

In and Out of the Boardroom: Why We Do What We Do

Presented by:

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Introduction

- ❑ Board protocols including outside the Boardroom are often driven by the law. Without an understanding of the why, these protocols can create barriers and lead to divisiveness. Panelists New Board Member Pamela Cort, Board President Jeremy Maestas, and School Attorney Elena M. Gallegos will discuss how to incorporate new Board members into effective leadership, through an understanding of the why.

In and Out of the Boardroom

- I feel like the Board President makes all these decisions.
 - New Board member perspective
 - Board President perspective



Board President Job Description

- ❑ Officer Job Descriptions are determined by Board Policy.
- ❑ Española Public Schools Board Policy BDB
 - ❑ Preside over all meetings and conduct meetings in accordance with New Mexico law, Secretary of Public Education rules and policies of the District.
 - ❑ Call special or emergency meetings.
 - ❑ Consult with the Superintendent on the agenda for each meeting.
 - ❑ Encourage and maintain orderly and democratic participation.
 - ❑ Keep all discussions factual and on the subject at hand.
 - ❑ Allow for full and complete exploration of each item of business.
 - ❑ The President may not act for, or on behalf of the Board, without prior specific authority from a majority of the Board, and
 - ❑ The President shall perform other duties as assigned by the Board or required by law.

Board President Job Description

- ❑ Las Cruces Public Schools Board Policy BDB
 - ❑ To direct the development of agendas.
 - ❑ To preside at meetings.
 - ❑ To appoint committees except in case of formal action by the Board to the contrary.
 - ❑ To call special meetings of the Board.
 - ❑ To sign all contracts and such other documents as may be proper and applicable to his/her position.
 - ❑ To perform other duties that properly pertain to the office or those duties that may be delegated to him/her by the Board.



Out of the Boardroom

- ❑ How did that get on the agenda?
 - ❑ New Board member perspective
 - ❑ Board President perspective



Agenda Setting

- ❑ Agenda setting is determined by Board Policy.
- ❑ Española Public Schools Board Policy BEDBA
 - ❑ “The Superintendent will prepare Board meeting agendas in consultation with the Board President.”
 - ❑ “The Superintendent or Board members may place items on the agenda. Any Board member desiring to place an item on the agenda will notify the Superintendent of the particular item of business at least five (5) central office working days before the meeting agenda is finalized (at least six [6] days prior to the meeting). Inclusion on the next agenda will depend upon the amount of time necessary to provide information to the Board for deliberation and decision making. The Superintendent will make this decision in consultation with the Board President.”
- ❑ Las Cruces Public Schools approach to agenda setting
- ❑ Can you do it differently? What are some of the legal boundaries?

Once the Agenda Has Been Set...

- ❑ How far in advance do Board members want to receive information related to the agenda?
- ❑ What type of information does the Board expect to have in advance in order to be able to make a decision?
- ❑ Española Public Schools Board Policy BEDBA
 - ❑ “The agenda and supporting materials shall be distributed to the Board members not less than twenty-four (24) hours prior to the meeting.”
- ❑ What can a Board member do if this expectation has not been met?

In the Boardroom

- ❑ Why is that on the consent agenda?
- ❑ What can I do about it and when?
 - ❑ New Board member perspective
 - ❑ Board President perspective



In the Boardroom

- ❑ That citizen is saying disrespectful and untruthful things about the Superintendent and a Board member during public comment.
- ❑ Why is the Board President doing nothing about it?

Public Comment

- ❑ There is no right to give public comment under the Open Meetings Act
 - ❑ OMA provides that “all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.” NMSA 1978, § 10-15-1(A).
 - ❑ Except for those portions of a meeting that are closed under OMA, a Board meeting is a limited public forum for the receipt of information. *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999).
- ❑ There is no right to give public comment under the constitution
 - ❑ However, 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.



Limited Public Forum

- ❑ 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.
- ❑ See *Shero v. City of Grove, Oka.*, 510 F.3d 1196 (10th Cir. 2007).
- ❑ Board's policy of prohibiting personal attacks upon Board members and district personnel "is viewpoint-based because it 'permits praise and neutral feedback, but not criticism...'" *MacQuigg v. APS*, Civ. No. 12-1137 (D.N.M. 2015).
- ❑ Board's policy of prohibiting discussion of personnel issues could be reasonable "given the Board's limited direct authority over personnel issues," except for "comments on the superintendent's performance." ...'" *MacQuigg v. APS*, Civ. No. 12-1137 (D.N.M. 2015).



Española Public Schools Board Policy BEDH

- ❑ “Any individual desiring to address the Board shall complete a form (Request to Address Board) and give this form to the Superintendent prior to the start of the Board meeting.”
- ❑ “The Board President shall be responsible for recognizing speakers, maintaining proper order, and adhering to a time limit of thirty (30) minutes for all presentations and a maximum of five (5) minutes per speaker. In order to ensure that each individual has an opportunity to address the Board, the President may also set a time limit of less than five (5) minutes for individual speakers based upon the length of the comment period and number of requests received.”
- ❑ “Personal attacks upon Board members, staff personnel, or other persons in attendance or absent by individuals who address the Board are discouraged. Presenters are cautioned that statements or representations concerning others that convey an unjustly unfavorable impression may subject the presenter to civil action for defamation. Policies KE, KEB, KEC, and KED are provided by the Board for disposition of legitimate complaints, including those involving individuals.”



