

The Ethics of School Board Service

2023 NMSBA Annual Conference

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Board Member Oath

- NMSA 1978, Section 22-5-9.1
 - All elected or appointed members of local school boards shall take the oath of office prescribed by Article XX, Section 1 of the constitution of New Mexico.
- Constitution of the State of New Mexico
 - Article XX, Section 1
 - Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will **support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.**

Powers of the Board

- NMSA 1978, Section 22-5-4:
- A local school board shall have the following powers or duties:
 - A. subject to the rules of the department, develop educational policies for the school district;
 - B. employ a local superintendent for the school district and fix the superintendent's salary;
 - C. review and approve the annual school district budget;
 - D. acquire, lease and dispose of property;
 - E. have the capacity to sue and be sued;

Powers of the Board (Continued)

- Section 22-5-4 (cont.)
 - F. acquire property by eminent domain
 - G. issue general obligation bonds
 - H. provide for repair & maint. of property
 - I. subpoena witnesses for school hearings
 - J. contract for expenditure of funds, except for salaries

Powers of the Board (Continued)

- Section 22-5-4 (cont.)
 - K. adopt rules for administration of all powers and duties of the board
 - L. accept or rejects gifts to the District
 - M. pay rewards for information regarding theft, defacement or destruction to school property

PED Regulations

Powers of the Board

- NMAC 6.29.1.9(A)
 - Employ and evaluate the local superintendent NMAC 6.29.1.9(A)(2)
 - Delegate administrative and supervisory functions to the local superintendent
NMAC 6.29.1.9(A)(4)
 - **Refrain from involvement in delegated administrative functions NMAC 6.29.1.9(A) (5)**
 - Ensure that district funds are appropriately managed and disbursed
NMAC 6.29.1.9(A)(9)
 - Be responsible for oversight of revenue and expenditures within the district budget
NMAC 6.29.1.9(A)(11)

Governance v. Administration

- The Board Governs
 - Legislative Function – Adopts Policies
 - Quasi-Judicial – Student & Employee Hearings
- The Superintendent Administers
 - Supervises & Directs work of employees
 - Administers the day-to-day functions
 - Follows policies adopted by the Board

THE NEPOTISM PROHIBITION

- The Nepotism Law – Section 22-5-6
 - The Superintendent may not employ or approve the initial employment of the spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister or sister-in-law of a local school board member or the Superintendent.
 - The Board may waive the prohibition as to relatives of the Superintendent.
 - The “Grandfather Clause” applies to continuing employment of relatives.

Additional Board Member Conflict of Interest Requirements

- **Prohibited Employment – Section 22-5-5**
 - Board members shall serve without compensation.
 - A Board member may not be employed in any capacity by the School District governed by that Board during the term of office for which the Board member was elected or appointed.
 - Charter Schools – Section 22-8B-4B
 - No Board member shall serve on the governing body of or be employed in any capacity by a locally-chartered charter school located in the School District during the Board member's term of office.

Additional Board Member and Employee Ethics and Conflict of Interest Requirements

- **Board Members' and Employee sales or contracts with the School District – Section 22-21-1**
 - Board members and employees may not sell or be a party to a transaction to sell instructional materials, furniture, equipment, insurance, school supplies or work directly or indirectly under contract with the School District:
 - Exception: Sales in regular course of business made in compliance with Procurement Code.
 - BEWARE: Unless an exception applies, violation carries FELONY sanctions!!

Board Members as Volunteers: Incompatibility Doctrine

- Exists where there “is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both.” *Haymaker v. State ex rel McCain* (N.M. 1917).
- Doctrine has not been applied to volunteers in New Mexico.

Board Members as Volunteers: Incompatibility Doctrine

- 2001 Texas Attorney General opinion: School board member barred by the common-law doctrine of incompatibility from simultaneously serving as a volunteer part-time teacher in a regular academic class for a single semester
- Primary incompatibility related to *supervision*. In capacity on school board, member supervised Superintendent. In capacity as volunteer teacher, board member was supervised by the Superintendent.

