**School Boards, The First Amendment, The Right-to-Know Law, the Digital World, School Board Hearings**

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**RSA - 91-A – Right to Know Law Basics**

Introduction

All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. *Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.*

*New Hampshire Constitution, Part 1, Article 8: "Accountability of Magistrates and Officers; Public's Right-to-Know" (Emphasis Added).*

91-A puts into statutory form the public's right of access to government, including the "reasonable restrictions" contemplated by Part 1, Article 8.

The two core areas of right of access under 91-A are "meetings" of "public bodies," and access to "governmental records."

The statutory definitions of those three words/phrases, along with a few others, are key to understanding the breadth of 91-A as it applies generally to school boards, and more specifically to their emails and other electronic communications.

Key Definitions

"Public body" – includes "Any … governing body, board … school district, [or] school administrative unit, … or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto." *91-A:1-a, VI.*

"Advisory committee" – includes any "committee … or other like body whose primary purpose is to consider … issues designated by the [public body] so as to provide such [body] with advice or recommendations concerning the formulation of any public policy … that may be promoted, modified, or opposed by such authority." *91-A:1-a, I.*

"Meeting" – means the convening of a quorum of the membership of a public body … whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other

contemporaneously,… for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power." *91-A:2, I.*

*NOTE: For this presentation and 91-A, "email" or "electronic communications" will include all forms/platforms of digital or electronic communication technology and media, e.g., social media, blogs, text messaging, instant messaging, group chats, etc., irrespective of whether ordinary usage of that platform normally includes contemporaneous exchanges.*

Where Technology and the Open Access Law Collide

From those definitions, it should be clear that email and other electronic communication among board members, can easily implicate both the governmental records and open meeting provisions of the 91-A.

So, where are the intersections between electronic communications and the Right to Know Law?

Meeting and Board Communications

As quoted above, RSA 91-A:2 establishes a three-prong test for whether a board communication (of whatever medium or form) should be deemed a meeting. A meeting occurs when:

1. A quorum of the body convenes;
2. In any manner in which they can communicate contemporaneously;
3. For the purpose of discussing or acting upon something over which the public body has supervision, control, jurisdiction or advisory power.

Prong #1 - Quorum

1. A quorum of the body convenes -

   In almost all matters, a school board quorum is a majority of the then-sitting members. *RSA 21:15*

   A couple of caveats/pointers:

   - If a board/committee member has a conflict on a matter, and has recused (should recuse) him/herself, then quorum is based upon the remaining membership.
   - Define the core membership of any standing or ad hoc advisory committee. This does not preclude additional, active, participants, but it at least helps with the determination of how 91-A applies in a situation (who is responsible for the committee's charge).

Prong #2 - Contemporaneous Communication

2. Convenes in any manner in which they can communicate contemporaneously

   It is this prong that seems to present the most difficulty for public officials when identifying the intersection of the meeting provisions of 91-A with emails or other electronic communications.

Assume a board member posts a comment on Facebook, or sends an email to quorum regarding a matter within the "jurisdiction" of the board.

- Does that constitute a meeting?
- Even if none of the other members respond?
- What if a community member posted it? The Superintendent?

If a single board member sends an email to all of the other board members regarding a matter within the "jurisdiction" of the board, but none of the other members respond, is it a meeting?

At least one N.H. Superior Court Judge thinks so. In *Porter v. Town of Sandwich*, (Carroll Cty. Super. Ct., Do. #212-2014-CV-180), the Judge ruled that the "ability" to communicate contemporaneously was the key factor rather than whether such communication actually occurred.

This is not the prevailing view among school and municipal attorneys, and at least one other Superior Court judge, but that decision highlights the ambiguity. Also, it might suggest that no board member could ever post anything regarding a jurisdictional matter on Facebook, even on his/her own page.

Prong #3 - Jurisdiction

3. For the <u>purpose</u> of discussing or acting upon something over which the public body has supervision, control, jurisdiction or advisory power.

