



MASB
MICHIGAN ASSOCIATION
OF SCHOOL BOARDS

Hudsonville Public Schools Board of Education Open Meetings Act Workshop

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Overview

- Key OMA provisions
- Electronic Communications
- Committee Meetings
- Virtual Meetings
- Closed meetings
- Special Meetings
- Emergency Meetings
- Public Comment
- Agenda
- Enforcement and Penalties
- Conclusion & Questions

Key OMA Provisions

- “All meetings of a public body shall be open to the public.”
- “All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public” unless as otherwise specified in the act.
- “All decisions of a public body shall be made at a meeting open to the public.”

Interpretation: “Meeting”

- A “meeting” is defined as the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on public policy.
- Workshops, retreats, work sessions, committees of the whole, study sessions and other similar “discussion only” gatherings still qualify as “meetings” under OMA.
- **Splintering the Quorum/Constructive Quorum-** Discussions between less than a quorum that are then communicated to enough other board members so that the total number deliberating constitutes a quorum.

***Hoff v Spoelstra et al*, Mich. App. Docket No. 272898, July 8, 2008**

- Two commissioners engaged in three separate private “get togethers” with three other individual commissioners to discuss the termination of the city attorney.
- The city attorney challenged the termination claiming the meetings violated OMA. Because the gatherings, alone, did not include a quorum, the City argued that the meetings should be exempt from OMA.
- The Court found that the commissioners engaged in subquorum discussions with the specific intent to circumvent OMA, and the purpose of the meetings was to deliberate on the city attorney’s employment.
- “The several meetings constituted far more than an informal canvas by one member of a public body to find out where the votes would be on a particular issue.”

“Prosecuting attorney finds OMA violation”

- Employees requested to meet with members of a 7-member public body to discuss personnel matters.
- The meeting began with three members, but a fourth board eventually arrived at the meeting.
- The meeting was not a posted public meeting under OMA.
- The members of the public body then had a “tag team meeting” with members rotating in and out of the room so that no more than three would be in the room at any one time.
- “A constructive quorum was created and meeting of the [public body] did occur.”- *Report of Assistant Prosecuting Attorney*

Can a quorum of the board ever “gather” outside of a public meeting?

Yes, under the following examples and as long as the members present do not collectively discuss school district matters:

- ✓ **Conferences and workshops:** (1) The purpose must be to consider issues broader than those which affect the particular school board only; (2) it must be open to members of other school boards or to the public generally; and (3) the members of the board must carefully refrain from any collective discussion of matters of public policy while attending the event.

Permissible Gatherings (Cont.)

- ✓ **Social or chance gatherings:** Social gatherings and genuinely chance meetings are not board meetings even if a quorum of board members is present.
- ✓ **Presentations by groups:** The board members' role in this situation is limited to listening to presentations by their constituents or observing demonstrations.
- ✓ **Political matters:** If members of a school board get together to discuss purely political matters, which are of personal concern, they are not considering matters of public policy and, therefore, need not follow OMA.

Could email communications or texts by school board members violate OMA?

- **Yes...**if a “*meeting*” occurs electronically via email or texts, it would violate the requirements of OMA.
- A two-way email exchange between two board members is not a violation of OMA, *if limited to only two members*.
- OMA doesn’t prohibit board members from distributing email information that doesn’t require a response.

Electronic Communications (Cont.)

Markel v. Mackley, COA Case No. 327617, November 1, 2016

- Members of a public body accused other members of using email to discuss and decide how to address Commission matters and then carrying out those decisions at public meetings as a united front.
- Four commissioners (a quorum) received emails, but only three of the members actively exchanged messages...the fourth member of the group simply received the emails without responding to them.

Electronic Communications (Cont.)

- The Court ruled that the email deliberations violated OMA.
- “[W]e conclude that whether a quorum is present for the purpose of deliberating toward a decision when only some [board members] in the email chain respond to a message is often a question of fact.”
- “[E]ven when a defendant did not affirmatively reply to an email, their tacit agreement was later demonstrated at the public meetings by acting consistently with the decision made in the mails.”

Email Best Practices

- Never use the “reply to all” button
- Avoid sequential communications (e.g., a chain of emails that add up to a quorum deliberating school business)
- Consider using “Bcc”
- Include a “do not copy/forward” alert when emailing a message concerning school business to another board member:

“BOARD MEMBER ALERT: This email is not for interactive discussion purposes. The recipient should not forward it to any other individual or copy a reply to other board members.”

