

Serving on the Board: An Overview of the Legal Responsibilities of a Board Member for a Chartered Public School

Presented to the Founders Academy

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***Wadleigh, Starr & Peters, P.L.L.C.
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A Word of Caution

No two legal matters are exactly alike. This material is designed to provide Chartered Public School Board members with a broad understanding of the law pertaining to their role on the Board. This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your charter school's legal counsel regarding any specific case.

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OVERVIEW

The purpose of this material is to review the unique legal responsibilities that are assumed by members of a chartered public school board. The goal of this material is to provide the board member with the tools necessary to meet their legal obligations and maximize their effectiveness as a board member.

I. The General Legal Framework for a Chartered Public School Board

A. The State Constitution

Part 2, Article 83 of the New Hampshire Constitution provides that:

[k]nowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people. . . .

Based on this language, the State Supreme Court concluded in the case of Claremont School District v. Governor, 138 NH 183 (1993), that Part 2, Article 83 imposes a duty on the State to provide a constitutionally adequate education to every educable child and to guarantee adequate funding. The right to an adequate education was identified by the Court as, “*at the very least an important, substantive right.*” Id. at 192.

B. The Chartered Public School as a Statutory Creation

Chartered public schools, and their boards, are a creature of statute. NH RSA 194-B:5, III provides that, “*an established chartered public school shall be a corporation, which shall be registered with the secretary of state . . . with authority necessary or desirable to carry out its charter program, including, but not limited to, the following . . .*”

NH RSA 21-N:4 outlines the duties of the New Hampshire Commissioner of Education. Those duties include an obligation to establish (by October 1, 2017), “a

chartered public school program officer position” in the Department of Education. RSA 21-N:4, XII. The chartered public school program officer shall:

- (a) Answer inquiries regarding charter public schools.
- (b) Act as a liaison between chartered public schools and the department of education.
- (c) Ensure that a chartered public school is implementing its charter mission.
- (d) Provide training for interested parties on the governance of chartered public schools and the development of chartered public school policy.
- (e) Assist the chartered public school in identifying and securing alternative funding sources.
- (f) Receive and evaluate progress reports from chartered public schools, identify best practices for instruction and management in chartered public schools, and develop a process to share such best practices with other public schools.
- (g) Act as the liaison between chartered public schools and the United States Department of Education.
- (h) Act as the liaison between chartered public school advocacy groups and interested parties.
- (i) Act as the liaison between chartered public schools and other public schools in the chartered public school's geographic region.
- (j) Work closely with the resident school districts and chartered public schools to assure appropriate support for students with disabilities.

Id.

C. The Role of the Board Member

The board of trustees is the governing body of a chartered public school. See RSA 194-B:1, III (defining board of trustees as the “governing body of a chartered public school authorized by the state board of education to supervise and control the chartered public school). Similar to a public school board, the board of trustees is granted “general supervisory control and authority over the operations of the chartered public school”. RSA 194-B:5, I.

1. Board Member Authority

The Board acts by a vote of the body as a whole. Individual board members do not have the authority to bind the Board or Founders Academy. Policy BEDH, Public Participation at School Board Meetings, embodies this premise. It states that *“members of the Board are without authority to act independently as individuals in official matters.”*

Although the State Board of Education has not adopted specific regulations outlining the role of the chartered public school board member, the regulations outlining the “substantive duties” of the public school board shed some light on the role of the chartered public school board member. Ed 303.01. These duties include the following:

- Adopt policies “necessary and desirable” to control and effectuate the recruitment, employment, evaluation, and dismissal of teachers and other employees. The Board may delegate this authority to the superintendent, except that the Board has the nondelegable duty to elect teachers nominated by the superintendent.
- Adopt policies as necessary and desirable to control and effectuate the purchase of equipment, supplies or services, and may delegate this duty to the superintendent;
- Provide, through documented planning and public meetings and quorum votes, accommodation for all pupils in approved schools or other facilities in accord with state law;
- Provide required transportation;
- Provide safe and healthy school buildings and learning environments;
- Prepare an annual budget;
- Comply with all federal and state laws and rules;
- Hold meetings at least once every 2 months, requiring the superintendent or designee to attend;
- Maintain a record of all meetings in accord with the “Right-to-Know Law;”
- Consult with the superintendent and in accord with statutes and state board regulations to determine the educational goals of the district, and develop long-range plans and identify measurable goals and short-term objectives;