   Almost any matter which directly or indirectly relates to the school or school district will likely fall within the school board's "jurisdiction," *even when it doesn't.*

   *NOTE: 91-A:2, I excludes from the definition of "meeting," "chance, social or other encounter not convened for the purpose of discussing or acting upon [jurisdiction] matters" provided that "no decisions are made regarding such matters."*

   For example: what if a quorum of the board discusses the possibility of the board taking up a resolution on DACA?

   For most New Hampshire school districts DACA would have – at best – an indirect connection to the statutory powers and duties of the board/district. Is DACA a matter within the "supervision, control, jurisdiction or advisory power" of a small town, New Hampshire school board?

   Probably not, but the power to make the resolution itself – is!

   In other words, don't get caught up on the "jurisdiction" language. If board is talking about a subject as board business, then it probably meets the "jurisdiction" threshold.

RSA 91-A:2-a – Just to Be Clear

Taken on its own, the three-pronged meeting definition of 91-A:2, I would seem to open the door to all sorts of misinterpretations which had the effect of public bodies effectively and improperly conducting business outside of public meetings.

- But I only sent my email to one member (who then forwarded it to another, who sent it to another, etc.);
- I knew that three of the four recipients were at work, so they couldn't communicate "contemporaneously" even if they wanted to;
- We were only batting some ideas around, we knew we had to vote at the meeting;
- It was only a straw poll.

Those misinterpretations – intentional or not - and others like them, led to the passage in 2008 of 91-A:2-a, which includes two paragraphs together serving as the "don'ts" reverse side of the coin to 91-A:2's "do's" relative to meetings.

- Paragraph I mandates that a board's deliberations (including discussions) upon jurisdictional matters *only* occur in a public meeting (unless falling within one of 91-A:2, I "non-meeting" categories – a little more on that later).
- Paragraph II specifically prohibits the use of outside communications, including "sequential communications" to circumvent the spirit and purpose of 91-A.

Sequential Communications

While use of the sequential email to accomplish business which should otherwise occur in a meeting might be a 21st century development, but really is just a new-fangled extension of what is known in some areas as a "walking quorum."

> "Walking quorum" – a series of meetings, telephone conferences, or some other means of communication such that groups of less than a quorum are effectively meeting and can arrive at a consensus or understanding regarding governmental business that, collectively, would constitute a quorum. *See, e.g., State ex rel Newspapers Inc. v. Showers*, 135 Wis. 2d 77, 92, 398 N.W.2d 154 (1987).

The Bottom Line

Taken together, 91-A:2, I and 91-A:2-a make it pretty clear:

> *Discussion* or action on official/jurisdictional matters should only occur in a properly held meeting.

This does not mean that any mention of a jurisdictional matter outside of a meeting is improper.

First – only deliberation and action are prohibited. An email on a purely administrative matter concerning the topic would not be (e.g., identifying the topic in order to schedule a meeting to deliberate upon it).

Second – a meeting requires a quorum – e.g., two members (of a 5+ member body) can legitimately discuss board business between themselves, but each should be careful not to pass any information from that discussion on to another board member.

Meeting Requirements

If/when the elements of a meeting are present relative to board communication, then – unless and to the extent a basis exists for a non-public session – the Right to Know law requires:

- Posted notice (24 hours, absent an emergency);
- Availability for the public to attend (subject to 91-A:3);
- Board deliberations and decisions in public;
- Physical presence at the location specified in the meeting notice (unless 91-A:2, III, regarding remote board member participation); and
- Appropriate minutes.

Non-Meetings

When a meeting is not a meeting

"Non-meetings" – 91-A:2, I carves out four specific categories of communications which, notwithstanding meeting the criteria above, are excluded from the definition of "meeting." Only three apply to school boards, they are:

- Strategy and negotiations regarding collective bargaining;
- Consultation with legal counsel (must include ability for contemporaneous communication); and
- Circulation of draft documents.