Board Members as Volunteers: Incompatibility Doctrine

- New Jersey ethics opinion: by serving as a “lead volunteer” of a club that meets in a school in the board’s school district, board member violates NJ’s code of ethics for board members.
- Board member responsibility is not to administer the schools but, with other members, to ensure that schools are well run. The frequency of the volunteer activity, the level of interaction, and control of the club evidenced direct involvement in the day-to-day administration of the school district in violation of the Code of Ethics.

Board as Impartial Decisionmaker at Termination and Discharge Hearings

- The School Board determines whether there is just cause to discharge or terminate an employee who contests the Superintendent's decision.
- Due Process requires that the Board be impartial and base its decision only on the evidence presented at a hearing.
- If board members are too involved in personnel issues (failure to refrain from delegated administrative functions), employee may have argument that he or she didn't get an impartial hearing.
- Don't try to be the Director of Human Resources
- Don't be the board member who all employees go to to voice their grievances with administration
- Do refer employees to the chain of command and grievance process; report to the Superintendent and ask Superintendent to report back on resolution.

Additional Board Member and Employee Ethics and Conflict of Interest Requirements

- **Procurement Code Restrictions**

- Unlawful employee participation – Section 13-1-190.

- Local public body employee (includes Board members) may not participate in a procurement (i.e., authorize the procurement or approve the contract) when the employee or a member of the employee's immediate family has a financial interest in the business seeking or obtaining the contract.

- “Financial interest” means officer, director, trustee, partner or management position or 5% or more ownership interest. Section 13-1-57.

Additional Board Member and Employee Ethics and Conflict of Interest Requirements

- Procurement Code Restrictions
 - Contemporaneous Employment – Section 13-1-193.
 - Local public body employee (including Board members) may not participate directly or indirectly in procurement and may not be or become the employee of a person or business contracting with the governmental body.

Additional Board Member and Employee Ethics and Conflict of Interest Requirements

- **Waiver of Unlawful Employee Participation and Contemporaneous Employment – Section 13-1-194**
 - The School Board may waive these Procurement Code restrictions by making a determination (usually by resolution adopted in public meeting) that the conflict has been disclosed publicly, that the Board member can perform the procurement function without bias or favoritism (usually by abstaining from involvement in the procurement process), and that the waiver is in the best interest of the School District.
 - We recommend that the resolution recite that in the absence of the waiver, the School Board could not procure the construction, goods or services at a competitive price.

Open Meetings Act

- **Meeting notices published 72 hours in advance**
 - No amendments within 72 hours
 - Publication required on website, if entity operates one
- **Emergency Meetings**
 - AG must be informed of emergency meetings within 10 days after the emergency meeting
 - Must be unforeseen circumstances that will likely result in injury or damage to persons or property or substantial financial loss
- **Proposed: Mandatory Public Comment period**
 - HB 378 (2015) - Either general period or during agenda items
 - Allow reasonable amount of time and diverse perspectives
 - Topics limited to those in scope of board authority
 - Already in NMSBA Policies (D-0300)

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Important Provisions

- **Applies to all meetings with a quorum of members (§10-15-1(D)):**
 - No rolling quorums
 - Meeting of a quorum by email included
- **Decisions must be made in open meetings (§10-15-1(A)):**
 - Public entitled to the greatest possible information including the official acts of officers and employees
 - Formulation of public policy or the conduct of business by vote shall be done in open meetings
 - All persons shall be permitted to attend and listen, reasonable efforts shall be made to accommodate use of audio and video devices

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Important Provisions

- **Meeting Notices shall contain an agenda with a list of specific items of business to be discussed or transacted (§10-15-1(F))**
- **Minutes (§10-15-1(G)): The policymaking body shall keep written minutes of all its meetings including:**
 - Date, time and place of meeting
 - Names of members in attendance and absent
 - Substance of the proposals considered and a record of votes
 - Minutes shall be prepared within 10 days, shall be approved at the next meeting with a quorum and are not official until approved by the policymaking body
- **Enforcement and penalties: AG, DA or individual enforcement; penalties include misdemeanor and/or fines, attorneys fees and costs (§10-15-3)**

