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# 2

## **School Board Practices, Procedures, and Elections**

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## I. [2.1] SCOPE OF CHAPTER

School board members and school attorneys must be familiar with a substantial number of rules and regulations in order to conduct the business of the school district legally, effectively, and efficiently. This chapter focuses on the basic statutory regulations governing school boards and their members and reviews the legal aspects of school board meetings, including provisions of the Illinois Open Meetings Act, 5 ILCS 120/1, *et seq.* This chapter also addresses other aspects of school boards' powers and duties, including school district records, the Illinois Freedom of Information Act, 5 ILCS 140/1, *et seq.*, school property, elections, and charter schools.

This chapter is limited to discussion of the two major types of school districts in Illinois: (a) school districts with populations of fewer than 1,000 inhabitants, which are governed by a board of directors; and (b) school districts with 1,000 or more but not more than 500,000 inhabitants, which are governed by a board of education.

Note that this chapter does not cover school districts governed by special acts under the Illinois School Code, 105 ILCS 5/1-1, *et seq.* Some of these special acts govern special charter districts (105 ILCS 5/32-1.1, *et seq.*), school districts from 100,000 to 500,000 population that have adopted Article 33 of the School Code (105 ILCS 5/33-1, *et seq.*), community college districts (110 ILCS 805/3-1, *et seq.*), and non-high school districts (105 ILCS 5/12-10, *et seq.*). Special provisions applicable to the Chicago Board of Education are found at 105 ILCS 5/34-1, *et seq.* Also, no coverage is given to any governing or administering body established under joint agreements between districts, such as those authorized by 105 ILCS 5/10-22.31, 5/10-22.31a, 5/10-22.31b, or the operation of charter school boards.

## II. GOVERNING BODIES OF SCHOOL DISTRICTS

### A. [2.2] Boards of Directors and Boards of Education

A school district with fewer than 1,000 inhabitants is governed by a board of school directors consisting of three members, which may be increased by citizen petition and referendum to seven members. 105 ILCS 5/10-1(a). Consolidated districts with fewer than 1,000 inhabitants, however, are governed by a seven-member board of directors. 105 ILCS 5/10-1(b). The board of directors may appoint a student from the district as an advisory nonvoting board member. 105 ILCS 5/10-1(c). Each nonstudent member is elected for a term of four years. 105 ILCS 5/10-4. Districts governed by a board of directors have three officers: a president; a clerk; and a treasurer. The president and clerk must be school board members. 105 ILCS 5/10-5. School districts with 1,000 or more but not more than 500,000 inhabitants are governed by a board of education of seven members. 105 ILCS 5/10-10. Each member is elected for a term of four years, although by referendum the voters of a district may vote to elect members for six-year terms. *Id.* The officers of the board of education include a president, vice president, secretary, and treasurer. 105 ILCS 5/10-10, 5/10-13 through 5/10-14, 5/8-1.

## **B. Qualifications of Board Members and Officers**

### **1. [2.3] Board Members**

By default, school board members are elected at large from their district in April of odd-numbered years at the consolidated election (the first Tuesday in April unless this conflicts with Passover). 10 ILCS 5/2A-1.2, 5/2A-54.

On the date of election, each member must be a United States citizen, 18 years or older, registered to vote, a resident of the state and territory of the school district for at least one year immediately preceding the election, not a school trustee or a school treasurer, and not a “child sex offender” as defined in at 720 ILCS 5/11-9.3. 105 ILCS 5/10-3, 5/10-10. All school elections are governed by the general election law of Illinois. 105 ILCS 5/9-1. Nothing in the general election law or the School Code limits the number of terms to which an otherwise qualified school board member may be elected.

As used within these statutes, “residence” is defined as physical presence within the district along with an intention of remaining there as a permanent home. *People ex rel. Madigan v. Baumgartner*, 355 Ill.App.3d 842, 823 N.E.2d 1144, 291 Ill.Dec. 558 (4th Dist. 2005); *Walsh v. County Officers Electoral Board of Cook County*, 267 Ill.App.3d 972, 642 N.E.2d 843, 204 Ill.Dec. 942 (1st Dist. 1994); *Dillavou v. County Officers Electoral Board of Sangamon County*, 260 Ill.App.3d 127, 632 N.E.2d 1127, 198 Ill.Dec. 516 (4th Dist. 1994); *Stein v. County Board of School Trustees of DuPage County*, 40 Ill.2d 477, 240 N.E.2d 668 (1968). Additionally, a referendum may be initiated to divide any school district into seven compact and contiguous school board districts of substantially equal population and with the residents of each district then electing board members by district rather than at large. 105 ILCS 5/9-22.

### **2. [2.4] President**

The president of a school board is elected by the members of the board. 105 ILCS 5/10-5, 5/10-13. In board of education school districts, the president serves for two years, except that the board by resolution may establish a one-year term of office. 105 ILCS 5/10-13. The president presides at all meetings and performs the duties imposed on him or her by law or by action of the board. *Id.*

### **3. [2.5] Secretary or Clerk**

The secretary or clerk is elected by the school board. The clerk must be a member of the board in school director districts, while in board of education districts, the secretary may or may not be a member of the board. The secretary serves a two-year term unless a one-year term is set by resolution. If the secretary or clerk is absent from any meeting or refuses to perform his or her duties, a secretary or clerk pro tempore, who need not be a member of the board, is elected. 105 ILCS 5/10-5, 5/10-6, 5/10-14.

#### 4. [2.6] Vice President

The vice president of a board of education is elected by the members from among their number for a term of two years unless a one-year term is set by resolution. The vice president performs the duties of the president if there is a vacancy in the office of the president or in the case of the president's absence or inability to act. 105 ILCS 5/10-13.1. If both the president and vice president are absent or unable to act, a president pro tempore is appointed. 105 ILCS 5/10-13.

#### 5. [2.7] Treasurer

The qualifications and methods for electing or designating a school treasurer depend on whether the district is in Cook County (Class II) or in one of the other counties in Illinois (Class I). 105 ILCS 5/8-1.

In Class I counties (those counties outside Cook County), each seven-member school board may either elect one of its members to serve as treasurer for a period of one year or appoint someone who is not a member of the school board as its treasurer.

An appointed nonmember treasurer serves at the pleasure of the board and therefore has no term of office. This type of treasurer may be paid and may but need not be a member of the school district staff. An appointed nonmember treasurer must be at least twenty-one years of age, of "approved integrity," and not a member of the county board of school trustees. 105 ILCS 5/8-1(b). Note that two or more districts may appoint the same treasurer. *Id.*

In Cook County (Class II), the township board of trustees of schools appoints a treasurer, who is also "ex-officio clerk" of the board of trustees, for a two-year term beginning and ending on the first of July. 105 ILCS 5/8-1(a). The treasurer acts for all school districts that are entirely within the township. For school districts located in two or more townships, the board of education may select as its treasurer the township treasurer of any of the townships in which it is located. The treasurer shall be a resident of the township and may be a trustee or school board member simultaneously, but if the treasurer serves both roles, he or she cannot receive compensation for his or her duties as treasurer. 105 ILCS 5/8-1(c). The official act of the election of a treasurer must be duly recorded, as failure of the record to reflect the election or reelection is evidence that it did not occur. (This requirement likely also would apply to school boards either electing or appointing treasurers in Class I county school districts as well as in Class II county school districts that have withdrawn from the jurisdiction of the township treasurer and trustees of schools.) *Otey v. Westerman*, 276 Ill.App. 395 (4th Dist. 1934).

Each treasurer in a Class I county school district appointed for his or her first term must have a financial background or related experience or twelve semester hours of credit of college level accounting. 105 ILCS 5/8-1(d). In a Class II county (Cook County), any treasurer appointed for a first term must be a certified public accountant or a "certified chief school business official." 105 ILCS 5/8-1(e). Experience as a township treasurer in a Class II county school unit prior to July 1, 1989, is deemed the equivalent of certification. *Id.*

Before being qualified to do his or her duties, the School Code requires that each school treasurer execute a bond conditioned on the faithful discharge of the treasurer's duties, with two or more persons who are not township trustees having an interest in real estate as sureties or a surety company authorized to do business in Illinois. No part of the state or other school fund may be paid to any school treasurer unless the bond requirements have been fulfilled. 105 ILCS 5/8-2.

Section 8-1 of the School Code provides that in Class II county school units, the trustees of schools may remove the treasurer for sufficient cause. 105 ILCS 5/8-1(a). Section 8-1 also provides that in Class I county school units, an appointed treasurer other than a member of the board shall serve at the pleasure of the board and thus may be removed at any time. *Id.*

School districts in Cook County may withdraw from the jurisdiction of the township treasurer and trustees of schools if the voters of each school district under the jurisdiction of the township treasurer and trustees of schools vote in favor of such action by referendum. 105 ILCS 5/5-1(b). Section 5-1 of the School Code establishes conditions and procedures for such withdrawal from and abolition of the township treasurer's office and also provides, in its last paragraph, that no mandate waiver of any provision in that section may be requested.

### C. Disqualification of Board Members and Creation of Vacancies

#### 1. [2.8] Generally

A person may be disqualified from serving in office as the result of an event that eliminates the individual's qualifications. In general, a board member who is in all respects legally appointed and qualified to exercise the office is a de jure officer. *People v. Brautigan*, 310 Ill. 472, 142 N.E. 208 (1923). The election of an unqualified individual to the board is invalid. When a board member holds office under colorable authority even though that individual lacks the statutory qualifications, that member is a de facto officer. *Norton v. Shelby County*, 118 U.S. 425, 30 L.Ed. 178, 6 S.Ct. 1121 (1886). The doctrine of de facto officers generally will result in the validation of official acts of the de facto officers, allowing the public body to function despite a defect in the appointment of the official. *Brautigan, supra*. See also *Pittman v. Chicago Board of Education*, 860 F.Supp. 495, 504 (N.D.Ill. 1994), *aff'd*, 64 F.3d 1098 (7th Cir. 1995).

The question as to the qualification or disqualification of a board member or a candidate for election does not arise unless a challenge to the member's authority to act results in a determination that prevents the board member from being elected or appointed or from performing his or her duties. This may occur in various ways. For example, the secretary of the board may determine from nominating papers offered for filing that the intended candidate is not a legal resident or lacks some other required qualification and refuse to accept the papers for filing on the grounds that they do not comply with the requirements of the statute. 105 ILCS 5/9-10. The right of the candidate to have his or her name on the ballot may be raised in an election challenge. 10 ILCS 5/10-8. After the individual takes office, his or her right to hold office also may be challenged in a quo warranto action. 735 ILCS 5/18-101, *et seq.*

Absent a legal challenge to his or her qualifications, a board member not legally qualified nevertheless may perform the duties of the office. As far as the public and third parties dealing with the school district are concerned, the acts of the board member are valid as long as the individual has colorable or apparent authority to hold the office by right of appointment or election. *Howard v. Burke*, 248 Ill. 224, 93 N.E. 775 (1910). In the absence of some sort of apparent authority, the acts of the board member may be held void as to the public and third parties dealing with the school district.

## **2. [2.9] School Code Definition of Vacancy**

Section 10-11 of the School Code provides that elective offices become vacant if any of the following events occurs during a board member's term:

- 1. The death of the incumbent.**
- 2. His or her resignation in writing is filed with the Secretary or Clerk of the Board.**
- 3. His or her becoming a person under legal disability.**
- 4. His or her ceasing to be an inhabitant of the district for which he or she was elected.**
- 5. His or her conviction for an infamous crime, or of any offense involving a violation of official oath, or of a violent crime against a child.**
- 6. His or her removal from office.**
- 7. The decision of a competent tribunal declaring his or her election void.**
- 8. His ceasing to be an inhabitant of a particular area from which he was elected, if the residential requirements contained in [the School Code] are violated. 105 ILCS 5/10-11.**

Section 10-11 of the School Code also states, "No elective office except as herein otherwise provided becomes vacant until the successor of the incumbent has been appointed or elected . . . and qualified." *Id.*

Section 10-11 of the School Code provides that a vacancy in office occurs when an elected official is removed from office. Illinois has no provision permitting recall, impeachment, or removal of a school board member by direct public action or decision during a term of office. The power to remove a member of a school board from office for willful failure to perform his or her official duties is given to the regional superintendent under 105 ILCS 5/3-15.5. *See People ex rel. Kolker v. Blair*, 8 Ill.App.3d 197, 289 N.E.2d 688 (5th Dist. 1972).

A person convicted of a felony, bribery, perjury, or other “infamous crime” in any court is ineligible to continue in office. 5 ILCS 280/1. The Illinois Criminal Code no longer defines the class of “infamous crimes.” However, what constitutes an “infamous crime” is subject to judicial decision in light of the common law at the time of the adoption of the Illinois Constitution. *People ex rel. Keenan v. McGuane*, 13 Ill.2d 520, 150 N.E.2d 168, *cert. denied*, 13 Ill.2d 520 (1958).

Although *McGuane* was decided before the adoption of the present Illinois Constitution, it is likely still good law. *McGuane* involved conviction of a county assessor of conspiracy to evade and the evasion of personal and corporate income taxes. The court explained that the felony was within a classification inconsistent with commonly accepted principles of honesty and decency or a crime involving “moral turpitude” and thus constituted an “infamous crime,” conviction of which resulted in a vacancy. The appeal of the conviction did not stay the operation of constitutional and statutory provisions creating the vacancy in the office.

In *People ex rel. City of Kankakee v. Morris*, 126 Ill.App.3d 722, 467 N.E.2d 589, 592, 81 Ill.Dec. 718 (3d Dist. 1984), the court, citing *McGuane*, *supra*, 150 N.E.2d at 175 – 176, explained: “Determining if a crime is infamous under the constitution and creates a vacancy in office is not an exclusive legislative function. The determination is subject to judicial decision in light of the common law.” The court in *Morris* concluded that a felony is “infamous” when “it is inconsistent with commonly accepted principles of honesty and decency, or involves moral turpitude.” 467 N.E.2d at 592.

If a final order reverses the conviction, the officer shall be reinstated for the duration of the term of office remaining. 5 ILCS 280/1.

### 3. Vacancies Created by Violations of Statutes

#### a. [2.10] Official Misconduct

Any public officer or employee, including school board members, forfeits his or her office upon conviction for the offense of official misconduct. 720 ILCS 5/33-3. The elements of the offense are that an officer in his or her official capacity

**(a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or**

**(b) Knowingly performs an act which he knows he is forbidden by law to perform; or**

**(c) With intent to obtain a personal advantage for himself or another, . . . performs an act in excess of his lawful authority; or**

**(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law. *Id.***

In regard to §33-3(c), see *People v. Scharlau*, 141 Ill.2d 180, 565 N.E.2d 1319, 152 Ill.Dec. 401 (1990), cert. denied, 111 S.Ct. 2892 (1991), and *Wright v. City of Danville*, 174 Ill.2d 391, 675 N.E.2d 110, 221 Ill.Dec. 203 (1996). A public officer convicted of this offense not only forfeits his or her office but also commits a Class 3 felony. 720 ILCS 5/33-3.

It also should be noted that Article 33E of the Criminal Code, 720 ILCS 5/33E-1, et seq., prohibits interference with public contract submission and award and improper acquisition or disclosure of bidding information by a public official, designating these actions as Class 3 or Class 4 felonies. 720 ILCS 5/33E-5, 5/33E-6. An Article 33E violation can operate as a §33-3 violation (knowingly performing an act known to be forbidden by law) and also lead to a forfeiture of office.

*b. [2.11] Interest in School District Contracts*

Under §10-9 of the School Code, a school board member shall not be interested either directly or indirectly in his or her own name or in the name of any other person, association, trust, or corporation in any contract, work, or business of the school district or in any sales or purchases of the school district. 105 ILCS 5/10-9. Several narrowly drawn exceptions to this general restriction are provided in §10-9 and are discussed in more detail in Chapter 6 of this handbook. Note that a parallel provision that deals with officers in general appears in the Public Officer Prohibited Activities Act, 50 ILCS 105/0.01, et seq. Any board member who violates these provisions is guilty of a Class 4 felony and will be removed from office. 105 ILCS 5/10-9; 50 ILCS 105/3.

*c. [2.12] Incompatible Offices*

Acceptance by a public official of an incompatible office is regarded, according to the common-law rule, as a resignation, vacation, or abandonment of the first office. *People ex rel. Stephen v. Hanifan*, 96 Ill. 420 (1880); *People v. Bott*, 261 Ill.App. 261 (2d Dist. 1931). But see *People v. Wilson*, 357 Ill.App.3d 204, 828 N.E.2d 1214, 293 Ill.Dec. 716 (3d Dist. 2005). The principle of incompatible offices is thoroughly discussed in Chapter 6 of this handbook.

*d. [2.13] Violation of Working Cash Fund Provisions*

Violation of working cash fund provisions found in 105 ILCS 5/20-1, et seq., also results in the forfeiture of office. 105 ILCS 5/20-6. A full discussion on working cash fund provisions can be found in Chapter 4 of this handbook.

*e. [2.14] Moving from District or Area*

A vacancy is created on the board if a board member changes residency from the district or particular area from which he or she was elected. 105 ILCS 5/10-10. See *Delk v. Board of Election Commissioners of City of Chicago*, 112 Ill.App.3d 735, 445 N.E.2d 1232, 68 Ill.Dec. 379 (1st Dist. 1983). See also *Dillavou v. County Officers Electoral Board of Sangamon County*, 260 Ill.App.3d 127, 632 N.E.2d 1127, 198 Ill.Dec. 516 (4th Dist. 1994); *Walsh v. County Officers Electoral Board of Cook County*, 267 Ill.App.3d 972, 642 N.E.2d 843, 204 Ill.Dec. 942 (1st Dist. 1994) (temporary residence).

*f. [2.15] Failure To File Statement of Economic Interest*

5 ILCS 420/4A-101 and 420/4A-105 require a member of a school board or a district employee to file a statement of economic interest by May 1 of each year unless the member or employee already has filed the statement for the school district in that calendar year. A board member may have filed the statement as a candidate for election to the board in the same calendar year.

5 ILCS 420/4A-107 provides that failure to file a statement of economic interest within the time permitted shall result in a forfeiture of the office. Under 5 ILCS 420/4A-105, the Illinois Secretary of State or the county clerk is required to issue a notice to any official required to file a statement who has not filed by the deadline. If the requisite notice is not given by the Secretary of State or the county clerk, no forfeiture of office will result as long as a statement is filed within 30 days of actual notice of the failure to file. Section 4A-107 also mandates that action in quo warranto be brought by the Attorney General or the state's attorney with respect to officers who have failed to file within the time given. The notice to be given by the Secretary of State or county clerk is to be given within seven days after the filing date (currently May 1), and persons required to file and who are given this notice must file by May 15. 5 ILCS 420/4A-105. Late filings are subject to fines.