Texting During Board Meetings

“E-mail, texting, or other forms of electronic communications among members of a board or commission during the course of an open meeting that constitutes deliberations toward decision-making or actual decisions violates OMA, since it is in effect a ‘closed’ session.”

Open Meetings Act Handbook
Attorney General Dana Nessel

OMA and Social Media

- School board members who use social networking sites may inadvertently violate the OMA if they are not vigilant about the content and subject matter posted on these sites and aware of the users of the site.
- If a board member's posted comments about school issues prompt responses from other board members ("friends"), the back-and-forth dialogue on a social networking page could amount to a quorum of the board deliberating outside of an open meeting in violation of the OMA.

Are school board committees subject to OMA?

- **Yes**, if a school board empowers a committee to perform a governmental function on behalf of the board, the committee becomes a “*public body*.”
- When a committee is empowered to act on matters that deprive the full board of the opportunity to vote on the issue, the committee’s decision is an exercise of governmental authority.
- Conversely, as long as a committee’s function is limited to just information gathering without making any decisions on behalf of the board, the committee may hold a meeting and it is **not** subject to the requirements of OMA.

School Board Committees (Cont.)

- When a committee is a “*public body*,” it must comply with the same open meeting requirements that apply to the full school board:
 - ✓ Post public notice of meetings
 - ✓ Meetings must be available to the public
 - ✓ Include opportunity for public comment
 - ✓ “Decisions” must be made in open session
 - ✓ Keep minutes

Booth Newspapers v Univ of Mich Bd of Regents **444 Mich 211 (1993)**

- The university's board of regents appointed itself as the committee responsible for choosing a new president for the university, appointed a single regent as chair, and formed several subcommittees to assist in the selection process.
- The chair was given sole authority to make the "first cut," and narrowed the pool of candidates from 250 to 70 after discussing the matter with the advisory committees and informal sub-quorum groups of regents.
- The acknowledged purpose of the chair's methods was "to achieve the same intercommunication that could have been achieved in a full board meeting."

Booth Newspapers v Univ of Mich Bd of Regents **444 Mich 211 (1993)**

- The Michigan Supreme Court concluded that the chair and various committees were acting as public bodies under OMA.
- The Court found that the chair and committees exercised expansive authority over the selection of the university's president, which was one of the most important exercises of governmental authority held by the board of regents.
- The Court recognized that the committees' reduction of the field of potential candidates constituted a series of "decisions" made by a public body that should have been made in open session.

Opinion of the Attorney General No. 6935 (April 2, 1997)

- Board of education created an advisory committee to study academic standards and athletic participation.
- The committee's essential charge was to gather information, review existing school district policy and make recommendations to the board of education regarding eligibility standards for athletic participation.
- The committee was not given authority to alter existing policy or create new policy.
- Decisions regarding the school district policy would be made by the board of education in an open meeting after the board evaluated the committee's recommendations.

Opinion of the Attorney General No. 6935 (April 2, 1997)

- The Attorney General ruled that OMA was not violated when the public was excluded from the committee's meetings.
- The Attorney General noted that the *Booth* decision was not applicable, because the board of education never delegated any decision-making authority to the committee.
- The board created the committee to study the issue and to make recommendations, so it was purely advisory in nature.
- Since the committee was only capable of making recommendations concerning the exercise of governmental authority, its meetings were not required to be open to the public.

Morrison v City of East Lansing **255 Mich App 505 (2003)**

- City council appointed a special committee to make recommendations concerning the development of a community center.
- Committee was expected to interview and recommend architects and construction managers; develop and recommend a site plan; determine tenancy guidelines and criteria; and oversee design of the interior.
- Held 19 meetings, only three were open to the public.

Morrison v City of East Lansing

255 Mich App 505 (2003)

- The city council, not the city manager, by resolution created the special committee, appointed its members and authorized it to perform a governmental function.
- Even though the committee was performing administrative functions, the court still concluded that the committee was a public body because it received its authority from the city council.

