



Avoiding Legal Traps And Pitfalls

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INTRODUCTION

As every district administrator and administrator's assistant has learned (or will learn soon enough), not all legal requirements are well-known or intuitive. In fact, almost every district administrator is faced with the response, "But that is how we have always done it!" when he or she has made an internal inquiry regarding whether a particular procedure or action comports with legal standards. This presentation will share a collection of "legalities" which pose common "traps" that arise in the cycle of a school year with specific insights designed to assist the administrator's assistant in keeping the district legally compliant.

GOVERNANCE

- School Board Powers vs. Elector Powers
 - Only the electors at an annual or special meeting may:
 - Designate sites for school district buildings;
 - Authorize the school board to acquire by purchase real estate;
 - Provide for the lease of suitable buildings for a period not exceeding twenty years. Wis. Stats. § 120.10.
 - Elect to provide transportation for pupils who reside in the district less than two miles from the nearest public school there are entitled to attend. Wis. Stats. § 121.54(2)(c) [the school board of a unified school district may make the same election.]

GOVERNANCE

- School Board Powers vs. Elector Powers
 - School board powers and duties include all other things reasonable to promote the cause of education so long as not prohibited by state or federal law. Wis. Stats. §§ 120.13, 118.001, and 120.12.

GOVERNANCE

- Delegation Of School Board Authority
 - Delegation permitted.
 - Authorization of an independent hearing officer to determine a pupil expulsion from school. Wis. Stats. § 120.13(1)(e).
 - Assignment of summer homework. *Larson v. Burmaster*, 295 Wis.2d 333 (2006).
 - Support staff employment decision-making.
 - Ministerial actions.
 - Delegation of responsibilities does not relieve board or officer of legal responsibility.

GOVERNANCE

- Delegation Of School Board Authority
 - Delegation not permitted.
 - Teacher nonrenewal - no teacher may be dismissed “except by a majority vote of the full membership of the board.” Wis. Stats. § 118.22(2).
 - Discretionary actions.

GOVERNANCE

- School Board Officials

- In the case of a school board in a common or union high school district with more than three members, the school board shall annually elect a school district president, vice president, treasurer, and clerk from among its members. Wis. Stat. § 120.05(1)(c).
- In the case of a school board in a unified school district, the school board shall elect a school district president, vice president, clerk, and treasurer from among its members and a school board secretary who need not be a member of the school board. Wis. Stat. § 120.43(1).Discretionary actions.

GOVERNANCE

- Special Board Meetings
 - In a unified school district, special board meetings may be held upon the call of the school district president or upon the filing of a request with the school district clerk signed by a majority of the school board members. Wis. Stat. § 120.43(2).

GOVERNANCE

- Special Board Meetings

- In common and union high school districts, a special school board meeting shall be held upon the written request of any school board member. Wis. Stat. § 120.11(2).
 - The school district clerk (or president in the clerk's absence) shall notify in writing each school board member of the time and place of the special school board meeting at least 24 hours before the meeting.
 - The notice must be delivered to each board member personally or left at the board member's usual place of abode, or sent 24 hours before the meeting via first class mail to the member's usual place of abode.

GOVERNANCE

- Special Board Meetings

- In common and union high school districts, a special school board meeting shall be held upon the written request of any school board member. Wis. Stat. § 120.11(2).
 - Email notice is likely insufficient under this statute.
 - A special school board meeting may be held without prior notice to board members if all school board members are present and consent, or if every school board member consents in writing even though he or she does not attend.

GOVERNANCE

- Agenda And Notices For Annual Meetings For Common And Union High School Districts
 - No agenda is required for the annual meeting.
 - If there is an agenda, it does not restrict the statutory rights of electors to address subjects within the scope of the powers of the annual meeting.
 - For example, even if an agenda for the annual meeting omits transportation from the agenda, an elector could make a motion to provide transportation to all pupils who reside beyond one mile of their school.

GOVERNANCE

- Agenda And Notices For Annual Meetings For Common And Union High School Districts
 - There is no requirement (nor does it make sense) that the minutes from the prior annual meeting be approved at the annual meeting. However, as a practical matter, at a regular board meeting, the board should review the minutes from the annual meeting.

GOVERNANCE

- Electronic Posting Of Legal Notices
 - 2015 Wisconsin Act 79 provided that certain legal notices can be posted in either three public places likely to give notice to persons affected, or posted in one such place and placed electronically on an Internet site maintained by the district. Wis. Stat. § 985.02(2)(a).
 - Notices likely eligible for this option include:
 - Annual notice of educational options under Wis. Stat. § 118.57.
 - Annual notice of student nondiscrimination policies under Wis. Admin. Code § PI 9.05.
 - Designation and maintenance of student records under Wis. Stat. § 118.125(3).