#### **4. [2.16] Filling Vacancies**

Whenever a vacancy occurs on either a board of directors or board of education, the remaining members shall notify the regional superintendent of that vacancy within 5 days after its occurrence and shall proceed to fill the vacancy until the next regular school election. At the next regular school election, a successor shall be elected to serve the remainder of the unexpired term. 105 ILCS 5/10-4, 5/10-10. However, if the vacancy occurs on a board of education with less than 868 days remaining in the term or if the vacancy occurs less than 88 days before the next regularly scheduled election for this office, then the person so appointed shall serve the remainder of the unexpired term, and no election to fill the vacancy shall be held. *Id.*

The newly appointed or elected member must have the same residential qualifications as the person being replaced. For example, if a certain number of the board members must be elected from a particular geographical area of the school district and if a member from that area resigns, then the new member must be from the same area. *Id.* Should a board of education fail to appoint a new member within 45 days after the vacancy occurs, the regional superintendent of schools shall fill the vacancy within 30 days. *Id.* In the case of a vacancy on a board of directors, the regional superintendent, upon the members' failure to file the vacancy within 30 days, shall make the appointment within the next 30 days to fill the vacancy. 105 ILCS 5/10-4(e). If the regional superintendent then fails to fill the vacancy, it will be filled at the next regular election.

Note that an unconditional resignation of a board member becomes irrevocable at the time it is submitted and cannot later be withdrawn. *See Weber v. Board of Fire & Police Commissioners of Village of Wheeling*, 204 Ill.App.3d 358, 562 N.E.2d 318, 149 Ill.Dec. 854 (1st Dist. 1990); *People ex rel. Coker v. Owen*, 116 Ill.App.3d 506, 451 N.E.2d 1021, 71 Ill.Dec. 867 (5th Dist. 1983). A resignation can be tendered with an effective date to occur in the future, but the 45-day

period for filling the vacancy arguably begins to run upon receipt of the resignation. A conditional resignation may be withdrawn until it is accepted by action of the board, and thus the 45-day period does not begin to run until acceptance of the resignation. *See Cole v. McGillicuddy*, 21 Ill.App.3d 645, 316 N.E.2d 109 (1st Dist. 1974); *City of Chicago ex rel. Martin-Trigona v. O'Malley*, 69 Ill.2d 474, 372 N.E.2d 671, 14 Ill.Dec. 475 (1978).

In both board of director and board of education districts, the school board shall make the appointments to fill vacancies in the office of secretary (or clerk) or vice president as if it were making an initial appointment. The same procedure is used for the office of president for board of director districts. 105 ILCS 5/10-5, 5/10-13 through 5/10-14.

For board of education districts, a vacancy in the office of president is to be filled by the vice president. 105 ILCS 5/10-13.1. The School Code is silent on the situation when both the office of president and vice president become vacant at the same time, but it seems logical that those offices would be filled by the board as if the initial appointments were being made. In Cook County, in the event of a vacancy in the office of treasurer, the township trustees of schools shall elect a treasurer for the unexpired term in school districts that have not withdrawn from the jurisdiction of the trustees of schools. In Cook County school districts that have so withdrawn and in all other counties, the school board shall appoint a successor treasurer. 105 ILCS 5/8-1.

#### **D. Compensation and Expenses of Board Members**

##### **1. [2.17] Board Members**

Members of school boards may not receive compensation for their services. The School Code provides that school directors or other school officers performing like duties shall receive “no pecuniary compensation.” 105 ILCS 5/22-1. Although 105 ILCS 5/10-10 provides for a board of education “serving without compensation except as herein provided,” no compensation is provided for at other locations in the School Code except for compensation of the secretary or clerk, as noted in §2.18 below, when the secretary or clerk is also a board member.

The school board, however, has the power to advance to its members the “anticipated actual and necessary expenses” incurred pursuant to 105 ILCS 5/10-22.32 for attendance at the following:

- 1. Meetings sponsored by the State Board of Education or by the regional superintendents of schools,**
- 2. County or regional meetings and the annual meeting sponsored by any school board association complying with the provisions of Article 23 of [the School Code (105 ILCS 5/23-1, *et seq.*)], and**
- 3. Meetings sponsored by a national organization in the field of public school education.**

“Actual and necessary expenses” are those reasonably anticipated to be incurred on the days necessary for travel to and from and for attendance at qualifying meetings. *Id.* If expenses are advanced, the member must submit an itemized verified expense voucher showing the amount of his or her actual expenditures with receipts attached when possible. When money is advanced but not required for actual reasonable expenses, the member shall refund the excess amount. The member also shall be reimbursed if the actual reasonable expenses exceed the amount advanced. *Id.* The same statutory section specifically prohibits advancing or reimbursing any expenses for anyone other than a board member (or eligible employee).

## **2. [2.18] Secretary or Clerk**

The secretary, if not a member of the board, may receive reasonable compensation as fixed by the board of education before his or her election. If the secretary is a member of the board, he or she may receive not more than \$500 per year as fixed by the board. 105 ILCS 5/10-14, 5/10-22.2. A clerk of a board of directors may receive reasonable compensation for services as set by the board of directors. 105 ILCS 5/10-22.2.

## **3. [2.19] Treasurer**

Each school treasurer will receive full compensation for his or her services at an amount fixed before the treasurer’s appointment, and this compensation may not be decreased during the treasurer’s term of office. 105 ILCS 5/8-3. However, in Class I county school units (all counties other than Cook County) and Class II county school units that have withdrawn from the jurisdiction and authority of the trustees of schools pursuant to 105 ILCS 5/5-1, a school board may elect one of its members to serve as treasurer “without salary.” 105 ILCS 5/8-1(b).

In Cook County (Class II), the township trustees of schools appoint the school treasurer for districts that have not withdrawn from the jurisdiction and authority of the trustees of schools. The trustees are required to appropriate and pay the compensation of the treasurer from the income of the permanent township fund if it is sufficient. If the permanent township fund is not sufficient, the additional amount needed may be taken from the total of other funds subject to distribution, with each school district being charged its share of any additional amount required in the proportion that the amount of school funds of the district handled by the township school treasurer bears to the total amount of all school funds handled by the treasurer. 105 ILCS 5/5-17.

Further, 105 ILCS 5/8-4 provides that each elementary school district, community high school district, and township high school district shall pay a proportionate share of the compensation of the township treasurer serving the district or districts. This compensation is determined by dividing the total amount of all school funds handled by the township treasurer by the amount of funds belonging to each elementary or high school district. *Id.*

### III. SCHOOL BOARD MEETINGS

#### A. Organizational Meeting of a New School Board

##### 1. [2.20] Generally

The School Code directs that, within 28 days after a board member election, the board meet and organize. 105 ILCS 5/10-5. Although the Code provides that a meeting shall be held within 28 days, it does not state how the precise time of the meeting is to be determined.

The Open Meetings Act provides that, at the beginning of each calendar or fiscal year, the board shall prepare a schedule of all its regular meetings for the year. 5 ILCS 120/2.03. The board may treat the organizational meeting as a regular meeting and set the meeting date in its annual calendar. If any regular meeting date shown in the board's calendar falls within this 28-day period, even though the calendar does not designate it as an organizational meeting, the new board may be organized at that meeting. Of course, the organizational meeting must be held after the canvass of the election. See §2.21 below.

If the board's calendar of regular meetings does not provide for a meeting at an appropriate time within the 28-day period, the board, at its regular meeting immediately before the annual board member election, should adjourn its regular meeting to a date within the 28-day period and indicate that the organization of the board will take place at that time.

In the absence of such action by the board, a special meeting may be called for the purpose of organizing the new board. This could be done by the president of the outgoing board since he or she retains the power to act until his or her successor has been appointed or elected. 105 ILCS 5/10-11. This special meeting also can be called by any three members of the newly elected board of education or two members of a newly elected board of school directors. 105 ILCS 5/10-6, 5/10-16. The organizational meeting also can be held pursuant to waiver of notice and consent to meeting signed by all the members of the new board, with public notice given as for a special meeting. 5 ILCS 120/2.02. If the district has a website that its staff maintains, the district must post the agenda for every regular meeting at least 48 hours in advance and until the meeting has concluded. *Id.*

##### 2. [2.21] Election of Officers

The president and secretary or clerk of the outgoing board may act as temporary chairperson and secretary or clerk of the organizational meeting since these officers retain their powers until their respective successors are elected at the organizational meeting. If these officers are not present or fail to act, a temporary chairperson and temporary secretary or clerk may be selected.

The president of the board is the first officer to be elected at the organizational meeting. In board of education districts, the term of the president is fixed at two years unless the board adopts a resolution fixing the president's term at one year. 105 ILCS 5/10-13. In board of director districts, the statute makes no mention of the length of the term, but because directors are elected

in odd-numbered years, the president's term should be fixed by resolution at either one or two years. 105 ILCS 5/10-4. In both board of director and board of education districts, the president must be a member of the board. 105 ILCS 5/10-5, 5/10-13. As soon as the president is elected, the temporary chairperson has no further duties, and the new president should preside at the meeting.

In board of education districts, the board then shall elect a vice president from among the members. The vice president serves a two-year term unless the board by resolution establishes a policy for the term of office to be one year. 105 ILCS 5/10-13.1.

Immediately following the election of the president (and vice president in board of education districts), the amount of compensation to be received by the board clerk or secretary is to be fixed since the School Code requires that this salary be determined prior to the election of the clerk or secretary. 105 ILCS 5/10-14.

In board of director districts, a clerk is then elected, and as in the case of the president, his or her term of office should be considered to be either one or two years as established by resolution. 105 ILCS 5/10-5. The clerk must be a board director. In board of education districts, a secretary is elected and serves for two years unless a one-year term is adopted by resolution. 105 ILCS 5/10-14. It is not required that the secretary be a member of the board of education. *Id.*

The election of the president and secretary should be by an open vote and not by any form of secret ballot. The School Code does not provide for a secret vote in officer elections, and the declared public policy of Illinois, as expressed in the Open Meetings Act, is that all actions of public bodies be taken openly except in those instances enumerated in that Act. 5 ILCS 120/1.

The names of the officers so elected should be reported at once to the school treasurer and to the regional superintendent of schools for the county. 105 ILCS 5/10-5.

## **B. Meeting Requirements of the School Code and the Open Meetings Act**

### **1. [2.22] Statement of Policy**

The policy statement of the Open Meetings Act reads as follows:

**It is the public policy of this State that public bodies exist to aid in the conduct of the people's business and that the people have a right to be informed as to the conduct of their business. In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.**

**The General Assembly further declares it to be the public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way. Exceptions to the public's right to attend exist only in those limited circumstances where the General Assembly has specifically determined that the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.**

**To implement this policy, the General Assembly declares:**

- (1) It is the intent of this Act to protect the citizen’s right to know; and**
- (2) The provisions for exceptions to the open meeting requirements shall be strictly construed against closed meetings. 5 ILCS 120/1.**

The requirements of the Open Meetings Act must be met. Any person, including the state’s attorney, may bring a civil suit for an illegal meeting within 60 days of the meeting or within 60 days of the discovery of a violation by the state’s attorney. 5 ILCS 120/3(a).

Amendments to the Open Meetings Act require that every school district identify and direct certain employees or officers to receive training on the Act’s requirements. 5 ILCS 120/1.05. The amendments also vest a new Public Access Counselor within the Illinois Attorney General’s office to oversee allegations of violations of the Open Meetings Act. 5 ILCS 120/3.5.

**2. [2.23] Time and Place of Meeting**

Regular board of director meetings are to be held at the time and place the board of school directors designates, and special meetings are held at the call of its president or of any two directors. 105 ILCS 5/10-6. The School Code does not specify a method for the service of notice of special meetings for board of director districts, but it is suggested that notice be served in the same manner as in the case of board of education districts.

The School Code provides that a board of education at its organizational meeting fix the time and place for the holding of regular meetings. 105 ILCS 5/10-16. Special meetings of a board of education may be called by the president or any three members of the board. Notice of a special meeting must be given in writing, and the notice must state the time, place, and purpose of the meeting. Notice may be served by mail 48 hours before the meeting or by personal service 24 hours before the meeting. *Id.*

It is not necessary that notice of a special meeting be given to board members when all members waive notice and consent to the holding of the meeting. *Olney School District v. Christy*, 81 Ill.App. 304 (4th Dist. 1899). However, public notice pursuant to the Open Meetings Act is still required.

Only matters specified in the call and agenda of a special meeting should be discussed and acted on at the meeting. The Open Meetings Act requires that public notice of a special meeting contain the agenda for the meeting. 5 ILCS 120/2.02. That section of the Act states, however, that “the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda.” *Id.*

Meetings that are required by the Open Meetings Act to be public must be held at a time and place convenient and open to the public and may not be held on a legal holiday, unless a regular meeting date falls on that legal holiday. In that case, a meeting may be held on that date. 5 ILCS 120/2.01. An Illinois appellate court has held that a school board did not violate the Act by

rescheduling a regular board meeting that fell on a legal holiday and at the same time scheduling a special meeting for the holiday. *Argo High School Council of Local 571 v. Argo Community High School District 217*, 163 Ill.App.3d 578, 516 N.E.2d 834, 114 Ill.Dec. 679 (1st Dist. 1987).

A school board may adjourn a regular or special meeting to a date prior to the time fixed for its next regular meeting. An adjourned meeting may be adjourned further provided the adjournment is taken to a date prior to the time of the next regular board meeting. A quorum of the school district's members must be physically present. 5 ILCS 120/2.01. If a quorum is not present at the time a regular meeting is to be held, those members present, by a majority vote, may adjourn the meeting to a specified time and place provided that the date to which adjournment is taken is prior to the date of the next regular board meeting. *People ex rel. Scott v. Nelson*, 252 Ill. 514, 96 N.E. 1071 (1911).

There are few cases that address what the phrase "places which are convenient and open to the public" means. 5 ILCS 120/2.01. But in one Illinois case, *Gerwin v. Livingston County Board*, 345 Ill.App.3d 352, 802 N.E.2d 410, 418, 280 Ill.Dec. 485 (4th Dist. 2003), the court said that the answer was "between . . . a broom closet and a football stadium." The county board held a controversial hearing on a landfill in its boardroom, which accommodated fewer than 20 spectators, and permitted landfill proponents early access to the few spaces, leaving about 150 people unable to attend, hear, or see the meeting. While the trial court dismissed the plaintiffs' complaint that the Open Meetings Act was violated, the appellate court reversed the dismissal, finding that plaintiffs had pleaded a violation of the Open Meetings Act.

### 3. Notice of Meetings

#### a. [2.24] Regular Meetings

At the beginning of each calendar or fiscal year, the school board must give public notice of the schedule of all its regular meetings for the year. The schedule shall state the times, dates, and places of the meetings and must be posted at the principal office of the district or, if there is no such office, at the building in which the meeting is to be held. 5 ILCS 120/2.02, 120/2.03.

In addition, P.A. 94-28 (eff. Jan. 1, 2006) requires a school district that has a website maintained by the full-time staff of the district to post notice on the website of all meetings of the board of education and the agenda for all regular meetings. 5 ILCS 120/2.02. Notice of the annual schedule of meetings must remain on the website until a new schedule is approved; any notice and agenda of a regular meeting posted on the website must remain posted until the meeting is concluded. *Id.* However, the failure to post notice or the agenda of a meeting does not invalidate the meeting or any actions taken at the meeting. *Id.*

An agenda for each regular meeting must be posted at the principal office of the school district and also at the location at which the meeting will be held, at least 48 hours in advance of the meeting. 5 ILCS 120/2.02. Although the Open Meetings Act states that "[t]he requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda" (*id.*), in *Rice v. Board of Trustees of Adams County, Illinois*, 326 Ill.App.3d 1120,

762 N.E.2d 1205, 261 Ill.Dec. 278 (4th Dist. 2002), the court held that no action could be taken on an item not specifically set forth in the agenda. Thus, under *Rice*, matters not on the agenda may be discussed but not decided.

If a newly elected board decides to change the schedule of regular meetings, it must give ten days' notice of the new schedule in a newspaper of general circulation. If the new board does not change the schedule, it should ratify the schedule adopted by the former board in order to satisfy the requirements of §10-16 of the School Code, 105 ILCS 5/10-16. Additionally, if the regular meeting schedule is changed, then ten days' notice should be given by publication and posting as noted above. In districts with a population of less than 500 where no newspaper is published in the area, the publication requirement is satisfied by posting the notice in at least three prominent places in the district. 5 ILCS 120/2.03. See also §2.26 below.

*b. [2.25] Adjourned, Rescheduled, Reconvened, and Special Meetings*

Notice of adjourned, rescheduled, reconvened, and special meetings must be given at least 48 hours before the meeting by posting a notice that includes the agenda for the meeting at the principal office of the district or, if there is no principal office, at the building where the meeting is to be held. 5 ILCS 120/2.02. However, no notice is necessary when a meeting that was open to the public (and, presumably, properly noticed) is reconvened within 24 hours or when an announcement of the time and place of the reconvened meeting was made at the original meeting and there is no change in the agenda. *Id.*

*c. [2.26] Emergency Meetings*

A meeting held in the event of a "bona fide emergency" is exempt from the 48-hour-notice requirements, but news media that have filed annual requests for notice of meetings, as discussed in §2.27 below, must be given notice prior to the holding of the meeting. 5 ILCS 120/2.02. It is clear that a "bona fide emergency" requires a reason more substantial than expedience or convenience of the public body. *See, e.g., Mead School District No. 354 v. Mead Education Ass'n*, 85 Wash.2d 140, 530 P.2d 302 (1975) (closing of schools by teachers' strike did not authorize meeting with less than 48 hours' notice under emergency exemption to Washington Open Public Meetings Act). Although the Open Meetings Act recognizes an emergency meeting, there is no provision for such a meeting under the School Code except as a special meeting called with at least 48 or 24 hours' notice as discussed in §2.25 above. At minimum, any action taken at an emergency meeting called with less than 48 hours' notice should be ratified at a regular or special meeting called with at least 48 hours' notice.

*d. [2.27] Notice to News Media*

Copies of the posted notice of regular meetings, rescheduled meetings, special meetings, and adjourned or reconvened meetings must be given to any news medium that has filed an annual request for notice. 5 ILCS 120/2.02.

These news media also must be given the same notice of all special, rescheduled, or adjourned or reconvened meetings in the same manner as is given to board members, provided

that the news medium has given the school board an address within the territorial jurisdiction of the school board at which the notice may be given. Proper notice must be given of all meetings, whether they are open or closed to the public. *Id. See, e.g., Cox Enterprises, Inc. v. Board of Trustees of Austin Independent School District*, 706 S.W.2d 956 (Tex. 1986). Although early caselaw permits board members to waive notice to themselves for special meetings, there is no provision for waiving public notice or notice to news media.

#### 4. [2.28] Quorum and Voting Procedures

A majority of the full membership of the board constitutes a quorum in both board of director and board of education districts. 105 ILCS 5/10-6, 5/10-12.

