



NDSBA
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BOARD MEETINGS AND THE COVID-19 PANDEMIC

On Sunday, March 15, Governor Doug Burgum and Superintendent of Public Instruction Kirsten Baesler announced that North Dakota's public and nonpublic schools (including BIE and tribal schools) must close by Monday, March 16, and remain closed through Friday, March 20, in light of the COVID-19 situation. Schools are closed to reduce the rate of infection. School officials should use this time to plan for education in the event of an extended COVID-19 pandemic. Appropriate school staff are expected to participate in the planning process except for school staff who are vulnerable to COVID-19 exposure as explained by the North Dakota Department of Health.

For the needed planning that will be taking place, school boards should be reminded of the legal requirements relating to meetings of the board, particularly in public health emergency situations. NDSBA has gathered the following information for school boards to keep in mind as they move through the planning process:

What Gatherings Are Covered by the Open Meetings Law?

Meeting means any gathering of a quorum of the members of a governing body of a public entity regarding public business, and includes committees and subcommittees, informal gatherings or work sessions, **and discussions where a quorum of members are participating by phone or any other electronic communication** (either at the same time or in a series of individual contacts). When one or more of the members of the governing body is participating by telephone or video, a speakerphone or monitor must be provided at the location specified in the notice.

If a governing body delegates any authority to two or more people, the newly formed committee is subject to the open meetings law even if the committee does not have final authority or is just fact-finding. What it is called does not matter, it is still a committee. It also does not require that a certain number of board members (or any board members at all) be on the committee in order to be a committee. Committee meetings must be noticed and minutes taken. Emails or text messages between members of a committee or subcommittee regarding public business may constitute a meeting and violate open meeting laws. Any doubt whether a gathering is a meeting should be resolved by complying with the open meetings law.

In light of the above, it is possible to hold a meeting of the board via telephone or video conference to allow for a level of social distancing or attendance by board members who might be considered more vulnerable to COVID-19. However, the meeting must be properly noticed and accessible by the public. When one or more of the board members are attending via

telephone or video conference, a speakerphone or monitor must be provided at the location specified in the notice to ensure public access to the meeting. NDSBA also encourages boards to consider televising or livestreaming their meetings going forward in order to allow access by the public without necessarily requiring members of the public to attend in person. To be clear, televising and/or livestreaming do not in and of themselves meet the public access requirement. Members of the public must still be allowed to attend public meetings in person at the location specified in the notice.

Basic best practices for participating in a meeting by telephone including muting your microphone unless you are speaking and stating your name before prior to talking so that others on the call know who is speaking.

Does the location of the meeting matter?

The location of any open meeting "must be accessible to, and the size of the room must be sufficient to accommodate, the number of persons reasonably expected to attend the meeting." The open meetings law does not specifically address the proximity of the public entity's meeting place to the people affected by the entity's decisions; however, holding a meeting a substantial distance away from the public entity's jurisdiction (i.e. outside of the boundaries of the school district) could result in the denial of the public's access to the meeting. The Americans with Disabilities Act of 1990 (ADA) also requires that meeting locations be readily accessible to individuals with disabilities. A public body should contact its attorney if it has any questions regarding ADA compliance.

What is a special or emergency meeting?

A special or emergency meeting is called to address a specific issue(s). Action by the board is limited to the issue(s) for which the meeting was called and the items set forth in the meeting notice. The board president or any two members of the board may call a special meeting. There is a requirement of written notice to board members, notifying the official newspaper and county auditor, and posting at the school office and at the meeting place.

When must notice be provided to the public in advance of a special or emergency meeting?

North Dakota law does not require that a minimum amount of notice (e.g., 24-hour notice) be provided prior to a special or emergency meeting of a school board. Rather, North Dakota law requires that required notice of the meeting be given at the same time as such governing body's members are notified, and that this notice is available to anyone requesting such information. Even if the governing body has not yet prepared an agenda for its meeting, if the governing body knows the meeting date, notice should be provided informing the public of the meeting date. Topics that may be considered at an emergency or special meeting are limited to those included in the notice.

How must notice of a meeting provided?

North Dakota law requires that notice be posted for all meetings of a public entity, including executive sessions, conference calls, and video conferences. Unless otherwise noted below, notice must contain the **date, time, and location** of the meeting and, if practicable, the **topics to be considered**. Notice need not be published in the newspaper, but must be posted as follows:

- Notice must be filed with the county auditor OR published on the district's website.
- Notice must be posted at the district's main office AND posted at the location of the meeting, if held somewhere other than the district's main office.
- Notice must be provided to anyone who has requested it. Members of the public may make an annual request to receive notice throughout the year.
- **For special or emergency meetings**, in addition to the above requirements, notify the district's official newspaper and any members of the media that have requested notice of special or emergency meetings. This notice must include the time, place, date, and topics to be considered at the meeting. In addition, written notice of a special meeting must be given to each member of the board of a public entity.

Can a meeting agenda be amended at the meeting?

For **regular meetings, yes**, usually by a majority vote of the board (check applicable board policy); for **special meetings, no**.

May a board discuss emergency preparedness in executive session?

Likely not. Meetings of an entity subject to the open meetings law are presumptively open to the public. However, because the open meetings law does not apply if "otherwise specifically provided by law," a meeting of a governing body of a public entity need not be open if it falls within a specific exemption from the open meetings law or if a confidential meeting is required. Interpreting identical language in the open records law, the North Dakota Supreme Court has held that a "specific" exemption may not be implied. Therefore, an exemption from the open meetings law must also be firmly grounded in law rather than an implied, vague, or arguable exemption.

There are exemptions relating to threat assessments and emergency evacuation and response plans. However, it is unlikely that the current situation relating to COVID-19 as it relates to school closures in North Dakota falls under any of these exemptions. It is possible that a particular topic to be discussed may require or permit a discussion in executive session. NDSBA recommends that school boards consult with their district's legal counsel before closing any portion of a public meeting to ensure compliance with North Dakota law.

OTHER COVID-19 PANDEMIC-RELATED GUIDANCE

Must School Districts still pay their employees and maintain benefits during school closure?

Maintaining wage security for employees is a top priority. Each school district must make specific decisions based on local policies and negotiated agreements. Everyone must come to the table to take care of employees. Considering the health crisis, it is critical that employees' health insurance not be interrupted.

School districts are still required to pay and continue benefits for their contractual certified employees (i.e. teachers and administrators) during the closure period. Schools should generally not require these employees to take paid leave during the closure period unless otherwise appropriate in a given situation. With respect to classified/ancillary staff members, school districts are likely not required by law to pay these individuals during the closure period; however, school districts can choose to compensate them and NDSBA encourages districts to do so. Again, this is a local decision that should be made with your employees' interests in mind.

Ongoing Questions

NDSBA, NDCEL, and other partners are currently researching a number of topics based on questions from superintendents and school board members, including potential waiver of minimum seat time requirements and remote-learning plans. Thank you for your patience as we work through these complex issues.

More Resources

NDSBA will continue to provide updated resources as they become available on our website at <http://ndsba.org/index.php/chunk/covid-19-resources/>.