Common Questions from the 2020 New Board Member Gatherings (held as webinars)

On the evenings of April 21, 22, and 23, the WASB held virtual "New Board Member Gatherings" in a webinar-type format for all board members who were newly elected to office at the 2020 Spring Election. Attendees were able to ask a small panel of WASB staff and consultants any questions that they might have about board service and the role of the WASB. The following questions reflect some of the common topics of interest. For each question, there is a short response as well as a list of resources that are available to find more information related to the general topic. In addition to the resources listed in this document, WASB staff are available to respond to member inquiries on any aspect of school board service. Please contact us any time at 1-877-705-4422.

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1. When and how will new school members receive their login information for the WASB website?

By late April or early May, school district staff usually provide the WASB with contact information for all newly-elected school board members. Once that contact information has been entered into the WASB's membership database, a new board member should be able to use his/her primary school board email address as his/her username for the WASB website.

The first time that you attempt to login to the WASB website, navigate to the login screen and then click on the link labeled "Forgot your password?" On the next screen, enter the email address that is on file with the WASB in the field that is provided for the username, and then click the "Get New Password" button. A link will be sent to you via email. Follow the link and the subsequent prompts to set a password. If you have any difficulty, please send an email to either Delta Smith (dsmith@wasb.org) or Paula Osburn (posburn@wasb.org) or call the WASB at 1-877-705-4422.

2. How specific do agenda items need to be when giving notice of a school board meeting under the Wisconsin Open Meetings Law?

Overview:

This is an important question because all board members have a responsibility to adhere to the Open Meetings Law, regardless of whether they had a direct role in preparing or issuing the public notice of the meeting. If a topic is not properly noticed and the school board addresses the topic during a meeting, each board member participating in the meeting could be found to have violated the law.

In terms of what the law actually requires, the question of specificity is governed by a case-by-case "reasonableness" standard. Under the standard, whether notice is sufficiently specific will depend upon factors such as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether the topic involves non-routine action that the public would be unlikely to anticipate. So, as an example, if the public notice of a meeting mentions only "facilities planning," that would almost certainly not be specific enough notice if the real issue to be addressed is a decision to permanently close one of the district's elementary schools. Closing a school is not routine business and would be of high public interest. Generic subject matter such as "new business" is also insufficient. According to guidance provided by the Office of the Attorney General, "In order to draft a meeting notice that complies with the reasonableness standard, a good rule of thumb will be to ask whether a person interested in a specific subject would be aware, upon reading the notice, that the subject might be discussed."

As a closely related issue, there are additional standards that govern notices of closed sessions. Although it is true that every closed session must appropriately fall under one of the statutory exemptions that allow a closed session, identifying the applicable statutory exemption, by itself, is not sufficient notice of the subject matter of a closed session. The Attorney General's *Open Meetings Law Compliance Guide* advises as follows: "Notice of closed sessions must contain the

specific nature of the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized. Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be taken up thereunder and thus is not adequate notice of a closed session."

If a board member has any questions or concerns about an agenda item, including whether the public notice is sufficiently specific, it is best to raise those questions prior to the meeting and, ideally, with enough time to amend the notice if necessary. Usually, it is appropriate to first contact the district administrator with such a concern or inquiry.

Where to find more information:

- The Attorney General's Open Meetings Law Compliance Guide, at pages 15-18.
- See also:
  - The WASB's "Basic Legal and Governance Resources" web page, under the "Meeting Management" and "Open Meetings Law" sections
  - The New School Board Member Handbook , especially Chapter 3

3. How many board members can get together outside of a noticed meeting and discuss a school district issue or an upcoming agenda item without violating the Wisconsin Open Meetings Law?

