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Ohio School Boards Association Capital Conference **Board Meetings: the Good, Bad and Ugly**

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Today's Goal

- Discuss ethical and inappropriate behaviors that arise during board meetings that interfere with the work that is to be accomplished by boards of education.



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**We'd like to call this
meeting to order...**



Prayer in Board Meetings

- School-sponsored religious activity violates the Establishment Clause. The United States Supreme Court has long held that use of prayer or ceremonial Bible reading in public schools is an unconstitutional governmental advancement of religion in violation of the Establishment Clause. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).
- However, in 1983, an exception was created by *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh* the Supreme Court held that the Nebraska legislature's practice of opening each session with a nonsectarian prayer offered by a chaplain paid out of public funds did not violate the Establishment Clause (even though it did appear to have a religious purpose and effect) because such prayers are "deeply embedded in the history and tradition of this country" and do not serve to advance one religion over others. The practice at issue in *Marsh* was similar to the one employed by the First Congress in 1789 and the chaplain delivering the prayers at issue in *Marsh* had "removed all references to Christ."
 - *Marsh* created a legislative prayer exception.
- **This exception is not applicable in school board meetings.**
 - In a case out of the Sixth Circuit, the Court held that the "legislative prayer exception" does not apply to a practice of opening school board meetings with a prayer **because students regularly attend and participate in school board meetings and that the Supreme Court has repeatedly struck down the official endorsement of religion in the public school context.**
 - *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999)



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Open Meetings-Interpretation

- There is no right to speak publicly at a meeting of the board. 1992 OAG No. 32.
- Disruptive attendees may be removed since they have no absolute right to be at the meeting. *Forman v. Blaser*, 1988 Ohio App. LEXIS 3405 (Seneca 1988).



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Nepotism

- R.C. 2921.42(A)(1) prohibits a public official from authorizing the employment of a family member. A “public official” is any elected or appointed officer, or employee, of the state or any political subdivision of the state.
 - Since board members are elected officials they would have to abstain from voting or discussing the hiring of any family member

Nepotism

- Who counts as a family member?
 - Spouse
 - Children (whether dependent or not)
 - Siblings
 - Parents
 - Grandparents
 - Grandchildren
 - Any other person related by blood or by marriage and living in the same household
- What does authorization mean?
 - An official has “authorized” the employment when the employment could not have been awarded without the approval of the official.
 - So, an official is prohibited from making a final decision about the hiring of a family member – includes voting

Nepotism

- What types of matters must the Superintendent or Board of Education members abstain from making decisions upon if a family member is employed in the District?
 - R.C. § 2921.42(A)(1) prohibits an official from participating in any decision, or using his position to secure any decision, that affects the continuation, implementation, or terms and conditions of a family member's employment.
 - i.e. prohibited from participating in matters related to the renewal, modification, or termination of a family member's employment
 - R.C. § 102.03(D) prohibits an official from participating , formally or informally, in any matter that directly affects a family member's employment
 - i.e. prohibited from securing any employment-related benefits for a family member including:
 - changes in compensation;
 - assignment of duties;
 - evaluations; and
 - actions involving layoffs, promotions, disciplinary action, and removal

Nepotism

- What are the actions that are not prohibited when dealing with a family member being an employee of the Board?
 - 1) Approval of Union Contract
 - No prohibition of approving a union contract when the relative is a member of the union, unless the relative serves as a union officer, board member, or on the union negotiating team.
 - 2) Matters Affecting a Class
 - Board members can vote on an ordinance setting compensation for employees as long as the ordinance does not:
 - Establish compensation on a basis other than membership of the class of employees
 - Affect the family member's compensation in a differential manner than other members of the class; or
 - Secures, renews, modifies, or renegotiates the terms of the family member's job
 - 3) General Appropriations



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Selling Goods/Services to a Public Agency

- R.C. § 2321.42(A)(4) prohibits an official from selling goods or services to the public agency with which she is “connected,” unless the exception is met.
- Exception - The public official must meet all four of the following requirements:
 - 1) The goods or services are necessary goods or services.
 - 2) Either the goods or services are part of a continuing course of dealing or they are unobtainable elsewhere for the same or lower cost.
 - 3) The treatment that the official provides to the agency is the same as, or better than, the treatment that she provides to other customers or clients in similar transactions.
 - 4) The transaction is conducted at arm’s length, the agency has full knowledge of the official’s interest in the sale of goods or services, and the official has taken no part in the deliberations or decision with respect to the transaction.