*NOTE: The concept of a "non-meeting" is not to be confused with non-public sessions under 91-A:3, which are beyond the scope of this presentation.*

Emails, Social Media Comments and other Electronic Communications

Best Practices

- Most importantly, leave discussion and deliberation of official matters for a public meeting;
- Never use comments/email/texts to express ideas, concerns, opinions, etc. on jurisdictional issues or matters;
- Don't use "reply all";
- Whenever possible, the Superintendent or central office should be responsible for communications which are appropriate for the entire board;
- When communicating on informational matters via email, use BCC for all recipient addresses (other than perhaps your own, or an administrator (helps limit intentional or inadvertent use of "reply all" and wandering into substantive discussions);
- Use a district-provided email address for all electronic communications including district business, such communications are "governmental records."

- Use caution with what you say in electronic communications both as to content and tone. Remember such communications are subject to the same public disclosure as a formal letter.

Pitfalls – Slippery Slopes - Violations

- Simultaneous e-mails sent to a quorum of a public body by a member discussing, proposing action on, or announcing how one will vote;
- Forwarding to a board member an email received from another board member regarding a jurisdictional matter;
- Straw polls or communications seeking "a sense of the board";
- Posting any message regarding jurisdictional matters on any community pages, forums, etc.

"Governmental Records" – RSA 91-A:1-a, III

As with hard copy letters, and whether sent or received through a district account or a board member's personal or business account, an email, etc. will be considered a governmental record if it contains information that is:

- created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, *or*
- the school district, *and*
- which is in furtherance of its official function.

Think hard before forwarding constituent emails or complaints.

Public Comments at Meetings and on District Web Sites

Government Purpose v. Public Access

The primary purpose of school board meetings is to conduct the business of the board as it relates to school policies, programs, budget, and operations.

A school board meeting* is one that the public has a right to attend, rather than a meeting of the public where everyone might have the right to speak.

**NOTE: this presentation relates most specifically to board or other public body "meetings," rather than a district's annual meeting, or statutory public "hearings" (required during the budget process, or regarding video recording for teacher evaluations).*

The general purpose of district websites, including social media pages, should be to inform the public, promote community involvement and collaboration.

But, in doing so, the District must recognize that all of the limitations, or considerations that apply with other forms of communication – e.g., confidentiality, protected speech, accessibility - apply equally to such digital platforms.

Public Meetings v. Meetings of the Public.

Likewise, the Right-to-Know Law, RSA 91-A does not create a right to speak at board meetings.

91-A is intended to further the right found in Part 1, article 8 of the New Hampshire Constitution, which protects the public's right of access to governmental proceedings.

As such, 91-A is devoted toward assuring that meetings of public bodies will be open and governmental records available to the public.

Allowing Public Comment and Creating a Public Forum

Despite no legal mandate to do so, there is a longstanding tradition within New Hampshire of school boards (and other public bodies) to allow some level of public comment at board "business" meetings. Likewise, to the extent, if any, web presence is required, all school districts maintain a website, and many also have an "official" Facebook page.

As there is no statutory or Constitutional right for the public to speak at board meetings, the "power" to create the right of public comment is one reserved to the school board. Similarly, when a District or board establishes a web presence, it may preclude any and all two-way comments.

However, once a board decides to provide time or space for public comment, the board creates a "forum" for speech, which in turn implicates free speech protections under both the Federal and State Constitutions.

Public Comments and 1st Amendment Forums

"Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say."

"[T]he First Amendment plays a crucially different role when, as here, a government body has, either by its own decision or under statutory command, determined to open its decision making processes to public view and participation. In such case, the state body has created a public forum dedicated to the expression of views by the general public."

*City of Madison Joint School Dist. No 8 v. Wisconsin Employment Relations Comm.*, 429 U.S. 167, 178-79 (1976)(Justice Brennan, concurring) (citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972)).

1st Amendment Forums

The United States Supreme Court has delineated three *general* types of public forums, each requiring different analysis to determine the scope of the public's right to speech, and the government's ability to regulate it.

