Today’s Discussion

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Introduction – Scenario #1

- It’s budget season, you look on the local community Facebook forum, there is a “vibrant” discussion regarding the Board’s proposal to reduce staff.
  - A board member has commented, but you think that his comment doesn’t tell the whole story, so you chime in and post a comment.
  - Another board member sees the two comments, and, wanting to be helpful, adds some missing information.
- It’s not a community page, but, in fact, your page.
- It’s the District’s page.
Introduction – Scenario #2

- The District’s website or social media page allows for public display of comments, subject to some enumerated parameters:
  - No disparaging comments regarding school officials or employees;
  - No profanity or otherwise offensive speech;
  - Only one comment per day per user;
  - No more than 50 words per comment;
  - The District’s IT Director begins her workday each morning sifting through comments and taking down those that do not comply with the parameters.

RSA - 91-A
Right to Know Law

Key Concepts & Definitions

Right to Know Law
New Hampshire Constitution

… Government, ..., should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.

New Hampshire Constitution, Part 1, Article 8: "Accountability of Magistrates and Officers; Public’s Right-to-Know" (Emphasis Added).
Right to Know Law
Key Concepts

- RSA 91-A, both reaffirms the public's right of access to government, and sets out the "reasonable restrictions" contemplated by Part 1, Article 8.

- SUGGESTION: Rather than seeing the statute as what the government needs to allow the public access to, view it as an expression of what legitimate bases the government may exclude the public from.

Right to Know Law
Key Concepts

- The two core areas of right of access under 91-A are "meetings" of "public bodies", and access to "governmental records".

- The statutory definitions of those three words/phrases, along with a few others, are key to understanding the breadth of 91-A as it applies generally to school boards, and more specifically to their emails and other electronic communications.

Note: This presentation focuses mainly on the intersection of digital communications and social media with the open meeting provisions of the Right to Know law and the First Amendment. Accordingly, discussion regarding 91-A's records requirements as they pertain to digital communications is limited.

"... all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. “ 91-A:2, II
Right to Know Law
Meeting Defined

RSA 91-A:2, I establishes a three prong test for whether a board communication (of whatever medium or form) should be deemed a meeting. A meeting occurs when:

1. A quorum of the body convenes;
2. In any manner in which the participating members are able to communicate contemporaneously;
3. For the purpose of discussing or acting upon something over which the public body has supervision, control, jurisdiction or advisory power. “Jurisdictional Matters”

Right to Know Law
Meeting Requirements

If/when the elements of a meeting are present, then 91-A:2, II requires:

• Posted notice (24 hours, absent an emergency);
• Board deliberations (discussion) and decisions occur only during the meeting;
• That no votes occur by secret ballot (except for annual meetings & elections);
• The public is able to physically attend (subject to 91-A:3);
• Physical presence of a quorum at the location specified in the meeting notice, except in cases of emergency, 91-A:2, II & II-a; and
• Appropriate minutes.

Right To Know Law
Public Bodies Defined

“Public body” - Includes “Any … governing body, board … school district, [or] school administrative unit, … or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.” 91-A:1-a, VI.

“Advisory committee” – includes any “committee … whose primary purpose is to consider … issues designated by the [public body] so as to provide such [body] with advice or recommendations concerning” a jurisdictional matter. 91-A:1-a, I.
Right to Know Law
Sequential Communications

“Communications outside a meeting, including, but not limited to sequential communications … shall not be used to circumvent the spirit of this chapter…” 91-A:2-a, II.

- Applies to forwarded emails, telephone calls, and any other mode of communication;
- Could also apply to the “passive majority”;
- What about the situation where you know someone will be recused, but the communications occur prior to the meeting.

Right To Know Law Meeting Exceptions and Non-Meetings

Are all contemporaneous communications about jurisdictional matters by a quorum of a body subject to the meeting requirements of 91-A?

NO. Remember, the meeting requirements under 91-A are triggered by those communications which fall within the definition of a “meeting” (quorum, public body, ability to communicate contemporaneously, discussion about a jurisdictional matter).