Unless otherwise provided by statute, when a vote is taken on any measure before the board, a quorum being present, a majority of the votes of the members voting on the measure shall determine the outcome. 105 ILCS 5/10-12. Thus, if a quorum is present and if several members fail to vote, a measure may be carried by the affirmative vote of those members who actually voted even though only one in number. *Launtz v. People ex rel. Sullivan*, 113 Ill. 137 (1885); *Bunsen v. County Board of School Trustees of Lake County, Illinois*, 48 Ill.App.2d 291, 198 N.E.2d 735 (2d Dist. 1964). The general rule is that abstentions are counted with the majority. *See Prosser v. Village of Fox Lake*, 91 Ill.2d 389, 438 N.E.2d 134, 63 Ill.Dec. 396 (1982). However, in several instances, the relevant statute provides that a proposition must be carried by a majority vote or greater of all board members, not merely a majority of those voting on the proposition. These statutes are exceptions to the general rule and require the requisite number of affirmative votes. *See Jackson v. Cook County Regional Board of School Trustees*, 282 Ill.App.3d 191, 667 N.E.2d 1335, 217 Ill.Dec. 759 (1st Dist. 1996); *County of Kankakee v. Anthony*, 304 Ill.App.3d 1040, 710 N.E.2d 1242, 238 Ill.Dec. 140 (3d Dist. 1999). Thus, if a statute requires a majority vote of all board members or the affirmative vote of a majority of the board, an abstention has the effect of a “no” vote.

A board may reconsider and rescind action that it has taken unless, by reason of the prior action, persons have acquired rights that would be prejudiced if the board’s original action were nullified. *People ex rel. MacMahon v. Davis*, 284 Ill. 439, 120 N.E. 326 (1918); *City of Kankakee v. Small*, 317 Ill. 55, 147 N.E. 404 (1925); *In re Annexation of Certain Territory to Village of North Barrington*, 8 Ill.App.3d 50, 288 N.E.2d 242 (2d Dist. 1972); *Ceresa v. City of Peru*, 133 Ill.App.2d 748, 273 N.E.2d 407 (3d Dist. 1971). *See also International Society for Krishna Consciousness, Inc. v. City of Evanston*, 89 Ill.App.3d 701, 411 N.E.2d 1030, 44 Ill.Dec. 664 (1st Dist. 1980), *cert. denied*, 102 S.Ct. 358 (1981).

In all cases, the president of the board is entitled to make motions, second motions, participate in the debate, and vote, and the secretary, if a board member, may do likewise as there is nothing in the School Code depriving these officers of their prerogatives as board members. However, in a highly controversial matter when the president wishes to make various motions, he or she may relinquish temporarily his or her position as chairperson and resume after the matter in question has been disposed of.

## 5. [2.29] Rules of Procedure

The School Code provides that the president of the board shall preside at all meetings and that the secretary shall keep a reliable record of the official acts of the board. 105 ILCS 5/10-7, 5/10-13, 5/10-14. Otherwise, the School Code specifies no rules of procedure to be followed at meetings. However, the Code does authorize school boards to adopt rules and regulations for the management and government of the schools under their jurisdiction. A board, therefore, may properly prescribe rules of procedure to be used at its board meetings. Furthermore, it has been held that a school board has “ample and full” rulemaking power. *Beck v. Board of Education of Harlem Consolidated School District No. 122*, 27 Ill.App.3d 4, 325 N.E.2d 640, 643 (2d Dist. 1975), *aff’d*, 63 Ill.2d 10 (1976). *See also Thomas v. Board of Education of Community Unit School District No. 1 of Pope County*, 117 Ill.App.3d 374, 453 N.E.2d 150, 72 Ill.Dec. 845 (5th Dist. 1983). Rules adopted at the school board must be filed for public inspection in the administrative office of the district. 105 ILCS 5/10-20.5.

Any procedural rules adopted by the board should be fairly simple in nature, and, in general, ROBERT’S RULES OF ORDER or any comparable publication is not recommended because the rules are drafted with much larger bodies in mind and are usually too complex for convenient use. It is recommended that adopted rules state that ROBERT’S RULES will be consulted in the event a situation arises that is not covered in the adopted rules.

## 6. [2.30] Conducting Business and Methods of Action

There is no specific limitation in the School Code as to the business that may be conducted at a regular board meeting, but undoubtedly the board, by rule, could establish reasonable limitations. Many school boards have done so by requiring that new policies or other actions be read twice before adoption. However, public notice of a special, an adjourned and reconvened, or a rescheduled board meeting must contain an agenda under the Open Meetings Act, and the board is limited by the agenda. 5 ILCS 120/2.02. An agenda must be posted for a regular meeting at least 48 hours in advance of the meeting, but the agenda does not preclude consideration of items not specifically set forth. *Id.* Remember, however, that one court has held that “consideration” means discussion but not action on items not specifically set forth. *Rice v. Board of Trustees of Adams County, Illinois*, 326 Ill.App.3d 1120, 762 N.E.2d 1205, 1207, 261 Ill.Dec. 278 (4th Dist. 2002).

Most matters coming before a school board are acted on following a motion and a second, and the substance of the motion generally is stated orally. However, in many instances, the School Code prescribes that action be taken by a resolution containing findings of fact and provisions for certain acts to be done by the school district, in which event the Code should be strictly followed. When a resolution is required, the motion and second should be to adopt a specifically described resolution. A resolution is also appropriate when many items are being covered that direct action by other persons or bodies, as in the case of resolutions calling elections or authorizing the issuance of bonds, tax anticipation warrants, etc.

The School Code requires that on all questions involving the expenditure of money, a ye and nay vote be taken. 105 ILCS 5/10-7. Note that the Code uses the words “involving the

expenditure of money.” [Emphasis added.] Thus, matters being voted on must be passed by a ye and nay vote even though the immediate action taken does not call for the expenditure of money but may subsequently result in money being spent by the school district, such as the approval of a contract. In fact, it is advisable to take a ye and nay vote on all matters of significance to indicate the precise vote by which the measure was adopted and to show how each board member voted.

An Illinois appellate court held that the requirement of a ye and nay vote is mandatory and that failure to observe the statute is fatal. *Ready v. Board of Education, School District No. 103, Madison County*, 297 Ill.App. 342, 17 N.E.2d 635 (4th Dist. 1938). It also has been held that this requirement cannot be waived, and it has not been repealed by provisions concerning the appointment, salaries, and tenure of teachers. *Lippincott v. Board of Education of Community Unit School District No. Five of Coles County*, 342 Ill.App. 642, 97 N.E.2d 566 (3d Dist. 1951).

The School Code does not provide for committees, but it is proper for a school board to use committees to assist the work of the board. However, a committee may be authorized only to advise the board or to make recommendations and cannot be empowered to act for the board inasmuch as the board has no authority to delegate its powers of a discretionary nature. *See Board of Education of City of Chicago v. Chicago Teachers Union, Local 1*, 88 Ill.2d 63, 430 N.E.2d 1111, 58 Ill.Dec. 860 (1981); *Board of Education, South Stickney School District 111, Cook County v. Johnson*, 21 Ill.App.3d 482, 315 N.E.2d 634 (1st Dist. 1974); *Lindblad v. Board of Education of Normal School District*, 221 Ill. 261, 77 N.E. 450 (1906); *Paprocki v. Board of Education of McHenry Community High School District No. 156*, 31 Ill.App.3d 112, 334 N.E.2d 841 (2d Dist. 1975). When committees are deemed necessary, it is advisable that the board adopt regulations setting forth what committees are to be appointed and the method by which appointment is to be made. It also should be kept in mind that the business of committees is fully subject to the Open Meetings Act. See 5 ILCS 120/1.02.

## **7. [2.31] Rights of the Public at Meetings**

The Open Meetings Act assures the right of the public generally to attend school board meetings. This includes the right to make a record of the proceedings by tape recorder or otherwise, including video recording. However, school boards may prescribe reasonable rules governing the right to make recordings. 5 ILCS 120/2.05; Op. Att’y Gen. (Ill.) Nos. S-867, S-908 (1975).

A member of the public may not address the board without its permission. However, school boards normally desire hearing from their constituents, and thus it is particularly important in the interest of saving time that a board establish rules in regard to oral presentation by the public and communications such as letters and petitions. Items covered by these rules may include advance notice, location on agenda, and limitation of time. The School Code expressly requires the board to provide time at its regular and special meetings for comments and questions by members of the public and employees of the district. 105 ILCS 5/10-6, 5/10-16. A public comment period is to be subject to “reasonable constraints” under the applicable First Amendment standard. 105 ILCS 5/10-6, 5/10-16.

### C. [2.32] Special Considerations Under the Open Meetings Act

The provisions of the Illinois Open Meetings Act apply essentially to all meetings of public officials, including school officials. While the civil remedies for violations of the Act are varied, a violation of the Act is also a criminal matter — a Class C misdemeanor punishable by a \$500 fine and/or 30 days in jail. 5 ILCS 120/4.

The Open Meetings Act has been in force for over 30 years. The latest, extensively amended version of the Act makes it clear that the Act is premised on the expressly stated public policy of the State of Illinois that public bodies “exist to aid in the conduct of the people’s business and that the people have a right to be informed as to the conduct of their business.” 5 ILCS 120/1. Thus, it is the intent of the Act that their actions be taken openly and that their deliberations be conducted openly. *See People ex rel. Hopf v. Barger*, 30 Ill.App.3d 525, 332 N.E.2d 649 (2d Dist. 1975). While it is clear that the intent of the Act is to maintain an informed public regarding the actions of their public officials, it is also true that particular duties of public officials require nonpublic deliberation. The Act attempts to strike a balance between these competing purposes by providing a number of exceptions, discussed in §§2.37 – 2.45 below.

#### 1. [2.33] Necessity of a Legal Meeting

No official business may be transacted except at a duly constituted regular or special meeting. 105 ILCS 5/10-6. Business attempted to be transacted at a casual meeting of school board members has no legal significance or validity. *Shortal v. School Directors of District No. 27, County of Jersey & State of Illinois*, 255 Ill.App. 89 (3d Dist. 1929). Moreover, action taken at a meeting that does not conform with the Open Meetings Act may be invalidated in a lawsuit brought by a citizen or the state’s attorney. *See* 5 ILCS 120/3; *Lindsey v. Board of Education of City of Chicago*, 127 Ill.App.3d 413, 468 N.E.2d 1019, 82 Ill.Dec. 365 (1st Dist. 1984). *See also Aldridge v. School District of North Platte, Lincoln County, Nebraska*, 225 Neb. 580, 407 N.W.2d 495 (1987); Op. Att’y Gen. (Ill.) No. 95-004.

#### 2. Definition of “Meeting”

##### a. [2.34] “Meeting” or “Nonmeeting”

What constitutes a “meeting” under the Open Meetings Act? A “meeting” is defined as any gathering “whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business.” 5 ILCS 120/1.02.

The recent addition of video and teleconferences, electronic mail, chat, and instant messaging confirms that the Open Meetings Act applies to every type of communication members of a school district board may undertake. Prior to this amendment in 2007, there was question of whether telephone conferences and electronic mail conversations were covered by the Open Meetings Act, but the amendment makes it clear that school district matters discussed through such media are indeed covered.

As an example, consider the following scenario: Following the sudden vacancy in office created by the death of a prominent public official, the elected officials empowered to appoint a person to fill the vacancy began to meet surreptitiously at various locations to discuss this appointment.

At one location, an estimated 15 of the 49 members of the public body with authority to appoint a successor met at night at the ward office of one. However, one of the public officials openly declared that never were more than 12 of these individuals physically present in the same room during discussions on the appointment of a successor. At all times, it was claimed, 3 public officials were in an adjoining room with the door closed, watching sports on television. Whenever one of these 3 individuals entered the room in which the discussions regarding appointment of a successor were taking place, 1 of the existing 12 would leave and join the other 2 in watching television so that never were more than 12 physically present in the same room.

Did these actions constitute a “meeting” under the Open Meetings Act? Under the Act, a meeting is defined as “any gathering . . . of a majority of a quorum of the members of a public body held for the purpose of discussing public business.” 5 ILCS 120/1.02. At least 1 public official present admitted that the purpose of the meeting was to discuss appointments to the vacant office but insisted that no “meeting” within the definition of the Open Meetings Act had taken place. Because this particular public body was comprised of 49 members, 25 members is a quorum, and 13 is a majority of that quorum. As stated, it was claimed that never more than 12 public officials were physically present in the room at one time while 3 others were present in an adjoining room.

While the law is unclear in this area, the Better Government Association felt strongly enough that this gathering was an illegal meeting that it filed a lawsuit challenging the eventual appointment made by the Chicago City Council. The Circuit Court of Cook County held that there was no violation of the Open Meetings Act, and that decision was not appealed. However, the Supreme Court of Minnesota, addressing a similar situation, stated that “serial meetings in groups of less than a quorum for the purposes of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of the statute depending upon the facts of the individual case.” *Moberg v. Independent School District No. 281*, 336 N.W.2d 510, 518 (Minn. 1983).

The circumstances of the gathering described above constitute a gathering that could be subject to the Open Meetings Act. The definition of a gathering of a majority of a quorum as a meeting, if held for the purpose of discussing public business, extends to any situation, like dinners, parties, or even telephone conferences, when some or all the members of a public body participate. While it would seem that spontaneous, informal discussion of public business by the required number of members of a public body at a social gathering would not be considered a meeting within the Act because the Act requires that the members meet with the express purpose of discussing public business, public officials still should be wary of discussing public business among themselves at social events. *See Harris v. Nordquist*, 96 Or.App. 19, 771 P.2d 637 (1989). The Illinois Attorney General has indicated that a gathering unrelated to discussion of public business can be converted to a meeting when the required number of public body members focus their discussion on public business. *See Op. Att’y Gen. (Ill.) No. S-726* (1974).

On the other hand, the U.S. District Court for the Northern District of Illinois, in *Nabhani v. Coglianese*, 552 F.Supp. 657 (N.D.Ill. 1982), concluded that a gathering of all members of a school board for a “political rally” was not a meeting under the Open Meetings Act. The evidence showed that there was no deliberation on school district business but instead a rally focused exclusively on political issues. The court further noted:

**This Court is wary of a finding that candidate[s’] political rhetoric must be devoid of reference to the actions of the body to which they seek election at the peril of rendering them subject to the penalties of an open meetings statute. Such a holding would greatly interfere with the ability of the electorate to make informed choices among candidates.** 552 F.Supp. at 661.

*b. [2.35] E-Mails*

The temptation to use an exchange of e-mails among all board members to discuss district business can be very strong. However, it is important to remember that unlike even telephone participation in a properly noticed meeting, there is virtually no way for the general public to be aware of what is happening as it happens in an e-mail exchange. Therefore, an e-mail exchange involving a majority of a quorum may be found to be a violation of the Open Meetings Act. There is no Illinois caselaw on point, but a Washington case has held that e-mail exchanges among a quorum of a school board sent to decide or deliberate on public business constituted a meeting in violation of Washington’s Open Public Meetings Act. *Wood v. Battle Ground School District*, 107 Wash.App. 550, 27 P.3d 1208 (2001).

The operative phrase here is “contemporaneous interactive” exchange of messages. 5 ILCS 120/1.02. A board member can send an e-mail to all other board members stating his or her position on a matter of public business. Board members can respond directly to that board member. But when they send their responses to the entire board and then another member responds to that and copies everyone, a discussion of public business by a majority of a quorum has occurred without notice to the public or an opportunity for the public to be informed about the discussion as it occurs. Whether an e-mail to and from a group of board members constitutes an “interactive” exchange may depend in part on the time lapse between messages. It appears that if e-mails are sent amongst the group in rapid succession, a contemporaneous interactive exchange has occurred because the members are quickly responding to one another, as they would in person or over the telephone.

While technology may expand to present a solution to this problem, for the present, group e-mails should be confined to notices about meetings or the sending of materials to be discussed at a meeting. Only one-on-one e-mail discussions should take place on policy matters.

Hard copies of substantive e-mails sent or received should be kept in the appropriate subject matter files in case of a Freedom of Information Act request in the future. See §§2.50 – 2.54 below for more discussion of the Freedom of Information Act.

c. [2.36] *Committee Meetings*

The Open Meetings Act applies to all school board committees except collective bargaining committees. 115 ILCS 5/18; 5 ILCS 120/1.02. *See also Pope v. Parkinson*, 48 Ill.App.3d 797, 363 N.E.2d 438, 6 Ill.Dec. 756 (4th Dist. 1977); Op. Att’y Gen. (Ill.) No. 82-030. Further, informal or advisory committees that are not directly accountable to, supervised by, or formally appointed by the school board are not subject to the provisions of the Act. *See Hopf v. Topcorp, Inc.*, 170 Ill.App.3d 85, 527 N.E.2d 1, 122 Ill.Dec. 629 (1st Dist. 1988).

The test to determine whether a meeting of a committee or subcommittee is a “meeting” of a public body under the Act is not whether it consists of less than a majority of a quorum of a public body but rather whether a majority of the quorum of the particular committee itself has gathered to discuss public business. 5 ILCS 120/1.02. *See also People ex rel. Difanis v. Barr*, 83 Ill.2d 191, 414 N.E.2d 731, 46 Ill.Dec. 678 (1980).

The Open Meetings Act does not encompass the informal meetings or conferences of department heads, staff, or employees who are not firmly designated by a public body as a “committee.” These meetings or conferences are not within the Act because the participants do not adopt any resolutions and meet only for the purpose of promoting “good staff work.” *People ex rel. Cooper v. Carlson*, 28 Ill.App.3d 569, 328 N.E.2d 675, 678 (2d Dist. 1975). As well, the mere attendance by a board member at a staff conference does not constitute a “meeting” under the Act, but attendance by enough board members to constitute a majority of a quorum probably would.

**3. [2.37] Closed Meetings**

School board meetings or portions of these meetings may be closed to the public only if the business under consideration falls into one of the specific statutory exceptions outlined in §§2.38 – 2.45 below. Even if a meeting is legally closed to consider business that falls within one of these exceptions, no final action can be taken at a closed meeting; the board must reopen the meeting in order to take a final vote on the matter under consideration. 5 ILCS 120/2(e). The exceptions to the open meeting requirements are to be strictly construed, extending only to subjects clearly within their scope. 5 ILCS 120/2(b). Moreover, the fact that a topic is listed as an exception does not require the public body to close the meeting; rather, it merely authorizes or permits such closure.

The exceptions under the Open Meetings Act that apply to school districts are found at 5 ILCS 120/2(c).

The Open Meetings Act now provides that at any properly noticed open meeting, a public body may hold a closed meeting in accordance with the Act without additional notice. 5 ILCS 120/2a. Despite this permission, it is good public relations policy to indicate whenever possible in the published agenda for a meeting that a closed meeting is planned as well.

A motion to hold a closed meeting must be passed at an open meeting in order to properly conduct the closed meeting, which may be held either on the same day or sometime in the future.

A quorum must be present at the open meeting, and a majority of those members at the meeting must vote in favor of the motion. The specific exception on which the closed meeting is based must be set forth in the motion and publicly disclosed at the time of the vote. *Id.* For example, a motion might read: “To go into a closed meeting to consider the employment of an employee.” Note that the specific exception must be indicated, but the specific matter need not be indicated. For example, in the above motion, the name of the employee does not have to be given. Nor is it necessary to give the specific statutory citation for the exception. *Henry v. Anderson*, 356 Ill.App.3d 952, 827 N.E.2d 522, 292 Ill.Dec. 993 (4th Dist. 2005).