1. Open Public Forums
2. Designated Public Forums (with a sub-class of "limited public forums")
3. Closed or Non-Public Forums

1. Open or Traditional Public Forums
    - Public streets, sidewalks, public parks.
    - The Supreme Court has repeatedly ruled that such places are generally open to all speakers and topics, subject only to reasonable "time, place and manner" restrictions.
    - Speakers' in these areas enjoy the strongest First Amendment protections.
    - *Restrictions on the content* of speech in a traditional public are subject to "strict scrutiny." Such exclusions must be "*necessary* to serve a *compelling state interest* and narrowly drawn to achieve that interest.
2. A: Designated Public Forums
    - A governmental body creates a "designated public forum" when it opens public property for public expression even though the public property is not a traditional public forum. (Examples include municipal theaters, bulletin boards, web pages, meeting space opened to non-government assemblies.)
    - After opening a designated public forum, the government is not obligated to keep it open.
    - However, *so long as the government does keep the forum open, speech in the forum historically receives the same First Amendment protections* as speech in traditional public forums (i.e., strict scrutiny analysis).

    B: Limited Public Forums
    - Although not as clearly delineated by the Courts, a sub-class of the designated public forum is the limited public forum.
    - Like the designated public forum, the limited public forum is created when the government allows speech in/upon public property which is not a traditional public forum.
    - The distinction between designated and limited forums (although not always clear in the reported Court decisions), is that a limited public forum may be open only to certain groups or topics (provided that the limitations are not viewpoint based).
    - For instance, a school may make its classrooms available as meeting space, but only to only to groups conducting "school related activities."
3. Closed or Non-Public Forums
    - Government property that has not been open to public expression, such as a jail or a military base.
    - Public schools are also, generally, considered closed or non-public forums.
    - Government restrictions on speech in nonpublic forums must be *reasonable*, and may not discriminate based on speakers' viewpoints.

Public Comment – Designated or Limited Forum?

As suggested above, the classification of a "limited" rather than "designated" forum is not as well defined in the judicial opinions as one would hope, with many decisions using the two terms interchangeably.

In other (Circuit and District court) cases, however, *especially regarding public comment at governmental body meetings*, the distinction (and rationale for the distinction) is clearer.

For school boards weighing the pros and cons of allowing public comment, or the limitations on such comment once allowed, the distinction can be crucial – irrespective of whether the platform is board meetings, or on District/board websites and social media pages.

A "School Board need not create a public forum, but, having done so, it cannot restrict who may speak *based on the content or viewpoint* of the speech." *City of Lakewood v. Plain Dealer Publ. Co*., 486 U.S. 750, 767 (1988) (citing *Madison Joint School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)).

Public Comment – Designated or Limited Forum? OR – Maybe it is Closed?

The *Lakewood* language quoted in the previous slide was not crucial to the Court's decision in that case, and therefore is considered "dicta," perhaps instructive, but not controlling.

The lower court cases that have followed the Supreme Court's decisions have used different standards, some using the strict scrutiny test used for open and "designated" forums, and some using the "reasonableness" standard used in closed forum cases.

Content Neutral v. Viewpoint Neutral

With closed or non-public forums, the government may restrict content (topic), but not viewpoint.

In one Supreme Court case the Court ruled that while a military base could on the one hand prohibit speech regarding the topic of abortion, it could not prohibit a pro-choice speaker while allowing a pro-life speaker.

In a few state court cases, courts have ruled that having allowed public praise or compliments for staff members during public comment, the board could not prohibit complaints or criticism. See, e.g., *Bach v. Sch. Bd. of City of Va. Beach*, 139 F. Supp.2d 738 (E.D. Va. 2001).

Regardless of the type of forum, any exclusion must be done on a viewpoint-neutral basis.

The School Board Meeting

"Meetings held by local governing bodies occupy their own corner of First Amendment jurisprudence. On the one hand, when a local board invites commentary from the

public, it resembles the traditional public forum, which time immemorial has been sanctified as a place for unfettered debate and commentary, and the airing of various views….On the other hand, in the interest of the efficient execution of town business, local governing bodies are generally granted latitude to regulate the public discussion." *Spaulding v. Newport, et al*., CV- 94-316-SD (U.S. Dist. Ct., N.H.1/31/96)

Allow or Disallow Public Comment?

This is essentially a political question that local school boards must grapple with.

Boards may expand the scope of allowable public comments. However, bear in mind that the broader the scope of public comments, the more the board opens itself up for members of the public airing complaints and criticism, including attacks against individual students and employees.