A Felon's Crusade for Equality, Honesty, and Truth v DPSCD Bd of Education, No. 343881 (2019)

- The board of education created a committee to review organizations that responded to RFPs for conducting a superintendent search.
- At an open meeting, the committee recommended a firm to serve as the board's search firm.
- The board accepted the recommendation without objection and entered into a contract with the firm.
- It was alleged that the committee violated OMA by failing to post notices of its meetings, failing to hold the meetings in public, failing to maintain minutes, and privately deciding which search firms would be employed.

A Felon's Crusade for Equality, Honesty, and Truth v DPSCD Bd of Education, No. 343881 (2019)



- The Court affirmed that the committee was not a public body required to comply with OMA.
- The committee's activities were investigative.
- While the committee derived its authority from a public body, "its activities were a far cry from the nearly unfettered authority held by the chair and committees in *Booth*."
- The board was free to consider the merits of the prospective search firms at a meeting open to the public.
- Because the committee only gathered and presented information to the board, and because the committee had no authority to act on its own recommendation, it was not a public body.

May a 4th board member attend a posted committee meeting?

- The fourth board member attending a virtual committee meeting could result in an OMA violation even if he or she doesn't participate in the deliberations of the committee.
- See *Markel v. Mackley* decision.
- **Two options to address this issue:**
 - Post the committee meeting as a special meeting of the board.
 - Recess the committee meeting if attended by a fourth board member.

Interpretation: “Decision”

- A “consensus building process” that equates to decision-making falls under OMA.
 - *Board members using electronic communications or sub-quorum meetings to achieve the same discussions that could’ve been achieved in an open meeting.*
- One member of a public body may conduct an informal canvas of his or her colleagues serving on the public body to find out where the votes will be on a particular issue. *St. Aubin v Ishpeming City Council*, 197 Mich App 100 (1992).

Interpretation: “Decision” (Cont.)

- Votes must be taken in such a way that a person attending the meeting or reading the minutes can see how each board member voted.
- “A secret ballot effectively closes part of a meeting to the public, since the ballot withdraws from public view an essential part of the meeting.” *Esperance v Chesterfield Township*, 89 Mich App 456 (1979).

Decision v. Deliberations

- The Court of Appeals has ruled that a public body violates OMA when it uses an informal voting procedure in a closed meeting.
- Even if no actual voting occurs, it is illegal for a public body to reach a general consensus in a closed meeting.
- Making a decision in a closed meeting, the court reasoned, is contrary to the purpose of providing full disclosure of the acts of government officials.

Closed Meeting Decision- Exception

- The Court of Appeals has interpreted the word “deliberation” to permit a school board to establish a consensus and develop a course of action for purposes of collective bargaining strategy. (e.g., voting on bargaining objectives)
- The court emphasized that the closed session deliberations in the case did not produce a decision because the closed-door discussion **was not a final determination affecting public policy.**

OMA and Virtual Meetings

Section 3a of OMA permits telephonic or video conferencing meetings in whole or in part under the following circumstances:

- On and after **March 31, 2021** through December 31, 2021, only to accommodate absent board members due to military duty, a medical condition* or “statewide or local state of emergency.”
- After **December 31, 2021**, only to accommodate board members due to military duty.

** Medical condition means an illness, injury, disability, or other health-related condition.*

Limiting Virtual Involvement

- OMA doesn't clarify whether conducting a virtual meeting in part means allowing an individual board member to virtually vote, virtually attend, virtually deliberate, etc.
- In order to err on the side of complying with OMA, MASB interprets this new requirement very broadly to mean that it covers any type of *virtual* involvement by an individual school board member.
- Based on this interpretation, if one of the stated reasons does not apply, a school board may not conduct a virtual meeting in part by allowing an individual member to virtually attend, vote or even participate in a public meeting.

Virtual Meeting Procedures

- If an electronic meeting is held to accommodate board members due to military duty or a medical condition, only those members absent due to military duty or a medical condition may participate remotely.
- For each school board member attending the meeting remotely (except for military duty), a public announcement must be made at the beginning of the meeting identifying the member and stating his or her physical location by indicating the county, city, or village and state.
 - **Must be documented in the meeting minutes**

Virtual Meetings: *Conducted In Part*

- If a school board holds a virtual public meeting in whole or *in part*, it must comply with all of the virtual meeting requirements.
- Even if a school board has six members physically present in a physical location and one board member is participating in the meeting by remote means, the board must comply with OMA's Section 3a virtual meeting requirements on notice, agendas, public attendance and public comment.

