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June 10, 2020

## Remote Board Meetings During a Disaster Declaration

In response to COVID-19, the Illinois legislature passed Senate Bill 2135 on 5/23/2020, which adds an entirely new section to the *Illinois Open Meetings Act* [5 ILCS 120/1 *et seq.*] governing remote public board meetings, both open and closed, during a disaster declaration.

At the present time, SB 2135 is written to become effective on the same day it is signed by the Governor. We are hoping against all hope that the Governor signs the bill in early July when many board meetings are on hiatus. The uncertainty of the effective date has prompted a number of questions from the field regarding the changes. What if the Governor signs it on the morning of one of your upcoming board meetings? We are happy to discuss your unique situation with you, but in the meantime, here is a quick summary of the changes.

- 5 ILCS 120/7(e) (new) amending the OMA
- Attendance by means other than physical presence
- Passed both Houses 5/23/2020
- Sent to the Governor 6/4/2020
- Gov has 60 calendar days (8/3/2020) to sign it
- If not signed, the bill becomes law on 8/4/2020

*Remember these changes have not yet been signed into law. Stay tuned!*

Fair warning – the SB 2135 language is convoluted, repetitive and just plain awkward to interpret. The main take-away is that the new language contains 10 requirements, all of which must be met before a board of education can meet remotely during a disaster declaration issued by the Governor or Director of the IDPH when your school district is situated within the area that the disaster declaration covers.

Our current disaster is, of course, COVID-19, which is considered a state-wide disaster. [FEMA data](#) indicates that 63 disaster declarations have been issued in Illinois since 1957. The vast majority have been localized disasters related to flooding, severe storms, tornados and snow. Although this new OMA language will apply in very limited circumstances, it is welcome relief in the era of COVID-19. This newsletter contains general information only and should not be considered legal advice. Please consult with your legal counsel to discuss specific questions and issues.

<p>5 ILCS 120/7(e) Subject to the requirements of <a href="#">Section 2.06</a> but notwithstanding any other provision of law, an open or closed meeting subject to this Act may be conducted by audio or video conference, without the physical presence of a quorum of the members, so long as the following conditions are met:</p> <p>* <i>note</i>: language in the grey shaded areas is taken verbatim directly from SB 2135.</p>	<ul style="list-style-type: none"> <li>• SB 2135 contains multiple references to Section 2.06 of the OMA [5 ILCS 120/2.06], which is entitled “minutes; right to speak.” The implications of Section 2.06 are significant and will be discussed in more detail below.</li> <li>• The language in the statute that allows individual board members to participate in board meetings remotely remains in full force and effect. In those situations, an individual board member may participate in a board meeting remotely (as long as a quorum of the board is physically present): due to (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency. 5 ILCS 120/7(a).</li> </ul>
<p>1) The Governor or the Director of the Illinois Department of Public Health has issued a disaster declaration related to public health concerns because of a disaster as defined in <a href="#">Section 4</a> of the Illinois Emergency Management Agency Act, and all or part of the jurisdiction of the public body is covered by the disaster area;</p>	<ul style="list-style-type: none"> <li>• “Disaster” is defined as an occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural or technological cause, including but not limited to fire, flood, earthquake, wind, storm, hazardous materials spill or other water contamination requiring emergency action to avert danger or damage, epidemic, air contamination, blight, extended periods of severe and inclement weather, drought, infestation, critical shortages of essential fuels and energy, explosion, riot, hostile military or paramilitary action, public health emergencies, or acts of domestic terrorism.</li> <li>• The phrase “disaster declaration related to public health concerns because of the disaster” seems unnecessarily confusing, but it is important to note. For example, if a disaster declaration is issued in one county for a drought, remote board meetings could only be held in that county if a ‘public health concern’ was also involved. While a drought would be devastating, it may not involve a public health concern.</li> </ul>
<p>2) The head of the public body as defined in subsection (e) of Section 2 of the <a href="#">Freedom of Information Act</a> determines that an in-person meeting or a meeting conducted under this Act <u>is not practical or prudent because of a disaster</u>;</p>	<ul style="list-style-type: none"> <li>• Section 2 of the FOIA defines “head of the public body” as the “president, mayor, chairman, presiding officer, director, superintendent, manager, supervisor or individual otherwise holding primary executive and administrative authority for the public body, or such person's duly authorized designee.”</li> <li>• For school districts, this means either the superintendent or president of the board of education. If they disagree, we think that as long as one of them makes this determination, that decision will prevail. Note that public board action is <u>not</u> required to make this determination, although it is advisable.</li> </ul>
<p>3) All members of the body participating in the meeting, wherever their physical location, shall be verified and can hear one another and can hear all discussion and testimony;</p>	<ul style="list-style-type: none"> <li>• This should be relatively simple to accomplish given current technology.</li> <li>• What happens if technology fails and one board member cannot hear the others? We think that SB 2135 would require the remote board meeting to stop unless and until full communication is restored.</li> </ul>