Seeking New or Outside Employment

- Questions to ask:

- Are there express prohibitions in statute, policy or regulations from holding the two positions?
 - Check prior opinions of the Ohio Ethics Commission.
- Consider R.C. 102.03(D) and (E) which prohibit an official from soliciting or using his position to get a job from any person that is regulated by, doing business or seeking to do business with, or interested in matters before the public agency he serves.

102.03(D): No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties

102.03(E): No public official or employee shall solicit or accept anything of value that is of such character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

Key to all of this is whether the payment for the employment is of "such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties – What it comes down to is that the rules do not prohibit a public official/employee from engaging in private employment, as long as that private employment does not lead to any conflict of interest



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Attorney-Client Privilege

- R.C. 2317.02
- Held by the Board of Education with the Board's legal counsel. This privilege is not held by individual administrators.
- Can only be waived by a vote of the Board.



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Confidentiality of Student Records

- R.C. 3319.321 and FERPA (20 USC 1232g) protect personally identifiable student information and student education records with certain exceptions.



Directory Information under Ohio law

- Directory information may be released without prior written consent unless the parent or over 18 year old student has informed the school that they do not consent to such release.
 - Districts should know who is on the “Do Not Release” list.
- Directory information includes:
 - Name
 - Address
 - Telephone listing
 - Date and place of birth
 - Major field of study
 - Participation in officially recognized activities and sports
 - Weight and height of members of athletic teams
 - Dates of attendance
 - Dates of graduation
 - Awards received
 - Anything else deemed directory information in Board of Education policy.
- NOTE – email addresses, parent names, etc. are not in the above list.

Who Can Have Access Under Ohio Law? Cont. ...

- Employees of the board of education acting exclusively in their capacity as an employee of the board of education.
- State, political subdivision, or any court provided the disclosure/use is required by statute, federal law, or subpoena.
- Law enforcement officers who are investigating missing child cases. This is NOT a general exception.

Family Educational Rights and Privacy Act (FERPA)

- ▶ Applies to educational agencies and institutions that receive funds under any program administered by the U.S. Department of Education
- FERPA protects the confidentiality of students' education records
- Education records are:
 - 1) Directly related to a student
 - 2) Maintained by an educational agency/institution or by a party acting on behalf of the educational agency/institution
- However, the following are not considered educational records, and/or are exempt:
 - Personal logs
 - Treatment records
 - Directory information

FERPA Privacy

- A parent or eligible student must provide written consent before a school or school district discloses personally identifiable information from the student's education records, unless one of the exceptions to FERPA's general consent rule applies.
- FERPA requires that a consent form be signed and dated by the parent or eligible student and (1) specify the records that may be disclosed; (2) state the purpose of the disclosure; and (3) identify the party or class of parties to whom the disclosure may be made.



FERPA Exceptions

- Exceptions to FERPA – permitted release:
 - Directory information
 - Teachers and other school officials having legitimate educational interests
 - Officials of other schools in which the student intends to enroll, so long as the parents are notified and given the opportunity to challenge the content of the record
 - State and federal officials for purposes of audits and law enforcement investigations
 - Persons requesting such records in connection with financial aid applications
 - Military recruiters
 - State and local officials having access to records pursuant to legislation.



Directory Information Exception

- Directory information includes:
 - Name, photograph, address, telephone listing (NOT necessarily cell phone numbers), electronic mail address, date and place of birth, dates of attendance, and grade level
 - Participation in officially recognized activities and sports;
 - Weight and height of members of athletic teams;
 - Degrees, honors, and awards received; and
 - The most recent school attendance.
- Addressed in both federal FERPA law and state law

School Officials Exception

- No consent is required in order to release student records to:
 - **Teachers and other school officials with legitimate educational interests**
 - Officials of other schools in which the student intends to enroll, so long as the parents are notified and given opportunity to challenge the content of the records
 - State and federal officials for purpose of audit and law enforcement
 - Persons requesting records in connection with the student's application for financial aid