GOVERNANCE

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 - Notices likely eligible for this option include:
 - Notice of annual budget hearing and budget summary under Wis. Stat. § 65.90(3)(a).
 - Notice of budget amendments under Wis. Stat. § 65.90(5)(a).

GOVERNANCE

- Electronic Posting Of Legal Notices
 - 2015 Wisconsin Act 79 provided that certain legal notices can be posted in either three public places likely to give notice to persons affected, or posted in one such place and placed electronically on an Internet site maintained by the district. Wis. Stat. § 985.02(2)(a).
 - Certain notices are likely ineligible for this posting option:
 - Notices of school board elections under Wis. Stat. § 120.06.
 - Notices related to school board referenda.
 - The proceedings of a school board under Wis. Stat. § 120.11(4):.

GOVERNANCE

- Electronic Posting Of Legal Notices
 - This Act did not change the notice requirements for the Open Meeting Law, which requires reasonable notice to the public. The Attorney General continues to recommend that a school board post notice of its meetings in three locations. Posting meeting notices on the district website could supplement but not replace those notices. However, it is possible that posting in one physical location and on the district website may be sufficient under the Open Meetings Law.

GOVERNANCE

- Board Meeting Minutes
 - The school district clerk (or another board member in the clerk's absence) shall record the minutes of all school board meetings, including the minutes of closed sessions.
 - Closed session minutes are subject to the Public Records Law, and closed session “proceedings” must be published or posted if doing so will not undermine the necessity for confidentiality.

GOVERNANCE

- Board Meeting Minutes

- The proceedings of a school board meeting must be published within 45 days of the meeting as a class 1 notice in a newspaper published in the school district, if any, or publicized by school district-wide distribution. If there is no newspaper published in the school district, the proceedings shall be posted or published as the school district directs. The proceedings shall include the substance of every official action taken by the school board at the meeting and a statement of receipts and expenditures in the aggregate. Wis. Stat. § 120.11(4). Although the proceedings may be posted electronically, electronic posting is not likely to satisfy the obligation to “publish” or “post” the proceedings.

GOVERNANCE

- Board members as employees.
 - No board member can maintain a governmental office and a governmental employee position if they impose conflicting duties or create too many conflicts of interest. For example, a board member could not also be an employee. *See Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 347 N.W.2d 614 (Ct. App. 1984); 67 Wis. Op. Att’y Gen. 177 (1978).

GOVERNANCE

- Board members as employees.
 - A board member must resign his/her position prior to applying for employment with the school board if the position being applied for includes salary and benefits in excess of \$15,000; failure to do so is technically the commission of a felony. Wis. Stat. § 946.13.

GOVERNANCE

- Board members as volunteers.
 - A board member may serve as a volunteer coach or a supervisor of an extracurricular activity if:
 - The board member receives no compensation.
 - The board member agrees to abstain from voting on an issue that substantially and directly concerns that activity.
 - The school board receives a criminal background investigation for the school board member.
 - Wis. Stat. § 120.20(1).

GOVERNANCE

- Board members as volunteers.
 - A board member serving as a volunteer coach or supervisor can vote on the annual budget. Wis. Stat. § 120.20(2).
 - While volunteering as a board member is statutorily permitted, it does not necessarily remove the potential appearance of impropriety from the potential conflict of interest, nor does it negate board policies that forbid doing so.

GOVERNANCE

- Vacancies On The School Board.
 - Vacancies are to be filled by appointment by the remaining board members.
 - Interviews of prospective board members must be conducted in open session unless there is reason to believe that the interview, if conducted in open session, would have a substantial adverse effect upon the reputation of the applicant (in which case the part of the interview affecting reputation may be conducted in closed session per Wis. Stat. § 19.85(1)(f)).

GOVERNANCE

- Vacancies On The School Board.
 - The board cannot vote for appointment of a candidate to a vacancy by secret ballot.
 - The board can vote for appointment of a candidate to a vacancy via a signed ballot (a ballot with the voter's name displayed on it). The ballots would be turned over to the board clerk who would record the vote without specific names.
 - However, the signed ballot lists the voter's name and for whom he/she voted, and is still subject to public records requests.

GOVERNANCE

- Adoption Of Policies.
 - Particularly when utilizing a policy service, district administrators and board members should review all policies prior to their adoption by the board.
 - In addition to assuring consistency among policies, board members and administrators should be comfortable with substantive provisions and procedures that extend beyond legal obligations.

OPEN MEETINGS AND PUBLIC RECORDS LAW

- Open Meetings Law.
 - Closed sessions are permitted only for enumerated reasons. Wis. Stat. § 19.85.
 - Closed sessions must be properly noticed in advance of the meeting. Wis. Stat. § 19.84(2).
 - The notice should cite the particular statutory exemption for the closed session and must be detailed enough to reasonably apprise the public of the subject matter of the closed session.
 - A recitation of the text of the statutory exemption is insufficient notice.
 - Broad categories such as “personnel” or “contracts” are insufficient.

