

Ohio Council of School Board Attorneys

School Law Workshop

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When Passion Becomes a Problem



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BOARD MEMBERS

I. Role of board members

A. Under the laws of the state of Ohio, the Board acts as the governing body of the public schools. Within the extent of its legal powers, the Board has responsibilities for operating the District in accordance with the desires of local citizens who elect its members.

B. The Board's major responsibilities are to:

1. select and employ a Superintendent;
2. select and employ a Treasurer;
3. determine and approve the annual budget and appropriations
4. provide needed facilities;
5. provide for the funds necessary to finance the operation of the District;
6. consider and approve or reject the recommendations of the Superintendent in all matters of policy, appointment or dismissal of employees, salary schedules, courses of study, selection of textbooks and other matters pertaining to the operation of the District;
7. require reports of the Superintendent concerning the conditions, efficiency and needs of the District;
8. evaluate the effectiveness with which the District is achieving the educational purposes of the Board;
9. inform the public about the progress and needs of the District and to solicit and weigh public opinion as it affects the District and
10. adopt policies for its governance and the governance of its employees and the students of the District.

C. Individual board member authority

1. No individual board member has any authority to act on behalf of the board unless expressly authorized to do so by board resolution. *Brannon v. Board of Education*, 99 Ohio St. 369 (1919).

2. Even the directives of a majority of board members can have no legal binding effect when expressed by such persons individually outside of a board meeting. See *State ex rel. Steinbeck v. Treasurer*, 22 Ohio St. 144 (1871).
 3. An individual Board member acts on behalf of the Board only when, by vote, the Board has delegated authority to him/her.
- D. Board president and authority. What does board president have the authority to do without the rest of the board?
1. The Board may adopt by resolution delegation of authority to an individual member, i.e. Board president, to execute mere administrative or ministerial duties, but duties must be within reasonably prescribed parameters and cannot remove decision-making authority from the board.
 2. A resolution granted a board president full authority of the board whenever it is not in session is void. See RC 121.22; *In re Removal of Kuehnle*, 2005-Ohio-2373.
 3. Board president does not have the authority to waive confidentiality and attorney-client privilege unilaterally.

II. Legal issues of confidentiality

A. Access to records

1. Family Education Rights and Privacy Act of 1974
 - a) District may disclose student records to individuals with a legitimate educational interest without parental consent. (34 CFR 99.31(a)(1)). District is required to develop criteria for determining what constitutes a legitimate educational interest and must include such information in an annual notification.
 - b) School board member may have a legitimate interest in school records at times, but it should not be assumed absent a specific reason for access.
2. Public records
 - a) A public record is a record “kept by a public office” that:
 - a. Contains information stored on a fixed medium;
 - b. Is created, received, stored or sent under the jurisdiction of a public office; and
 - c. Documents the organization, functions, policies, decisions, procedures, operations or other activities of the office unless

the record is otherwise exempt. RC 149.43(A)(1) and RC 149.011(G).

- b) Common exceptions: RC 149.43 states that a “public record” does not include any of the following records:
 - a. Medical records (RC 149.43(A)(1)(a))
 - b. Infrastructure and security records (RC 149.433)
 - c. Attorney-client privileged documents (*State ex rel. ESPN Inc. v. Ohio State*, 132 Ohio St. 3d 212).
 - d. Criminal records checks (RC 3319.39(D))
- c) Emails/texts as public records.
 - a. Electronic communication not explicitly listed as an exception to public records and may become public records dependent on the use.
 - b. In other states, such as Pennsylvania, messages in which board members discuss school district business have been held public records. *See i.e., Easton Area Sch. Dist. V. Baxter*, 35 A.3d 1259 (Pa. Commw. Ct. 2012).

B. Executive session

1. Executive sessions may only be held for the purposes specifically enumerated by law (RC 121.22(G)).
2. Participants in executive session should respect the confidentiality of the setting. However, generally not illegal for board members to reveal information obtained in executive session.
3. Board may legally designate information as confidential. (RC 102.03(B)).
 - a) Notice of confidentiality must be given and confidentiality must be necessary for the proper conduct of board business.
 - b) RC 102.99 makes it a first-degree misdemeanor to violate the confidentiality provisions of RC 102.03.
4. Handling leaks
 - a) Only a board as a whole can waive confidentiality, not an individual board member. When leaks occur, ethics and confidentiality laws are likely implicated.