<p>4) For open meetings, members of the public present at the regular meeting location of the body can hear all discussion and testimony and all votes of the members of the body, <u>unless attendance at the regular meeting location is not feasible due to the disaster</u>, including the issued disaster declaration, in which case the public body must make alternative arrangements and provide notice pursuant to this Section of such alternative arrangements in a manner to allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes, such as by offering a telephone number or a web-based link;</p>	<ul style="list-style-type: none"> <li>• Importantly (and oddly), SB 2135 provides that even in situations where the school board members are meeting remotely, the school district must make its regular meeting location open and available for members of the public to attend in person to watch/listen to the board meeting live on a web-based platform or telephone line. Social distancing and limits on attendees (10, 50, etc.) will strictly apply.</li> <li>• That is, “unless attendance [by members of the public] at the regular meeting location is not feasible due to the disaster, including the issued disaster declaration.”</li> <li>• Take special note of the two different standards (!): <ul style="list-style-type: none"> <li>○ For board members, the head of the public body must determine that an in-person meeting “<u>is not practical or prudent because of a disaster.</u>”</li> <li>○ For members of the public, the head of the public body must determine that an in-person meeting is “<u>is not feasible due to the disaster.</u>”</li> </ul> </li> <li>• It seems only logical that if the board members have decided that it is not “practical or prudent” for them to meet in person, that they will similarly determine that attendance by members of the public is not “feasible” due to the disaster declaration.</li> <li>• The school board must notify the public how they can “contemporaneously hear all discussion, testimony and roll call votes...” that occur during the open session meeting. ‘Contemporaneous’ is the key word in this sentence, which may be offered by a telephone number or web-based link.</li> <li>• Take special note of what the statute does <u>not</u> say – contemporaneous public comment is <u>not</u> required, but must be accommodated in another way. Most school districts provide notice on their websites detailing how members of the public can ask questions of the board or make public comments, <i>i.e.</i>, questions are read out loud during the board meeting and answered by a members of the administration.</li> </ul>
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On a related note, the *Illinois School Code* contains a provision that gives school districts 60 calendar days to respond to a written correspondence from a member of the public who is a resident of the school district requesting the consideration of a matter before the board [105 ILCS 5/10-6]:

“When the president or district superintendent of schools receives a written correspondence from a resident within the school district’s territory, requesting the consideration of a matter before the board, the author of the correspondence shall receive a formal written statement from an appointed official of the board stating the board’s position on their request, no later than 60 days from the receipt of the correspondence by the president or district superintendent of schools. The formal written response from the board shall establish a meeting before the board or list the reasons for denying the request.”

Requesting consideration of a matter before the board and simply asking a question are two different things, to be sure, but it is important to keep this unique and related *School Code* provision in mind.

<p>5) At least one member of the body, chief legal counsel, or chief administrative officer is physically present at the regular meeting location, <u>unless unfeasible due to the disaster</u>, including the issued disaster declaration;</p>	<ul style="list-style-type: none"> <li>• One person — a board member, superintendent (probably alternatively a central office administrator), or legal counsel — must be physically present at the regular meeting location during the board meeting date/time <u>unless unfeasible due to the disaster</u>.</li> <li>• This provision applies regardless of whether members of the public are present or not (see subsection 4 above).</li> <li>• Insert primal scream here [ ] as we encounter yet a third standard in SB 2135, although admittedly “unfeasible” = “not feasible.”</li> </ul>
<p>6) All votes are conducted by roll call, so each member's vote on each issue can be identified and recorded.</p>	<ul style="list-style-type: none"> <li>• This is feasible, pun intended.</li> <li>• Taking a roll call vote on each issue listed on a board meeting agenda will be a significant change in practice for many boards of education. The requirement will require extra diligence on the part of the administration and board.</li> <li>• Which begs an interesting question – do the findings required under SB 2135 need to be made by roll call vote? We believe the answer is ‘no’ since a vote is not specifically required to make the 10 findings contained in SB 2135.</li> </ul>
<p>7) Except in the event of a <i>bona fide</i> emergency, 48 hours' notice shall be given of a meeting to be held pursuant to this Section. Notice shall be given to all members of the public body, shall be posted on the website of the public body, and shall also be provided to any news media who has requested notice of meetings pursuant to subsection (a) of Section 2.02 of this Act....</p>	<ul style="list-style-type: none"> <li>• This language is a reiteration of the OMA itself and does not act to change current practice.</li> <li>• This sub-paragraph means that even if a board meeting is held remotely, 48 hours' notice is still required, in the normal course, unless there is a <i>bona fide</i> emergency.</li> <li>• A <i>bona fide</i> emergency should be considered separate and apart from the disaster declaration that allows the board to meet remotely.</li> </ul>
<p>8) Each member of the body participating in a meeting by audio or video conference for a meeting held pursuant to this Section is considered present at the meeting for purposes of determining a quorum and participating in all proceedings.</p>	<ul style="list-style-type: none"> <li>• This language acts to clarify/stress that a quorum of the board of education must still be ‘present’ during the audio or video meeting even though the meeting is held remotely.</li> <li>• A quorum is defined as a majority of the full membership of the board of education (105 ILCS 5/10-12). For 7 member school boards, a quorum is 4; for all others, a quorum is 2.</li> </ul>