Virtual Meetings: Notice

If a school board is conducting a virtual meeting, it must post **18 hours advance notice of the meeting** on the district's website if the website includes monthly or more frequent updates of agendas or minutes.

Notice of a virtual meeting must include:

- Why the school board is meeting electronically.
- How members of the public may participate in the meeting electronically by providing internet link or telephone number if needed to connect to the meeting.
- How members of the public may contact members of the school board to provide input or ask questions on any business that will come before the board.
- How persons with disabilities may participate in the meeting.

Virtual Meetings: Agendas

- If an agenda exists for an electronic meeting, a school board must make the agenda available to the public at least two (2) hours before the meeting begins on the school district's website if the website includes monthly or more frequent updates of meeting agendas or minutes.
- Webpage must be fully accessible to the public.
- Posting the agenda does not restrict amending it at the virtual meeting.

Virtual Meetings: Public Comment

- All virtual meetings must be conducted in a manner that permits two-way communication so that public participants can hear members of the school board and can be heard by the school board and other participants **during a public comment period.**
- A school board may establish and **require** mechanisms relating to signing up for participating in the public comment period of the school board meeting.
- School boards **may** use technology to facilitate typed public comments **during the meeting** submitted by members of the public participating in the meeting that may be read to or shared with board members and other participants to satisfy the two-way communication and **public comment** requirements.

MASB's Top Five Closed Meeting Violations

1. Making a decision in closed session.
2. Discussing individual administrative contracts in closed session.
3. Citing “personnel matters” as the reason for calling a closed meeting.
4. Discussing *oral* legal opinions from legal counsel without a pending lawsuit.
5. Exceeding the scope of the closed session.

Closed Meeting Requirements

- All meetings of a public body must be open to the public unless a statutory exemption exists under Section 8 of OMA to permit a meeting in a closed session.
- The decision to hold any portion of a meeting as a closed session must be made at an open meeting.
- Majority vote or two-thirds roll call vote is required depending on the purpose.

Closed Meeting Requirements (Cont.)

- Even when a school board is permitted to conduct a closed meeting, OMA prohibits taking any action during the closed meeting.
- Once legitimately in closed session, a school board may **deliberate** on the specific topic for which the closed session was called, but **decisions** related to that topic must be made in open session.

Who decides who can attend a closed session?

- *The Board.* A board may selectively include certain individuals in a closed meeting while at the same time excluding all others.
- Decision by consent. President: “Any objection to Principal Smith attending the closed meeting? Hearing none, Principal Smith shall attend the closed session.”

Legitimate Purposes for Closed Sessions

- Section 8(a) of OMA permits closed sessions to consider the dismissal, suspension, or disciplining of a school district employee or school board member, *if the named person requests a closed hearing.*
- Also permits closed sessions to hear complaints or charges against an employee or board member.
- Majority vote.

Legitimate Purposes for Closed Sessions

- Section 8(a) of the OMA also permits closed sessions to consider a periodic personnel evaluation of an employee *if the employee being evaluated requests a closed session.*
- “Person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered after the rescission only in open session.”
- Majority vote.

OMA Rules for Superintendent Evaluations

OPEN PHASE

- * Scheduling “periodic” evaluation
- * Developing type of evaluation instrument
- * Determining process for the evaluation
- * Action (voting) to go into closed session

CLOSED PHASE

- * Only if requested by employee
- * Discuss & deliberate about the evaluation

OPEN PHASE

- * Adoption of the board’s evaluation
- * Related board actions and discussions

Exceeding the Scope of the Closed Meeting for Evaluations

- “[C]losed session exceptions of the OMA must be construed strictly to limit the situations not open to the public.”
Michigan Court of Appeals.
- Thus, after the deliberations about the evaluation have concluded, any related ***discussions*** about extending the superintendent’s contract or increasing salary must take place in an open meeting.

Legitimate Purposes for Closed Sessions

- Section 8(b) of OMA permits a school board to meet in closed session to consider the expulsion, suspension, or disciplining of a student, *if the student or the student's parent or guardian requests a closed session.*
- OMA was amended to prohibit school boards from including personally identifiable information on students in meeting minutes in violation of the Family Educational Rights and Privacy Act (FERPA).
- Majority vote.