Recent Issues in OMA

- Vague Agenda Items
- Executive Session placeholders
- Discussions during a meeting recess
- Compliance with minutes requirements
- Enforcement of public comment rules
- Properly posted meeting notices

- ATTORNEY GENERAL INQUIRIES
 - Costly – monetarily and public opinion

Open Meetings Act - Best Practices

- **Meeting Notices and Agendas**
 - Publish by 5 pm Friday the week before
 - Include copies of board packet online
 - No additions, only deletions, after publishing
- **Include a Public Comment item**
 - Limit comments to topics within Board Authority
 - No disclosure of student information
 - Limit to 2 to 3 minutes per person, and no sharing of time
 - Treat all the public participants the same
 - Use a “script” to introduce public session

Open Meetings Act – Best Practices

- Use specific language in agenda items, including Executive Session
- Post draft meeting minutes online within 10 days, until final minutes are adopted
- NO rolling quorums!
- Conduct as much business as possible in open session
- Continue taping or live streaming meetings and permanently post online

Inspection of Public Records Act (IPRA)

- **Public has the right to inspect public records except for limited exclusions**
 - Records include emails, texts, pictures, videos, etc.
 - Includes draft documents
 - Unless there is a specific exclusion, it is typically public record
 - If the Request is vague or contradictory, you can ask the Requester for Clarity
- **Response Timelines (§ 14-2-8): Immediately or as soon as practicable but not later than 15 days**
- **Enforcement action (§14-2-12): Brought by AG, DA or requestor**
- **Penalties: Damages up to \$100 per day, costs and attorney's fees (§14-2-11)**

IPRA - Best Practices

- ALWAYS Use District Email for School Business
 - Avoids a search of your personal email
- Only Use District Cell Phones for District Business
 - Understand implications of using personal cell
- Written Communications Should Always be Professional
 - Write like a 3rd party is going to read your emails
- District should have a centralized public records custodian, with records as primary duty

Governmental Conduct Act Amendments

- SB 432 – Passed by 2011 NM Legislature and signed by Governor Martinez on April 7, 2011, effective **July 1, 2011.**
- Amends definitions of:
 - **“local governmental agency,”** to include local political subdivisions, within scope of Act. **See Section 10-16-2G. School Districts are political subdivisions, per Section 22-1-2R**

Governmental Conduct Act Amendments

- Amends definitions of:
 - **“public employee”** to include employees of local governmental agencies. Local governmental agency employees include officers, elected or appointed officials and those eligible to receive per diem or mileage. See Section 10-16-2(I) . **Prior to 2011, only “prohibited bidding” section (Section 10-16-13) applied to local public schools.**

Governmental Conduct Act

- General Principles:
 - Public employment or office is a public trust. Officers and employees must maintain integrity and high ethical standards. May not use their position to advance personal or private interests and must disclose real or potential conflicts of interest. **Section 10-6-3 A, B and C.**
 - May not offer, request or receive any money or thing of value in exchange for performance of an official act, or take official act which primarily enhances personal financial interest. **Imposes 4th degree felony penalties! Sections 10-16-3D and 10-16-4A.**

Governmental Conduct Act

- Additional Prohibitions - Public Officers and Employees Shall Not:
 - Coerce or attempt to coerce another public officer or employee to pay or contribute anything of value to any person or organization for political purposes. **Section 10-16-3.1A.**
 - Threaten or deny promotion or pay increase to an employee who does not vote for certain candidates, require contributions to a political fund or purchase of fundraising tickets for a political event, or advise employees to participate in political activity. **Section 10-16-3.1B.**