Right To Know Law Meeting Exceptions and Non-Meetings

When a meeting is not a meeting…

91-A:2, I - excludes from the definition of “meeting”, “chance, social or other encounter not convened for the purpose of discussing or acting upon [jurisdiction] matters” provided that “no decisions are made regarding such matters.”
Right To Know Law
Non-Meetings

“Non-meetings” - 91-A:2, I also carve out four specific categories of communications which, notwithstanding meeting the criteria above, are excluded from the definition of “meeting”. Only three apply to school boards, they are:

- Strategy and negotiations regarding collective bargaining;
- Consultation with legal counsel (must include ability for contemporaneous communication); and
- Circulation of draft documents.

NOTE: The concept of a “non-meeting” is not to be confused with non-public sessions under 91-A:3, which are beyond the scope of this presentation.

Emails, Social Media Comments and Other Electronic Communications

Pitfalls & Practice Tips

Communications Outside of Meetings
Slippery Slopes/Violations

- “I only sent my email to one member (who then forwarded it to another, who sent it to another, etc.”
- “I knew that 3 of the recipients were at work, so they couldn’t communicate “contemporaneously” even if they wanted to”;
- “Bob doesn’t have a Facebook account”;
- “We were only batting some ideas around, we knew we had to vote at the meeting”;
- “It was only a straw poll”;
- “We were only trying to get a “sense of the board””;
- “We know we have to enter the emails into the minutes of the Board’s next meeting.”
**Electronic Communications & Social Media**

**Best Practices**

- Leave discussion and deliberation of substantive matters for a public meeting.
- Never use comments/email/texts to express ideas, concerns, opinions, etc. on jurisdictional issues or matters.
- Whenever possible, the Superintendent or central office should be responsible for sending communications which are appropriate for the entire board.
- If you have something you want the Board to discuss, check your agenda policy, and or communicate the issue to the Chair and/or the Superintendent.

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**Electronic Communications**

**Best Practices**

- When communicating on informational matters via email, use BCC for all recipient (other than perhaps your own, or an administrator) (helps limit intentional or inadvertent use of “reply all” and wandering into substantive discussions).
- Don’t use “reply all”.
- Include reminders/warnings to other board members in your own text – “Please do not respond to this email outside of a meeting”.

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**Electronic Communications**

**Best Practices**

- Use a district provided email address for all electronic communications including district business, such communications are “governmental records”.
- Don’t use a district provided email address for communications unrelated to your school board business (concerns: discovery, electioneering).
- Use caution with what you say in electronic communications both as to content and tone. Remember such communications are subject to the same public disclosure as a formal letter.
Electronic Communications
Pitfalls – Slippery Slopes - Violations

“Governmental Records” - RSA 91-A:1-a, III

As with hard copy letters, and whether sent or received through a district account or a board member’s personal or business account, an email, etc. will be considered a governmental record if it contains information that is:

• created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or
• the school district, and
• which is in furtherance of its official function.

➢ Think hard before forwarding constituent emails or complaints other than to the Superintendent.

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Electronic Communications
Pitfalls – Slippery Slopes - Violations

➢ Simultaneous e-mails sent to a quorum of a public body by a member discussing, proposing action on, or announcing how one will vote.

➢ Forwarding to a board member an email received from another board member regarding a jurisdictional matter.

➢ Straw polls or communications seeking “a sense of the board”.

➢ Posting messages regarding jurisdictional matters on any community pages, forums, etc.

➢ Emojis?

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Public Comments at Meetings and On District Web Sites
Public Comment

Despite no legal mandate to do so, there is a longstanding tradition within New Hampshire of school boards (and other public bodies) to allow some level of public comment at board “business” meetings.

- As there is no statutory or Constitutional right for the public to speak at board meetings, the “power” to create the right of public comment is one reserved to the school board.
- Similarly, when a District or board establishes a web presence, it may preclude any and all two way comments.


Although 91-A makes clear that the public has a right to attend school board meetings, it does not include a requirement that everyone has the right to speak.

Other than elections, annual meetings and some statutes requiring “public hearings” (e.g., budgets, bonds, expenditures of un-anticipated revenues, etc.), Board and other District meetings are for the purpose of carrying on District business.