Legitimate Purposes for Closed Sessions

- Section 8(c) allows a school board to meet in closed session for the purpose of strategy and negotiation sessions connected with a collective bargaining agreement, if either party requests a closed hearing.
- School board must be engaged in negotiations.
- Majority vote.

Moore v Fennville Board of Education

223 Mich App 196 (1997)

- School board went into closed session to discuss collective bargaining strategy connected to the negotiation of a CBA.
- During the discussion, the board president solicited the board members' opinions on a pending proposal by asking each board member to indicate where he or she stood.
- Did the Board make a “decision” in violation of OMA?

Moore v Fennville Board of Education (Cont.)

223 Mich App 196 (1997)

- The Court interpreted the word “deliberation” to permit the school board to establish a consensus and develop a course of action relative to the board’s desire to hold firm on a particular offer for purposes of bargaining strategy.
- The court emphasized that the closed session deliberations in this case did not produce a decision because the closed-door discussion **was not a final determination affecting public policy.**

Legitimate Purposes for Closed Sessions

- Section 8(d) permits a school board to meet in closed session to consider the purchase or lease of real property, but only up until the time an option to purchase or lease that real property is obtained.
- Allows a public body to meet in a closed session to “direct” its agents as to their limits in negotiating the purchase of real property. 1978 OAG 5364
- **Requires a two-thirds roll call vote.**

Legitimate Purposes for Closed Sessions

Pending Litigation Exception(Section 8(e)). Four conditions must be met to use this exception:

1. Attorney must be present.
2. The consultation must be related to specific pending litigation (must identify).
3. The exemption applies only if an open meeting would have a negative financial effect on the public body's litigation or settlement position.
4. **Two-thirds roll call vote.**

Pending Litigation – Identifying the Case

- Michigan Court of Appeals found that a public body violated OMA by not identifying specific cases to be discussed in closed sessions under the pending litigation exception. *Estate of Timothy Ader v. Delta College Board of Trustees*, No. 337157, June 5, 2018.
- “Reading the OMA broadly to further the purpose of government accountability, we conclude that the statutory language requires the public body to identify the *specific* litigation it would be discussing in justifying its decision to close its meeting to the public.”

Legitimate Purposes for Closed Sessions

- Section 8(f) permits a school board to meet in closed session to review the specific contents of employment applications and applications submitted by individuals seeking appointment to public office.
- **Requires two-thirds roll call vote.**
- Requires “all interviews by a public body for employment or appointment to a public office be held in an open meeting.”

Legitimate Purposes for Closed Sessions

- Section 8(h) of OMA permits closed meetings of a public body to consider material exempt from discussion or disclosure by state or federal statute.
 - ✓ **Attorney-Client Privilege.**
 - ✓ **FERPA.**
 - ✓ **Other records, such as test questions and answers and law enforcement records.**

Attorney-Client Privilege

- The attorney-client privilege protects written communications.
- Opinions, conclusions and recommendations based on facts are protected by the attorney – client privilege when the facts are confidentially disclosed to an attorney for the purpose of legal advice.
- The privilege *does not protect documents simply because they are the product of an attorney-client relationship.*

Legitimate Purposes for Closed Sessions

- Section 8(K) of the OMA allows a school board to meet in closed session “to consider security planning to address existing threats or prevent potential threats to the safety of the students and staff.”
- **Requires a two-thirds roll call vote.**
- **Effective Date: March 27, 2019.**

Closed Meetings Minutes

- OMA requires a separate set of closed meeting minutes, but it doesn't include a requirement for approving those minutes.
- Minutes of closed sessions are not available to the general public and cannot be disclosed or released to the public without a court order.
- Closed meeting minutes must be retained by the designated clerk of the school board and kept in a special, locked file – apart from the minutes of open meetings – at the school district office.
- To preserve the chain of custody for closed meeting minutes, MASB recommends that the minutes should not be included in board packets, emailed to board members or even posted on a password-protected website.

Special Meetings

- “Special meetings may be called and held in the manner and for the purposes specified in the bylaws.” MCL 380.11a
- Bylaws rarely require a board to pass a motion to schedule a special meeting.
- Most bylaws allow the president or two board members to call a special meeting.
- OMA Notice – 18 hours before the meeting.
- Board member notice – Varies
- *Affidavit of Service of Call for School Board Meeting* (attests that school district complied with bylaw’s notice provisions).