The minutes of the meeting should reflect the vote of each member and the specific exception that justified the closed meeting. Only those topics covered by the particular exception under the Act specified in the motion for the closed session can be discussed. A single vote may serve to authorize a series of closed meetings if each meeting in the series involves the same topics and if the meetings are scheduled to be held within no more than three months from the date the vote is taken. *Id.* Finally, to conduct a closed meeting properly, the notice and minutes requirements set forth above must be met.

The Open Meetings Act now provides that all final action taken by the board in open session on a matter discussed at a closed meeting must be preceded by a public recital of the nature of the matter being considered as well as “other information that will inform the public of the business being conducted.” 5 ILCS 120/2(e). This amendment to the Act makes it clear that a public body may not conduct its business “in code” by voting on measures discussed in closed meetings by agenda number or some other identification that does not describe the matter being voted on.

Since the Open Meetings Act was originally adopted, many questions have been raised regarding certain specific exceptions. Several court decisions have been rendered under the Act, and the Illinois Attorney General has rendered numerous opinions interpreting the Act. Several of these issues are discussed in §§2.38 – 2.45 below.

*a. [2.38] Final Action*

The Open Meetings Act provides that no final action shall be taken at a closed meeting. 5 ILCS 120/2(e). An Illinois appellate court has upheld a vote taken in a closed meeting when another vote was taken later on the same matter in an open meeting. The fact that two votes are taken, one at closed and one at open session, is not a violation of open meetings law. *Jewell v. Board of Education, DuQuoin Community Unit School, District No. 300*, 19 Ill.App.3d 1091, 312 N.E.2d 659 (5th Dist. 1974). *See also Williamson v. Doyle*, 112 Ill.App.3d 293, 445 N.E.2d 385, 67 Ill.Dec. 905 (1st Dist. 1983); *Grissom v. Board of Education of Buckley-Loda Community School District No. 8*, 75 Ill.2d 314, 388 N.E.2d 398, 26 Ill.Dec. 683 (1979).

*b. [2.39] Real Property*

In *People ex rel. Ryan v. Village of Villa Park*, 212 Ill.App.3d 187, 570 N.E.2d 882, 156 Ill.Dec. 406 (2d Dist. 1991), the Second District Appellate Court very narrowly interpreted the exception allowing closed meetings to discuss the acquisition of real estate. The court found that the particular facts in *Ryan* did not fit within the real estate exception because the board was

discussing whether to acquire a parcel, and not how much to pay for it, and thus declared the Villa Park Village Board's closed meeting to be illegal.

The court stated that one of the evils sought to be eliminated by the Open Meetings Act is the ability of public officials to meet behind closed doors and interpreted the real estate exception language to apply only in the following limited instances: "if public agencies are discussing formulating the terms of an offer to purchase specific real estate or discussing the seller's terms, or if [they are] considering strategy for obtaining specific real estate." 570 N.E.2d at 887.

Subsequent to this case, the legislature amended the Open Meetings Act to specify that the exception for the purchase of real property includes "meetings held for the purpose of discussing whether a particular parcel should be acquired." 5 ILCS 120/2(c)(5). We include this case here as an example of courts' narrow readings of Open Meetings Act exceptions.

In *Board of Education School District No. 67 v. Sikorski*, 214 Ill.App.3d 945, 574 N.E.2d 736, 158 Ill.Dec. 623 (1st Dist. 1991), a newly elected school board sought, based on alleged violations of the Open Meetings Act by the previous board, to invalidate a contract to sell a school building. The court held that because the closed session minutes stated only that the board discussed the sale of the school, the previous board had not satisfied the requirement of the Open Meetings Act that a closed session be held only for the purpose of discussing the sale price of school property. However, the court also held that when the issue of the sale of the subject property was discussed later in open meetings, the violation was cured and the sale was validated.

*c. [2.40] Employment or Dismissal of Employees or Officers*

As noted in §2.37 above, the Open Meetings Act authorizes discussion of the employment of an employee or officer in a closed meeting. 5 ILCS 120/2(c). The Attorney General has issued an opinion indicating that this exception allows a discussion of information relating only to the initial employment of an individual. Op. Att'y Gen. (Ill.) No. S-726 (1974). However, an Illinois appellate court disagreed in *People v. Board of Education of District 170 of Lee & Ogle Counties*, 40 Ill.App.3d 819, 353 N.E.2d 147 (2d Dist. 1976), and held that the Act exempts closed meetings regarding renewal or continuation of employment and compensation as well. *See also Vertichio v. Divernon Community Unit School District No. 13*, 198 Ill.App.3d 202, 555 N.E.2d 738, 144 Ill.Dec. 379 (4th Dist. 1990). The question of whether this exception authorizes a closed session at the board's organizational meeting to discuss the election of the new president and other board officers is a controversial one. At least one trial court has held that it does. *See People ex rel. Ryan v. Board of Education of School District 200*, No. 90 MR 33 (DuPage Cty.Cir. 1990). The Attorney General's Office, on the other hand, has taken the public position that these discussions must be in open session.

The present wording of the Act, which took effect June 1, 1995, should make it clear that the Attorney General's position is the one intended by the legislature. Exception 3 states in part that a closed meeting may be held regarding the "selection of a person to fill a public office . . . when the public body is given power to appoint under law or ordinance." 5 ILCS 120/2(c)(3). The Act then defines the term "public office" as "members of the public body, but it shall not include organizational positions filled by members thereof, whether established by law or by the public body itself, that exist to assist the body in the conduct of its business." 5 ILCS 120/2(d).

When a vacancy on the board arises, filling that position may be considered in a closed meeting, although final action must be taken at an open meeting. But selection of board officers may not be considered in a closed meeting.

Also note that the second clause in exception 3 permits consideration in closed meetings of “discipline, performance or removal of the occupant of a public office, when the public body is given power to remove the occupant under law or ordinance.” 5 ILCS 120/2(c)(3). Because the School Code does not give school boards power to remove board officers or members, no closed meeting may be held to consider these topics.

*d. [2.41] Personnel Matters*

Frequently, governmental bodies adopt a motion to go into a closed meeting to discuss personnel matters. However, this motion is clearly insufficient under the Open Meetings Act. A proper motion would be a motion to go into a closed meeting to discuss the “employment” or “dismissal” of an officer or employee, etc. The Attorney General has stated and the Act reads that this exception covers only discussions relating to specific individuals and does not include a class of employees or officers. 5 ILCS 120/2(c)(1); Op. Att’y Gen. (Ill.) No. S-726 (1974). In *Henry v. Anderson*, 356 Ill.App.3d 952, 827 N.E.2d 522, 523, 292 Ill.Dec. 993 (4th Dist. 2005), the court held that identifying the purpose of a closed meeting as “an employee matter” regarding “reclassification of employment” met the requirement of the Act.

*e. [2.42] Collective Bargaining Matters*

The Open Meetings Act specifically excepts collective negotiating matters between a public body and its employees or their representatives and deliberations concerning salary schedules. 5 ILCS 120/2(c)(2). Moreover, the Educational Labor Relations Act, 115 ILCS 5/1, *et seq.*, specifically states that the provisions of the Open Meetings Act shall not apply to collective bargaining negotiations and grievance arbitrations conducted under the Educational Labor Relations Act. 115 ILCS 5/18. The Illinois Attorney General issued an opinion that the Open Meetings Act’s collective bargaining exception does not include deliberations on the question of whether to recognize a union or association as the collective bargaining agent for a municipality’s employees (Op. Att’y Gen. (Ill.) No. S-1490 (1980)), but an Illinois circuit court judge held to the contrary in *Evergreen Communications, Inc. v. Godfrey*, No. 79 MR 12 (McLean Cty.Cir. 1979). See also Op. Att’y Gen. (Ill.) No. 80-024.

*f. [2.43] Pending or Possible Litigation*

The Open Meetings Act as originally adopted exempted meetings held to consider “pending” litigation. The Attorney General originally indicated that this exception applied only when an actual lawsuit had been filed in court, but an Illinois appellate court in *People ex rel. Hopf v. Barger*, 30 Ill.App.3d 525, 332 N.E.2d 649 (2d Dist. 1975), held that a municipality could consult with its attorney in a closed session regarding foreseeable litigation. The court’s decision recognized the attorney-client privilege, at least in relation to litigation that was likely to be commenced by the public body or by another party against the public body in the foreseeable future.

However, the Attorney General has determined that this litigation exception does not apply to the deliberations of a board of school trustees when the board is acting in a quasi-judicial capacity by conducting hearings on school district boundary changes. Op. Att’y Gen. (Ill.) No. 83-004. In that situation, the board of trustees must deliberate in public.

The 1982 amendments to the Open Meetings Act expanded the exception to include litigation the public body finds to be “probable” or “imminent.” 5 ILCS 120/2(c)(11). This amendment apparently is legislative recognition of *Barger, supra*. The Act specifically requires, however, that the public body record in the minutes of the closed meeting the basis for the conclusion that litigation is probable or imminent. *Id.*

In 1983, the Attorney General issued a controversial opinion regarding the basis of the “probable or imminent” litigation exception contained in §2 of the Act. The opinion emphasized the importance of the closed meeting minutes’ containing a clear and definite statement of the basis for the board’s finding that litigation is probable or imminent. Op. Att’y Gen. (Ill.) No. 83-026.

In 2005, the appellate court found that a school district had violated the Act when it identified a potential litigation matter as a reason for a closed meeting but then failed to make the necessary finding that the litigation was probable or imminent or to give the basis for such a finding. *Henry v. Anderson*, 356 Ill.App.3d 952, 827 N.E.2d 522, 292 Ill.Dec. 993 (4th Dist. 2005).

It must be emphasized that, as indicated in *Barger, supra*, there may be a nonstatutory exception available to school districts pursuant to the attorney-client privilege — *i.e.*, the school board may meet privately with its attorney if the circumstances are such that the attorney-client privilege is applicable. The Illinois Supreme Court in *In re Information To Discipline Certain Attorneys of Sanitary District of Chicago*, 351 Ill. 206, 184 N.E. 332 (1932), recognized that public bodies may invoke the privilege. In these situations, the board’s need for confidentiality must be weighed against the expressed public policy established legislatively by adoption of the Act.

Although the attorney-client privilege is very important, it should not be used to evade the spirit and intent of the Open Meetings Act. For example, the Illinois House debates on the 1982 amendments to the Act made it clear that the General Assembly did not intend to allow public bodies to consult in private with their attorneys on routine matters including interpretation of statutes, legal policies, or other available options, and the Attorney General has indicated that this includes general legal advice. See Op. Att’y Gen. (Ill.) Nos. 83-004, 83-026. Finally, one point must be emphasized — the root of the privilege is confidentiality, and thus any private meeting must be solely between the attorney and the school district authorities. The presence of other parties destroys the privilege. See *In re Busse’s Estate*, 332 Ill.App. 258, 75 N.E.2d 36 (2d Dist. 1947).

*g.* [2.44] *Gosnell v. Hogan*

The Illinois Fifth District Appellate Court’s 1989 opinion in *Gosnell v. Hogan*, 179 Ill.App.3d 161, 534 N.E.2d 434, 128 Ill.Dec. 252 (5th Dist.), *appeal denied*, 126 Ill.2d 558

(1989), represents an expansive interpretation of the exceptions under the Open Meetings Act. Gosnell, a newspaper reporter, had sought an injunction against a board of education, alleging that the board had improperly discussed several issues in closed session in violation of the Open Meetings Act.

The court, in ruling in favor of the board of education, noted that “substantial compliance” with the procedural requirements of the Act, such as notice, is sufficient. 534 N.E.2d at 445. The court then interpreted the exception of employment or dismissal of employees or officers to include independent contractors within the definition of “employee.” The court further found that the board’s closed meeting decision to request mediation to resolve an impasse in contract negotiations with the secretaries’ union was not a “final action” that should have been discussed in open session under the Act. The court also decided that a closed-session discussion of the superintendent’s goals fell under the “employment or dismissal of employees” exception. 5 ILCS 120/2(c)(1); 534 N.E.2d at 436. The 1995 amendments to the Act make it clear that independent contractors are not employees of the board, effectively overruling that decision. However, the collective negotiating exception (5 ILCS 120/2(c)(2)) should cover the decision to request mediation, and the “performance” of an employee exception (5 ILCS 120/2(c)(1)) should cover and affirm the other decisions in *Gosnell*. The liberal approach to Open Meetings Act exceptions taken in this case probably should now be considered a dead letter.

*h. [2.45] Disclosure of Closed Meeting Information*

The Attorney General has concluded that a public body has no authority to sanction one of its members for disclosing information on issues discussed in closed session. Op. Att’y Gen. (Ill.) No. 91-001. The opinion does not address problems that might arise or the possible effects of a member’s releasing information that may be defamatory or that the public body has contractually promised not to release. In *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), the court noted that Ohio courts repeatedly have invalidated official promises of confidentiality when the material otherwise would be considered a public record under state law. Nevertheless, the *Kallstrom* court found the city liable for disclosure of names and addresses of certain police officers, despite the state law mandating disclosure. See further discussion of this issue in §§2.22 – 2.44 above.

When a county board attempted to obtain an injunction to prevent one of its members’ disclosure of privileged communications (such as letters from the board’s attorney on possible litigation issues), the Illinois appellate court found the injunction to impose an unconstitutional prior restraint on the member’s speech. *Will County Board v. Konicki*, 318 Ill.App.3d 1248, 789 N.E.2d 947, 273 Ill.Dec.773 (3d Dist. 2000), *appeal denied*, 193 Ill.2d 600 (2001) (unpublished).

However, the Tenth Circuit Court of Appeals, in *Phelan v. Laramie County Community College Board of Trustees*, 235 F.3d 1243 (10th Cir. 2000), reached a different conclusion than the Illinois Attorney General regarding censure (without any sanctions) of a member of a public body. The community college board had an ethics policy that required trustees to abide by and uphold a final majority decision of the trustees. The board voted unanimously to go to referendum for a tax increase, but the day before the election, Ms. Phelan placed an ad in a local newspaper urging a “no” vote and identifying herself as a trustee. At its next meeting, the board voted to censure her for violating the ethics policy. She sued the board, claiming the censure damaged her

reputation and violated her free speech rights. The district court granted summary judgment for the board, and the Tenth Circuit affirmed. Ms. Phelan was not an employer or a contractor of the board, and the censure did not carry any consequences that infringed her rights. It did not restrict her right to vote as a board member or her right to speak at meetings. The board merely expressed its opinion that she had violated the ethics policy, the Tenth Circuit said.

#### **D. [2.46] Record of Meetings**

The Open Meetings Act requires that all public bodies keep written minutes of both open and closed meetings. The minutes of an open meeting must be made available for public inspection no later than 7 days after their approval. 5 ILCS 120/2.06(b). If the school district has a website maintained by district staff, the minutes of regular meetings must be posted within 7 days of the approval of the minutes and remain on the website for 60 days after their initial posting. *Id.*

In addition to the requirement of keeping written minutes of closed meetings, P.A. 93-523 (eff. Jan. 1, 2004) amended the Open Meetings Act to require that public bodies make a “verbatim record” of closed meetings using either “audio or video recording.” 5 ILCS 120/2.06(a). The recordings may be destroyed after 18 months without notice to or approval by the local records commission if the public body has approved written minutes of the closed meeting and has approved the destruction of the particular recording. 5 ILCS 120/2.06(c). The recordings are not available for public inspection unless the public body consents, and they are not subject to discovery in any administrative proceeding except one brought to enforce the Open Meetings Act itself. In the case in which a civil action is brought to enforce the Open Meetings Act, a court may conduct an in camera review of the tape to determine if the Act was violated. 5 ILCS 120/2.06(e).

Minutes of closed meetings shall be made available only after the board determines that it is no longer necessary to the public interest or to the privacy of an individual to keep the minutes confidential. 5 ILCS 120/2.06(f). Public bodies must meet periodically, but not less than semiannually, to review minutes and recordings of all closed sessions. At these meetings, which may be held as closed meetings (5 ILCS 120/2(c)(21)), the board must determine and then report in open session whether (1) the need for confidentiality still exists as to all or part of those minutes or recording, or (2) the minutes or portions thereof no longer require confidential treatment and are available for public inspection. 5 ILCS 120/2.06(d). This includes the review of all previous closed meeting minutes prior to January 1, 1989.

If the school district fails to comply with the semiannual review requirement, the minutes or verbatim record of the unreviewed meetings do not become public, as long as within 60 days of discovering its failure to comply with the reviewing requirement the school district does so. *Id.*

The Open Meetings Act now requires that, at a minimum, all minutes include

**(1) the date, time and place of the meeting;**

**(2) the members of the public body recorded as either present or absent and whether the members were physically present or present by means of video or audio conference; and**

**(3) a summary of discussion on all matters proposed, deliberated, or decided, and a record of any votes taken. 5 ILCS 120/2.06(a).**

The “summary of discussion” requirement does not mean that each speaker’s (or board member’s) comments must be summarized. Rather, it means that the overall discussion be summarized. *E.g.*, “The board considered the proposed ‘no pass-no play’ policy, its effect on student morale, participation in extracurricular activities, and school spirit in general. Comments pro and con were received from parents, students, and teachers and administrators on the subject.”

The School Code also directs that the secretary or clerk of the board keep a record of all official acts in a “punctual, orderly and reliable manner.” 105 ILCS 5/10-7. A school board speaks only through its official minutes and other written instruments it has adopted, and it is therefore important that these documents be complete and accurate. The minutes are the primary record showing not only that the board took official action but also that it took the necessary prerequisites to make that action legally sufficient. Even an attempted adoption of a written instrument, such as a resolution, is of no avail if in fact the adoption of the resolution is not reflected in the minutes.

Reflecting the prerequisites to a legal act in the minutes can save the school from unnecessary investigations and attack. The minutes are also useful for proving jurisdictional matters when the action of the board is challenged and for demonstrating the legal authority of the board to act on financial matters. The board minutes and resolutions are often necessary supporting documents for bond issues and other transactions.

Care also should be taken in preparing minutes regarding various important actions of the school board, including, as examples, the suspension or expulsion of a student and the dismissal of a teacher. These types of proceedings have many technical requirements, such as notices and hearings, that should be reflected in the minutes. To the extent that jurisdictional prerequisites to an official act are recited in a resolution adopted by the board, no repetition need appear in the minutes as these statements are incorporated in the minutes by adopting the resolution. It is unnecessary to include lengthy resolutions verbatim in the minutes as they may be identified by reference. In referring to a resolution in the minutes, the full title or caption of the resolution should be set forth.

The minutes also should show whether the meeting is a regular, adjourned and reconvened, or special meeting. If it is an adjourned and reconvened meeting, the minutes should show the date of the meeting from which adjournment was taken. In special meeting minutes, the call or notice of meeting or waiver and consent to meeting should be set forth in the minutes. If not set forth in the minutes, a reference should be made in the minutes to the call of meeting or waiver and consent to meeting, or the document referred to may be attached to the minutes. Proper notice of the meeting also should be demonstrated. Such detailed showings in the minutes will prevent an attack on the legality of the meeting.