Overview:

This question implicates what is known as the "numbers test" for determining whether a "meeting" is occurring for purposes of the Open Meetings Law. The general rule of thumb is that participation in such a discussion is limited to a group that is less than the number of board members that could determine the outcome of a board decision that is related to whatever topic is discussed (even if there are currently no specific plans to make any decisions on the topic). In some situations, this will be less than a quorum or majority of the board, such as when less than the full membership of the board will be voting on a matter (e.g., due to an unfilled vacancy) or when a decision requires a 2/3 vote of the board in order to pass.

In practical terms, this means that the larger the total membership of the school board (e.g., 7, 9, or 11 members) the greater the freedom that any two board members generally have to discuss a school district issue between just the two of them. Five-member boards need to be substantially more cautious, and three-member boards have essentially no freedom to engage in such discussions.

Keep in mind that the same concepts apply to school board committees and to the members of a committee—which can be challenging at times. Also, it is important to be aware that "meetings" are not confined to in-person gatherings (e.g., electronic communications can also

sometimes be considered a convening of board members). Board members also need to be aware of the rule that prohibits "walking quorums" (see Question #4, below).

Where to find more information:

- The Attorney General's Open Meetings Law Compliance Guide, at pages 9-12.
- See also:
  - The WASB's "Basic Legal and Governance Resources" web page, under the "Meeting Management" and "Open Meetings Law" sections.
  - The New School Board Member Handbook, especially Chapter 2 and Chapter 3.

4. What is a "walking quorum"?

Overview:

According to the Attorney General's *Open Meetings Law Compliance Guide*, a "walking quorum" is a series of gatherings or communications among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum. Attempts to avoid the appearance of a "meeting" through use of a walking quorum is subject to prosecution under the Open Meetings Law.

The essential feature of a "walking quorum" is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, it is possible for exchanges among separate groups of school board members to take place without violating the Open Meetings Law. However, also refer to the responses to Question #3 (above) and Question #5(below).

Responding to a scheduling matter regarding one's availability for a board meeting will not create a walking quorum. Also, merely expressing one's support for the inclusion of a proposed agenda item or for holding a special meeting will not create a walking quorum provided that the board members have not engaged in substantive discussion or agreed on a course of action regarding the proposed subject matter.

Where to find more information:

- The Attorney General's Open Meetings Law Compliance Guide, at page 12
- The New School Board Member Handbook, especially Chapter 2 and Chapter 3

5. How does sending and receiving emails as a school board member implicate the Wisconsin Open Meetings Law?

Overview:

It is possible for electronic communications to constitute a "convening" of the members of a school board or other governmental body for purposes of the Open Meetings Law. According to the Attorney General's *Open Meetings Law Compliance Guide*, although no Wisconsin court has applied the Open Meetings Law to email, text messaging, blogging, social media, or other similar types of electronic communications, if a court were to be presented with a complaint, it is likely that the court would try to determine whether the communications in question are more like an in-person discussion or more like non-electronic written correspondence, such as a mailed memo. If the communications closely resemble an in-person discussion, then they may constitute an improper "meeting" if they involve enough members to control an action by the body. It is also possible to create an improper "walking quorum" of the board through a series of electronic communications (see Question #4, above).

Although email is commonly used as an efficient way to provide one-way communication to the members of a school board, board members are regularly cautioned to avoid starting a back-and-forth discussion among the board about a substantive issue (e.g., by using "reply all"). Further, even if a particular set of email communications is ultimately found not to be a violation of the Open Meetings law, substantive email exchanges among board members about issues within the board's realm of authority still can be requested under the Public Records Law and characterized by the media or a community member as inappropriate, nontransparent, or "secretive" communications.

Where to find more information:

- The Attorney General's Open Meetings Law Compliance Guide, at pages 10-12.
- See also:
    - The WASB's "Basic Legal and Governance Resources" web page, under the "Open Meetings Law" section
    - The New School Board Member Handbook, especially Chapter 2 and Chapter 3

6. How does sending and receiving emails as a school board member implicate the Public Records Law?

Overview:

School board members must observe the Wisconsin Public Records Law in connection with their email correspondence. In general, any email sent or received by a school board member that relates to the school district is very likely going to be considered a "record" that needs to appropriately retained and that may need to be disclosed in response to a public records request. This is true regardless of the email address or email account that a school board member uses for the correspondence. The Wisconsin Public Records Law focuses much more on the content of a record than either the format of the record (paper, electronic, etc.) or the original source of the record (e.g., a private email account versus a school district email account).

