

# COLORADO SCHOOL BOARD SERVICE: Legal and Practical Issues

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# Agenda: Legal Information

- Sources of Board Authority
- Colorado School Board Service & Ethics Rules
- Colorado Open Records Act (CORA)
- Colorado Open Meetings Act (COMA)
- Use of Social Media

# Sources of Board Authority

# State Sources of Board Authority

## Colorado Constitution:

- Requires General Assembly to maintain **thorough and uniform system of free public schools.**
- School boards have “**local control**” of instruction.
- No aid to private schools, churches, corporations.
- No general obligation debt unless by election.
- No multi-fiscal year district debt without adequate present cash reserves held (TABOR).

# State Source of Board Authority – CRS Title 22

## Duties:

- Elect officers, adopt bylaws on conflicts of interest
- Hold meetings in public
- Adopt certain policies such as policies related to conduct, safety and welfare of students, including procedures for due process in suspension, expulsion and denial of admission
- File reports with State Board
- Follow code of ethics
- Determine educational programs and prescribe textbooks
- Establish DAC
- Determine school calendar and instructional time

## State Source of Board Authority – CRS Title 22

### Duties cont'd:

- Expel and deny admission to students for statutory reasons (quasi-judicial role)
- Implement certificated personnel evaluation system and performance evaluation council
- Adopt salary schedule, teacher salary policy or combination of schedule and policy for all teachers
- Annually adopt budget and appropriation resolution
- Certify necessary tax levies to county
- Incur no obligation in excess of appropriation

# State Source of Board Authority – CRS Title 22

## Powers:

- Employ superintendent
- May sue and be sued
- Board members protected by CGIA
- Buy, sell & lease property
- Power of eminent domain
- Determine which schools will be operated and fix attendance boundaries
- May furnish transportation
- Provide for free use of textbooks
- Require fees reasonably necessary for expendable supplies
- Exclude books, publications and materials determined by BOE to be of immoral or pernicious nature

## State Source of Board Authority – CRS Title 22:

### Powers cont'd:

- Contract for performance of any service/activity district authorized to perform
- Enter into IGAs
- Discharge personnel subject to TECDA
- Power to employ teachers may not be delegated, but power to discharge classified personnel may be delegated to Supt.
- Issue bonds after election
- Increase compensation for future board members



# Federal Sources of Board Authority

**U.S. Constitution:** Though silent on education, Bill of Rights applies to actions of district by virtue of Fourteenth Amendment.

- First Amendment - free speech; religion principles found in free exercise and establishment clauses.
- Fourth Amendment - search and seizure.
- Fourteenth Amendment - due process issues, applies to students and staff.

# Federal Sources of Board Authority

Federal statutes and federal regulations apply because district accepts federal funds, including ESSA, civil rights laws (Title IX, Title VI, Section 504, etc.), FERPA and IDEA.

# School Board Services & Ethics Rules

## Role: Individual v. Board Action

- Board members have no individual authority over district and cannot act alone; they must act collectively as group and in interest of district they serve.
  - Board works on team agenda rather than election platforms on which you ran
  - Think long-term rather than day-to-day

## Role: Individual v. Board Action

- While you will act (vote) individually regarding board matters, you do not have the right to speak for the Board, unless specifically delegated the authority to do so.

# Role: Individual v. Board Action

- Examples of things you should not do:
  - Write letters to newspapers/speak to media without making it clear that you speak only for yourself.
  - Make public predictions about future board actions.
  - Make public (or private) statements suggesting that you or another member have already decided an issue before Board has publicly considered it.
  - Make promises about what the Board will do.

## Role: Ethics

- In Colorado, public office “is a public trust” and public officials “shall carry out [their] duties for the benefit of the people of the state.”
- Board members shall not use confidential information acquired as part of official duties to further “substantially” their personal financial interests.

# Role: Ethics

**Fiduciary Duty** is intended to ensure high degree of care and complete loyalty to district and encompasses:

- **Duty of Loyalty:** Putting district's interest ahead of private interests.
- **Duty of Care:** Devote necessary time and attention to affairs of district to be able to make reasonable and informed decisions.
- **Duty of Obedience:** To obey all applicable local, state and federal laws, and district policies.



## Role: Ethics

- Should not vote on matter if you have conflict of interest.
- Cannot accept gifts of substantial value if doing so would tend to improperly influence reasonable person from impartially carrying out duties.

## Role: Ethics

- A member of board “who has a personal or private interest in any matter proposed or pending before any governing body shall **disclose such interest** to the governing body and shall **not vote** thereon and shall **refrain from attempting to influence** the decisions of the other members of the governing body in voting on the matter.”