When it is necessary that the notice of meeting be posted in compliance with the Open Meetings Act, a copy of the notice as posted should be filed with the school records together with

a certificate or affidavit of the person who posted the notice, stating when and where it was posted. When a meeting is adjourned to another date, the time and place of the adjourned meeting must be specified in the minutes, and if the board has an agenda, it should be attached to the minutes.

The School Code requires that minutes be signed by the president and secretary or clerk of the board. *Id.* When a resolution is included in the minutes by reference only, it is recommended that the resolution also be signed by the president and secretary or clerk.

Although the School Code has no provision in this regard, it is advisable that minutes be approved at the next regular meeting of the board so that any inaccuracies may be corrected promptly and at a time when the memories of board members are fresh. The secretary or the clerk, as the keeper of the board records, should certify the minutes of meetings.

A board may amend its minutes at any time to conform to what in fact occurred at a given meeting. Amendments may be made even though the personnel of the board have changed and a long period of time has elapsed. *Lingle v. Slifer*, 8 Ill.App.2d 489, 131 N.E.2d 822 (4th Dist. 1956). The board may not amend its minutes to change the action taken but may change only the record of the action in order that the record may reflect correctly what transpired at the meeting.

When an official record of a meeting appears to be complete and there is no obvious inaccuracy, it may be difficult to effect a change because there is a presumption of law that public officials have performed their duties properly, and one who contends to the contrary has a difficult burden of proof. *Compton v. School Directors of District No. 14, Whiteside County*, 8 Ill.App.2d 243, 131 N.E.2d 544 (2d Dist. 1955).

The Illinois Supreme Court has stated that the official record constitutes the only lawful evidence of action taken and cannot be contradicted by, added to, or supplemented by parol evidence. *People ex rel. Toman v. Chicago Heights Terminal Transfer R.R.*, 375 Ill. 590, 32 N.E.2d 161 (1941). *See also People ex rel. Prindable v. New York Central R.R.*, 400 Ill. 507, 81 N.E.2d 201 (1948); *Clapsaddle v. Bethel Park School District*, 103 Pa.Comm. 367, 520 A.2d 537 (1987).

However, in *Hankenson v. Board of Education of Waukegan Township High School District No. 119*, 10 Ill.2d 560, 141 N.E.2d 5 (1957), the Illinois Supreme Court said that, although the official minutes of school boards are entitled to great weight, they are not conclusive as to every detail of the meeting and must be considered with other portions of the school board's records in order to determine the true facts. (See also the appellate court decision in *Hankenson* at 10 Ill.App.2d 79, 134 N.E.2d 356 (2d Dist. 1956). This decision closely analyzes the issues of this case and, although it was reversed by the Supreme Court, is of interest. To avoid the *Hankenson* problem, close compliance with statutory language is advised.) *Compton, supra*, permitted introduction of parol evidence when it was clear that certain action had been taken by the board that was omitted from the board minutes by the secretary. *See also Jackson v. School Directors of District No. 85, Grundy County, Illinois*, 232 Ill.App. 102 (2d Dist. 1924).

## IV. PUBLICATION OF SCHOOL DISTRICT NOTICES

### A. [2.47] Publication in the School District

When notice is required by publication in a newspaper that is published in the school district, a determination must be made as to whether a given newspaper is actually published in the district. The “place of publication” is not necessarily the place where the paper is printed but the place where the paper is first issued to the public or first put into circulation. *Ricketts v. Village of Hyde Park*, 85 Ill. 110 (1877); *People ex rel. O’Connell v. Read*, 256 Ill. 408, 100 N.E. 230 (1912); *People ex rel. Mollman v. Board of Assessors of St. Clair County, Illinois*, 46 Ill.App.2d 311, 197 N.E.2d 117 (5th Dist. 1964); Op. Att’y Gen. (Ill.) No. 81-037. When a newspaper is issued simultaneously to several distribution points, the paper is considered published at each point. Op. Att’y Gen. (Ill.) No. 477 (1958).

The Illinois Supreme Court in *Garcia v. Tully*, 72 Ill.2d 1, 377 N.E.2d 10, 17 Ill.Dec. 820 (1978), indicated that the Illinois General Assembly intended that “publication” of a newspaper and its “general circulation” be regarded as two distinct concepts. Quoting *Polzin v. Rand, McNally & Co.*, 250 Ill. 561, 95 N.E. 623, 627 (1911), the *Garcia* court differentiated the two terms by defining a newspaper of “general circulation” as a newspaper that “circulates among all classes and is not confined to a particular class or calling in the community.” 377 N.E.2d at 15. The term “published,” however, as used in statutes requiring notice to be made in a newspaper of general circulation published in a community, village, district, etc., was held by the court to mean “the place where the newspaper is first issued or printed, to be sent out by mail or otherwise.” 377 N.E.2d at 16, quoting *Polzin, supra*, 5 N.E. at 627. *Accord North Shore Savings & Loan Ass’n v. Griffin*, 75 Ill.2d 166, 387 N.E.2d 680, 682, 25 Ill.Dec. 804 (1979), in which the Illinois Supreme Court stated:

**It is our belief that the legislature intended the notice to occur on as local a level as possible so as to increase the likelihood that local residents would become informed of the proposed action.**

See also Op. Att’y Gen. (Ill.) No. S-1050 (1976).

If no newspaper is published in the school district, then notice is to be given by publication in a newspaper published in the county in which the district is located and having a general circulation within the district. 715 ILCS 5/2. *See also North Shore Savings & Loan, supra*.

### B. [2.48] Requirements for Publication

When a notice is required to be published in a newspaper, it is intended to be a “secular newspaper of general circulation.” 715 ILCS 5/5. The statute specifically states that the term “newspaper” means a newspaper

**(a) which consists of not less than 4 pages of printed matter and contains at least 100 square inches of printed matter per page; and**

**(b) which is printed through the use of one of the conventional and generally recognized printing processes . . . ; and**

(c) which annually averages at least 25% news content per issue; or which annually averages at least 1,000 column inches of news content per issue, the term “news content” meaning for the purposes of this Act any printed matter other than advertising; and

(d) which publishes miscellaneous reading matter, legal or other announcements and notices, and news and information concerning current happenings and passing events of a political, social, religious, commercial, financial or legal nature, and advertisements or bulletins; and

(e) which has been continuously published at regular intervals of at least once each week with a minimum of 50 issues per year, for at least one year prior to the first publication of the notice; or which is a successor to a newspaper as herein defined with no interruption of publication of more than 30 days. *Id.*

Publication of a notice includes the printing of the notice in the “total circulation of each edition on the date of publication.” 715 ILCS 5/3.1. Whenever the statute requiring publication does not specify the number of publications, the law requires that the notice be published for three successive weeks. 715 ILCS 5/3. In computing the time for which any notice is to be given, the first day is to be excluded and the last included unless the last is a Saturday, Sunday, or holiday and then it is to be excluded. 715 ILCS 5/6; 5 ILCS 70/1.11.

Proof of publication may be made by certificate of the publisher or an authorized agent, with a written or printed copy of the notice annexed, stating the number of times the notice was published and the dates of the first and last papers containing the notice. The certificate also must contain the further certification of the publisher or the authorized agent that the newspaper is qualified as a newspaper under the above definition. 715 ILCS 5/1.

## V. [2.49] SCHOOL DISTRICT RECORDS

School district records are governed by many local, state, and federal statutes. Sections 2.50 – 2.57 below review the legal obligations of school boards as to general school district records.

### A. [2.50] Freedom of Information Act

Sweeping amendments to the Illinois Freedom of Information Act (FOIA), 5 ILCS 140/1, *et seq.*, are effective January 1, 2010. The FOIA makes all school records open to public inspection and copying except when (1) other statutes expressly forbid public access (such as the Illinois School Student Records Act, 105 ILCS 10/1, *et seq.*); (2) a requested record falls under one of the exemptions in the FOIA as listed at 5 ILCS 140/7 and 140/7.5; or (3) providing the requested records would be unduly burdensome for the school district. According to the declaration of intent in the amended FOIA, providing records in accordance with the FOIA is a primary duty of public bodies to the citizenry of Illinois, and the FOIA should be construed to that end, fiscal obligations notwithstanding. 5 ILCS 140/1. In addition to making various procedural changes, the

amendments establish the office of the Public Access Counselor in the Attorney General's Office. 15 ILCS 205/7. As further discussed below, the Public Access Counselor has specific authority related to FOIA requests and has additional authority to review Open Meetings Act issues.

Another significant addition to the amended FOIA is the requirement that all public bodies appoint a freedom of information officer. 5 ILCS 140/3.5. Except in instances when records are furnished immediately, all FOIA requests immediately must be forwarded to a school district's freedom of information officer or designee, who in turn must ensure that the school district responds to requests in a timely fashion and must issue responses to the requester. Upon receiving a request for a public record, the FOIA requires the freedom of information officer to:

1. note the date the public body receives the written request;
2. compute the day on which the period for response will expire and make a notation of that date on the written request;
3. maintain an electronic or paper copy of a written request, including all documents submitted with the request until the request has been complied with or denied; and
4. create a file for the retention of the original request, a copy of the response, a record of written communications with the requester, and a copy of other communications. 5 ILCS 140/3.5(a).

All freedom of information officers must complete by July 1, 2010, an electronic training curriculum to be developed by the Illinois Attorney General's Public Access Counselor and on an annual basis thereafter complete a training program. 5 ILCS 140/3.5(b). Whenever a new Freedom of Information officer is designated by a school district, that person must complete successfully the electronic training curriculum within 30 days after assuming the position. *Id.*

The general provisions of the FOIA can be summarized as follows:

1. The FOIA requires each school district to make school records available for public inspection and copying upon a written request except when those records are expressly exempted from the FOIA. 5 ILCS 140/3.
2. Any person denied access to inspect or copy records may appeal the denial to the Public Access Counselor of the Illinois Attorney General's Office or to circuit court. 5 ILCS 140/9.
3. School districts must make available, at the place where records are requested by the public, a brief description of the district, including a summary of its purpose, a block diagram or organizational chart of its functional subdivisions, the total amount of its operating budget, the number and location of all its separate offices, the approximate number of full- and part-time employees, and the identification and membership of all boards, commissions, and committees. In addition, school districts must provide a description of the methods for making a FOIA request, the name of the school district's freedom of information officer, the address where FOIA requests are to be directed, and fees for records provided. A school district that maintains a website must post this information on its website. 5 ILCS 140/4.

4. The school district must prepare a current list that describes all types or categories of records (rather than specific records) prepared and received by the district after the effective date of the FOIA and make that list available to the public. 5 ILCS 140/5. In addition, the freedom of information officer must develop a list of documents or categories of records that the public body will disclose immediately upon request. 5 ILCS 140/3.5(a).

### **1. [2.51] Compliance with Request for Access**

The Freedom of Information Act requires school districts to make available to any person for inspection or copying all public records except for records that are exempt under §7 and 7.5 of the FOIA. 5 ILCS 140/3, 140/7, 140/7.5. If the person requesting the record or records submits a written request, the district must provide that person with a copy of the record requested promptly. 5 ILCS 140/3(b). A certified copy must be provided if requested. Except when records are furnished immediately, a written request for access to records for noncommercial purposes must be complied with or denied within five business days after its receipt. The failure to respond to a written request within this time shall be considered a denial of the request, and the school district consequently waives its right to treat the request as unduly burdensome. 5 ILCS 140/3(d).

If such request cannot be filled within five business days, the district can obtain an additional five business days, or such longer time as agreed to in writing with the requester, to fill the request if it can meet at least one of the conditions set forth in 5 ILCS 140/3(e):

- a. The requested records are stored in another location.
- b. The request requires the collection of a substantial number of records.
- c. The request is categorical in nature and requires an extensive search.
- d. The requested records have not been located in the course of a routine search, and additional efforts are being made to locate them.
- e. The records require examination and evaluation by competent personnel who have the discretion to determine whether the records are exempt under §7 of the FOIA or should be revealed only with appropriate deletions.
- f. Compliance within five business days would burden unduly or interfere with the operations of the public body.
- g. There is a need for consultation that shall be conducted “with all practicable speed” with another public body or between two or more components of a public body having a substantial interest in the determination or in the subject matter of the request.

When additional time to comply with a request is required because of one or more of the reasons noted above, the district must send a letter within the original five-business-day period to the requesting party. The letter must state the reason for the delay and the date by which the response will be made available. The district’s failure to respond within the time permitted for the

extension shall be considered a denial of the request, and the school district consequently waives its right to treat the request as unduly burdensome. In any event, the maximum time for an extension for responding to a FOIA request for noncommercial purposes is five business days, unless the school district and the requester agree in writing to extend the time for compliance by the agreed-on period. 5 ILCS 140/3(e), 140/3(f).

Requests for commercial purposes must be responded to within 21 working days and must either (a) provide the requester with an estimate of the time required by the school district to provide the requested records and an estimate of the fees to be charged, (b) deny the request pursuant to one or more of the exemptions set out in the FOIA, (c) notify the requester that the request is unduly burdensome and extend him or her an opportunity to attempt to reduce the request, or (d) provide the records requested. 5 ILCS 140/3.1(a). Unless the records are exempt, a school district must provide the requested records within a reasonable period of time considering the size and complexity of the request. 5 ILCS 140/3.1(b).

If the school district is of the opinion that compliance with a request would unduly burden or interfere with its operations, the district must extend to the requesting party an opportunity to confer with it in an attempt to reduce or narrow the request to manageable proportions. 5 ILCS 140/3(g).

A school district is allowed to charge fees reasonably calculated to reimburse its actual costs for reproducing and for certifying public records and for the use of the district's equipment for the copying of records. A school district may not charge fees for the first 50 pages of black-and-white, letter- or legal-sized copies and may charge no more than 15 cents for each black-and-white, letter- or legal-sized copy thereafter. For any color copies or copies in sizes other than letter or legal, the school district may not charge more than its actual cost for reproducing the records. The fees may not include reimbursement for staff time spent searching for and reviewing the records. The fee schedule that the district uses must be standardized and made public by the district. A school district may not charge more than \$1 for certifying a record. 5 ILCS 140/6(b). The fee schedule must be included in the school district records directory that sets forth the procedure by which records may be requested.

## **2. [2.52] Exemptions**

The exemptions under §7 of the Freedom of Information Act that commonly apply to school districts are as follows:

- a. records specifically prohibited from disclosure by state or federal law, such as those records made confidential by the Illinois School Student Records Act (5 ILCS 140/7(1)(a));
- b. private information, unless disclosure is required by another provision of the FOIA, a state or federal law, or court order (5 ILCS 140/7(1)(b)) (private information means unique identifiers, including person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information,

- passwords or other access codes, medical records, home or personal telephone numbers, personal e-mail addresses, home address, and personal license plates, except as otherwise provided by law or when compiled without possibility of attributing such information to any person);
- c. personal information that, if disclosed, would constitute a “clearly unwarranted invasion of personal privacy” unless disclosure is consented to in writing by the individual whose privacy is being invaded (5 ILCS 140/7(1)(c) (*see also Bowie v. Evanston Community Consolidated School District No. 65*, 128 Ill.2d 373, 538 N.E.2d 557, 131 Ill.Dec. 182 (1989)) (unwarranted invasion of privacy means “disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject’s right to privacy outweighs any legitimate public interest in obtaining the information” (5 ILCS 140/7(1)(c)));
  - d. preliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed or policies or actions are formulated except “when the record is publicly cited and identified by the head of the public body” (5 ILCS 140/7(1)(f); *see also* 5 ILCS 140/2(e)) (in context of school district, “head of the public body” is superintendent but also may be interpreted to include president of school board);
  - e. proposals and bids for any contract, grant, or agreement until an award or final selection is made (5 ILCS 140/7(1)(h)) (information prepared for school board in preparation of solicitation of bids shall be exempt until award or final selection);
  - f. valuable formulae, computer geographic systems, designs, drawings, and research data obtained or produced by any district when disclosure reasonably could be expected to produce private gain or public loss (5 ILCS 140/7(1)(i)) (this exemption would apply to copyrightable or patentable material developed by faculty members, including computer software);
  - g. test questions, scoring keys, and other examination data used to administer an academic examination (5 ILCS 140/7(1)(j));
  - h. information received by a primary or secondary school under its procedures for the evaluation of faculty members by their academic peers (*id.*);
  - i. information regarding a school’s adjudication of student disciplinary cases, but only to the extent that disclosure would unavoidably reveal the identity of the student (*id.*);
  - j. course materials or research materials used by faculty members (*id.*);
  - k. the architects’ and engineers’ plans for buildings constructed with public funds to the extent the disclosure would compromise security (5 ILCS 140/7(1)(k));
  - l. minutes of meetings that may be kept confidential under the Open Meetings Act (5 ILCS 140/7(1)(l));

- m. communications with the district's attorney that would not be subject to discovery in litigation and the materials prepared or compiled for a criminal, civil, or administrative proceeding on the request of the district's attorney (5 ILCS 140/7(1)(m)) (*but see Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill.2d 456, 791 N.E.2d 522, 274 Ill.Dec. 430 (2003); this exemption does not apply to information that governmental entity sends to Illinois Attorney General in order to obtain written opinion of Attorney General);
- n. communications with the district's auditor and materials prepared for an internal audit of the district (*id.*);
- o. records relating to the school district's adjudication of employee grievances or disciplinary cases, except for the final outcome of the cases in which discipline is imposed (5 ILCS 140/7(1)(n));
- p. administrative or technical information associated with data processing, including software and other information, that, if disclosed, would jeopardize the security of the data contained in the system or would jeopardize the security of materials exempt under §7 (5 ILCS 140/7(1)(o));
- q. records that relate to collective bargaining matters between the district and its employees or the employees' representative except for the final collective bargaining agreement (5 ILCS 140/7(1)(p)) (*see Illinois Educational Labor Relations Board v. Homer Community Consolidated School District No. 208*, 160 Ill.App.3d 730, 514 N.E.2d 465, 112 Ill.Dec. 802 (4th Dist. 1987), *aff'd*, 132 Ill.2d 29 (1989));
- r. test questions, scoring keys, and other examination data used to determine the qualifications of an applicant for a license or employment (5 ILCS 140/7(1)(q));
- s. records regarding negotiations for the purchase or sale of real estate up until the time the negotiations are concluded (5 ILCS 140/7(1)(r));
- t. proprietary information and records relating to the operation of an intergovernmental risk-management association or self-insurance pool or jointly administered health and accident cooperative pool (5 ILCS 140/7(1)(s));
- u. insurance or self-insurance (including any intergovernmental risk-management association or self-insurance pool) claims, loss, or risk management information, records, data, advice, or communications (5 ILCS 140/7(1)(t));
- v. vulnerability assessments, security measures, and response policies or plans that are designed to identify, prevent, or respond to potential attacks on a community's population or systems, facilities, or installations, the destruction or contamination of which would constitute a clear and present danger to the health or safety of the community, but only to the extent that disclosure reasonably could be expected to jeopardize the effectiveness of the measures or the safety of the personnel who implement them or the public (5 ILCS 140/7(1)(v));

- w. although not as typical as the other examples provided here and usually utilized only by law enforcement and prosecutorial agencies, investigatory records in the possession of a school district created in the course of administrative enforcement proceedings to the extent that disclosure would
1. interfere with pending or actually and reasonably contemplated law or administrative enforcement proceedings (5 ILCS 140/7(1)(d)(i));
  2. create a substantial likelihood that a person will be deprived of a fair trial or impartial hearing (5 ILCS 140/7(1)(d)(iii));
  3. unavoidably disclose the identity of a confidential source, confidential information furnished only by the confidential source, or persons who file complaints with or provide information to administrative, investigative, law enforcement, or penal agencies, except for the identities of witnesses to traffic accidents and reports and rescue reports (5 ILCS 140/7(1)(d)(iv));
  4. disclose unique or specialized investigative techniques other than those generally used and known (5 ILCS 140/7(1)(d)(v)); or
  5. endanger the life or physical safety of law enforcement personnel or any other person (5 ILCS 140/7(1)(d)(vi)).