Because school district email systems are generally structured to facilitate compliance with the Public Records Law, most school board members will want to be in the habit of using a district-issued email account for all of their board-related email communications. And, if a board member receives an email at a personal or work-related email address, a recommended practice is to forward the email to the board member's school district email account and respond, if necessary, from the district account.

As further addressed in the resources listed below, the public records issues related to email extend to other types of electronic records as well (such as social media posts, text messages, etc.).

Where to find more information:

- The Attorney General's Public Records Law Compliance Guide, at pages 2-6 and 19.
- See also:
    - The WASB's "Basic Legal and Governance Resources" web page, under the "Public Records" section
    - The New School Board Member Handbook, especially Chapter 2.

7. Are there any school district jobs that a school board member can hold while they are a board member? What about just occasional substitute teaching in the district?

Overview:

The legal doctrine known as "incompatibility of office" can sometimes prohibit public officials from holding two positions at the same time. Two positions can be incompatible where one office/position is superior to the other such that the duties exercised under each might conflict to the detriment of the public, or where the nature and duties of two offices are such that public policy considerations bar one person from discharging the duties of both offices. If two positions are identified as being incompatible, the general rule is that the person must choose between holding one position or the other. Merely abstaining from participation in certain decisions does not resolve the incompatibility.

In connection with serving on a school board, one example of an incompatible position is simultaneously being an employee of the same school district. WASB is not aware of any court decisions or authoritative advisory opinions (e.g., from the Wisconsin Attorney General or the Wisconsin Ethics Commission) that have identified an exception for part-time employment, short-term employment, or substitute employment. Even volunteering to perform responsibilities that are often performed by paid employees can raise "incompatibility" issues. In fact, as covered in Question 8 (below), a special statute was enacted to define conditions under which a current board member may serve as a volunteer coach or supervisor for student extracurricular activities. In the absence of the special statute, volunteer coaching may have been vulnerable to a determination of incompatibility.

Where to find more information:

- The New School Board Member Handbook, especially Chapter 6
- The WASB's "Basic Legal and Governance Resources" web page, under the "Conflicts of Interest / Ethics" section

8. Can school board members be coaches?

Overview:

In 2015, the legislature enacted section 120.20 of the state statutes. Under that statute, a board member may serve as a volunteer coach or as a volunteer supervisor of an extracurricular activity if the school board member (1) does not receive compensation for such services; (2) agrees to abstain from voting on any issue that substantially and directly concerns the activity; and (3) completes a criminal background check procedure. In the absence of the special statute, volunteer coaching by a current board member may have been vulnerable to a determination of incompatibility of office. (See Question 7, above.) The authorization to volunteer that is

provided by section 120.20 does not apply to roles other than coaching and supervising extracurricular activities. Finally, even though such volunteering is now expressly permitted by section 120.20, a school board could conclude that it prefers not to authorize current board members to serve as a volunteer in those roles.

Where to find more information:

- Section 120.20 of the state statutes
- The New School Board Member Handbook, especially Chapter 6
- The WASB's "Basic Legal and Governance Resources" web page, under the "Conflicts of Interest / Ethics" section

9. Can a school board member be employed by a company that provides services to the school district? Can a board member be one of the employees that provides those contracted services—such as a bus driver or food service employee?

Overview:

The short answer to the question of whether a school board member may be an employee of a company that provides services to the school district is, "It depends." It depends, for example, on factors such as whether the board member (or his/her spouse) has any ownership interest in the company and (even where there is no ownership interest) on the board member's exact role and duties. But, at one extreme, where the board member is employed in a capacity that has no direct or indirect connection to the contract between the company and the school district, it is likely that the employment itself does not create an issue. At the same time, there could be some school board decisions in which such a board member would not participate due to his/her outside employment.