<p>9) In addition to the requirements for open meetings under Section 2.06, public bodies holding open meetings under this subsection (e) must also keep a verbatim record of all their meetings in the form of an audio or video recording. Verbatim records made under this paragraph (9) shall be made available to the public under, and are otherwise subject to, the provisions of Section 2.06.</p>	<ul style="list-style-type: none"> <li>• Importantly, the new language provides that school boards meeting remotely due to a disaster declaration must keep a verbatim audio or video recording of the remote meeting, both open and closed.</li> <li>• Verbatim recordings of closed session meetings held remotely will be maintained by the school district in the normal course.</li> <li>• Verbatim recordings of open session meetings held remotely is brand new territory for most school districts.</li> <li>• We do <u>not</u> interpret SB 2135 to require verbatim recordings of open session meetings held remotely to be posted on the school district's website.</li> <li>• However, the verbatim recordings of open session meetings held remotely must be available for public inspection for a period of at least 18 months, until they are destroyed. We believe this is the case under SB 2135 because a verbatim recording of an open session meeting would not generally require confidential treatment.</li> <li>• The verbatim recordings of open session meetings may be destroyed in the same manner as closed session recordings, no less than 18 months after the completion of the meeting recorded but only after: <ul style="list-style-type: none"> <li>(1) the public body approves the destruction of a particular recording; and</li> <li>(2) the public body approves minutes of the closed meeting that meet the written minutes requirements of subsection (a) of this Section.</li> </ul> </li> </ul>
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<p>10) The public body shall bear all costs associated with compliance with this subsection</p>	<ul style="list-style-type: none"> <li>• This is self-explanatory. One caution is that this subsection arguably will not allow a school district to charge a member of the public for a flash drive containing the verbatim audio recording of an open session meeting.</li> </ul>
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***Must board policies be amended to include SB 2135 requirements?***

Yes, but we do not recommend that any revisions be made to board policies or procedures until the legislation is signed by the Governor and a final effective date is determined. Once SB 2135 is signed into law, the provisions will be applicable even if a school district has not yet updated its board policies and/or procedures.

***What if the Governor signs SB 2135 right before a board meeting held remotely?***

It depends on the final effective date of the law, which we anticipate will be effective immediately. For the duration of the Gubernatorial Disaster Proclamation, the provisions of the OMA relating to in-person attendance by members of a public body are suspended by [Executive Order 2020-07](#). The current Disaster Proclamation is effective through June 28, 2020. When SB 2135 becomes effective, the 10 requirements summarized in this newsletter will go into full force and effect. The 'findings' that need to be made are summarized in the next question/answer.

**Must boards of education take public action or otherwise vote at the beginning of board meetings held remotely pursuant to SB 2135?**

SB 2135 is silent on this particular issue. Since it does not specifically require board action or a vote, we do not believe that is necessary. However, it is advisable for the board president or superintendent to make the following findings at the beginning of the open session meeting by reading them out loud and incorporating the findings into the meeting minutes. Alternatively, the board may choose to prepare a resolution containing the following six paragraphs that can be adopted by roll call vote of the board of education. School districts may choose between either of these options. Following are the six specific findings that must be made pursuant to SB 2135:

1. This board meeting is being held remotely pursuant to Section 120/7(e) of the *Illinois Open Meetings Act* [5 ILCS 120/7(e)] due to the state-wide COVID-19 disaster declaration issued by Governor Pritzker effective through June 27, 2020, to ensure the health and safety of our community members, staff members and students.
2. The head of the public body (board president or superintendent) has determined that holding a board meeting with the board members attending in-person is not practical or prudent at this time due to the COVID-19 disaster declaration.
3. The head of the public body (board president or superintendent) has determined that members of the public should similarly not meet in-person during the board meeting because their attendance is not feasible due to the COVID-19 disaster declaration.
4. The head of the public body (board president or superintendent) has determined that no member of the board, including legal counsel or a school district administrator, should be physically present in-person at the regular meeting location because their attendance is unfeasible due to the COVID-19 disaster declaration.

OR

The head of the public body (board president or superintendent) has determined that [insert member of the public body, chief legal counsel or administrator] shall be physically present in-person at the regular meeting location during the board meeting.

5. The board of education has made alternative arrangements and has provided notice to the public on the school district's website describing how any interested member of the public may contemporaneously hear all discussion, testimony and roll call votes taken during the board meeting by offering a telephone number or a web-based link [select method].
6. The board of education will keep a verbatim record of all board meetings held remotely in the form of an audio or video [select method] recording. The recordings of open session meetings will be made available for public inspection.

the  **friday recap**  
WEEK ENDING  
June 12, 2020  
*\*fireside chat series*

Join us at  
1:30 PM CST



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