Three General Options

1. Allow public comment on any matter, including raising issues such as personnel or student matters.
2. Limit public comments to topics specific to the purpose e.g., agenda items at a meeting, subject matter of a page (content-specific, viewpoint-neutral).
3. Do not allow public comment.

*NOTE: NHSBA's sample policies BEDH, KD and KD-R generally adopt option #2.*

Board Member Pages

Additional Considerations for Board Member Pages

1. Notice of problems - In many instances (e.g., student on student sexual harassment, bullying, etc.), a district's liability might arise only when it "knows or should know" of a situation;

    - If information is posted on a board member's page, will that impute knowledge upon the district?
    - Does the member's administered page make it clear that posting should not be construed as a communication to the district?
    - What if the board member him/herself did not see the post as it was a reply to a reply on another post, or he/she was not fully monitoring the page?

    Board members do not lose their rights to speak as citizens, whether in person, writing or on Facebook, simply by virtue of their office.

    However, no individual board member has the power or authority to speak on behalf of the board, without first having that authority approved by the board.

    It is important, therefore, for board members to be clear when they are communicating their own views, as opposed to official positions of the board.

2. Messaging – There is the possibility that an individual believes that the page represents the board/district's policies, statements or positions, and/or suggests that

the individual member has authority to speak for the board. Although this generally would not be a substantial liability concern, it could significantly increase the district's exposure to litigation. Examples of this might be if statements on the page were defamatory or constituted an invasion of privacy. Although the district might ultimately prevail in the suit, the fact of the litigation itself could impose substantial financial and other costs.

Disclaimers:

Many of the potential risks for the District can be minimized by appropriate notices/disclaimers included prominently on the Board member's page and even comments.

This page is administered by _____. Although _____is an elected member of the School Board, he/she created and maintains this _____ in his/her personal capacity. The page is in no way affiliated with or sanctioned by the _____ School District or its School Board. No comment or post on this page may be construed as an official communication by, to or with the _____ School District, the School Board, or any of its members. Furthermore, no comment posted on this page may be considered as a communication, - or an endorsement of a communication - by or on behalf of the _____ School District or its School Board.

**School Board Hearings**

From time to time, school boards must conduct adjudicative hearings relative to the rights of employees or students.

The source of these rights varies – some are established via state or federal statute while others are the product of NHDOE Rules. Others have their roots in Constitutional due process requirements. Further, local collective bargaining agreements and/or school board policies may grant students or staff a right to a hearing.

A sampling of the issues over which a board may conduct a hearing includes:

- Teacher dismissals (RSA 189:13)
- Teacher non renewals (RSA 189:14-a)
- Collective bargaining grievances (RSA 273-A:4; CBAs)
- Student Discipline (RSA 193:13 & 193-D)
- Manifest Educational Hardship (RSA 193:3)
- Bullying (RSA 193-F)

Because such hearings concern rights of individuals, the board, as a state actor, is required to adhere to general rules of due process, with greater procedural requirements imposed for more substantial individual rights, most of which are enumerated in various statutes and/or Department of Education regulations.

The importance of adhering to the procedures is essential. Failure to do so may result in substantial liability, and, more certainly, significant legal expenses.

One of the most crucial areas for a board to master when dealing with matters falling under the board's quasi-judicial jurisdiction, is the relative responsibilities of the board and individual board members, as opposed to those of the superintendent and other administrative staff.

School Board's Two Functions: Legislative & Quasi-Judicial

*Board Legislative Role*

The board's legislative role consists of actions that are characterized by a high degree of discretion and judgment and that do not concern the rights of particular individuals in a particular matter.

This "political" role includes setting policies, preparing the budget, and setting long term and short term educational goals of the school district. A school board's legislative role is summarized in New Hampshire Department of Education Administrative Rule Ed 303.01.

*Board Quasi-Judicial Role*

The board's quasi-judicial role involves making decisions that determine the rights of particular individuals in specific matters that fall within the school board's jurisdiction.