Special Meetings (Cont.)

- OMA doesn't require a special meeting notice to include an agenda or state the purpose of the special meeting.
- A special meeting agenda may be amended under OMA and most bylaws provide that “the order of business may be altered and added at any meeting by a majority vote of the members present.”
- Special meetings may also be identified as workshops, study sessions, retreats, etc.
- In some cases, a bylaw may provide that “no votes are taken or business conducted at board workshop meetings.”

Emergency Meetings

- A school board may hold an emergency meeting without complying with the notice requirements of OMA if it becomes necessary to deal with a severe and imminent threat to the health, safety, or welfare of the public and **two-thirds** of the members decide delay would be detrimental to efforts to lessen or respond to the threat.
- Thus, if a COVID-19 outbreak creates a severe and imminent threat to the health, safety, or welfare of the school district, a school board may schedule an emergency meeting (without public notice) to address health and safety issues relatedd to the outbreak.

Emergency Meetings (Cont.)

- If a school board holds an emergency meeting, it must make paper copies of the public notice for the emergency meeting available to the public at the meeting, if the meeting is held in-person.
- If it's a virtual emergency meeting, then the public notice should be emailed to anyone who connects to the virtual meeting. (**Best Practice**)
- The notice must include an explanation of the reasons why the school board could not comply with the 18-hour posted notice requirement.
- The explanation must be specific in regard to the circumstances that required the emergency meeting. (More than generalized explanations.)

Emergency Meetings (Cont.)

- The notice of the emergency meeting must also be posted on the school district's website in the same manner as special meetings postings.
- Within 48 hours after the emergency public meeting, a school board must send official correspondence to the board of county commissioners of the county in which the board is principally located, informing the commission that an emergency public meeting with less than 18 hours' public notice has taken place.
- The communication can be delivered by either email or the U.S. Postal Service and must include the public notice that was distributed at the meeting.

Public Participation Management 2019!



Public Participation Management 2021!



Public Participation Management 2021!



Public Comment at School Board Meetings

- “A person shall be permitted to address a meeting of a public body under rules established and recorded by the public body.”
MCL 15.263(5)
- The rules must be reasonable, flexible, and written in a way that encourages public participation and approved by the board.
- Administering public comment also requires careful consideration of the speakers’ free speech rights under the First Amendment.
- A school board’s public participation rules will assist in balancing the board’s interest in conducting an orderly meeting with the First Amendment rights of public commentators.

When is public comment?

“Public participation shall be permitted...

- ...as indicated on the order of business. (Neola Option 1)
- ...before the board takes official action on any issue of substance. (Neola Option 2)
- ...at a time as determined by the presiding officer.” (Neola Option 3)

Lysogorski v. Charter Twp of Bridgeport

256 Mich App 297 (2003)

- Plaintiff alleged that the Township Board violated OMA by denying his request to address the board at a public meeting after the time for public comments had expired.
- The Court found that Bridgeport's established rule of limiting public comment to a prescribed time near the beginning of the meeting was reasonable, enforceable and compatible with the purposes of OMA.
- The Court also recognized that OMA does not require an agenda detailing the items to be discussed at a public meeting.

Public Comment: Length of Comment

- A bylaw may impose a time limit for individual speakers.
1978 OAG 5332
 - ✓ **MASB advises that a time limit should be no less than three minutes.**
 - ✓ **Must be enforced consistently!**
- Don't have to permit sharing of time.
- If a bylaw limiting public participation to a specific timeframe (e.g., 30 minutes) is applied so that some people are denied their opportunity to speak, the bylaw violates OMA. 1978 OAG 5332

Length of Comment (Cont.)

Sample Public Comment Rule to Consider-

The public participation portion of the meeting is limited to one-half hour, but the timeframe will be extended, if necessary, so that no one's right to address the board will be denied.

Each person will be allowed to speak for up to five minutes, except where the number of speakers exceeds the above time limit. In those instances, the President may either reduce the five-minute limit to a three-minute limit for each speaker and/or the Board of Education shall waive the half-hour time limit.

