OMA Guide, page 29.



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A Few Things for New Board Member to Keep in Mind

- ❑ "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." NMRA, Rule 16-113.
- ❑ Board policies usually address who in the district can access legal counsel on behalf of the district. Typically, it is the board president, superintendent and superintendent's designee(s). See for Example NMSBA Policy BDG.
- ❑ Ethically, your school attorney must act in the best interest of the district. See NMRA, Rule 16-113.
- ❑ Most board policies clarify that in the event of any dispute between the superintendent and the board, the district's attorney represents the board.



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8. Guard Against Rolling Quorums

- ❑ Scenario from the Attorney General's OMA Guide:
 - ❑ "Mr. Green and Ms. Thomas, two members of the five-member board of directors for the ZZZ Domestic Mutual Water Users Association (a public body established under the Sanitary Projects Act), have a telephone conversation during which they decide that the board should discharge the Association's executive director. Mr. Green writes a letter to the director terminating her employment, signs the letter and passes it on to Ms. Thomas. Ms. Thomas signs the letter and delivers it to a third board member, who signs it and delivers it to a fourth board member for his signature. The fifth board member does not participate in the termination action." OMA Guide, page 8.



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Applicability of the OMA

- ❑ The Open Meetings Act applies to meetings of public bodies:
 - ❑ at which a quorum of the members of the public body is present in person or by telephone; and
 - ❑ during which the public body will formulate public policy, discuss public business or take action.

NMSA 1978, § 10 -15-1 (B).



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What is a Rolling Quorum?

- ❑ A rolling quorum occurs when board members are not physically present together at the same time and place, but through a series of conversations, discuss public business or take action.
- ❑ “For example, if three members of a five member board discuss public business in a series of telephone or email conversations, the discussion is a meeting of a quorum.” OMA Guide, page 8.



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Why Does a Rolling Quorum Violate OMA?

- ❑ “The use of a rolling quorum to discuss public business or take action violates the Act because it constitutes a meeting of a quorum of the public body’s members outside of a properly noticed, public meeting.” OMA Guide, page 8.



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What did the AG Conclude Regarding the Example?

- ❑ “The board’s action violates the Act. The letter discharging the executive director and signed by four of the board members amounts to action by a quorum of the board outside of a properly noticed and conducted public meeting. It makes no difference for purposes of the Act that the four members who made up the quorum were not together in the same place when they discussed and signed the letter.” OMA Guide, page 8.



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9. Be Careful when You Text, Tweet, or Email

- ❑ Scenario:
 - ❑ You are sitting in a Board meeting when another Board member makes a comment you disagree with. Through your Facebook messenger app on your phone, and during the meeting, you send a message to a friend about the issue which you think will remain private. Your friend is also worked up over the issue and posts your message on her Facebook feed.



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Code of Ethics

- ❑ "As a member of my local board of education, I will strive to improve public education for all children, and to that end, I will ... work in harmony with the rest of the board members to always promote and preserve the integrity of the board." Code of Ethics for NM School Board Members.



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Inspection of Public Records Act (IPRA)

- ❑ "Records used, created, received, maintained or held on behalf of a public body are public records just as if they were maintained by the public body itself. In this regard, if email is used to conduct public business, the email is a public record even though a personal account is used. The person using the personal account is effectively using, creating, receiving, maintaining or holding the public record on behalf of the public body." IPRA Guide, page 26.
- ❑ This can include "all applicable messages sent to and from [a] personal email account [if] they are records related to public business..." IPRA Guide, page 26.



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10. Strive to be a Fair and Effective Supervisor

- ❑ Scenario:
 - ❑ Superintendent Conscientious has told the Board that anytime they have concerns or requests, to come to her directly. All five eager Board members take her up on it, regularly emailing her with concerns and requests. In her evaluation, the Board criticizes her for not following their directives, and lists examples from their email requests.



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Relevant Law

- ❑ It is the board's duty and power to "employ and evaluate the local superintendent or charter school administrator." 6.29.1.9(B)(2) NMAC.
- ❑ The board may go into a closed executive session to discuss "limited personnel matters; provided that for purposes of the Open Meetings Act, 'limited personnel matters' means the discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee; provided further that this Subsection is not to be construed as to exempt final actions on personnel from being taken at open public meetings; nor does it preclude an aggrieved public employee from demanding a public hearing." NMSA 1978 § 10 -15-1 (H)(2).



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Code of Ethics

- ❑ “As a member of my local board of education, I will strive to improve public education for all children, and to that end, I will ... Recognize that I have no legal authority outside the board meetings, and that all decisions of the board will be made at a public meeting where a quorum of the board is present and only after a thorough review of the available information.” Code of Ethics for NM School Board Members.



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Practical Tips

- ❑ Find out length of superintendent’s contract (usually tied to fiscal year).
- ❑ Find out evaluation calendar including when the board will consider a contract extension (by policy, board action, or custom & practice).
- ❑ Ask to review past evaluations and any written directives.
- ❑ Keep in mind that the Superintendent has one boss (the Board) and not five bosses.
- ❑ Provide direction as a body through Board action.
- ❑ Communicate with one voice.
- ❑ Conduct regular check-ins with the Superintendent in a properly noticed executive session.



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