III. Running board meetings

A. Setting the agenda

1. Agendas aren't mentioned in the Ohio Revised Code. Agenda practices do not affect substantive legal rights.
2. Agendas exist entirely pursuant to custom, practice or policy of board.

B. Parliamentary procedure ("Robert's Rules of Order")

1. Not required by law. Adoption of Robert's Rules of Order is entirely optional and at the board's discretion.
2. Even when a public body adopts parliamentary procedures, it is generally held that they may *not* invalidate otherwise lawful actions. (*Savarese v. Buckeye Local School Dist.*, 74 Ohio St. 3d 543 (1996).

IV. Liabilities of Boards of Education and Board Members

A. Boards of education today are immune from liability for many of their actions. Although the Supreme Court of Ohio abolished sovereign immunity for school boards in 1983 in *Carbone v. Overfield* (1983), 6 Ohio St.3d 212, the legislature enacted Chapter 2744 of the Revised Code, commonly called the Sovereign Immunity Law, which preserves certain limitations on damage actions and some types of immunity.

B. The board of education is immune if:

1. the officer or employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function;
2. the officer's or employee's conduct was required or authorized by law, or necessary or essential to the operation of the school district, and was not negligent;
3. the officer or employee was acting within his discretion with respect to his policy-making, planning, or enforcement powers; or
4. the injury involved resulted from the good-faith exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources.

C. Personal liability of board members

1. Generally, school board members may not be held liable for actions taken within the scope of their official duties, as long as the actions were taken in good faith and complied with any affirmative statutory duties.
2. Board members may be sued for money damages for violations of constitutional rights or other rights guaranteed by federal law. 42 U.S.C. § 1983.

3. Under Sovereign Immunity Law, a board member is immune from liability unless his actions were wanton, reckless, malicious, in bad faith, or manifestly outside the scope of his duties. R.C. § 2744.03(A)(6).
4. Board of education members can be held criminally liable for intentional violations of Ohio's Privacy Act. R.C. § 1347.99.
5. Board members may also be held criminally liable for soliciting or accepting bribes or other unlawful compensation, for having an unlawful interest in a public contract, for dereliction of duty, for theft in office, or for knowingly depriving or conspiring or attempting to deprive any person of constitutional or statutory right. R.C. §§ 2921.02, 2921.41, 2921.42, 2921.43, 2921.44, 2921.45.
6. Board members can be held civilly liable for the unlawful destruction of public records. R.C. § 149.351(B).
7. An individual member of a board of education cannot be held liable on the indebtedness of the board. A valid contract with the board can only be created by the board members acting as a unit at a formal session of the board and contracts entered into by individual board members, which are not later ratified by the full board, are void and unenforceable. However, if a board member agrees to be personally liable on a contract or debt, that agreement may be enforceable.
8. A board president may be held liable on any bond or up to \$10,000 for signing a certificate of adequate resources which he knows to be false or for knowingly authorizing the expenditure of funds on a contract that is void because it lacks a proper certificate of adequate resources. R.C. § 5705.412.
9. Members of a board of education may be held liable in their personal capacities for expenditures of public funds not authorized by law.
10. Board members cannot be held liable for torts (a noncontractual act or omission causing injury to persons or property) committed in the performance of official duties involving the exercise of judgment and discretion as long as the duties were performed in good faith and without corrupt motive.
11. A board member may use any of three different legal theories to protect himself or herself from claims of libel or slander.
 - a) If the claim is being brought by a non-employee, the board member or employee may be entitled to qualified immunity under Ohio Sovereign Immunity Law.
 - b) To the extent that the Sovereign Immunity Law does not apply, the board member may be entitled to the qualified good-faith defense from tort liability.

- c) Board members are also protected from liability by the doctrine of privilege, which may be invoked in libel and slander actions.