- Require the implementation of educational programs designed to reflect the board's goals and objectives, reviewing such programs and making public the results of its investigation;
- Exercise all powers and duties required by law;
- Adopt a rule to ensure that there is no unlawful discrimination;
- Establish a policy on sexual harassment;
- Establish written criteria for evaluating the superintendent;
- Annually evaluate the superintendent; and
- Adopt a teacher performance evaluation system, with the involvement of teachers and principals, for use in the district, pursuant to RSA 189:1-a, III.

The state board of education has also adopted rules pertaining to the duties of superintendents. NH RSA 21-N:9 (II)(p); NH RSA 186:8; Ed 302.01-302.02. The superintendent's duties include, but are not limited to:

- Serving as the executive officer of the districts within the SAU;
- Responsibility for the overall administrative and leadership services of the SAU;
- Performing the duties set forth in Ed 302.01-02;
- Responsibility for planning and managing the administration and leadership services of the districts within the SAU subject to statutory requirements, rules, and policies of the local districts;
 - Local district services include, but are not limited to:
 - Personnel
 - Finance
 - Communication/community relations
 - Student services
 - Maintenance/capital improvement
 - Curriculum
 - Instruction
 - Assessment
 - Short and long range planning

- Governance for student achievement
 - Policy research
 - Implementation and review
 - Overall leadership on educational issues
- Developing and maintaining a system of public schools, staffed by certified educators, qualified professionals, and persons providing support services, subject to statutory requirements, rules, and policies of the local districts;
- Providing, developing, and implementing procedures to achieve educational objectives within the districts in the SAU;
- Being directly responsible to the districts within the SAU;
- May nominate for SAU board appointment one or more assistants, including assistant superintendents and business administrators;
- May assign duties for the efficient management of the SAU;
- Nominating all certified staff and appointing other employees in accord with state law, rules, and board policies;
- Directing and supervising the work of all employees of the districts within the SAU;
- Having all powers necessary to make direction and supervision of employees effective, including the ability to delegate powers and duties to other personnel;
- Responsibility for developing and recommending to the boards within the SAU the annual budget;
- Responsibility for developing and maintaining an accounting system and financial reporting procedures for all funds;
- Responsibility for developing an educational plan including curriculum, instruction, and assessment programs for the districts and for recommending a program of studies suitable to the needs of the pupils and the community;
- Removing a teacher or other employee in accord with RSA 189:31;
- Recommending the dismissal of certified staff to the board;

- Providing for temporary staff to fill vacancies;
- Providing supplies immediately needed for the operation of schools;
- Responsibility for maintaining records and filing reports as required by the state board and local boards;
- Admitting pupils to the resident district in accord with state law, rules, and local policies;
- Directing pupils to assigned classes and grades, consistent with local policies;
- Maintaining a safe environment for pupils free of hazardous conditions;
- Responsibility for evaluating personnel and programs;
- Responsibility for implementing state board rules, which apply in the area of superintendent jurisdiction;
- Responsibility for developing and recommending to the boards within the SAU an annual maintenance program and long-term capital improvement plan;
- Responsibility for implementing and recommending to boards within the SAU a community relations and communications program; and,
- Responsibility for implementing and reviewing district policies.

These duties are similar to that of the Dean of the chartered public school.

Practice Pointer: The Board adopts educational policies, and the Dean is responsible for implementing those policies. Policy BG, Board Policy Process states that "Policies are guides for action by the administration, who then sets the rules, regulations and procedures to provide specific directions to school personnel."

Practice Pointer: The Dean also serves as the conduit for communication between the Board and other employees. See Policy BHC, Board-Employee Communications; see also Policy KEB, Public Complaints About School Personnel, Employees, Students or Administration.