Governmental Conduct Act

- Additional Prohibitions (Continued) - Public Officers and Employees Shall Not :
 - Use or allow use of governmental property for unauthorized purposes. **Section 10-16-3.1C.**
 - Engage in an official act directly affecting personal financial interest (unless greater benefit accrues to the public) or acquire financial interest which will be affected by the officer's or employee's official action. **Section 10-16-4B and C.**

Governmental Conduct Act

- Additional Prohibitions (Continued) - Public Officers and Employees Shall Not :
 - Receive payment or honoraria exceeding \$100, exclusive of per diem, mileage and lodging, for speeches or services related to performance of official duties. **Section 10-16-4.1.**
 - Disclose confidential information acquired in an official position for his or another's private gain. **Section 10-16-6.**

Governmental Conduct Act

- Additional Prohibitions (Continued) - Public Officers and Employees Shall Not :
 - If the employee or official has authority over public money or issuance of bonds, accept a contribution or anything of value (not including food or refreshments less than \$100 consumed in one day) from a business that contracts with the governmental entity for financial services involving investment of public funds or issuance of bonds. **Section 10-16-13.3B.**

Governmental Conduct Act

- Specific Requirements as to **Contracts** with the Public Agency:
 - Current Officers or Employees:
 - Officer or employee, family members, or businesses in which officer or employee has a **substantial interest** may not enter into contract with Agency, unless public disclosure of interest is made, and competitive process is used to award the contract. **Sections 10-16-13.2B and 10-16-7 (similar to current restrictions imposed by Sections 22-21-1 and 13-1-190.)**

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Current Officers or Employees (Continued):
 - Officer or employee may not sell or be party to contract to sell goods, services tangible personal property or construction directly or indirectly through family or business to an employee supervised by the officer or employee. **Section 10-16-3.2A.**

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Current Officers or Employees (Continued):
 - Agency may not accept a bid or proposal from a person who directly participated in preparing the specifications, evaluation criteria or qualifications for the bid or RFP.
Section 10-16-13.

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Current Officers or Employees (Continued):
 - Officer or employee may not accept an offer of a contract or receive a commission or profit from sale or transaction to sell goods, services, tangible personal property or construction from person over whom officer or employee has regulatory authority. **Section 10-16-3.2C and D.**

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Former Officers or Employees:
 - Agency may not enter into contract with person or business which:
 - Is assisted in the transaction by a former employee whose action while a public employee resulted in the Agency making or acting on the contract,

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Former Officers or Employees (Continued):
 - Agency may not enter into contract with person or business which:
 - Is represented by person who was public officer or employee within the preceding year, if the contract amount exceeds \$1,000, and results from the official act of the officer or employee.

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Former Officers or Employees may not represent any person in dealings with the public employer:
 - On a matter as to which the former officer or employee participated directly or substantially, while employed, or
 - For one year period after leaving employment, receive compensation or pay for representation before the Public Employer.

Governmental Conduct Act

- Disclosure of Outside Employment:
 - **All public officers or employees must disclose in writing to the employer all employment engaged in by the officer or employee, other than the employment with or service to the School District. Section 10-16-4.2**

Governmental Conduct Act

- Penalties for Violation:
 - Other than those prohibitions which carry felony sanctions, as specified above, violation of the Act constitutes a misdemeanor (maximum penalties \$1,000, or imprisonment of up to 1 year, or both.)
 - Attorney General may enforce civil penalties.
 - Alleged violations could be basis for initiating recall effort of local school board members.