Exception for School Officials

- Teachers and “other school officials” with legitimate educational interests are permitted to access student records under FERPA
- Although there is no specific definition for “school official” or “with legitimate educational interests,” it generally includes someone who is working for the district in some capacity who needs to utilize the information to carry out his or her duties

Exception for School Officials

- FERPA's model notice provides the following definition of "School Officials":
 - A person employed by the district as an administrator, supervisor, instructor, or support staff member (including health/medical staff and law enforcement)
 - A person serving on the school board
 - A person or company with whom the district has contracted to perform a special task (such as an attorney, auditor, medical consultant or therapist)
 - A parent or student serving on an official committee or assisting another school official in performing his or her tasks
 - Take care with what information is disclosed to parents or students!
 - Additionally, it is recommended that confidentiality agreements are signed



Exception for School Officials

- Suggested definition for “with legitimate educational interests”:
 - For the purpose of serving the student
 - For the purpose of protecting the health, safety, and learning of the student and others
 - For the purpose of obtaining payment for educational programs and services
 - For other purposes as specified by federal and state law



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Medical Records and Medical Information

- Medical records that pertain to a patient's medical history, diagnosis, prognosis or medical condition and were generated and maintained in the process of medical treatment are not public records and are not subject to release – including the information contained in the same.
- May have some implications for disability discrimination, pregnancy discrimination, HIPAA, etc.
- R.C. 149.43(A)(1)(a)



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Executive Session

- Conference of board members from which the public is excluded.
- Permissible topics:
 - Certain personnel matters*
 - Purchase or sale of property
 - Pending or imminent court action
 - Collective bargaining matters
 - Matters required to be kept confidential
 - Security matters
 - Hospital trade secrets
 - Confidential business information for an applicant of economic development assistance
 - Veterans service commission applications

Executive Session Procedures

- Executive session may only be held at regular or special meetings – the meetings must always begin and end in an open session.
- Process:
 - Motion approved by the majority of quorum using roll call vote
 - Stated specific reason(s) for going into executive session
- Limited to the reasons stated in the motion.
- Confidentiality of executive session discussions does not extend to the documents presented.
- Open Meetings Act does not prohibit the board or a member from disclosing information discussed in executive session, **but** R.C. 102.03(B) does prohibit board members from disclosing confidential information acquired in the course of official duties



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Open Meetings-Publicity

- The Board of Education must pass a rule that establishes a method whereby the public may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings.
- A public body shall not hold a special meeting unless it gives at least twenty-four hours' advance notice to the news media that have requested notification.

§ 121.22(F).

Open Meetings-Publicity

- If the meeting is an emergency, requiring immediate action the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.
- The rule should establish that anyone can request and pay for reasonable advance notification of all meeting where specific business will be discussed.

§ 121.22(F).

Open Meetings-Validity of Acts

- For a resolution, rule, or formal action to be valid, it must have been adopted in an open meeting.
- If the resolution, rule, or formal action resulted from discussion in a closed meeting, it is also invalid unless:
 - The deliberations were for a specifically authorized purpose, and
 - They were conducted at an executive session held in compliance with the law.

§ 121.22(H).



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Open Meetings-Interpretation

- Investigative, information-gathering, or quasi-judicial functions are not deliberative and are not generally considered ‘discussion’ of public business. *Springfield Bd. of Ed. v. OAPSE*, 667 N.E.2d 458 (Ohio App. 1995).
- The Ohio Attorney General has found that if a committee or subcommittee is required by law, rule, regulation, or was created by public body action, it is subject to Sunshine Law. 1994 OAG No. 096.

Open Meetings-Interpretation

- One-on-one conversations between board members, even if pre-arranged, do not violate the Sunshine Law.
State ex rel. Cincinnati Post v. City of Cincinnati, 76 Ohio St.3d 540, 544 (1996).
 - However a string of meetings or one-on-one conversations may be subject to the Law.
- Since the Law does not define ‘meeting’ in terms of a place, electronic communication may be subject to it.

Open Meetings-Interpretation

- Informal work sessions or retreats to discuss issues are subject to the Law. *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97 (1990).
- Everyone must vote in person except in the case of regional council of governments. § 121.22(C).
- The Law doesn't apply to collective bargaining meetings or meetings with auditors. § 4117.21 & 121.22(D)(2).



Questions?



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