Note that certain records pertaining to district employees, such as employment contracts, are in most cases not exempt from disclosure under 5 ILCS 140/7, although certain information contained in the record may be personal in nature and could be redacted. *See Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 910 N.E.2d 85, 331 Ill.Dec. 12 (2009). Records referring to an individual employee are not exempt if they concern the employee's performance of public duties, including records of public complaints against that employee. This is the case even if the complaints are unfounded. *See Gekas v. Williamson*, 393 Ill.App.3d 573, 912 N.E.2d 347, 332 Ill.Dec. 161 (4th Dist. 2009).

In addition, §7.5 of the FOIA cites specific statutes that exempt the disclosure of records. 5 ILCS 140/7.5.

### **3. [2.53] Denials of Requests**

If the school district determines that a request for records should be denied on the basis of an exemption under §7 of the Freedom of Information Act, 5 ILCS 140/7, the district must prepare a written notice of denial to the requesting party. 5 ILCS 140/3(d), 140/9. This notice must include

- a. a statement that the request is denied;
- b. the reasons for the denial, including a detailed factual basis for the application of any exemption claimed and a citation to supporting legal authority;

- c. the name and title of “each person responsible for the denial”; and
- d. a statement of the person’s right to (1) review by the Public Access Counselor’s Office of the Attorney General, including the address and phone number for the Public Access Counselor; and (2) judicial review to the circuit court. 5 ILCS 140/9(a).

Depending on the basis of the denial, however, a school district may be required to seek prior approval from the Public Access Counselor before delivering the denial to the requester. Specifically, if the denial is on the basis of either the personal information exemption (5 ILCS 140/7(c)) or the preliminary drafts exemption (5 ILCS 140/7(f)), the school district must provide prior written notice of intent to deny to the requester and the Public Access Counselor before denying the request. The notice of intent to deny must include

- a. a copy of the request for access to records;
- b. the proposed response from the school district; and
- c. a detailed summary of the school district’s basis for exerting the exemption. 5 ILCS 140/9.5(b).

Within five working days after receipt of the notice of intent to deny, the Public Access Counselor will notify the school district and requester of whether further inquiry is required. If further inquiry is required, the Public Access Counselor has the authority to request production of documents. The school district must provide the requested documents within seven working days of receiving a request for documents, and if the school district fails to do so, the Attorney General may issue a subpoena for those documents. Both parties may submit briefs on the issue, as well as affidavits or records concerning any matter germane to the review to the Public Access Counselor. 5 ILCS 140/9.5. Unless the parties receive a notice of extension of time from the Public Access Counselor, the Attorney General will examine, within 60 days after receipt of the notice of intent to deny, the issues and the records, make findings of fact and conclusions of law, and issue a binding opinion to the requester and the school district. A party may seek administrative review of a binding opinion issued by the Attorney General in Cook or Sangamon County. 5 ILCS 140/11.5. The Attorney General also may exercise his or her discretion and choose to resolve the notice of intent to deny through some other means than a binding opinion, such as mediation. The time for responding to the request is tolled while the Public Access Counselor conducts its inquiry regarding the notice of intent to deny. See 5 ILCS 140/9.5(b).

No preauthorization from the Public Access Counselor is required for denials based on exemptions other than the personal information exemption (5 ILCS 140/7(c)) or the preliminary drafts exemption (5 ILCS 140/7(f)). In all other cases, the school district may send the notice of denial to the requester as soon as the determination to deny the request is made.

Copies of all notices of denial must be maintained in a separate file by the school district. The file must be organized and indexed according to the type of exemption asserted and, “to the extent feasible,” to the types of records that were requested. 5 ILCS 140/9(b).

Any person denied access to inspect or copy any public record may file a request for review of the denial with the Public Access Counselor not later than 60 days after the date of the final denial. The request for review must be in writing, signed by the requester, and must include

- a. a copy of the request for access to the records; and
- b. any responses from the school district. 5 ILCS 140/9.5(a).

The FOIA requires that the Public Access Counselor review the request for review, determine whether further inquiry is warranted, and notify the school district and the requester of its finding. 5 ILCS 140/9.5(c).

If further inquiry is warranted, the Public Access Counselor will forward a copy of the request to review to the school district within seven working days after receipt and will specify records or other documents it wishes to review in making a decision. The school district must provide the requested documents within seven working days after receiving a request for documents, and if the school district fails to do so, the Attorney General may issue a subpoena for those documents. The school district also may provide, within seven working days after receipt of the request for review from the Public Access Counselor, an answer to the allegations of the request for review, although an answer is not required. If the school district believes information in its answer is confidential, it also should provide a redacted version to be provided to the requester; otherwise, the copy provided to the Public Access Counselor will be provided to the requester. The requester may, but is not required to, respond in writing to the answer within seven working days, providing a copy of the response to the school district. Both parties also may submit affidavits or records concerning any matter germane to the review to the Public Access Counselor. 5 ILCS 140/9.5(c).

Unless the parties receive a notice of extension of time from the Public Access Counselor, the Attorney General will examine, within 60 days after receipt of the request for review, the issues and the records, make findings of fact and conclusions of law, and issue a binding opinion to the requester and the school district. The Attorney General also may exercise his or her discretion and choose to resolve the request for review through some means other than a binding opinion, such as mediation. 5 ILCS 140/9.5(f). A party may seek administrative review of a binding opinion issued by the Attorney General in Cook or Sangamon County. 5 ILCS 140/11.5.

The Attorney General also has the authority to issue advisory opinions under the FOIA, upon receipt of a written request from the head of a school district or its attorney for an advisory opinion. 5 ILCS 140/9.5(h). The written request must contain sufficient accurate facts from which a determination can be made, and the Public Access Counselor has authority to request additional information from the school district in making its determination. A school district that in good faith relies on an advisory opinion of the Attorney General in responding to a request is not liable for penalties under the FOIA, as long as the facts on which the opinion was based were fully and fairly disclosed to the Public Access Counselor. 5 ILCS 140/9.5(f).

#### 4. [2.54] Judicial Remedies for Denial

Any person whose request for access to public records is denied may file an action for injunctive or declaratory relief, either in lieu of or in addition to a request for review filed with the Public Access Counselor. 5 ILCS 140/11(a). Further, any person making a request for public records is considered to have exhausted his or her administrative remedies for purposes of judicial review if the school district fails to act within the time periods provided for in §3 of the Freedom of Information Act. 5 ILCS 140/9(c).

If the requester files suit in circuit court, however, with respect to the same denial that is the subject of a pending request for review with the Public Access Counselor, the requester must notify the Public Access Counselor of its filing, and the Public Access Counselor will not take any further action with respect to the request for review. The FOIA places no limit on the time in which an action in circuit court must be filed. 5 ILCS 140/11(a). Suits filed under the FOIA are to take precedence over other matters on the court's docket except for matters the court considers to be of greater importance. 5 ILCS 140/11(h).

The hearing on the denial is a de novo hearing in which the court conducts an in camera examination of the requested records in order to determine whether the records are exempt. The burden of proof is on the school district to establish that its refusal to permit access to records complies with the FOIA, and any school district that asserts that a record is exempt from disclosure has the burden of proving that it is exempt by clear and convincing evidence. 5 ILCS 140/11(f). The court need not conduct an in camera review when the school district meets its burden of showing that the statutory exemption applies by means of affidavits. The affidavits, however, will not suffice if the school district's claims are conclusory, merely recite statutory standards, or are too vague or sweeping. *Williams v. Klinicar*, 237 Ill.App.3d 569, 604 N.E.2d 986, 989, 178 Ill.Dec. 463 (3d Dist. 1992).

The court has jurisdiction to enjoin the school district from withholding public records and to order the production of any records that were improperly withheld from the requesting party. If the school district can show that exceptional circumstances exist and that it is exercising due diligence in responding to a request for access, the court may retain jurisdiction of the case and allow the district additional time to complete its review of the requested records. 5 ILCS 140/11(d).

The court may enforce compliance with its order through the use of its contempt powers. 5 ILCS 140/11(g). A prevailing plaintiff in a FOIA action filed on or after January 1, 2010, must be awarded reasonable attorneys' fees. 5 ILCS 140/11(i). Prevailing school districts, however, are not automatically eligible for attorneys' fees. In determining what amount of attorneys' fees is reasonable, the court will consider the degree to which the relief obtained relates to the relief sought.

If the court determines that a school district willfully and intentionally failed to comply with the FOIA or otherwise acted in bad faith, the court also shall impose a civil penalty on the school district of no less than \$2,500 and no more than \$5,000 for each occurrence. The court will consider in aggravation or mitigation the budget of the school district and whether the school district previously has been assessed penalties for violation of the FOIA.

The FOIA includes no criminal penalties unlike, for instance, the School Student Records Act, 105 ILCS 10/9(e) (willful noncompliance is a Class A misdemeanor), and the Open Meetings Act, 5 ILCS 120/4 (any violation is a Class C misdemeanor).

## **B. Retention and Destruction of Records**

### **1. [2.55] Applicable Law**

The Illinois Local Records Act, 50 ILCS 205/1, *et seq.*, has long been the primary source relative to the retention and destruction of school records and most other local government records. Basically, that law prohibits the destruction of any public records, including school records, without the prior written approval of the appropriate local records commission. 50 ILCS 205/7. This authority is shared with the Illinois State Board of Education (ISBE) as a result of the Illinois School Student Records Act and existing accommodations between the two bodies.

The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g, does not require retention nor prohibit destruction of school student records unless there is an outstanding request to inspect and review those records. 34 C.F.R. §99.10(e).

The Illinois School Student Records Act provides that each school must maintain a student's permanent record and the information contained in it for not less than sixty years after the student has transferred, graduated, or otherwise permanently withdrawn from the school. 105 ILCS 10/4(e). That Act further provides that each school must maintain student temporary records and the information contained in those records for not less than five years after the student has transferred, graduated, or otherwise withdrawn from the school. 105 ILCS 10/4(f). However, a school may maintain indefinitely anonymous information from the student temporary records for authorized research, statistical reporting, or planning purposes, provided no student or parent can be individually identified. *Id.*

The ISBE, pursuant to the Illinois School Student Records Act, issued regulations to govern the periodic review of student temporary records and the length of time for maintenance of entries to these records. 105 ILCS 10/4(g). Pursuant to this directive, the ISBE requires that a school principal, a person with a similar duty, or a designate review school student records to verify entries and eliminate or correct all out-of-date, misleading, inaccurate, unnecessary, or irrelevant information every four years or upon a student's change in attendance center, whichever occurs first. 23 Ill.Admin. Code §375.40(b).

In addition to its obligation to review information periodically, school districts also are required, before the destruction or deletion of any information from a permanent or temporary student record, to give the parents or student, as appropriate, reasonable notice and an opportunity to copy the record and information proposed to be destroyed. 105 ILCS 10/4(h). Amplifying this obligation, the ISBE has required that, upon graduation, transfer, or permanent withdrawal of a student from a school, the parents and student be notified of the destruction schedule for the student permanent record and the student temporary record and of the right to request a copy of the records at any time before their destruction. 23 Ill.Admin. Code §375.40(c).

The temporary records of a handicapped student, such as psychological evaluations, special education files, and other information contained in the student temporary record that may be of continued assistance to the student, may be transferred after five years to the parents or the student, as appropriate. The district is also to explain to the student and the parents any future usefulness of these records. 23 Ill.Admin. Code §375.40(d).

The Illinois Attorney General has considered the interrelationship of the Illinois School Student Records Act and the Local Records Act and concluded that the Local Records Act is applicable to student records maintained pursuant to the Illinois School Student Records Act. Therefore, a local school district must obtain the written approval of the appropriate local records commission before destroying or otherwise disposing of student records. Nevertheless, the Attorney General noted that the commission must recognize and give effect to the statutory time periods governing the maintenance of student records under the Illinois School Student Records Act. Thus, a commission could not authorize the destruction of a student's permanent record less than sixty years after the student has left school or require the maintenance of a student's temporary record for more than five years or for its period of usefulness as determined by the school. Op. Att'y Gen. (Ill.) No. 83-018. See also 105 ILCS 10/4(e), 10/4(f).

## 2. [2.56] Procedures To Destroy Records

The procedures to destroy public records must be approached with caution. The Local Records Act warns:

**All public records made or received by, or under the authority of, or coming into the custody, control or possession of any officer or agency shall not be mutilated, destroyed, transferred, removed or otherwise damaged or disposed of, in whole or in part, except as provided by law. 50 ILCS 205/4.**

The Local Records Act requires that before any public record is destroyed, the appropriate local records commission first must approve a request in writing. 50 ILCS 205/7. This approval is sought in Cook County from the Local Records Commission of Cook County and is sought in all other parts of the state from the Illinois Local Records Commission.

The initial step in the procedures to destroy public records is to conduct an inventory of the documents and materials for which permission to destroy is sought. In all parts of the state other than Cook County, the Illinois Local Records Commission will provide one of seven regional field representatives to assist the school district in preparing an inventory worksheet for each type of document sought to be destroyed. Although the Local Records Commission of Cook County provides no field assistance in preparing an inventory, an inventory nevertheless should be made.

The purpose of the inventory of records is to aid in the preparation of an application for authority to dispose of local records. In all parts of the state other than Cook County, the inventory worksheet prepared with the assistance of a field representative and sample documents are forwarded to the Local Records Unit of the Illinois State Archives. Its staff will prepare the actual application for authority to dispose of local records. In Cook County, the application itself is prepared by the school seeking to destroy the records. The completed application and sample documents are submitted directly to the Local Records Commission of Cook County.

Once the application for authority to dispose of local records has been reviewed by the appropriate local records commission, the commission will either approve or deny the request. Generally, approval or denial is dependent on whether the records have been retained in accordance with the applicable retention schedule for the records established by the appropriate commission. If the application has been approved, the approval will be forwarded to the district together with a records disposal certificate. The purpose of this document is to verify whether the records were in fact destroyed in accordance with the approval granted.

Note that in all parts of Illinois, including Cook County, the records disposal certificate must be submitted 60 days before the proposed disposal date. 44 Ill.Admin. Code §§4000.40, 4500.40. The purpose of this notice is to allow time for the Illinois State Archivist to determine whether the records should be saved for historical or other purposes. In Cook County, the Illinois State Archivist is contacted before granting approval. Therefore, in Cook County, the records disposal certificate need not be filed in advance of disposal because the State Archivist has already determined that the records to be destroyed can be destroyed.

Microfilming or digitizing of records is permitted. Any record may be microfilmed or digitized without permission of the appropriate local records commission. Nevertheless, once the records themselves are to be destroyed, permission must be obtained. Note, however, that underlying records that have already been microfilmed or digitized will not be held to the retention schedules of the commissions as long as the microfilming or digitizing satisfies various technical and other requirements established by the regulations of the commission. 50 ILCS 205/7.

The Local Records Act provides that each local records commission must provide by regulation that the State Archivist may retain any records the respective commissions have authorized to be destroyed when the records have historical value. The Act further states that the State Archivist may deposit them in the “State Archives, State Historical Library, or a university library, or with a historical society, museum, or library.” 50 ILCS 205/7. The State Archivist also may accept for deposit in the State Archives or regional depositories official papers, drawings, maps, writings, and records of every description of counties, municipal corporations, political subdivisions (including school districts), and courts of the state when the materials are deemed by the State Archivist to have sufficient historical or other value to warrant their continued preservation by the State of Illinois. 50 ILCS 205/4.

### **3. [2.57] Retention and Destruction Schedules**

The Local Records Act effectively places the responsibility for setting retention schedules for the destruction of public records with the local records commissions “[e]xcept as otherwise provided by law.” 50 ILCS 205/7. Accordingly, the district first must be sensitive to statutorily established retention and destruction schedules. Those retention and destruction schedules should be followed irrespective of any directives of the local records commission. One instance is in the case of school temporary records, which can be destroyed if held no less than five years after a student’s transfer, graduation, or permanent withdrawal from school. 105 ILCS 10/4(f).

Federal law also requires that the records pertaining to federal grants and programs be retained for certain minimum periods. Typically, this period is three years. A helpful summary of the rules relative to this are summarized in **GUIDE TO RECORD RETENTION REQUIREMENTS**, published biannually by the Office of the Federal Register, National Archives and Records Administration.

School district attorneys whose advice is sought relative to the retention and destruction of school records therefore should first consider whether a statutory schedule for retention and destruction has been established. Caution should be observed, however, when there is merely a requirement of retention and no obligation to destroy those records. An example of this would be a school board's obligation to maintain records to substantiate all district claims for state aid in accordance with regulations prescribed by the Illinois State Board of Education and to retain the records for a period of three years. 105 ILCS 5/10-20.1. This merely establishes a minimum retention schedule; the local records commission would be entitled to impose greater retention schedules as it deems appropriate, and indeed, the Illinois Local Records Commission requires that state aid claims be retained for a minimum of seven years.

While there are a few retention and destruction schedules established by statute, other general guideposts must be considered accordingly when determining how long school records should be retained. Again, it must be recognized that the appropriate local records commission must approve destruction of school records unless otherwise provided by law. Any guideposts therefore would be indicative only of when a school should consider applying for approval to destroy certain records.

An initial guidepost would be that all records of a school pertaining to its organization, procedures, and continued operations should be retained permanently. Included with this classification would be real estate records, legal descriptions of the school district, board minutes and resolutions, referenda, legal opinions, audits, building blueprints and plans, tax levies and assessments, and annual budgets.

A second guidepost would be the various Illinois statutes of limitation. These are particularly important regarding personal actions. Generally, the statute of limitations relative to actions on bonds, promissory notes, written leases, written contracts, and other written evidence of indebtedness requires that the action be commenced within ten years after the cause of action has accrued. 735 ILCS 5/13-206. Accordingly, any school records pertaining to written contracts and other written evidence of indebtedness should be retained at least ten years after their due date. Examples include records regarding all bidding and written contracts.

The general statute of limitations for personal actions not otherwise provided for by law, including unwritten contracts, expressed or implied, is five years. 735 ILCS 5/13-205. Thus, any documents that could give rise to any contractual or other liability, if there is no underlying contract, should be retained at least five years. The local records commissions have not favored five-year retention of records but generally have required that records be retained at least seven years. This arises in part from the five-year statute of limitations and also from the practical reality that some leeway is required so that proper auditing may be completed. Accordingly, the

local record commissions generally have required that payroll records, check stubs, deposit slips, bills, vouchers, invoices, expenditures, receipts, and most insurance policies be retained at least seven years.