Las Cruces Public Schools Board Policy BEDH

- ❑ “The individual or spokesperson desiring to address the Board shall complete a ‘Public Input Form’ provided in the Board Room prior to the start of the meeting.”
- ❑ “Public comment will be limited to three (3) minutes per individual speaker and five (5) minutes for each group spokesperson. The Board President or presiding officer may further restrict or waive these time limits.”
- ❑ “The Board of Education does not prohibit public criticism or comment upon personnel matters. However, any person making public comments shall be solely responsible for the content of his or her comments. The Board of Education neither adopts nor assumes responsibility for any comments made by individuals during the “Public Input” section at board meetings.”

How to Balance Privacy Interests

- ❑ When properly noticed, under the Open Meetings Act, the Board may go into Executive Session to discuss “limited personnel matters;” i.e., “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.” NMSA 1978, § 10-15-1(H)(2).
- ❑ However, the Tenth Circuit has held: “We do not read the Open Meetings Act to require the [county] commissioners to discuss, or allow discussion of, [personnel] matters [involving the county manager] only at closed meetings. It does not require them to say or do anything in response to a public comment on such matters at an open meeting—they can just sit and listen and then discuss matters falling within the exceptions among themselves at a closed meeting.” *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999).

In the Boardroom

- ❑ Why did the Board President cut me off when I tried to respond to the concerns expressed during public comment?



Open Meetings Act

- ❑ “Meeting notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting or information on how the public may obtain a copy of such an agenda.” NMSA 1978, § 10 -15-1 (F).
- ❑ “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.” New Mexico Open Meetings Act Compliance Guide (2015).

Española Public Schools Board Policy BEDH

- ❑ “Questions of fact asked by the public shall, when appropriate, be answered by the President or referred to the Superintendent for reply. No action or discussion shall transpire among Board members regarding such questions or comments. Questions requiring investigation shall be referred to the Superintendent for later report to the Board. Questions or comments on matters that are currently under legal review will not receive a response.”

Las Cruces Public Schools Board Policy BEDH

- “The Board of Education shall not act upon any comments made during the ‘Public Input’ section of Board meetings unless the subject matter falls within the Board’s powers and duties and is properly noticed under the New Mexico Open Meetings Act. If the subject matter has not been noticed, action may be deferred to a future meeting.”

Out of the Boardroom

- ❑ Why can't I have coffee with the Union President to discuss bargaining? She is my constituent.

Public Employee Bargaining Act (PEBA)

- ❑ NMSA 1978, § 10-7E-19 (Public Employers; Prohibited Practices)
 - ❑ “A public employer or the public employer's representative shall not:
 - (F) Refuse to bargain collectively in good faith with the exclusive representative.”
- ❑ Under case law, a common Prohibited Practices Complaint (PPC) during negotiation is indirect bargaining.

What is the Board's Role?

- ❑ The Board does have a role, in the Boardroom.
- ❑ "The appropriate governing body of a public employer is the policymaking individual or body representing the public employer. ... At the local level, the appropriate governing body is the elected or appointed representative body or individual charged with management of the local public body." NMSA 1978, § 10-7E-7.
- ❑ *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.

In the Boardroom

- ❑ Why can't the Board decide grievances/complaints against the superintendent regarding his/her personnel decisions?
- ❑ I thought there was a constitutional right to grieve?

Is There a First Amendment Right to Grieve?

- ❑ The U.S. Constitution states: “Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government [Board] for a redress of grievances.” U.S. Const. Amend. I.
- ❑ The Supreme Court has consistently held that the First Amendment does not require the government to listen to individuals or to respond to individual grievances.

Is There a First Amendment Right to Grieve?

- ❑ No; in this instance, our New Mexico State Constitution does not confer greater rights than that of the U.S. Constitution.
- ❑ Even in Texas where there is a state constitutional right to grieve, the Texas Court of Appeals has held that the Board does not have to respond to complaints, and instead, only has to “stop, look, and listen” and consider the “petition.” *Prof'l Ass'n of College Educators v. El Paso County Cmty. [College] District*, 678 S.W.2d 94 (Tex. App.—El Paso 1984, writ ref'd n.r.e.).

Can the Board Confer Greater Rights?

- ❑ Yes, as long as it does not violate H.B. 212 (2003).



Superintendent Powers and Duties

- ❑ Under H.B. 212 (2003), the Superintendent has the power and duty to:
 - ❑ “Administer and supervise the school district;” NMSA 1978, § 22-5-14(B)(2).
 - ❑ “Employ, fix the salaries of, assign, terminate or discharge all employees of the school district;” NMSA 1978, § 22-5-14(B)(3).

Board Powers and Duties

- ❑ The Board has the power and duty to:
 - ❑ “Subject to the rules of the department, develop educational policies for the school district;” NMSA 1978, § 22-5-4(A).
 - ❑ “Employ a local superintendent for the school district and fix the superintendent’s salary;” NMSA 1978, § 22-5-4(B).
 - ❑ “Evaluate the Superintendent.” 6.29.1.9(A)(2) NMAC.

PED's Perspective on the HB 212 Dividing Line

- ❑ *In the Matter of: Board of Education Los Lunas Public Schools, State of New Mexico Public Education Department (August 31, 2021):*
 - ❑ “NMSA 1978, § 22-5-4 provides that the local school board shall have certain powers or duties, which include, subject to the rules of the department, to develop educational policies for the school district, employing a local superintendent for the school district and fixing the superintendent’s salary, reviewing and approving the annual school district budget, and certain other functions listed in the statute. That was not followed when the school board members were participating in discussions pertaining to specific employees’ personnel matters.”

Out of the Boardroom

- Who knew the Superintendent was going out of town?
- Who approved the Superintendent's:
 - Vacation?
 - Out-of-State business travel?

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