V. Potential remedies

A. Censure

1. Purpose: to reprimand the member with the hope of reforming him or her so that he or she won't behave in the same way again. Indicates the board's displeasure with the board member's conduct.
2. Needs a second. Amendable. Debatable. Requires a majority vote. Can't be reconsidered.
3. Work with board counsel prior to voting to censure a fellow board member.

B. Recall (removal by voters)

1. The right to recall local elected government officials in Ohio under R.C. 705.92 does not extend to members of school boards.

C. Removal (court judgment of forfeiture of office)

1. Board members are subject to removal from office for misconduct, which includes willfully and flagrantly exercising authority or power not authorized by law, refusing or neglecting to perform any official duty, gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance. R.C. 3.07
2. Removal proceedings are pursuant to R.C. 3.07 to 3.10 and procedures should be strictly construed, which includes that at least 15% of voters must sign the removal complaint.
3. Board members have been removed in Ohio for violations of state law or the school district's code of ethics:
 - a) Voting on contracts to employ spouse in the district (*See In re Steed*, 1989 WL 411471 (Ohio Ct. App. 4th Dist. Lawrence County 1989);
 - b) Repeated violations of the public meetings law;
 - c) Purposely maintaining unlicensed and incompetent teachers;
 - d) Board president exercising – with other board members giving – improper authority to act unilaterally with regard to matters requiring action of the full board;
 - e) Purposely maintaining unlicensed and incompetent teachers; and

- f) Obstructing official business and violating a duty to protect students. See *In re Removal of Kuehnle*, 2005-Ohio-2373.

D. Training/policies

1. Board development

- a) Begin working with newly elected board members before they are sworn in.
 - a. Include in board meetings immediately.
 - b. Develop handouts to assist them in understanding more about their area(s) of concern.
 - c. Ask new members about their perceptions of the board and its operations.
- b) Support in-service (and pre-service education) for all board members
 - a. Board candidate workshops
 - b. New board member workshops
 - c. Board presidents' workshops
 - d. Regional, state and national meetings

2. Board member code of ethics – OSBA Policy BBF

- a) The Board believes public education should be conducted in an ethical manner. In addition to State law, the conduct of Board members should conform to the code of ethics recommended by the Ohio School Boards Association, which includes the following.
- b) It is unethical for a board member to:
 - a. seek special privileges for personal gain;
 - b. personally assume unauthorized authority;
 - c. criticize employees publicly;
 - d. disclose confidential information;
 - e. place the interest of one group or community above the interest of the entire District;
 - f. withhold facts from the Superintendent, particularly about the incompetency of an employee or

- g. announce future action before a proposition has been discussed by the Board.

3. Board Policy

- a) Consider adopting policy to clearly define ethical duties, such as confidentiality and conflicts of interest, to include implementation guidelines and procedures for complaints.

STAFF

- VI. Board-superintendent relationship

- A. The superintendent shall be the executive officer for the board. RC 3319.01.

- B. The superintendent shall:

1. Direct and assign teachers and other employees of the district.
2. Assign pupils to the proper schools and grades.
3. Perform other duties as the board determines

- C. OSBA Model Policy BCD

1. The enactment of policies, consistent with long-term goals, is the most important function of the Board, and the execution of the policies should be the function of the Superintendent and his/her staff.
2. Delegation by the Board of its executive powers to the Superintendent provides freedom for the Superintendent to manage the District within the Board's policies and frees the Board to devote its time to policymaking and appraisal functions.
3. The Board holds the Superintendent responsible for the administration of its policies, the execution of Board decisions, the operation of the District and keeping the Board informed about District operations and problems.
4. The Board:
 - a) gives the Superintendent full administrative authority for properly discharging his/her professional duties, holding him/her responsible for acceptable results;
 - b) acts in matters of employment or dismissal of personnel after receiving the recommendations of the Superintendent;
 - c) refers all complaints to the Superintendent for appropriate investigation and action;

- d) strives to provide adequate safeguards for the Superintendent and other staff members so that they can discharge their duties on a thoroughly professional basis and
- e) presents personal criticisms of any employee directly to the Superintendent.