OPEN MEETINGS AND PUBLIC RECORDS LAW

- Open Meetings Law.
 - Closed sessions are permitted only for enumerated reasons. Wis. Stat. § 19.85.
 - The vote to convene in closed session shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. Wis. Stat. § 19.85(1).

OPEN MEETINGS AND PUBLIC RECORDS LAW

- Open Meetings Law.
 - Closed sessions are permitted only for enumerated reasons. Wis. Stat. § 19.85.
 - No motion to convene in closed session may be adopted unless the presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions by which such closed session is claimed to be authorized. No business may be taken up at any closed session except that which relates to matters contained in the presiding officer's announcement of the business to be considered. Wis. Stat. § 19.85(1).

OPEN MEETINGS AND PUBLIC RECORDS LAW

- Open Meetings Law.
 - Public Participation at meetings.
 - There is no legal requirement that a meeting of a school board or committee include a public comment period on its agenda.
 - There is also no legal requirement that school boards allow public comment during the meeting as particular subjects of business are addressed.

OPEN MEETINGS AND PUBLIC RECORDS LAW

- Public Records Requests.
 - Records requests v. requests for information.
 - Districts are only obligated to produce *records* in response to a public records request.
 - Information that is not recorded or preserved in physical or electronic form, is not a record subject to request.
 - If no public record is responsive to a given request, the district is not obligated to provide general information in response to that public record request, nor is the district obligated to create a responsive record based on that request. *The Journal Times v. City of Racine Board of Police and Fire Commissioners*, 2015 WI 56, 362 Wis. 2d 577, 866 N.W.2d 563.



OPEN MEETINGS AND PUBLIC RECORDS LAW

- Public Records Requests
 - Public records requests where *employees* are the record subject.
 - A record subject is defined as “an individual about whom personally identifiable information is contained in a record.” Wis. Stat § 19.32(2g).
 - A record that merely makes a passing reference to a person or mentions the person’s name is not “related to” the employee. The “record subject” must be the focus or subject of the record.
 - Subject to three exceptions, generally, school districts are not required to notify a record subject before permitting access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the districts’ decisions. Wis. Stat. § 19.356(1).

OPEN MEETINGS AND PUBLIC RECORDS LAW

- Public Records Requests
 - Public records requests where *employees* are the record subject in records involving an investigation into a disciplinary matter, a record obtained through a subpoena or search warrant, or a record prepared by another employer that contains information relating to an employee of that employer:
 - Upon notification, a record subject may seek a court order restraining the school district from providing access to the record. Wis. Stat. § 19.356(4).
 - The school district shall not provide access to that requested record within 12 days of sending the notice, nor shall the school district provide access to the record during the pendency of the court proceedings, including appeals. Wis. Stat. § 19.356(5).

OPEN MEETINGS AND PUBLIC RECORDS LAW

- Public Records Requests
 - Public records requests where people who hold *local public office* are the record subject.
 - Districts must adopt and display a public records notice that, among other things, separately identifies each position of the district that constitutes a local public office. Wis. Stat. § 19.34(1).
 - The definition of local public office likely encompasses school board members, district administrators, business managers, and principals. District policy should establish who qualifies as a person holding local public office.

OPEN MEETINGS AND PUBLIC RECORDS LAW

- Public Records Requests
 - Public records requests where people who hold *local public office* are the record subject.
 - In general, people holding local public offices are entitled to augment the disclosure of a record that contains information relating to the record subject prior to the school district permitting the record requestor to access to the record.
 - People holding local public offices are generally entitled to written notice within 3 days of the school district making the decision to permit access to a record containing information relating to a record subject who is an officer or employee of the school district holding a local public office. Wis. Stat. § 19.356(9)(a). The district must make this written notice by either certified mail or by personally serving the notice on the record subject. *Id.* The notice shall briefly describe the requested record and include a description of the rights of the record subject. *Id.*

OPEN MEETINGS AND PUBLIC RECORDS LAW

- Public Records Requests
 - Public records requests where people who hold *local public office* are the record subject.
 - Within 5 days after receipt of the notice, a record subject may augment the record to be released with written comments and documentation selected by the record subject. Wis. Stat. § 19.356(9)(b). The district shall release the record as augmented by the record subject. *Id.*
 - Unlike with employees, the district does not have the authority to delay the release of the records pertaining to people who hold local public office beyond this notice and opportunity for the person holding local public office to respond, and the person holding local public office does not have access to the expedited court proceedings that an employee record subject would have.

STUDENTS

- Administrators May Not Be Present At, Or Participate In, Board Expulsion Deliberations.
- The confidentiality of pupil records and the procedures associated with disclosure of them, cannot be over emphasized.