2. Ethical Obligations of the Board Member

The Founders Academy policies include a code of ethics. See Policy BCA, School Board Member Ethics. The policy states:

“Each board member shall comply with the following ethical provisions:

1. Attend all regularly scheduled Board meetings insofar as possible, and become informed concerning the issues to be considered at those meetings;
2. Make decisions only after full discussion at public Board meetings; render all decisions based on the available facts and independent judgment, and refuse to surrender that judgment to individuals or special interest groups;
3. Seek systematic communications with students, staff, and members of the community;
4. Work respectfully with other Board members to achieve the educational goals of the school district by encouraging the free expression of opinions by all Board members;
5. Communicate to other Board members and the Dean expressions of public reaction to the Board policies and school programs;
6. Be informed about current educational issues by individual study and through participation in programs providing needed information, such as those sponsored by my state and national school boards associations;
7. Support the employment of those persons best qualified to serve as school staff, and insist on a regular and impartial evaluation of all staff;
8. Respect the confidentiality of information that is privileged under applicable law or is received in confidence or executive session;
9. Recognize that no individual member has authority to speak or act for the entire Board, except as specifically designated to do so by Board action;
10. Recognize that final Board actions will be supported by all members of the Board; take no private action that will compromise the Board or administration; and refrain from private actions which undermine or compromise official Board action.
11. Display and demonstrate courtesy and decorum toward fellow Board members at all public meetings and in all public statements.”

See Policy BCA, School Board Member Ethics.

II. The “Right to Know” Law NH RSA 91-A

The governing board of a chartered public school (as well as any committee of the board) is considered a public body and as such is subject to the Right to Know Law set forth in NH RSA 91-A. The preamble to the Right to Know Law observes that, “[o]penness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.” The meeting of the School Board is considered a public proceeding. See NH RSA 91-A:1-a (VI)(d); NH RSA 91-A:2 (I).

A. The General Presumption of Openness

There is a general presumption that all meetings of the School Board are open to the public. A meeting is defined as, “*the convening of the quorum of the membership of a public body . . . whether in person, or by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, . . . for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction or advisory power.*” See NH RSA 91-A:2 (I).

The Right to Know Law creates a general presumption that “*all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public.*” NH RSA 91-A:2 (II).

Practice Pointer: Board members should model civic responsibility, ethical standards, and the same healthy dialogue that they expect from students and staff.

B. Defining a Meeting

There are certain activities that do not include a meeting. A meeting does not include: (a) A chance, social, or other encounter not convened for the purpose of discussing or acting upon matters over which the public body has supervision, control, jurisdiction, or advisory power if no decisions are made regarding such matters;¹ (b) strategy or negotiations with respect to collective bargaining; (c) consultation with legal counsel; (d) a caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis; or (e) circulation of draft documents

¹ No such chance or social meeting shall be used to circumvent the spirit of the Right to Know Law. RSA 91-A:2-a (II).

which, when finalized, are intended only to formalize decisions previously made in a meeting.² NH RSA 91-A:2 (I).

1. Participation in the Meeting

The board may allow one or more of its members to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body. If the board chooses to allow this type of participation, it must comply with the following:

- A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. The reason(s) that attendance is not reasonably practicable shall be stated in the minutes of the meeting;
- Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this section, an emergency “*means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action.*” The determination that an emergency exists shall be made by the chairperson or presiding officer of the public body, and the facts upon which that determination is made shall be included in the minutes of the meeting;
- Each part of the meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating electronically or otherwise shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice;
- Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of the Right to Know Law, and shall not circumvent the spirit and purpose of the Right to Know Law; and
- A member participating in a meeting by electronic or other means is

² This subsection does not alter or affect the application of any other section of the Right to Know law pertaining to said documents or related communications. NH RSA 91-A:2 (I)(d).

deemed to be present at the meeting for purposes of voting. All votes taken during the meeting shall be by roll call vote.

NH RSA 91-A:2, III.