# Role: Ethics

- Shall not perform official act directly and substantially benefiting an undertaking in which Board member either has substantial financial interest or is engaged as counsel, consultant, representative, or agent; nor to economic detriment of competing firm or undertaking.
- “Official act” means any vote, decision, recommendation, approval, disapproval, or other action that involves use of discretionary authority.
- “Financial interest” includes an ownership interest in real property.

# Role: Requesting Records

- Board members “shall have access to all school records at all times,” but access to records carries with it responsibility to request records only as required to carry out your official duties.
- Requests for records/information should be made to Superintendent in writing with a copy to other members. Copies of requested records, or a summary, should be provided to all other board members.
- Keep in mind quasi-judicial role (employment, student discipline), need to wait to receive record.

# Colorado Open Records Act



# CORA: Purpose and Declaration

“It is declared to be the public policy of this state that all **public records** shall be open for inspection by any person at reasonable times, except as provided in this part [] or otherwise provided by law.”

# CORA: What is a “public record”?

- “**Public records**” include all **writings** made, maintained, or kept by the school district for use in the exercise of functions required or authorized by law or involving the receipt or expenditure of public funds.
- “**Writings**” include all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristic.
- Does not depend upon ownership of device upon which records are stored. (Personal device/public business, District device/personal business)

# CORA: What is a “public record”?

A “public record” is not “**work product**,” which means and includes “all intra- and inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials **express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision** within the scope of their authority.”

This can include, but is not limited to, **(a)** notes and memoranda that relate to or serve as background information for decisions and **(b)** preliminary drafts and discussion copies of documents that express a decision by an elected official.



# CORA: Common Exceptions

## **Some common exceptions to the CORA disclosure rule:**

- Where disclosure would be unlawful (ex. attorney-client)
- Personnel files and letters of reference
- Medical, mental health, and scholastic data on a person
- Trade secrets or privileged information
- Contact information for students, employees, and email address of individuals
- Sexual harassment complaints and investigations
- Application for executive position in district (not selected)
- Confidential communications to and from board members by constituents

# School Board Meetings & the Colorado Open Meetings Act

# Board Meetings:

Types of meetings –

- Regular meetings shall be held at time and place as designated in board's policies.
- Special meetings may be called by board president at any time or upon written request of majority of board members.
- All regular and special meetings shall be open to the public.

# Board Meetings:

For Special meetings:

- Board secretary shall deliver notice of time, place, and purpose of special meeting to board members.
- Any member may waive notice, and attendance at such meeting shall be deemed waiver.
- No business other than that stated in notice may be transacted unless all board members are present and all consent to consider and transact other business.

## COMA: Purpose

“It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret.”

# COMA: Primary Requirement

All “**meetings**” of **three or more members** “at which **public business** is discussed or at which any **formal action may be taken** are declared to be public meetings open to the public at all times.”

# COMA: What is a “meeting”?

- A “meeting” subject to COMA means any kind of gathering, convened to discuss public business, in person, by telephone, or by other means of communication.
- COMA **does not apply** “to any chance meeting or social gathering at which discussion of public business is not the central purpose.”

# COMA: Emails as a “meeting”?

**Emails can be considered a “meeting” under COMA:**

“If elected officials exchange [email] to discuss pending legislation or other public business among themselves, the electronic mail is subject to [COMA’s open-meeting requirements].”

Also, emails between members of board are generally public records.



## COMA: Emails as a “meeting”?

The Colorado Supreme Court has stated that the public meetings requirement “is not meant to permit ‘rubber stamping’ previously decided issues.”

## COMA: Emails as a “meeting”?

- In general, any message dealing with topic that will be discussed or acted upon by board that is sent by one board member to more than one other board member, whether simultaneously or sequentially, will likely fall under definition of a public meeting.
- However, one-way distribution of information for which no response is required or requested is not considered to be a meeting.

# COMA: Emails as a “meeting”?

**HB21-1025 clarifies which emails will not create a “meeting”:**

“[Email] communication between elected officials that does **not relate to the merits or substance of pending legislation or other public business**, including [email] communication regarding scheduling and availability or ... that is sent by an elected official for the purpose of forwarding information, responding to an inquiry from an individual who is not a [board] member ..., or posing a question for later discussion by the public body, shall not be considered a ‘meeting’ [under COMA]. ... **‘Merits or substance’ means** any discussion, debate, or exchange of ideas, either generally or specifically, related to the essence of any public policy proposition, specific proposal, or any other matter being considered by the governing entity.”



# COMA: Public Notice Requirements

## **“Meetings” requiring public notice beforehand:**

“Meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public.”

# COMA: Public Notice Requirements

## **If a meeting is subject to public notice:**

- Notice can be given by posting a notice in a designated public place at least 24 hours prior to the meeting.
- The designated public place “shall be designated annually at the [board]’s first regular meeting of each calendar year.”
- The notice shall include agenda information “where possible.”
- Meeting must be held at the time and place designated.