Address-The-Chair Rule

- Requiring commentary to be directed to the chair to ensure that commentators do not incite other attendees to heckle or debate the commentary, or otherwise disrupt the orderly progress of the public participation period.
- The Michigan Court of Appeals recently ruled that an Address-the-Chair Rule is legally enforceable under the First Amendment. (“The rule was...reasonably calculated to ensure the orderly participation of the community members who wished to expressed their views without targeting the content of their viewpoint.”)

Complaints – Anonymous Example

- *“The Board of Education shall not permit complaints against school personnel to be expressed in an open meeting.”*
- *“Such concerns should be submitted in writing to the board and eventually aired in an open or closed session according to the wish of the person(s) involved.”*

Enforceable under OMA or the First Amendment?

Complaints

- Under the First Amendment, a board cannot adopt a rule in its bylaw that prohibits citizens from publicly criticizing or making complaints against school employees by name during public comment.
- A rule may still encourage citizens to process complaints through proper personnel and administrative channels before requesting board consideration.

Controlling Complaints - Example

- *“To ensure due process and respect of individual rights, the District maintains a formal process for handling complaints against individuals. A problem involving an individual or specific incident is best handled through administrative channels. For assistance, please contact the superintendent’s office.”*
- *"Speakers are asked to express themselves in a civil manner, with due respect for the dignity and privacy of others who may be affected by your comments. While it is not our intent to stifle public comment, speakers should be aware that if your statements violate the rights of others under the law of defamation or invasion of privacy, you may be held legally responsible. If you are unsure of the legal ramifications of what you are about to say, we urge you to consult first with your legal advisor."*

Personal Attacks

- Comments that constitute a “personal attack” on an employee or board member totally unrelated to his or her duties may be prohibited.
- A rule that prohibits personally abusive attacks during public comment is a reasonable time, place and manner restriction as long as it is content neutral and narrowly tailored to serve a significant government interest.

Subject Matter - Anonymous Example

- *“Citizens wishing to speak on an agenda item must complete a ‘public input’ form and submit it to the secretary prior to the official start of the meeting.”*
- *“When addressing the Board of Education regarding matters not on the agenda (in order to investigate or provide proper information) a 24-hour notice must be given by contacting the Superintendent’s office and registering the presenter’s name and nature of the comments.”*

Enforceable under OMA or the First Amendment?

Subject Matter

- A rule that limits public comment to only agenda items violates OMA.
- Rules cannot limit the topics members of the public may discuss in the course of addressing the board, but rules may require that the topics be related to business within the jurisdiction of the school board. **1977 OAG 5218**

Repetitive Comments

- The Sixth Circuit Court of Appeals case *Lowery v. Jefferson County Board of Education*, 586 F3d 427 (CA 6 2009) provides some limited authority to school boards to restrict repetitive comments.
- The case arose after the parents of two football players were denied the opportunity to speak for a second time regarding a coach's decision to dismiss their sons from the football team.
- In the restricting the parents' comments, the board relied on a policy that prohibited "frivolous, repetitive, or harassing" presentations during public comment.

Repetitive Comments (Cont.)

- The court upheld the policy and concluded that it was content-neutral and served the significant government interest of conducting an orderly and productive meeting.
- The facts of this case are based on the Tennessee Open Meetings Act, so the application of its ruling may be limited in Michigan courts.
- However, the case appears to suggest that school boards may establish content-neutral rules that restrict repetitive comments in order to better facilitate efficient and orderly board meetings.

Public Meetings and Large Groups

- Rules cannot limit the right to address the board to residents of the school district. 1977 OAG 5332
- It is reasonable to have individuals identify themselves and provide notice that they wish to speak to the board in order to facilitate the orderly conduct of a meeting. 1977 OAG 5218
- **Request** to designate a spokesperson.
- Public comment may be tabled until later in the meeting.
- Recessing meetings
 - **At the beginning, middle, or end of a meeting.**
- Removing disruptive and unruly individuals
 - **Committing a “breach of the peace.”**

What is “a breach of the peace?”

- “A person shall not be excluded from a meeting otherwise open to the public except for a **breach of the peace** actually committed at the meeting.” MCL 15.263(6)
- Township board expelled a citizen from an open meeting:
 - Plaintiff filed a lawsuit to remove a trustee from the board.
 - Chair: “So, thank you, Mr. Cusumano [Plaintiff], you probably have cost us another few thousand dollars.”
 - Plaintiff rose from his seat and walked to the lectern to speak.
 - Chair: “Sit down, your time to speak is over.”
 - Plaintiff: “I just wish that this board would act appropriately and professionally,” as he walking back to his seat.
 - Chair: “That’s enough. Deputy, would you please remove this man.”