2. Public Participation in Board Meetings

The Board has adopted a policy encouraging parents and New Hampshire residents to attend its meetings. It has adopted the following procedures and rules pertaining to public participation at Board meetings:

1. The first 10 minutes will be set aside for citizens to address the Board. This period may be extended by a majority vote of the Board. Speakers will be allotted five minutes per person.
2. Members of the public may offer comments on agenda items only. The Board will not entertain comments on items that do not appear on the agenda. Requests to address the Board on matters not on the agenda must be presented to the Dean and must set forth the specifics of the subject to be addressed. When appropriate, the Board may place such requests on the agenda.
3. Consistent with RSA 91-A:3, Policy BEDB [Agenda], and the laws pertaining to student and family privacy rights, the Board will not place any matter on the public agenda that is to be properly discussed in a non-public session. Complaints regarding individual employees, personnel or students will be directed to the Superintendent in accord with Policies KE and KEB.
4. All speakers are to conduct themselves in a civil matter. Obscene, libelous, defamatory or violent statements will be considered out of order and will not be tolerated. The Board Chair may terminate the speaker's privilege or address if the speaker does not follow this rule of order.

See Policy BEDH, Public Participation at Board Meetings.

In the event a member of the public directs a question to an individual Board member, the policy also provides that the answer must be deferred pending consideration by the full Board. Id.

C. Protections Afforded to the Public

In order to ensure openness, the public is afforded certain protections. These are as follows:

- Except as provided in RSA 91-A:3, all meetings must be open to the public;
- No vote in open session may be taken by secret ballot;
- People are permitted to record meetings and to use all forms of recording devices;
- Minutes of all meetings are to be promptly recorded and open to public inspection within 5 business days after the meeting;
- Minutes are to be treated as permanent records of the School Board;
- Except in an emergency, notice of the time and place of each meeting, including a non-public session, shall be posted in two appropriate public places one of which may be the public body's website, or shall be printed in a newspaper of general circulation at least twenty-four (24) hours, excluding Sundays and legal holidays, prior to the meeting; and
- Even in an emergency, the chairperson or presiding officer of the public body must post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting.

NH RSA 91-A:2 (II).

D. The General Presumption Against Non-public Sessions

In order to further openness, the Right to Know Law sets forth a general presumption against non-public sessions. NH RSA 91-A:3 (I). Unless the subject matter fits within certain statutory exceptions, a board is required to meet in public session. Further safeguards are afforded by requiring that the Board may not enter into non-public session except pursuant to a motion properly made and seconded. Moreover, any motion to enter non-public session must state on its face the specific reason for the non-public session. The vote on a motion to go into non-public session must be by roll call vote and requires a vote of the majority of the members present. All discussions held, and decisions made, during non-public session must be confined to the matters set out in the motion. NH RSA 91-A:3 (I)(a)-(c).

Effective January 1, 2018, "[i]f a member of the public body believes that any discussions in a meeting of the body, including in a nonpublic session, violates [the Right-to-Know law], the member may object to the discussion. If the public body

continues the discussion despite the objection, the objecting member may request that his or her objection be recorded in the minutes and may then continue to participate in the discussion without being subject to the penalties of RSA 91-A:8, IV or V. Upon such a request, the public body shall record the member's objection in its minutes of the meeting. If the objection is to a discussion in a nonpublic session, the objection shall also be recorded in the public minutes, but the notation in the public minutes shall include only the member's name, a statement that he or she objected to the discussion in nonpublic session, and a reference to the provision of RSA 91-A:3, II, that was the basis for the discussion." 2017 N.H. Session Laws, Ch. 165 (amending RSA 91-A:2, by adding paragraph II-a) (Eff. Jan. 1, 2018).

E. The Circumstances Under Which a Board May Go Into Non-public Session

A board may go into non-public session to consider or act upon the following matters:

- The dismissal of an employee;
- The promotion of an employee;
- The compensation of an employee;
- The disciplining of an employee;
- The investigation of any charges against an employee;
- The hiring of an employee;
- Matters which if discussed in public would likely affect adversely the reputation of any person other than a Board member unless that person has requested an open meeting;
- Consideration of the acquisition, sale or lease of real or personal property which, if discussed in public would likely benefit a party or parties whose interests are adverse to those of the general community;
- Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed by or against the Board or any subdivision thereof or by or against any member of the Board because of his membership in the Board, until such time as the claim for litigation has been fully adjudicated or otherwise settled;
- Consideration by a school board of entering into a student or pupil tuition

contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering the contract, including any meeting between the school boards, or committees thereof, involved in the negotiations. A contract negotiated by a school board shall be made public prior to its consideration for approval by a school district, together with minutes of all meetings held in nonpublic session, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the contract, shall be made public. Approval of a contract by a school district shall occur only at a meeting open to the public at which, or after which, the public has had an opportunity to participate; and,

- Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.