However, the question for Boards and Districts should not be whether to allow public comment, but, rather, in what forum, and by what means should such comment be encouraged or allowed?


A primary purpose of district websites, including social media pages, should always be to inform the public, promote community involvement and collaboration.

A District may, however, identify other purposes for its web platforms, including, for instance – course and program sign-ups, meal payments, convenience access to outside links (e.g., statutes, PTA, etc.), and public comment.

But, in doing so, the District must recognize that all of the limitations, or considerations that apply with other forms of communication – e.g., confidentiality, protected speech, accessibility - apply equally to such digital platforms.
Public Comments and 
1st Amendment Forums.

Once a board decides to provide time or space for public comment, the board creates a “forum” for speech, which in turn implicates free speech protections under both the Federal and State Constitutions.

“Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”

Public Comments and 
1st Amendment Forums.

“[T]he First Amendment plays a crucially different role when, as here, a government body has, either by its own decision or under statutory command, determined to open its decision making processes to public view and participation. In such case, the state body has created a public forum dedicated to the expression of views by the general public.”


1st Amendment Forums.

The United States Supreme Court has delineated three general types of public forums, each requiring different analysis to determine the scope of the public’s right to speech, and the government’s ability to regulate it.

1. Open Public Forums

2. Designated Public Forums (with a sub-class of “limited public forums”)

3. Closed or Non-Public Forums
1st Amendment Forums.

(1) Open or Traditional Public Forums.
- Public streets, sidewalks, public parks.
- The Supreme Court has repeatedly ruled that such places are generally open to all speakers and topics, subject only to reasonable “time, place and manner” restrictions.
- Speakers’ in these areas enjoy the strongest First Amendment protections.
- Restrictions on the content of speech in a traditional public are subject to “strict scrutiny”. Such exclusions must be "necessary to serve a compelling state interest and narrowly drawn to achieve that interest.

Types of Forums.

(2) A - Designated Public Forums.
- A governmental body creates a “designated public forum” when it opens public property for public expression even though the public property is not a traditional public forum. (Examples include municipal theaters, bulletin boards, web pages, meeting space opened to non-government assemblies.)
- After opening a designated public forum, the government is not obligated to keep it open.
- However, so long as the government does keep the forum open, speech in the forum historically receive the same First Amendment protections as speech in traditional public forums (i.e., strict scrutiny analysis).

Types of Forums.

(2) B - Limited Public Forums.
- Although not as clearly delineated by the Courts, a sub-class of the designated public forum is the limited public forum.
- Like the designated public forum, the limited public forum is created when the government allows speech in upon public property which is not a traditional public forum.
- The distinction between designated and limited forums (although not always clear in the reported Court decisions), is that a limited public forum may be open only to certain groups or topics (provided that the limitations are not viewpoint based).
- For instance, a school may make its classrooms available as a meeting space, but only to only to groups conducting "school related activities".
Types of Forums.

(3) Closed or Non-Public Forums.

- Government property that has not been open to public expression, such as a jail or a military base.
- Public schools are also, generally, considered closed or non-public forums.
- Government restrictions on speech in nonpublic forums must be reasonable, and may not discriminate based on speakers' viewpoints.

Public Comment – Designated or Limited Forum?

As suggested above, the classification of a “limited” rather than “designated” forum is not as well defined in the judicial opinions as one would hope, with many decisions using the two terms interchangeably.

In other (Circuit and District court) cases, however, especially regarding public comment at governmental body meetings, the distinction (and rationale for the distinction) is clearer.

For school boards weighing the pros and cons of allowing public comment, or the limitations on such comment once allowed, the distinction can be crucial – irrespective of whether the platform is board meetings, or on District/board websites and social media pages.

Public Comment – Designated or Limited Forum?

A “School Board need not create a public forum, but, having done so, it cannot restrict who may speak based on the content or viewpoint of the speech.”

The Lakewood language quoted in the previous slide was not crucial to the Court’s decision in that case, and therefore is considered “dicta”, perhaps instructive, but not controlling.

The lower court cases that have followed the Supreme Court’s decisions have used different standards, some using the strict scrutiny test used for open and “designated” forums, and some using the “reasonableness” standard used in closed forum cases.