What is “a breach of the peace?” (Cont.)

- Previous cases recognize that “‘a breach of the peace’ constitutes seriously disruptive conduct involving abusive, disorderly, dangerous, aggressive, or provocative speech and behaviors tending to threaten or incite violence.”
- “[C]ases clarify that under Michigan law a ‘breach of the peace’ goes well beyond behavior acceptable in a civil society.
- “The mere violation of [a rule] cannot automatically constitute a ‘breach of the peace,’ and expulsion solely for not abiding by such rule, without more, violates MCL 15.263(6)’s prohibition against exclusion of any person from a public meeting.”
- Trial court upheld meeting expulsion...Court of Appeals reversed that decision. *Cusumano v Dunn*, No. 349959, August 27, 2020.

Public Comment: Minutes

- OMA doesn't require that the minutes list the names of everyone who addresses the board during public participation or their comments.
- For example, the minutes could document the public comment portion of the meeting by simply indicating - "Public comments/ audience participation. No action taken," and that would be legally sufficient.
- That is what MASB recommends, because sometimes it's very difficult to summarize someone's comments... balancing between what is too little and what is too much.

Public Comment: Minutes (Cont.)

- The decision of how public comment is documented in the minutes ultimately lies with the board.
- If a community member is unhappy with how the minutes document public comment, that community member would have to convince the board to amend its proposed minutes to reflect more detail in regard to public comment.

Meeting Agendas (Cont.)

- OMA doesn't include a rule/requirement on following or complying with a meeting agenda regardless of whether it is posted for the public, but the issue is covered by *Robert's Rules of Order*.
- Under *Robert's Rules of Order*, a board may adopt an agenda.
- Traditionally, the president presents a draft agenda to the board, but to be binding it must be adopted by the board soon after a meeting is called to order.
- At the time an agenda is presented for adoption, it is in order for any board member to move to amend the proposed agenda by adding an item that the member desires to add, or by proposing any other change.

Meeting Agendas (Cont.)

- If the board adopts the agenda that includes a new item, then that issue can be discussed during the meeting in compliance with *Robert's Rules of Order*.
- If, however, a board adopts the agenda without the new discussion item, then the president should rule the board member “out of order” if he or she attempts to discuss that item, because it is not listed on the approved agenda
- Because the choice of adopting *Robert's Rules of Order* is totally within a board's discretion, Michigan courts will follow other state courts and conclude that a board's failure to follow adopted parliamentary procedures will not invalidate any school board decisions.

Parliamentary Procedure Minute

- Most school boards adopt *Robert's Rules of Order* as the parliamentary authority governing the board.
- Cannot supersede Michigan law.
- **Issues:**
 - Voting threshold for the board to legally act.
 - Following formal or informal rules of debate.
 - Board president making motions and voting-
- **Officer bylaw could clarify:**

“The president is permitted to participate in all board meetings in a manner equal to all other board members, including the ability to make and second motions.”

When does a school board legally act?

An act of the board is not valid unless:

- ✓ the act is authorized at a meeting*
- ✓ by a majority vote of the members elected or appointed to and serving on the board,
- ✓ and a proper record is made of the vote.

MCL 380.1201

* A meeting at which *all* members are present, with or without proper notice to board members, is considered a legal meeting.

OMA Enforcement & Penalties

- ***Civil Liabilities.*** A public official who intentionally violates the act is personally liable in a civil case for damages (up to \$500), plus court costs and attorney fees to a person or group bringing the lawsuit.
- ***Criminal Penalties.*** A public official who intentionally violates the act also may be guilty of a criminal misdemeanor. The maximum penalty for a first offense is a fine of \$1,000. For a second offense within the same term of office, the public official may be fined up to \$2,000, jailed for a maximum of one year, or both.
- ***Invalidation.*** If a violation has been committed, a Circuit Court has the power to invalidate the board's decision. To succeed in a lawsuit for invalidation, the person who brings the complaint must show first, that the act was violated, and second, that the rights of the public were prejudiced.

Conclusion

- Questions?
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THANK YOU!

Questions?