It is rare that a school district will not retain records at least five or seven years. Nevertheless, the local records commissions will permit some records of only current importance to be destroyed in two or three years. These records include, for example, those pertaining to personnel absences, substitute slips, teacher institute records, school calendars and schedules, requisition orders, election records, and cafeteria menus.

These guideposts are, of course, broad generalizations. Each school attorney should use these and other guideposts to assist the school in developing an overall plan of school record retention and destruction.

## VI. CONTROL AND USE OF SCHOOL PROPERTY

### A. [2.58] Generally

School boards have control and supervision of all public schoolhouses and grounds in their district. 105 ILCS 5/10-22.10. A school board has wide discretion in the exercise of this power. *People of State of Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois*, 333 U.S. 203, 92 L.Ed 649, 68 S.Ct. 461 (1948).

Teachers are under a duty to see that property of a district under their care and control is not unnecessarily damaged or destroyed. 105 ILCS 5/24-17. Teachers and other employees may request any person entering a public school building or grounds to identify himself or herself and to state the purpose of the entry. Refusal to provide this information is a Class A misdemeanor. 105 ILCS 5/24-25.

Criminal damage to government-supported property is at least a Class 4 felony, and criminal trespass to state-supported land is a Class A misdemeanor. 720 ILCS 5/21-4, 5/21-5. Entering or remaining on government-supported property by presenting false documents or falsely representing one's identity orally in order to enter or remain on the property is also a Class A misdemeanor. 720 ILCS 5/21-5(c). "Government-supported land" is defined as property or land "supported in whole or in part with State funds . . . or Federal funds administered or granted through State agencies." 720 ILCS 5/21-4(1)(a). See *People v. Bartlett*, 175 Ill.App.3d 686, 530 N.E.2d 90, 125 Ill.Dec. 172 (2d Dist. 1988).

The general criminal trespass law applies fully to school property. 720 ILCS 5/21-3. Persons trespassing on school property after receiving notice from the board or its agents that they may not enter or remain on the property or persons presenting false documents or falsely representing their identity orally to the board or its agents in order to obtain permission to enter or remain on the property are guilty of a Class B misdemeanor in addition to potential liability for trespass on state-supported land described above. *Id.*; *People v. Thompson*, 56 Ill.App.3d 557, 372 N.E.2d 117, 14 Ill.Dec. 312 (3d Dist. 1978).

## **B. Nonschool Use of School Property**

### **1. [2.59] Generally**

School boards are authorized to grant the temporary use of school facilities to citizens when the facilities are not occupied or not otherwise needed for school purposes. 105 ILCS 5/10-22.10. School facilities may be used, for example, for religious meetings, Sunday school, evening school, literary societies, public lectures, concerts, and other educational and social activities. *Id.* Pursuant to §10-22.11 of the School Code, a school board may lease school property to another school district, a municipality, or a public body.

The lease for school buildings and land must provide for adequate insurance for liability and property damage or loss. 105 ILCS 5/10-22.11(c). Additionally, reasonable charges for maintenance and depreciation of such buildings and land also may be assessed. *Id.*; *Lincke v. Moline Board of Education*, 245 Ill.App. 459 (2d Dist. 1927). Charges levied for these items should be done uniformly and pursuant to a policy adopted by the board of education setting forth the charges, insurance requirements, cleanup responsibilities, etc., for public access.

Also note that the Physical Fitness Facility Medical Emergency Preparedness Act, 210 ILCS 74/5.25, requires school districts and other entities to provide automated external defibrillators (AED) in their physical fitness facilities and to provide trained AED users.

### **2. [2.60] Equal Access Act**

The Equal Access Act, 20 U.S.C. §4071, *et seq.*, prohibits public high schools from discriminating against or denying equal access to school facilities to students to conduct religious, political, or philosophical meetings if the school receives federal financial aid and has a limited open forum. 20 U.S.C. § 4071(a).

The Equal Access Act defines a “limited open forum” as “an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.” 20 U.S.C. §4071(b). If the district has a limited open forum, then it must afford an opportunity for all of these groups to use school premises. 20 U.S.C. §4071(a). *See Student Coalition for Peace v. Lower Merion School District Board of School Directors*, 633 F.Supp. 1040 (E.D.Pa. 1986).

The Act provides that

- a. meetings must be voluntary and student initiated;
- b. there must be no sponsorship of the meeting by the school, the government, or its agents or employees;
- c. employees or agents of the school or government may be present at religious meetings only in a nonparticipatory capacity;

- d. the meetings may not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- e. “nonschool persons” may not direct, conduct, control, or regularly attend activities of student groups. 20 U.S.C. §4071(c).

*See Student Coalition for Peace, supra.*

The U.S. Supreme Court in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 110 L.Ed.2d 191, 110 S.Ct. 2356 (1990), concluded that the Equal Access Act does not violate the Establishment Clause, prohibiting state establishment of religion, and that high schools that maintain a “limited open forum” may not deny “equal access” to student religious groups under the Act.

In the Court’s view, “even if a public secondary school allows only one ‘noncurriculum related student group’ to meet, the Act’s obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.” 110 S.Ct. at 2364. The Equal Access Act does not define “noncurriculum related student group.” Using a dictionary definition, the Court found a “sensible interpretation” to be that “such student groups are those that are not related to the body of courses offered by the school.” 110 S.Ct. at 2365. To be “curriculum related,” a student group must have “more than just a tangential or attenuated relationship to courses offered by the school.” *Id.* The Supreme Court provided the following:

**In our view, a student group directly relates to a school’s curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.** 110 S.Ct. at 2366.

Finally, the Court concluded that compliance with the requirements of the Equal Access Act does not violate the Establishment Clause. As the Court ruled in another case, “‘an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose,’ . . . and would in fact *avoid* entanglement with religion,” the logic of which, Justice O’Connor concluded, applies with equal force to the Equal Access Act. [Emphasis in original.] 110 S.Ct. at 2370, quoting *Widmar v. Vincent*, 454 U.S. 263, 70 L.Ed.2d 440, 102 S.Ct. 269, 275 (1981).

Although the Equal Access Act generally has been utilized by religious groups to obtain access to school grounds and buildings, the Act is also utilized by other groups, including those concerning sexual orientation tolerance. *See Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, KY*, 258 F.Supp.2d 667 (E.D.Ky. 2003) (court granted injunction to group ruling that it had established likelihood of success to utilize facilities for group meetings).

### 3. [2.61] Use of Facilities for Religious Purposes

The U.S. Supreme Court concluded in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 124 L.Ed.2d 352, 113 S.Ct. 2141 (1993), that a school district that did not allow a church to use school facilities to show a film series solely because the film dealt with issues from a religious point of view violated the Free Speech Clause of the First Amendment.

Writing for the Court, Justice White concluded that allowing church access to school facilities would not constitute an establishment of religion because the film series would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, not just church members. 113 S.Ct. at 2148.

In *Good News Club v. Milford Central School*, 533 U.S. 98, 150 L.Ed.2d 151, 121 S.Ct. 2093 (2001), the Court affirmed its ruling in *Lamb's Chapel* and held that a school's refusal to allow a Christian organization to conduct storytelling and prayer at an elementary school after school hours violated the Free Speech Clause of the First Amendment. The school asserted that the activities proposed were "in fact the equivalent of religious instruction itself," but the Court rejected this proffered distinction. 121 S.Ct. at 2098.

Noting that "any group that 'promote[s] the moral and character development of children' " was eligible to use school property, the Court concluded that "it is clear that the Club teaches morals and character development to children" and that, consequently, exclusion of the Club from school grounds constituted "unconstitutional viewpoint discrimination." 121 S.Ct. at 2101. The Court went on to reject the school's argument that its refusal to allow the Club to use school property was mandated by the Establishment Clause.

### 4. [2.62] Joint Use with Other Public Entities

Joint use of certain facilities such as gymnasiums and swimming pools by school boards and other public entities or the sharing of certain equipment is common. This practice has been encouraged by Article 7, §10, of the Illinois Constitution and the provisions of the Intergovernmental Cooperation Act, 5 ILCS 220/1, *et seq.*

### C. [2.63] Regulation of School Property

Zoning ordinances and health and safety regulations pose problems of intergovernmental relationships. The law is not entirely clear as to the effect of local zoning ordinances on construction and use of school land and facilities. Numerous cases have held that school districts are creatures of the legislature and that, as such, no other public entity may place limitations or restrictions on a school district unless expressly authorized by statute. *People v. Deatherage*, 401 Ill. 25, 81 N.E.2d 581 (1948); *Board of Education of School District No. 150 v. City of Peoria*, 76 Ill.2d 469, 394 N.E.2d 399, 31 Ill.Dec. 197 (1979).

2 Kenneth H. Young, ANDERSON'S AMERICAN LAW OF ZONING §12.06, pp. 514 – 517 (4th ed. 1996), states the general rule:

**Absent a waiver expressed by, or necessarily inferred from, the language of a state statute, the courts of many states have ruled that a state is not amenable to the zoning regulations of its political subdivisions.**

\* \* \*

**A public corporation or authority created by the state to carry out a function of the state is not bound by local zoning regulations.**

The Illinois Supreme Court, however, has held that a park district, in exercising its statutory authority over the operations of a park, is subject to the zoning ordinances of its host home-rule municipality as long as the general police powers of the municipality are not used to frustrate or thwart the public purpose of the other public body. *Wilmette Park District v. Village of Wilmette*, 112 Ill.2d 6, 490 N.E.2d 1282, 96 Ill.Dec. 77 (1986). The extent to which the principles of *Wilmette* apply to school districts and other local governmental bodies is not settled. *City of Joliet v. Snyder*, 317 Ill.App.3d 940, 741 N.E.2d 1051, 251 Ill.Dec. 873 (3d Dist. 2000); *County of Lake v. Semmerling*, 195 Ill.App.3d 93, 551 N.E.2d 1110, 141 Ill.Dec. 767 (2d Dist. 1990); *State of Illinois Medical Center Commission v. Peter Carlton at Ogden & Oakley, Inc.*, 169 Ill.App.3d 769, 523 N.E.2d 1091, 120 Ill.Dec. 180 (1st Dist. 1988); *City of Evanston v. Regional Transportation Authority*, 202 Ill.App.3d 265, 559 N.E.2d 899, 147 Ill.Dec. 559 (1st Dist. 1990); *City of Peoria, supra*; *City of Chicago v. Board of Trustees of University of Illinois*, 293 Ill.App.3d 897, 689 N.E.2d 125, 228 Ill.Dec. 253 (1st Dist. 1997); *Chicago Park District v. City of Chicago*, 111 Ill.2d 7, 488 N.E.2d 968, 94 Ill.Dec. 721 (1986); *Lake County Public Building Commission v. City of Waukegan*, 273 Ill.App.3d 15, 652 N.E.2d 370, 209 Ill.Dec. 830 (2d Dist. 1995).

Without immunity from local zoning regulations, schools may be subject to reasonable zoning restrictions. Note that the School Code specifically grants school boards the authority to seek zoning changes, variations, or special uses for property held by the school district. 105 ILCS 5/10-22.13a. At least one Illinois circuit court, however, held that a municipality did not have the authority through its zoning powers to prohibit an alternative school from locating in a particular area of the municipality because such an action would frustrate the school's statutory duty to provide education. *See North Cook Intermediate Service Center v. Village of Skokie*, No. 99 CH 12107 (Cook Cty.Cir. Apr. 28, 2000). Other jurisdictions also have held that zoning does not apply to school districts. In one example, a New York court held that municipal zoning provisions did not apply when a school district leased a vacant school building. *See Village of Camillus v. West Side Gymnastics School, Inc.*, 109 Misc.2d 609, 440 N.Y.S.2d 822 (1981) (to require zoning variance would thwart statutory duty to maintain and finance fixed cost and bond payment of vacant school); William L. Bergen, Note, *The Immunity of Schools From Zoning*, 14 Syracuse L.Rev. 644 (1963).

The issue of zoning must be reviewed carefully. Almost all municipal zoning ordinances contain regulations regarding the location of schools. Before a school district purchases or accepts property for a school site, it should determine what, if any, zoning issues and requirements it may face. Consideration also should be given to the length of time and attention to detail required by many municipal zoning processes.

As to the local building ordinance, generally, a school district is not subject to such ordinances. The appropriate test is to compare seemingly conflicting powers and determine which statutory regulation is more specific to the issue at hand. The Health/Life Safety Code for Public Schools, 23 Ill.Admin. Code pt. 180, prescribed by the Illinois State Board of Education, establishes minimum standards for the construction and rehabilitation of school facilities in order to protect the health and safety of pupils. The Health/Life Safety Code preempts the local building code to the extent they conflict.

In *Board of Education, School District 33, DuPage County v. City of West Chicago*, 55 Ill.App.2d 401, 205 N.E.2d 63 (2d Dist. 1965), the issue was whether the school district, in constructing a school building, was bound by municipal building ordinances. The court held that the specific building construction provisions set out in the School Code must prevail over the more general powers granted the municipality.

In *County of Lake v. Board of Education of Lake Bluff School District No. 65, Lake County*, 325 Ill.App.3d 694, 761 N.E.2d 163, 260 Ill.Dec. 319 (2d Dist. 2001), the court held that the Health/Life Safety Code and not the county's building code applied to a building owned by the district even though only a small portion of the building was used for school purposes. The district used approximately 10 – 15 percent of the floor area of the building for storage and held occasional school functions at the building. Although these school uses did not represent the primary use of the building, the fact that the district was still using the building for school purposes placed the building under the sole authority of the Health/Life Safety Code.

The State Fire Marshal Act, 20 ILCS 2905/1, *et seq.*, does not apply to schools. In *Board of Education of Minooka Community High School District No. 111, Grundy, Kendall & Will Counties v. Carter*, 119 Ill.App.3d 857, 458 N.E.2d 50, 52, 54, 75 Ill.Dec. 882 (3d Dist. 1983), the court held that the applicable rules and regulations for fire safety were those of the former State Board of Education Life Safety Code (now the Health and Life Safety Code, 105 ILCS 5/2-3.12), which specifically addressed fire hazards, rather than the State Fire Marshal's "Grey Book." The county health department, however, was held to have jurisdiction to inspect and regulate food service operations in schools. *County of Winnebago v. Davis*, 156 Ill.App.3d 535, 509 N.E.2d 143, 108 Ill.Dec. 717 (2d Dist. 1987); *County of Macon v. Board of Education of Decatur School District No. 61*, 165 Ill.App.3d 1, 518 N.E.2d 653, 116 Ill.Dec. 31 (4th Dist. 1987), *appeal denied*, 119 Ill.2d 558 (1988). There is no school regulation that specifically addresses food handling.

As to the matter of whether the building remains a school building while it is being leased temporarily to a lessee other than a public school district, it is helpful to examine particular provisions of the lease. Language pertaining to early termination is particularly relevant in

establishing the temporary nature of these arrangements. The exemptions applicable to school buildings for zoning, building, or fire safety enforcement purposes are not relinquished because the school building is temporarily being used by another under a lease.

#### **D. [2.64] Personal Property**

The provisions of the School Code relating to acquisition, use, and disposition of personal property by school districts range from narrow, archaic statutes to statutes sufficiently broad in nature to allow school districts to meet current needs.

For example, a school board has the power to purchase a suitable book for its records (105 ILCS 5/10-22.1); to improve schoolhouses and furnish them with necessary fixtures, furniture, apparatus, libraries, and fuel (105 ILCS 5/10-22.7); to purchase textbooks and rent them to students (105 ILCS 5/10-22.25); and to purchase, maintain, repair, and operate school buses (105 ILCS 5/10-23.4).

School districts may obtain personal property by lease, with or without an option to purchase, or purchase under an installment contract. 105 ILCS 5/10-22.25a. “Personal property” includes computer hardware and software and all equipment, fixtures, renovations, and improvements to existing facilities of the district necessary to accommodate computers. In addition, school districts may enter into a lease for equipment and machinery for corporate purposes for a period not to exceed five years. 105 ILCS 5/10-23.4a.

Contracts for supplies and materials involving an expenditure in excess of \$25,000, or a lower amount as required by board policy, require competitive bidding, with certain exceptions contained in §10-20.21 of the School Code that generally, by their nature, are not adapted to award by competitive bidding. 105 ILCS 5/10-20.21. See Chapter 6 of this handbook. One exception within §10-20.21 allows the district to enter into contracts for repair, maintenance, remodeling, renovation, or construction on a single project involving up to \$50,000 in expenditures, or a lower amount as required by board policy, and not involving a change or increase in size, type, or extent of an existing facility. 105 ILCS 5/10-20.21(a)(xi). The school district, however, has great discretion in determining the lowest responsible bidder on a contract. *Best Bus Joint Venture v. Board of Education of City of Chicago*, 288 Ill.App.3d 770, 681 N.E.2d 570, 576, 224 Ill.Dec. 255 (1st Dist. 1997). A contract may be awarded to a higher bidder “where this is done in the public interest, in the exercise of discretionary power granted under the laws, without fraud, unfair dealing or favoritism and where there is sound and reasonable basis for the award as made.” *Id.*, quoting 10 Eugene McQuillin, *MCQUILLIN ON MUNICIPAL CORPORATIONS* §29.73a, pp. 429 – 430 (3d ed. 1966).

Personal property also may be acquired by contract jointly with another unit of government pursuant to the Governmental Joint Purchasing Act, 30 ILCS 525/0.01, *et seq.* The intent of these provisions is to reduce the costs of purchasing materials and supplies through joint purchase of large quantities. School districts also may purchase personal property through the state’s purchasing program. If the items must be bid and the state is a party to the joint purchase agreement, the state must conduct the letting of bids. When the state of Illinois is a party to the joint purchase agreement, the Department of Central Management Services shall conduct the

letting of bids. 30 ILCS 525/3. The acceptance of bids when the state is a party shall be governed by the Illinois Procurement Code, 30 ILCS 500/1-1, *et seq. Id.* Expenses of such bid letting may be shared by the parties involved in proportion to the amount of personal property, supplies, or services each unit purchases. When the state is not a party to the joint purchase agreement, the acceptance of bids shall be governed by the agreement. The personal property, supplies, or services involved shall be distributed to each governmental unit participating, and the seller may bill each unit separately. *Id.*

There is little authority for school districts to lend personal property to others. School districts may purchase textbooks to lend to students whose parents cannot afford to buy them. In fact, the school board is required to adopt written policies and procedures for the waiver of textbook and other fees. 105 ILCS 5/10-20.13. If approved by referendum, school districts may purchase and lend textbooks free of charge to all public school students of the district. 105 ILCS 5/28-14.