NH RSA 91-A:3, II.

Discussion of the dismissal, promotion, or compensation of a public employee, or the disciplining of such employee, or the investigation of charges against that employee will occur in public session if the employee: (a) has a right to a meeting; and (b) requests that the meeting be open, in which case the request must be granted. NH RSA 91-A:3 (II)(a). Employees may have assertable rights which can result in a personnel matter being heard in a public session.

F. Minutes of Non-public Sessions

The law requires that minutes of non-public sessions be kept and must include the names of members, persons appearing during the non-public session, and a brief description of the subject matter discussed and final decisions. Minutes must record all actions in such a manner that the vote of each member is ascertained and recorded. Further, the minutes must be promptly made available for public inspection unless the Board has properly voted to seal the minutes. Minutes and decisions reached in non-public session must be publicly disclosed within seventy-two (72) hours of the meeting unless by a recorded two-thirds vote of the members present taken in public session it is determined that divulgence of the information:

- Likely would affect adversely the reputation of any person other than a member of the Board; or
- Render the proposed action ineffective.

RSA 91-A:2, II; RSA 91-A:3, III.

G. Public Access to Minutes and Records

Suffice it to say citizens have a right to access the minutes and records of the Board during the regular business hours of the school. Citizens are explicitly given a right to access records of all payments made to public employees.

Effective January 1, 2018, RSA 91-A:2, has been amended to include the following new paragraph, RSA 91-A:2, II-b, which states:

“(a). If a public body maintains an Internet website or contracts with a third party to maintain an Internet website on its behalf, it shall either post its approved minutes in a consistent and reasonably accessible location on the website or post and maintain a notice on the website stating where the minutes may be reviewed and copies requested.

(b). If a public body chooses to post meeting notices on the body's Internet website, it shall do so in a consistent and reasonably accessible location on the website. If it does not post notices on the website, it shall post and maintain a notice on the website stating where meeting notices are posted.”

H. Privacy Rights and Student Records

The following records of the school are exempt from the Right to Know Law:

- Personal school records of pupils;
- Records pertaining to internal personnel practices;
- Test questions;
- Scoring keys;
- Other student examination data;
- Personnel files;
- Medical files;
- Teacher certification records;
- Unique pupil identification information collected in accord with RSA 193-

E:5;

- Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of the Board.

NH RSA 91-A:5.

III. Duties Owed by the Chartered Public School

A. Duties Owed to Students

1. The Family Educational Rights and Privacy Act ("FERPA")

As implied by the title, FERPA addresses the **privacy** and **access** rights of parents and adult students in their educational records. Under FERPA, schools are required to protect the privacy rights of parents and adult students through the limitation of disclosure and to further the access rights through the opportunity to inspect, review and seek to amend student records. 20 U.S.C. 1232g.

FERPA defines educational records as: "those records, files, documents, and other materials which:

- Contain information directly related to a student; and
- Are maintained by a school district or by a person acting for a school district."

20 U.S.C. 1232g(a)(4)(A).

The term "record" means "any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche." 34 C.F.R. 99.3.

However, educational records do not include:

- Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker and which are not accessible or revealed to any other person except a substitute;
- Records maintained by a law enforcement unit of the school district that were created by that law enforcement unit for the purpose of law enforcement;

- iii. In the case of persons who are employed by a school district but who are not attending a school district, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose;
- iv. Records on a student who is 18 years of age or older, or is attending a college or other postsecondary institution, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice;
- v. Records created or received by a school district after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student; or,
- vi. Grades on peer-graded papers before they are collected and recorded by a teacher.