- A matter is judicial or quasi-judicial if board members "are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence and arguments as the parties choose to lay before them." *Winslow v. Holderness Planning Board*, 125 N.H. 262, 266 (1981).
- A board's quasi-judicial role is limited to the matters for which it has been granted jurisdiction by law.

School Board members, when acting in a quasi-judicial role and when acting within their jurisdiction, have immunity from civil liability. *Sweeney v. Young*, 82 N.H. 159 (1925).

To enjoy this immunity, it is very important that the members and the Board act only within its jurisdiction, comply with law, and follow proper procedures.

*Slide prepared with materials graciously provided by Peter Phillips, of Soule, Leslie, Kidder, Sayward & Loughman, P.L.L.C., of Salem, N.H.*

Superintendent Responsibilities

- Implement school board policies – Ed. 302.02 (r);
- Nominate teaching staff - RSA 189:39; RSA 189:14-a; Ed 302.02;
- Recruit, supervise and evaluate all staff - 194-C:4, II (b);
- Process collective bargaining grievances - 194-C:4, II (b);

- Compliance with all laws, rules and regulations – including, e.g., anti-discrimination, sexual harassment - 194-C:4, II (d);
- Pupil governance and discipline – RSA 194-C:4, II (m);
- Place employees on administrative leave for cause (e.g., investigations, pending discipline) – 189:31;
- Prepare and "prosecute" dismissals, non-renewals and other actions in personnel matters – RSA 189:13, 189:14-a, Ed. 204.02.

Board Hearings and RSA 91-A the Right-to-Know Law

Board hearings must occur during properly noticed "meetings."

If the hearing is non-public (discussed later):

- the Board must open a public meeting and vote to go into non-public session.
- Following the non-public hearing, the Board must return to public session to vote to seal the minutes of the non-public session and to adjourn the public meeting.

Minutes must be taken and approved.

- For non-renewal hearings, a verbatim record is required, either by audio recording or stenographer; the minutes can be a summary.
- The votes of the Board must be part of the minutes, recorded by roll call if in non-public session.
- It is important that the decision and the minutes use the same language to describe the ultimate decision/action of the Board.

Non-renewal, dismissal and most grievance hearings qualify as reasons to enter non-public session under RSA 91-A:3, II(a):

> "The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted."

General Considerations and Practice Tips

NHSBA recommends that its member districts consult with local counsel for the specific procedures to employ when called upon to act in their quasi-judicial capacity.

In more complex, high-stakes matters, or for boards that do not regularly conduct hearings, it may be prudent for the board to engage a third party to assist the board in the conduct of the hearing.

Direct early complaints and concerns regarding employees, students or other individuals to the appropriate district or SAU personnel ("chain of command").

Adhere to the chain of command; failing to do so may undermine managerial employees' abilities to do their jobs and, worse yet, create unnecessary liability risks and/or legal challenges;

- disqualification of board members,
- destruction of evidence,
- witness intimidation,
- defamation,
- improper meetings under the Right-to-Know law, etc.

Even when the District is able to overcome such challenges, doing so often only occurs after significant costs and in both money and time (board and administration).

A majority of the Board may vote to delegate a task within its jurisdiction to one or more of the board members. For example, the board may vote to delegate its responsibility for holding a non-renewal hearing to a subcommittee of the board, or assign the responsibility of drafting a decision (or working with an attorney to do so).

Board members risk personal liability when they act alone. Statutes which protect board members from personal liability (RSA 31:104 – :106) apply only when board members act in good faith and within the scope of their official authority. Since individual board members have no legal or official authority to act alone, acting alone exposes an individual board member to personal liability.

See *Chadwell v. Lee County School Board*, 535 F. Supp. 2d 586 (W.D. Va. 2008), in which a jury returned a verdict against a local school board for $300,000 in compensatory damages, and against three individual school board members for $15,000 in punitive damages, agreeing that plaintiff school administrators had been demoted due to their constitutionally protected political views, and that the personnel actions had been initiated by school board members.

