

Conducting Open School Board Meetings In A Pandemic

Traditionally, public bodies have had to follow strict guidelines for their public meetings pursuant to Article 7 of the New York State Public Officers Law ("POL"), also known as the Open Meetings Law ("OML"). This statute imposes important obligations on public bodies, such as villages, towns, and school district boards, when conducting public meetings.

Anyone who has attended a meeting of their local school board, town, or village may have seen facets of the OML at work. The manner in which these meetings are conducted are well established. But the current COVID-19 pandemic has resulted in an Executive Order from Governor Andrew Cuomo generating substantive changes.¹ This article will provide an overview of these changes, with particular emphasis on school board meetings.

Under the OML, school boards are required to conduct business in an "open and public manner."² This is generally accomplished through meetings to discuss public business, or gatherings by a quorum of the public body at a designated time and place. To achieve this purpose, the statute requires that "[e]very meeting of a public body shall be open to the general public..."³

For a meeting to be valid, a majority of the total membership of that body, i.e., a quorum, must gather together, either in the presence of each other or through "the use of videoconferencing for attendance and participation by the members of the public body."⁴ Only under certain circumstances may the school board transact business in a proceeding closed to the public known as an "executive session."⁵

On March 12, 2020, Governor Cuomo's

Executive Order 202.1 suspended certain OML requirements pertinent to public participation and in-person attendance at meetings of public entities. Under subsequent Executive Order 202.14 and Executive Order 202.28, such requirements have been further extended through June 6, 2020 (and will likely be extended again, given that schools are closed for the remainder of the 2019-20 school year).

As a result, school boards (and other public bodies) can hold meetings and take action as authorized by the law without "public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed."⁶

School boards now have two options for conducting public meetings without the public being physically present. The first option contemplates a public meeting where the school board is physically present in one location, and the public views or listens to the meeting through electronic means. This option allows a public meeting to take place where the school board is physically present in the same room conducting business (with social distancing), while the public listens or views the meeting electronically.

The second option contemplates a public meeting where the school board members meet via conference call or videoconference with no in-person location, and the public views or listens to the meeting electronical-



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ly. This option provides for even more "socially distancing," relying exclusively on technology to shape the meeting and allowing public bodies to transact business during the pandemic. In both cases, however, the public body must record and later transcribe the meeting, and presumably make the record available under New York State's Freedom of Information Law.⁷

In sum, based on this suspension of the OML:

- Board members can participate by telephone conference or videoconference, and their attendance is counted for purposes of obtaining a quorum and for voting;
- While a board meeting must be publicly noticed, the meeting notice does not have to state each site from which an individual board member will be participating; instead, the notice has to include information on how the public can view or listen to the board meeting in real time; and,
- Board meetings conducted under Executive Order 202.1 must be recorded by the board, and later transcribed, with the transcription available through the Freedom of Information Law.

In addition, the New York State Committee on Open Government has indicated that, where the public is excluded for health and safety reasons, it should use technology, if possible, to broadcast the meeting, and/or it should limit the business conducted to things that would result in damage or harm if not acted upon by the school board.⁸

School boards can continue to meet in executive sessions to discuss items permitted

to be discussed in executive sessions, such as collective bargaining (i.e., impact of a shut down on contractual employees), and the preparation or administration of exams (this could include issues related to school closures and administration of exams). Any discussions with an attorney regarding proposed litigation or any specific item in which the school board seeks the advice of counsel would also fall under the executive session parameters.

Pursuant to New York State Executive Order 202.1, the notice of a meeting should indicate that public attendance is not permitted on account of the suspension of the OML provision of the POL. The notice should indicate that the meeting will be teleconferenced or livestreamed and describe how the public can listen or view the meeting live. School boards may allow individuals to submit written comments to be read and/or allow public discussion at the meeting.

However, neither is required under the Executive Order. Generally, there is no legal requirement that school boards allow members of the public to speak at school board meetings, although it has been encouraged by the New York State Commissioner of Education.⁹ Finally, the meeting notice should be posted prominently on the school district website and on school building doors, to the extent practicable.

As a result of the unprecedented changes brought about by the COVID-19 pandemic, public entities need to be aware of the options available so as to continue holding meetings and conducting business. Public bodies should familiarize themselves with the provisions of the OML, continue to monitor the Governor's Executive Orders, and consult with their attorneys to ensure that OML violations are avoided.

An additional source for guidance on this subject is the New York State Committee on Open Government, which issues and posts advisory opinions regarding the OML at www.dos.ny.gov/coog/.

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1. See Executive Order 202.1 (Mar. 12, 2020); see also Executive Order 202.28 (May 7, 2020); Executive Order 202.14 (Apr. 7, 2020).

2. POL § 100.

3. POL § 103(a).

4. POL § 102(1).

5. POL § 103(a).

6. Executive Order 202.1 (Mar. 12, 2020).

7. POL §§ 84-90.

8. Shoshannah Bewlay, Memorandum: Open Meetings Law "In-Person" Requirement and Novel Coronavirus, Committee on Open Government (Mar. 9, 2020), available at <https://bit.ly/3cXz0vl>.

9. See, e.g., *Appeal of Kushner*, 49 Ed. Dept. Rep. 263 (2010) (stating no statutory mandate requiring public participation at board meetings); *Appeal of Witneben*, 31 Ed. Dept. Rep. 375 (1992) (noting public participation nonetheless encouraged at board meetings).

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