It is the practice of some school districts to lend special education equipment to private facilities in which some students of the district may have been placed for services. The constitutionality of such a practice depends on the facts in question. In *Wolman v. Walter*, 433 U.S. 229, 53 L.Ed.2d 714, 97 S.Ct. 2593 (1977), and *Meek v. Pittenger*, 421 U.S. 349, 44 L.Ed.2d 217, 95 S.Ct. 1753 (1975), the Supreme Court promulgated a distinction between textbooks and other instructional materials, holding funding for the former constitutional and the latter unconstitutional.

The Court since has overruled that distinction. In *Mitchell v. Helms*, 530 U.S. 793, 147 L.Ed.2d 660, 120 S.Ct. 2530 (2000), the Court upheld the distribution of federal aid to state and local educational agencies who subsequently purchased and loaned materials and equipment to public and private schools. Although the equipment loaned included computers, computer software, and library books, the Court held that such a practice did not violate the Establishment Clause because the distribution of the aid did not result in religious indoctrination or define fund recipients by reference to religion. Accordingly, it appears that the lending of materials and equipment to private and parochial schools may be permissible as long as those materials do not contain explicit religious content and are provided without favoritism on the basis of religion.

School boards are authorized to sell at public or private sales any personal property not needed for school purposes. 105 ILCS 5/10-22.8. While disposal of personal property may be accomplished by a private sale, this method should be approached cautiously and should be used only when the circumstances do not warrant holding a public sale. A private sale too easily can be regarded as having the appearance of impropriety. School boards at the very least should enter into a bill of sale that waives any warranty claims when selling personal property.

## **VII. BOARD RESPONSIBILITY FOR ELECTIONS**

### **A. [2.65] Nominating Petitions**

The school board secretary or clerk is the “[l]ocal election official.” 105 ILCS 5/9-2(d). Unless the board designates another person, as it is authorized to do under §9-10 of the School

Code, the board secretary or clerk has the overall responsibility of administering and certifying the nominating petitions. 105 ILCS 5/9-10. In particular, the board secretary or clerk has the following duties under §9-10:

1. The secretary or clerk may (but is not required to) provide petition forms for potential candidates.
2. The secretary or clerk may (but is not required to) provide notice of the petition filing period. If the secretary or clerk does provide the notice, it must be placed in a newspaper of general circulation within the school district not less than ten days prior to the first day of filing.
3. The secretary or clerk receives all nominating petitions filed by candidates. Note in this respect that §9-10 mandates that the secretary or clerk shall receive and file only those petitions that include a statement of candidacy, the required number of signatures, a circulator's notarized affidavit, and the statement of economic interest receipt. To avoid problems, it is strongly recommended that candidates file their economic statements and have their receipts available for filing at the time they file their nominating petitions.

An interesting problem would occur if the candidate submitted his or her petition on the first day of the filing period but without filing a receipt for the statement of economic interest. It would appear from §9-10 of the School Code that if the candidate does not file the statement receipt by the end of the filing period, the board secretary or clerk may not accept that petition for filing. It is possible, then, that a candidate would not be placed on the ballot by the action of the board secretary or clerk without an objection being filed by a third party. *See Haymore v. Orr*, 385 Ill.App.3d 915, 897 N.E.2d 337, 325 Ill. Dec. 89 (1st Dist. 2008); *North v. Hinkle*, 295 Ill.App.3d 84, 692 N.E.2d 352, 229 Ill.Dec. 579 (2d Dist. 1998) (court held that clerk has authority to refuse to certify nominating petitions, even if objection has not been filed against petitions, if, by looking at face of nominating petitions, they are not in apparent conformity with requirements of Election Code, 10 ILCS 5/9-1, *et seq.*).

4. The secretary or clerk must notify candidates of their obligations under the Illinois campaign financing statute under the Election Code. The notice must be given on a form to be provided by the State Board of Elections.
5. The secretary or clerk must acknowledge in writing acceptance of the candidate's petition within seven days of filing or on the last day of filing, whichever is earlier.
6. The secretary or clerk must ensure that the office in which petitions must be filed remains open for receipt of the petitions until 5:00 p.m. on the last day of the filing period. 10 ILCS 5/1-4.
7. Finally, if the secretary or clerk is an incumbent school board member running for reelection, a disinterested person must witness the filing of the secretary's or clerk's petition.

In accordance with §9-11.1 of the School Code, all petitions filed by persons waiting in line as of 8:00 a.m. on the first day of filing and all petitions filed by mail and received after midnight

of the first day for filing and in the first mail delivery that day are deemed to be simultaneously filed as of 8:00 a.m. that first day. 105 ILCS 5/9-11.1. All petitions thereafter are deemed filed in order of actual receipt.

For purposes of ballot position, it then becomes the secretary's or clerk's responsibility to break the tie "by means of a lottery or other fair and impartial method of random selection." *Id.* The lottery must be conducted in public within nine days after the last day for filing petitions. The candidates must be given seven days' written notice of the time and place of the hearing, and notice of the hearing must be posted publicly. Candidates are certified in accordance with the lottery results and before candidates who later file. The same rules apply when the election is to fill out an unexpired term. *Id.*

Section 10-6.2 of the Election Code provides that when multiple sets of nomination papers are filed for a candidate to the same office, the local election official shall notify the candidate of the multiple filings within two business days. 10 ILCS 5/10-6.2. The candidate then has three business days to notify the local election official to cancel prior sets of petitions. If the candidate so notifies the local election official, the last set of petitions filed shall be the only ones considered for certification; if the candidate does not notify the local election official, the first set of petitions shall be for certification, and all subsequent petitions shall be void. *Id.*

## **B. [2.66] Canvassing Returns and Proclaiming the Results**

Beginning January 1, 2006, P.A. 94-647 abolished local canvassing boards in Illinois. Now, in accordance with §17-22 of the Election Code, the judges of elections must transmit original sealed tally sheets and certificates of results from each precinct within the district to the county clerk or county election commission, if one exists. 10 ILCS 5/17-22. The county clerk in turn must transmit the tally sheet and certificate of results to the local election official of the school district. *Id.*

The election authority, which is either the county clerk or the county election commission, is the "canvassing board" for school districts. 10 ILCS 5/22-17. The election authority has 21 days following the election to complete the canvass and proclaim the results. *Id.* The election authority then immediately transmits a signed copy or original duplicate of its completed abstract of votes to the State Board of Elections, and the county clerk issues a certificate of election to each person declared elected to an office. 10 ILCS 5/22-18. The school district also should receive a copy of the results from the election authority. The school board then should note the results, and the new board of education should be seated and organized. 105 ILCS 5/10-16.

## **C. [2.67] Discovery Recounts**

As with canvassing and proclaiming the results, P.A. 94-647 transferred responsibility for discovery recounts from the school board to the election authority (*i.e.*, the county clerk or the election commission). Within 5 days after the last day for the proclamation of results (*i.e.*, 26 days after the election), the following people may petition for a discovery recount of certain votes cast at the election:

1. a losing candidate for the board of education who received at least 95 percent of the number of votes cast for a successful candidate for the same office; and
2. any 5 voters in the district in which a referendum was held if the results of the canvass are such that the losing side on the question would have been the winning side had it received an additional number of votes equal to 5 percent of the total number of votes cast on the question. 10 ILCS 5/22-9.1.

A discovery recount petition must be filed with the county clerk or board of election commissioners. The petition must request that ballots, voting machines, or ballot cards be examined and that equipment be tested, etc., in certain specified precincts not exceeding 25 percent of the total number of precincts within the jurisdiction of the election authority. The petitioner must pay a fee of ten dollars per precinct specified. *Id.*

It is important for candidates to understand that a discovery recount has no binding legal effect. It may not be used to amend the results previously certified or deny a certificate of election to a successful candidate for the same office. The result is not binding in a subsequent election contest; in fact, a discovery recount is not a prerequisite to bringing an election contest. Perhaps most important, the filing of a discovery recount petition does not toll the time period within which an election contest must be filed. *Id.*

For a more detailed and in-depth treatment of school elections, see Chapter 12 of this handbook.

## VIII. [2.68] CHARTER SCHOOLS

The Illinois Charter Schools Law (Law), 105 ILCS 5/27A-1, *et seq.*, provides for the formation, maintenance, and management of charter schools. Charter schools exist to encourage educational excellence by developing flexible and innovative educational techniques and programs. 105 ILCS 5/27A-2(a). Charter schools must be public, nonsectarian, nonreligious, non-home-based, and nonprofit entities. 105 ILCS 5/27A-5(a). Charter schools must be open to any student who lives in the geographic area served by the local school board. The City of Chicago may create attendance boundaries for charter schools if necessary to relieve overcrowding or to better serve low-income and at-risk students. Students that live in the attendance boundaries are given admissions priority. 105 ILCS 5/27A-4(d). However, no local school board can compel a student living in the district to attend a charter school. 105 ILCS 5/27A-4(g).

Effective July 30, 2009, the Law allows for a total of 120 charter schools to operate at any one time in Illinois (70 in Chicago and 45 in the remainder of the State). 105 ILCS 5/27A-4(b). In addition, up to but no more than 5 charter schools devoted exclusively to reenrolled “high school dropouts” may operate at any one time in Chicago. *Id.* If there are more eligible applicants for enrollment in a charter school than there are spaces available, successful applicants will be selected by lottery. Priority, however, must be given to siblings of students enrolled in the charter school and to students who were enrolled in the charter school the previous year, unless expelled for cause. Dual enrollment at a charter school and a public school or nonpublic school is

prohibited under the Law. A student suspended or expelled from a charter school will be deemed suspended or expelled from the public schools of the district in which the student resides. Notwithstanding the above, any charter school with a mission exclusive to educating students who have dropped out of high school may restrict admission to such students. 105 ILCS 5/27A-4(h).

Charter schools may be established by creating a new school or by converting an existing public school or attendance center to charter school status. 105 ILCS 5/27A-5(b). The Law, however, provides that no charter will be granted that would convert any existing private, parochial, or nonpublic school to a charter school. 105 ILCS 5/27A-4(c). Local boards of education may propose charter schools. 105 ILCS 5/27A-7(b). Additionally, two or more local school boards may jointly issue a charter to a single shared charter school. 105 ILCS 5/27A-4(e). Not more than one charter school that has been initiated by a board of education or by an intergovernmental agreement between boards may operate at any one time in the school district where the charter school is located, however. 105 ILCS 5/27A-4(b).

Charters may be granted for a period of not less than five and not more than ten years and may be renewed in incremental periods not to exceed five years. 105 ILCS 5/27A-9(a). A proposal to establish a charter school may be initiated by individuals or organizations that will have majority representation on the board of directors or other governing body of the corporation or other legal entity operating the proposed charter school. 105 ILCS 5/27A-7(b). The proposal must be submitted to the Illinois State Board of Education and the local school board in the form of a proposed contract entered into between the local school board and the governing body of a proposed charter school. See 105 ILCS 5/27A-7(a).

The Law requires that all proposals for the establishment of a charter school contain the following:

- a. the name of the proposed charter school;
- b. the age or grade range, areas of focus, minimum and maximum numbers of pupils to be enrolled in the charter school, and any other admission criteria that would be legal if used by a district;
- c. a description of and address for the physical plant in which the charter school will be located, provided that approval of a charter school proposal shall not be withheld if a facility has not been rented or acquired as long as the proposal identifies and names at least two sites that are potentially available as a charter school facility by the time the charter is to open;
- d. the mission statement of the charter school;
- e. the goals, objectives, and student performance standards to be achieved by the charter school;

- f. when the proposal establishes a charter school by converting an existing public school attendance center, evidence that the proposed formation has received the approval of certified teachers, parents, and guardians;
- g. a description of the charter school's educational program, student performance standards, curriculum, school year, school days, and hours of operation;
- h. a description of the charter school's plan for evaluating pupil performance, the types of assessments that will be used to measure student progress toward achievement of the school's student performance standards, the timeline for the achievement of those standards, and the procedures for taking corrective action in the event student performance falls below those standards;
- i. evidence that the terms of the charter are economically sound for both the charter school and the school district, a proposed budget, a description of the school's audit procedures, and a plan for the displacement of students, teachers, and other employees who will not attend or be employed in the charter school;
- j. a description of the governance and operation of the charter school;
- k. an explanation of the relationship that will exist between the charter school and its employees;
- l. an agreement between the parties regarding their respective legal liability and applicable insurance coverage;
- m. a description of how the charter school plans to meet the transportation needs of its students and a plan for addressing the transportation needs of low-income and at-risk students;
- n. the proposed effective date and term of the charter, provided that the first day of the first academic year and the first day of the fiscal year shall be no earlier than August 15 and no later than September 15 of a calendar year;
- o. any other information reasonably required by the ISBE. 105 ILCS 5/27A-7(a).

A charter proposal must be accompanied by evidence of sufficient support to fill the number of pupil seats set forth in the proposal. This evidence may take the form of a petition in support of the charter signed by parents and guardians of students eligible to attend the charter school. However, in lieu of including such a petition with the proposal, the charter school applicant may elect to demonstrate that it has received the requisite support by other evidence and information presented at the public meeting that the local board is required to convene to consider the proposal. 105 ILCS 5/27A-8(b).

Within 45 days of receipt of a charter school proposal, the local school board must convene a public meeting to obtain information to assist the board in its decision to grant or deny the charter

school proposal. 105 ILCS 5/27A-8(c). Within 30 days of the public meeting, the local board must vote, in a public meeting, to either grant or deny the charter school proposal. 105 ILCS 5/27A-8(e). Within 7 days of making its decision, the local board must file a report with the ISBE granting or denying the proposal. If the local board grants the charter school proposal, the ISBE has 30 days from receipt of the local school board's report to determine whether the approved charter proposal is consistent with the provisions of the Law and, if so, certify the proposal. 105 ILCS 5/27A-8(f).

With respect to certified charters, the local school board or ISBE may revoke or not renew a charter if the local board clearly demonstrates that the charter failed to comply with the requirements of the law or for other reasons, including a material violation of the terms of the charter, failure to make reasonable progress toward achievement of the content standards or pupil performance standards listed in the charter, and fiscal mismanagement. In the case of a revocation, the local school board or ISBE must notify the charter school in writing of the reasons why it is subject to revocation. The charter school subsequently must submit a remediation plan, including a timeline for implementation that shall not exceed two years or the date of the charter's expiration, whichever date is earlier. If the local board or ISBE finds the charter school failed to implement the remediation plan and adhere to the timeline, then the board must revoke the charter. Except in emergency situations, revocation shall take place at the end of the school year. 105 ILCS 5/27A-9(c).

Notice of a local school board's decision to deny, revoke, or not renew a charter may be appealed to the ISBE. The ISBE may reverse a local school board's decision to deny, revoke, or not renew a charter if the ISBE finds that the charter school or charter school proposal (a) is in compliance with the Law, and (b) is in the best interests of the students it is designed to serve. Final decisions of the ISBE will be subject to judicial review under the Administrative Review Law. 105 ILCS 5/27A-9(e). The ISBE is authorized to reverse the denial of a charter "upon a finding that the proposal substantially complies with the Act and that the approval of the charter would be in the best interests of the students." *Board of Education of Community Consolidated School District No. 59 v. Illinois State Board of Education*, 317 Ill.App.3d 790, 740 N.E.2d 428, 434, 251 Ill.Dec. 347 (1st Dist. 2000).

If the ISBE on appeal reverses a local board's decision, the ISBE shall act as the authorized chartering entity for the charter school. The ISBE shall approve and certify the charter and shall perform all functions under the Law otherwise performed by the local school board. The ISBE must report to the local school district the aggregate number of pupils in the district that attend the charter school and the amount of funding to be paid by the ISBE to the charter school enrolling such students. The ISBE shall withhold from funds otherwise due the district the funds authorized by the Law to be paid to the charter school and shall pay such amounts to the charter school. 105 ILCS 5/27A-9(f).

As part of a charter school contract between a charter school and a local school board, the parties must agree on funding and any services to be provided by the school district to the charter school. Agreed funding that a charter school is to receive from the local school board for a school year must be paid in equal quarterly installments, with the first installment due by July 1. All services centrally or otherwise provided by the school district are subject to negotiation between a

charter school and the local school board and paid for out of the revenues negotiated by the parties. In no event shall the funding be less than 75 percent or more than 125 percent of the school district's per capita student tuition multiplied by the number of students residing in the district who are enrolled in the charter school. 105 ILCS 5/27A-11(b). The proportionate share of state and federal resources generated by students with disabilities or staff serving them will be directed to charter schools enrolling those students by their school districts or administrative units. 105 ILCS 5/27A-11(c). The ISBE shall make transition impact aid available to school districts that approve a new charter school or that have funds withheld by the ISBE to fund a new charter school that is chartered by the ISBE. 105 ILCS 5/27A-11.5(1). The amount of aid shall equal 90 percent of the per capita funding paid to the charter school during the first year of its initial charter term and shall decrease to 65 percent in the second year, 35 percent in the third year, and no aid in the fourth year. *Id.* Transition impact aid shall not be paid for any charter school that is proposed and created by one or more boards of education. *Id.*

A charter school may not charge tuition but may charge reasonable fees for textbooks, instructional materials, and student activities. 105 ILCS 5/27A-5(e). Fees collected from students enrolled at a charter school will be retained by the charter school. 105 ILCS 5/27A-11(b).

The governing body of a charter school is authorized to accept gifts, donations, or grants of any kind made to the charter school and to expend or use these in accordance with the conditions prescribed by the donor and any applicable terms applied by the school district. 105 ILCS 5/27A-11(d). Upon the nonrenewal or revocation of a charter, each charter school will refund to the local school board all unspent funds. 105 ILCS 5/27A-11(g). A charter school is authorized to incur temporary, short-term debt to pay operating expenses in anticipation of receipt of funds from the local school board. 105 ILCS 5/27A-11(h).

A person will be deemed employed by a charter school unless a collective bargaining agreement or the charter school contract provides otherwise. 105 ILCS 5/27A-10(a). No local school board can require any employee of the school district to be employed in a charter school. 105 ILCS 5/27A-4(f). However, a local school board must grant, for a period of up to five years, a leave of absence to teachers who accept employment with a charter school. At the end of the leave, the teacher must return to the local school district or resign. If the teacher returns to the district, the teacher must be assigned to a position that requires the teacher's certification and legal qualifications. 105 ILCS 5/27A-10(b).

Charter schools may employ in instructional positions, as defined by the charter, individuals who are certified under Article 21 of the School Code, 105 ILCS 5/21-1, *et seq.*, or who meet the alternative criteria listed in the Law. 105 ILCS 5/27A-10(c). Notwithstanding any other provisions of the School Code, charter schools may employ noncertified staff in all other positions. A teacher at a charter school may resign a position only if notice is given to the school's governing body at least 60 days before the end of the school term. The resignation must take effect immediately upon the end of the school term. 105 ILCS 5/27A-10(d). Effective January 1, 2010, charter schools are subject to and must comply with the Illinois Educational Labor Relations Act (IELRA) and accordingly must permit its employees to be represented by a union as provided for under the IELRA. 105 ILCS 5/27A-5(g); *Northern Kane Educational Corp. v. Cambridge Lakes Education Ass'n*, \_\_\_ Ill.App.3d \_\_\_, 914 N.E.2d 1286, 333 Ill.Dec. 474 (4th Dist. 2009).