The second part of the question, about being one of the employees who actually provides the contracted services to the district, also does not have an easy, one-size-fits-all answer. In the specific examples of being a bus driver for a private transportation company or a food service employee of a third-party food service contractor, one approach would be to try to avoid some of the potential issues by working with the third-party employer to obtain assignments with other customers. If it is not practical to avoid the issues in that manner, a potential legal concern is the doctrine of incompatible offices (see Question 7, above). Although WASB is not aware of any court decisions or authoritative advisory opinions that have determined that such third-party employment is either compatible or incompatible with serving as a board member, there is room to argue that the public policy reasons behind the doctrine could be applied to the situation. In addition, such a board member would have to be cautious in both his/her public capacity (as a board member) and his/her private capacity (as an employee of a private company) to avoid any conduct that would violate section 946.13 (a criminal statute that

prohibits private financial interests in public contracts) or section 19.59 (the local government code of ethics). In short, these are situations that involve some legal risks and for which a board member may need to seek legal advice from his/her personal attorney.

Where to find more information:

- Section 19.59 and Section 946.13 of the state statutes
- The New School Board Member Handbook, especially Chapter 6
- The WASB's "Basic Legal and Governance Resources" web page, under the "Conflicts of Interest / Ethics" section

10. What does a board member who has a family member employed by the school district need to be aware of? What are the differences between having a spouse employed by the district as compared to a child, parent, or other relative?

Overview:

This question correctly anticipates that the conflicts-of-interest analysis changes based on the type of relationship. One of the primary reasons for the differences has to do with the extent to which the board member has (or does not have) a direct or indirect financial interest in the relative's employment or in a public contract that is closely related to the relative's employment. So, a spouse is an example of a relationship that creates the broadest array of restrictions on and potential legal consequences for a board member's conduct. If the district-employed relative is an adult child of a board member with whom the board member no longer has any direct financial ties (e.g., the child is no longer on his/her parents health insurance, does not live at home, etc.), then some statutory rules and statutory consequences become less relevant. However, such a board member would still be advised to abstain from participating in a variety of potential votes that would affect their child's employment. This is because the common law (i.e., law that is defined through court cases as opposed to legislative statutes) establishes conflict-of-interest principles that will be applied to the parent-child relationship and to the divided loyalties that such a board member may have. A similar analysis would likely apply to other close relatives—such as a parent or an adult sibling. As a general rule, as the degree of kinship between the board member and his/her relative becomes more remote, there will be fewer restrictions on the board member's participation in board decisions and other official conduct. All the same, sometimes board members elect to avoid participating in certain decisions out of an abundance of caution or due to the appearance of a potential conflict of interest, even if the law would not strictly require the board member to abstain.

As a bottom line answer to the question, the legal analysis that applies to these kinds of conflict-of-interest scenarios is very context sensitive. A board member who has a relative (or other person with whom the board member has a special relationship, such as a non-married partner

with whom the board member resides) who is employed by the school district needs to carefully evaluate the extent to which they can lawfully participate in certain decisions affecting the employee's compensation, performance evaluation, and other terms and conditions of employment. Disclosing such relationships to the other members of the leadership team can put the team in a better position to help spot potential issues and engage in timely problem solving. More generally, all school board members need to evaluate the extent to which they may have divided loyalties or other biases on particular issues that counsel against the board member's participation in making some decisions.

Where to find more information:

- Section 19.59 and Section 946.13 of the state statutes
- The New School Board Member Handbook, especially Chapter 6
- The WASB's "Basic Legal and Governance Resources" web page, under the "Conflicts of Interest / Ethics" section
- Wisconsin Ethics Commission guideline regarding nepotism under the statutes administered by the Commission.