Code of Ethics

The citizens in my community have elected me to represent them. 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

- ***Attend all scheduled board meetings** insofar as possible;
- ***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 all the available information;
- ***Work in harmony with the rest of the board members** to always promote and preserve the integrity of the board;

Code of Ethics, Continued

- * **Avoid speaking on behalf of the board** except at those times when the board, by official action, authorizes me to do so, and respect the confidentiality of information that is privileged under applicable law;
- * **Upgrade my performance as a board member** by informing myself about current educational issues by individual study and through participation in programs provided by the local school district and by the state and national school boards associations;
- * **Support the employment of those persons best qualified** to serve as school staff and make every effort to ascertain that all employees are properly remunerated for their services, and that they are dealt with fairly in the performance of their duties;

Code of Ethics, Continued

- * **Avoid being placed in a position of conflict of interest** and refrain from using my board position for personal or partisan gain;
- * **Accept that my primary function is to establish policy** by which schools are administered; and that the actual administration of the education program is delegated to the superintendent and his staff;
- * **Welcome and encourage active participation by citizens** for better understanding of their needs and improvement of relations with the public that I serve;
- * **Strive to promote and perpetuate our democratic way of life;**
- * Remember that my first and greatest concern must be the **fair and equal educational opportunities** for all students attending public school.

Board Member Bill of Rights

The School Board recognizes that good governance depends on each Board member being able to expect the following in a manner consistent with Board Policy:

On joining the School Board . . .

1. A thorough orientation to the Board, including the Board's governing process- the work the Board chooses to do and how the Board chooses to do the work
2. A thorough orientation to the District's operations, finance and structures.
3. Access to the District's School Board Policy Manual, the Board's regular meeting minutes for the past year, material explaining the Board's roles and responsibilities and other information that might facilitate a better understanding of District operations

Board Member Bill of Rights

Before a meeting...

1. Notification of Board meetings and receipt of meeting agendas at the same time that other Board members receive theirs and consistent with Board policy
2. An opportunity to propose the addition of pertinent items to the agenda
3. The timely receipt of information before each meeting that will enable the Board member to make informed decisions

Board Member Bill of Rights

During a Meeting

1. Board meetings that start on time, stay on task and end at reasonable times
2. Unless restricted by Board policy, the opportunity to question the appropriateness of any item on the agenda, to request the removal of an item from a consent agenda for independent consideration and to propose changes before the agenda is approved, consistent with legal constraints
3. The opportunity to make and second motions regarding agenda items and to move to defer any agenda item or to enter into closed session as allowed by law
4. An opportunity to request the justification, alternatives and consequences for items presented for a decision and to participate in full and free discussion before voting

Board Member Bill of Rights

During a Meeting, Continued

5. The opportunity to express opinions during a Board meeting without interruption and ridicule, as well as civil and respectful treatment by all other School Board members and staff members
6. The opportunity to speak candidly during a legally called closed session without concern for being quoted or having confidentiality breached after the meeting
7. The opportunity to remind other Board members of policy and legal responsibilities, including those imposed by the Open Meetings Act, without fear of reprisal. This includes the ability to suggest that the Board or an officer, whichever is appropriate according to Board policy, consult with the Board attorney about the legality of current or planned action or procedure

Board Member Bill of Rights

During a Meeting, Continued

8. The opportunity to request to explain a vote or to append a statement to the minutes as to such vote when they are approved
9. The opportunity to suggest the correction of any inaccuracies in the minutes before their approval and, if the changes are not made, the opportunity to enter a minority view to the minutes
10. The opportunity to participate in the process of selecting officers when the Board reorganizes at an open meeting
11. The opportunity to participate in all policy making functions including suggesting changes to Board processes

Board Member Bill of Rights

In general...

1. Similar opportunities afforded other members of the Board including the opportunity to have expenses reimbursed pursuant to Board policy for attending non-District meetings and educational opportunities
2. A professional relationship with the Superintendent characterized by mutual respect
3. The receipt of timely, accurate responses from the Superintendent to reasonable inquiries

Board Member Bill of Rights

In general, continued ...

4. The opportunity to express personal opinions and viewpoints provided no attempt is made to undermine Board action, misrepresent the majority Board opinion, or otherwise violate Board policy or this “School Board Member Bill of Rights”
5. The opportunity to participate in regular Board self-evaluation
6. Access to relevant data pertaining to district and Board performance

QUESTIONS?

Thank You!

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