In upholding the jury's award, the *Chadwell* court noted that the case:

> should be a lesson to local school board members, if one is needed, of the danger to micromanagement of personnel issues. Even aside from the claims of political motivation, it is far better for school board members, most of whom are part-time volunteers, usually ill-paid for their time spent, to concentrate on selecting a well-qualified professional superintendent in whom they have faith, and leave to that person the selection and assignment of subordinate school personnel. The evidence here, where the board spent much of its time selecting slots for individual teachers and supervisors, shows exactly the wrong way to go. Instead, a school board should utilize its time deciding the appropriate education policy for the community and making sure that the superintendent implements that policy. 535 F. Supp. 2d 586, 604.

Hearing Procedures

Department of Ed Rules

- Ed. 204.01 provides the general procedures for most other quasi-judicial hearings – *including teacher dismissals*.
- Ed. 204.02 pertains only to non-renewals.
- Other rules include provisions for other specific types of hearings (e.g., 317.04 for student suspensions/expulsions, and pending rule 320 for manifest hardship proceedings.
- Ed. Rule 204.02 is more comprehensive than 204.01 in process. The following slides will note some of the more significant differences.

Collective Bargaining & Labor Law

- The exact process / procedures required for Board level grievance review may be subject to provisions of specific Collective Bargaining Agreements, PELRB decisions, and/or court holdings.
- Absent any of those relative to the specific matter before the Board, Ed. 204.01 applies

Additional Appeals

- EEOC, HRC, PELRB, Dept of Labor, State and Federal Courts, Arbitrators
- The NH Supreme Court will grant certiorari and will consider whether the State Board exceeded its jurisdiction or authority or otherwise acted illegally, abused its discretion, or acted arbitrarily, unreasonably, or capriciously. Petition of Dunlap, 134 N.H. 533 (1991)

In *Dunlap*, the State Board upheld a local board's decision to non-renew a teacher based upon a condition claimed to be protected under the ADA and RSA New Hampshire's anti-discrimination law. Among other things, the Court also ruled that the non-renewal hearing statute did not afford sufficient due process/remedies as provided for under 354-A.

Conflict of Interest – Recusal

Recusal - Do You Participate?

The standard for when a School Board member must recuse himself or herself from participating when the Board is sitting in a quasi-judicial capacity is different from the standard when the Board is sitting in its legislative or executive roles.

- A School Board member must recuse himself or herself if he or she has actual bias or prejudice against the teacher who is the subject of the hearing. *Appeal of Hopkinton School District*, 151 N.H. 478 (2004).
- A School Board member must recuse himself or herself if he or she has prejudged the issue, either as a Board member or before joining the Board. *Winslow v. Holderness*, 125 N.H. 262 (1984).
- A School Board member must recuse himself or herself if he or she has a direct personal or pecuniary interest that is immediate, definite and capable of

demonstration, and is not speculative, uncertain, contingent, or remote. *Atherton v. Concord*, 109 N.H. 164 (1968).

This ground for recusal applies to both quasi-judicial and legislative/executive decisions.

Failure to recuse when one should have will result in the board's decision being vacated and remanded (sent back for a re-do) *Totty v. Grantham Planning Board*, 120 N.H. 388 (1980) or, in the most extreme cases, reversed.

Preponderance of the Evidence

The Superintendent must satisfy the board that based solely upon the evidence at the hearing, the reasons stated in the notice are more likely than not to be true.

The Superintendent does not have to prove the ground(s) beyond a reasonable doubt, as is required in a criminal case. What the Superintendent has to prove is that the ground for non renewal is more likely than not.

Adopted from NH civil jury instructions:

> "Imagine in your mind the scales of justice. For each ground asserted by the Superintendent, put all the credible evidence on the scales, with the evidence supporting the Superintendent's position on one side of the scale and the evidence in favor of the teacher's position on the other side of the scale … If the scales tip, ever so slightly, for the Superintendent's position, then on that ground the Superintendent has sustained his or her burden of proof. If the scales tip in favor of the teacher's position, *or remains level*, then the Superintendent has failed to prove that ground … Consider all the evidence in the case no matter who produced it. Keep in mind that it is the quality or weight of the evidence that is important, which is not necessarily determined by the number of exhibits or witnesses.