VII. Board-treasurer relationship

A. OSBA Model Policy BCCD

1. The development of financial policies, consistent with long-term goals, is one of the most important functions of a board, and the implementation of financial policies is the function of the Treasurer and his/her staff.
2. Delegation by the Board of its financial powers to the Treasurer provides freedom for the Treasurer to manage the District's finances and frees the Board to devote its time to policymaking and appraisal functions.
3. The Board holds the Treasurer responsible for the administration of its financial policies, the execution of Board decisions and keeping the Board informed about District financial issues and concerns.
4. The Board strives to procure the best financial leadership available. The Board:
 - a) gives the Treasurer full authority for properly discharging his/her professional duties, holding him/her responsible for acceptable results;
 - b) refers all complaints of the Treasurer's staff to the Treasurer for appropriate investigation and action and
 - c) strives to provide adequate safeguards for the Treasurer and other staff members so that they can discharge their duties on a thoroughly professional basis.

COMMUNITY

VIII. Public participation

- A. The Ohio Open Meetings Act ("OMA") requires that the public be permitted to attend and observe all meetings of any public body. (R.C. 121.22(C)) The OMA does not require that a public body provide the public with an opportunity to comment at its meetings. However, if public participation is permitted, it is subject to the protections of the First and Fourth Amendments to the United States Constitution. *Black v. Mecca Township Board of Trustees*, 91 Ohio App.3d 351, 356 (11th Dist. 1993).
- B. In other words, the OMA neither provides nor prohibits attendees the right to be heard at public meetings. Further, it has been held that a disruptive person waives his/her right to attend a public meeting, and the public body may remove that person

- from the meeting. (*Forman v. Blaser*, Case No. 13-87-12 (3rd Dist. 1988); *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Circuit 1989)).
- C. School board meetings are a limited public forum, subject to reasonable time, place, and manner restrictions of the board, as long as the restrictions are content neutral and narrowly tailored to serve a significant governmental interest (timing and order of public participation at board meetings). *Featherstone v. Columbus City School District Board of Education* (S.D. Ohio 2003), No. C2-01-1220.
 - D. "Meeting" is defined as "any prearranged discussion of the public business of the public body by a majority of its members" (R.C. 121.11(B)((2))), therefore, discussions of the members via technology such as e-mail may.
 - 1. The Ohio Supreme Court will hear an appeal where the Court of Appeals held that e-mails between board members (one-to-one) did not constitute a meeting under the Sunshine Law. See *White v. King*, 2014-Ohio-3896.
 - E. Consider forming standing community relations committees to build productive community involvement, study circles, focus groups, town meetings, or polling.
 - 1. Identify and prioritize key stakeholders organizations in the community.
 - 2. Identify how the district wants and needs to be seen by the general public and stakeholders in order to carry out its educational mission effectively and update the district's formal image statement to reflect this.

ROLE OF THE BOARD ATTORNEY

- IX. Who is the client?
 - A. The board attorney represents the board as an entity, not the board president, or members individually, or majority members. Ohio Rules of Professional Conduct 1.13 indicate that a lawyer retained by an organization owes its allegiance to the organization and not to any constituent. Constituents include officers, directors, trustees, and employees. The board attorney is obligated to proceed as necessary in the best interest of the organization.
 - B. When a lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing, the identity of client shall be explained.
 - C. Attorney-client privilege generally belongs to the district, thus an individual cannot waive it and if there is a conflict, the privilege belongs to the board as an entity to decide what may be waived for disclosure.
- X. How do you manage divergent opinions?
 - A. Use respectful and courteous language (and body language) to assist in mediating conflicts.

- B. Focus on facts and data and encourage the discussion process to as well.
 - C. Keep to a specified agenda and process to work through opinions and reach decisions.
 - D. Attempt to remain and appear neutral.
 - E. Encourage expression of opinions as well as adoption of the ultimate majority decision in presentation.
- XI. Conflict of interests
- A. When appropriate, dual representation may occur with written consent as guided by Ohio Rules of Professional Conduct 1.7 for conflicts of interest.
 - B. Obligations to preserve client confidences may conflict with obligations to provide information to the client. Joint representation may not translate to a right to share confidential information. There are split opinions on this, ranging from sharing of information among co-clients regarding a matter is expected, while others argue informed consent is not assumed, to the concept that an employee cannot reasonably expect an attorney to keep information from the employer.