FINANCE

- Financial Components Of Annual Meetings For Common And Union High School Districts.
 - One annual meeting power is to vote on annual salaries for school board members or an amount for each school board meeting the member actually attends.
 - The annual meeting can vote for either an annual salary or an amount per meeting.
 - The annual meeting does not have the power to create a composite method of compensation for board members that includes both a salary and an amount per meeting.
 - Compensation cannot be based on attendance at committee meetings.

FINANCE

- Financial Components Of Annual Meetings For Common And Union High School Districts.
 - The budget hearing takes place during the annual meeting. Wis. Stat. § 65.90(4). This hearing provides the opportunity for residents or taxpayers of the district to be heard on the proposed budget. However, the electors at annual meeting do not vote to approve the budget.
 - The school board can make alterations to the proposed budget after the budget hearing. The final budget is approved by majority vote of the school board after the budget hearing.
 - The amount of tax to be levied or certified, and the amounts and purposes for appropriations stated in the budget may not be changed unless authorized by a vote of two-thirds of the entire membership of the board. Wis. Stat. § 65.90(5)(a). A class 1 notice must be provided within 15 days after any change is made. Failure to give notice precludes those alterations to the budget.

LABOR & EMPLOYMENT

- Notices For Collective Bargaining.
 - Notice of commencement of collective bargaining on WERC form.
 - Notice to public of opening of collective bargaining.
 - Notice of open meeting for exchange of initial proposals and rationale.
 - If a bargaining unit exits, notices of teacher contract renewal or issuance of individual teacher contracts must provide that the base wage is subject to amendment by a subsequent collective bargaining agreement.

LABOR & EMPLOYMENT

- Responses To Petitions For Union Recertification.
 - Differentiate between the response to the Wisconsin Employment Relations Commission and the petitioning union.
 - Provide the WERC with an electronic, sortable, alphabetical list of the employees the employer believes are eligible to vote in the election, their mailing addresses, and the last four digits of their social security numbers.
 - Provide the petitioning union with an electronic, sortable, alphabetical, names-only list of the employees the employer believes are eligible to vote in the election.

LABOR & EMPLOYMENT

- Support Staff Employment.
 - All drivers of motor vehicles owned by the school district and used for the transportation of pupils shall be under written contract with the school board of the district. Wis. Stat. § 121.52(2)(a).
 - Letters of employment, if utilized, should make clear that their issuance does not negate the at-will status of the support staff employee. Letters of employment for a fixed term (e.g., July 1 - June 30, or the 2017-2018 school year) have been interpreted as negating at-will status and as creating an expectation of employment which requires procedural due process if termination is under consideration.

LABOR & EMPLOYMENT

- Support Staff Employment.
 - Notices of reasonable assurance must be issued to school year employees prior to the end of a school year in order to avoid the employee being eligible for unemployment compensation over the summer months. Generally, there is an 80% wage and benefit standard that must be met or exceeded to constitute an assurance of a reasonably similar position in the subsequent school year in order to qualify as a bona fide notice of reasonable assurance.

LABOR & EMPLOYMENT

- Layoffs And Reductions In Staff.
 - For full-time teachers, districts should follow the nonrenewal procedures in Wis. Stat. § 118.22 when conducting layoffs, reductions in staff, and reduction of teacher assignments.
 - For part-time teachers and other staff, districts do not have to comply with the procedure laid out in Wis. Stat. § 118.22 when conducting layoffs, reductions in staff, and reduction of teacher assignments. Instead, districts can establish their own procedures through individual contracts (where applicable), board policy, or employee handbooks.

LABOR & EMPLOYMENT

- Employee Conflicts of Interest.
 - Under Wis. Stat. § 118.12, no school district (or CESA) employee may receive for his or her personal benefit anything of value from any person other than his or her employing school district to sell, promote the sale of or act as an agent or solicitor for the sale of any goods or services to any public school pupil while on the property of his or her employing school district or at an activity of his or her employing school district.

LABOR & EMPLOYMENT

- Employee Conflicts of Interest.
 - Any person violating this law is subject to a forfeiture of not more than \$200 for each offense.
 - It is not a violation of this statute for an employee to receive a benefit from the sale of goods or services if the benefit is provided to the employee from the school district (rather than the third party).

LABOR & EMPLOYMENT

- Employee Conflicts of Interest.
 - A band director would violate this law by accepting a free trip from a third party travel service in exchange for soliciting his students to sign up for a performance in Florida sponsored by that travel service.
 - To avoid such a violation, the school district could negotiate the voucher for free travel and then recruit the teacher to chaperone the trip in exchange for the voucher.

LABOR & EMPLOYMENT

- Background Checks.
 - No notice to prospective employee or current employee necessary prior to district doing background check on its own.
 - Multiple procedures required, including notices, if district engages third party in background checks of prospective employees or current employees.

QUESTIONS?