**Content Neutral v. Viewpoint Neutral**

- With closed or non-public forums, the government may restrict content (topic), but not viewpoint.
  - In one Supreme Court case the Court ruled that while a military base could on the one hand prohibit speech regarding the topic of abortion, it could not prohibit a pro-choice speaker while allowing a pro-life speaker.
  - In a few lower/state cases, courts have ruled that having allowed public praise or compliments for staff members during public comment, the board could not prohibit complaints or criticism. See, e.g., Bach v. Sch. Bd. of City of Va. Beach, 139 F. Supp.2d 738 (E.D. Va. 2001).
- Regardless of the type of forum, any exclusion must be done on a viewpoint neutral basis.

**Public Comment – Designated or Limited Forum?**

**OR – Maybe it is Closed?**

This is essentially a political question that local school boards must grapple with.

The New Hampshire Constitution and its tradition both strongly mitigate in favor of maintaining a means for the public given input to the government.

… Government, …, should be open, accessible, accountable and responsive: N.H. Const. Part 1, Article 8 (Emphasis Added).

However, due process and privacy interests of individuals, as well limited government interests (competition, safety, liability) may militate against a designated public forum (i.e., open-ended or unfiltered content).
Three General Options – On a Spectrum

1. Do not allow public comment.
2. Limit public comments to topic specific to the purpose (e.g., agenda items at a meeting, subject matter of a page (content specific, viewpoint neutral)).
3. Allow public comment on any matter, including raising issues such as personnel or student matters.

Both #2 and #3 allow for other content/viewpoint neutral “time, place & manner” restrictions (length of comment, length of comment period, time of comments, early sign-up, etc.).

NOTE: NHSBA’s sample policies BEDH, KD and KD-R generally adopt option #2.

Considerations Specific to Social Media.

While “forum analysis” does not change considerably when considering the difference between a school board meeting public comment period and public comment on a board, district or school social media page or web-site, some concerns are more specific to the digital presence.

➢ Who monitors and how often?
➢ How does public see or monitor the monitors?
➢ How to minimize risk of commercial or specific group postings (especially when considering that many such postings will include links to other content)?

Because of these general concerns, NHSBA does not recommend that districts include public comment pages.

Board Member Pages
Additional Considerations For Board Member Pages.

- Board members do not lose their rights to speak as citizens by virtue of their office, whether in person, writing or on Facebook.
- However, no individual board member has the power or authority to speak on behalf of the board, without first having that authority approved by the board.
- It is important, therefore, for board members to be clear when they are communicating their own views, as opposed to official positions of the board.

Concerns Regarding Board Member Pages.

1. **Notice of problems** - In many instances (e.g., student student sexual harassment, bullying, etc.), a district's liability might arise only when it "knows or should know" of a situation;
   - If information is posted on a board member's page, will that impute knowledge upon the district?
   - Does the member's administered page make it clear that posting should not be construed as a communication to the district?
   - What if the board member him/herself did not see the post as it was a reply to a reply on another post, or he/she was not fully monitoring the page?

Additional Considerations For Board Member Pages.

2. **Messaging** - There is the possibility that an individual believes that the page represents the board/district's policies, statements or positions, and/or suggests that the individual member has authority to speak for the board. Although this generally would not be a substantial liability concern, it could significantly increase the district's exposure to litigation. Examples of this might be if statements on the page were defamatory, or constituted an invasion of privacy. Although the district might ultimately prevail in the suit, the fact of the litigation itself could impose substantial financial and other costs.
Additional Considerations For Board Member Pages.

Disclaimers:
Many of the potential risks for the District can be minimized by appropriate notices/disclaimers included prominently on the Board member’s page and even comments.

Sample Disclaimer: This page is administered by . Although is an elected member of the School Board, he/she created and maintains this in his/her personal capacity. The page is in no way affiliated with or sanctioned by the School District or its School Board. No comment or post on this page may be construed as an official communication by, to or with the School District, the School Board, or any of its members. Furthermore, no comment posted on this page may be considered as a communication, - or an endorsement of a communication - by or on behalf of the School District or its School Board.

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