# COMA: Executive Sessions

- Boards may hold “executive sessions” outside of public view, but **only to discuss** certain topics and no final policy decisions shall be made.
- Boards may move to go into executive session from any regular or special meeting, and generally should do so only at beginning or end of scheduled board meetings.
- Only those persons invited by board may be present.

# COMA: Executive Sessions

Boards **cannot adopt** any proposed policy, position, resolution, rule, regulation, or formal action during an executive session.

# COMA: Executive Sessions

Going into executive session requires:

- announcement of topic for discussion;
- citation to relevant statutory section
- affirmative vote of two-thirds of quorum present; and
- identification of particular matter to be discussed without compromising purpose.



# COMA: Executive Sessions

- **Valid topics for executive sessions are designated by statute and include:**
  - Purchase or transfer of real estate
  - Conferences with an attorney to receive legal advice
  - Matters required to be kept confidential by law
  - Developing strategy for negotiations
  - Sensitive personnel matters
  - Consideration of documents protected from disclosure under CORA
  - Discussion of students (FERPA)

# COMA: Executive Sessions

## Remedies for Violation

- “No resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless made at a meeting that meets the requirements of [the law].”
- Courts may issue injunctions to enforce the law upon an action by any citizen. Prevailing party shall be entitled to reasonable attorney fees and costs.

# COMA: Executive Sessions

## Good Practice:

- Board members must maintain the confidentiality of discussions held in Executive Session.
- Strict compliance with statutory procedures is required for convening and participating in executive sessions.

# Meeting Recordings

- You must maintain electronic recordings of meetings where action is taken and retain those recordings for at least 90 days.
- This is also true for executive sessions, except for (a) discussions with counsel to receive legal advice and (b) discussions about specific students where no recording is made.
- Executive session recordings are confidential (not privileged) and could be subject to subpoena or court order.

# Meeting Minutes

- Maintain minutes of meetings where action is taken and make available for public inspection.
- State law does not dictate content of minutes, allowing each board to determine degree of specificity.
- *Robert's Rules* counsels that “[i]n an ordinary society . . . [minutes] should contain mainly a record of what was done at the meeting, not what was said by the members.”

# Voting

- All voting shall be by alphabetical roll call with each member present voting “aye” or “no.”
- Member may abstain from voting only if excused by board for good cause or in the case of conflict of interest.
- Since board has policy allowing electronic participation, member will be considered present and may vote, but must have real-time access to materials presented to those physically present.

# Robert's Rules of Order

Generally, any matters not covered by the board's policies concerning the operation of a meeting are governed by *Robert's Rules of Order*.

# Public Participation

- The district's public participation policy sets the “norms” for participation. (See Policy 2.D.11.)
- Can impose reasonable, content-neutral time, place, and manner restrictions on speech, limit comments to subject matter that is relevant to board's duties, and prohibit behavior that disrupts orderly process of meeting.
- Can't stop people from speaking just based on viewpoint.



# School Board Member Use of Social Media

# Use of Social Media

## Is your social media account subject to the First Amendment?

- Not every social media account operated by a public official is a government account subject to the First Amendment.
- Whether First Amendment concerns are triggered when a public official uses their account will in most instances be a **fact-specific inquiry**.
- Are you acting as a private actor or government actor?

# Use of Social Media

## **Private Actor = NOT subject to First Amendment Restrictions**

- Explains account is private and wholly for personal use
- Channel for discussing issues wholly unrelated to official duties
- Channel for engaging with friends and family
- Account is private and only available to individuals known personally
- Individuals visit account to get updates on personal life events and do not associate it with official duties

## **Government Actor = subject to First Amendment Restrictions**

- Describes self as a public official in bio
- Channel for discussing—among other things—issues related to official duties
- Channel for engaging friends, family, and constituents
- Account is public or widely available to the public
- Individual visit account to get insight on actor's stance on public issues or news on public issues

# Use of Social Media

## How to maintain a private social media account?

- Set your profile to private
- Only allow friends and family to “follow” or “friend” you
- Describe your account as a private account
- Avoid tweeting or posting about issues or news related to the school district or your official duties
- Avoid expressing opinion about issues or news related to the school district or your official duties

# Use of Social Media

If you are acting as a **government actor**...

- **Don't discriminate based on viewpoint since viewpoint discrimination violates the First Amendment.**
- Viewpoint discrimination occurs when you single out a particular opinion or perspective for treatment unlike that given to other viewpoints.
  - Do not block or remove users who disagree with your views.
  - Do not block or remove users who express views with which you disagree.

# QUESTIONS?

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