20 U.S.C. 1232g(a)(4)(B) (emphasis added); 34 CFR 99.3.

FERPA enumerates a number of rights that Parents and adult students (students 18 years of age and older) have with regard to student records. These rights include:

- The right to inspect, review and access education records;
- The right to challenge the content of education records; and,
- The right to consent to the disclosure of education records.

a. The right to inspect, review and access education records

Parents have the right to inspect and review the education records of their children. When the data pertains to more than one child the parent has the right “to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material.” The privacy rights of other students are implicated in these circumstances, and the school is required to redact the names and other personally identifiable information about other students that may be included in the child’s education records.

The FERPA regulations require that when a parent makes a request to inspect and review his or her child’s education records the school must provide the parent with access within 45 days of the request. State law, however requires that schools provide parents with access within **14 days** of the request. RSA 189:66, IV.

The right of access includes the right to request copies of education records. The school has a duty to provide copies to parents, but may charge a reasonable duplication fee for those copies.

b. The right to challenge the content of education records

A parent/adult student has the right to challenge the content of their education records.

Upon receipt of a challenge, the school has a choice:

- To agree to amend the record; or
- To offer the student a hearing on the request if it decides not to amend the record in accord with the request.

If after a hearing, the school still is of the mind not to permit amendment, the school is required to offer the parent the right to place a statement in their child’s record, which will be kept and disclosed with the record in question. A school that fails to offer a policy allowing parents a hearing when it refuses to amend a record is considered ineligible for federal funds.

c. The Right to Consent to the Disclosure of Education Records

The parent/adult student retains the right to consent to the release/disclosure of education records. FERPA creates a general presumption that a school may not release the education records of a student without **the prior written consent** to the disclosure. This general presumption is ameliorated by two concepts: the concept of

directory information and the concept of certain **exceptions to the prior written consent rule**.

Directory information is defined as information that a school may release, after public notice, provided that the parent/adult student has not refused the release of the information. Directory information may include the student's:

- name;
- address;
- telephone listing;
- date and place of birth;
- major field of study;
- participation in officially recognized activities and sports;
- weight and height, if a member of an athletic team;
- dates of attendance;
- degrees and awards received;
- the most recent previous educational institution attended.

In order for a school to be free to release directory information without prior written consent, the school must provide public notice of the areas of information that it has designated as "directory information," and allow a reasonable time for parents to refuse to allow release of directory information without prior written consent.

There are twelve (12) relevant **exceptions to the "prior written consent" rule**. They are as follows:

1. Other school officials, including teachers within the local educational agency, who have been determined to have a legitimate educational interest in the information.
2. Officials of other schools or schools systems in which the student intends to enroll.
3. Authorized representatives of the State Department of Education, the Attorney General of the United States, or State and local educational authorities.
4. Financial Aid Officials.
5. Persons subject to a Subpoena or Court Order.
6. Disclosure to State and local officials in connection with the state's juvenile justice system under specified conditions.

7. Organizations conducting studies for educational agencies.
8. Accrediting organizations.
9. Parents.
10. Health or safety emergencies.
11. The Patriot Act of 2001: Ex Parte Orders from the US Attorney General
12. Any agency caseworker or other representative of a State or local child welfare agency, or tribal organization, who has the right to access a student's case plan, as defined by the State, when such agency or organization is legally responsible, in accord with State law, for the care and protection of the student.

Practice Pointer: Board members should preserve the confidentiality of all student educational information.

The Individuals with Disabilities Education Act ("IDEA") also requires that all information pertaining to a student's educational disability remain confidential.

Practice Pointer: Board members should refrain from any discussion regarding a student's educational disability, and should never reveal the fact that a student has an educational disability.

2. Pupil Safety and Violence Prevention Act

In 2000 the state legislature adopted the "Pupil Safety and Violence Prevention Act of 2000." RSA 193-F:1, et seq. The Pupil Safety and Violence Prevention Act was a direct response to incidents of school violence that had occurred throughout our nation. Educators and lawmakers alike observed a persistent theme where the perpetrator of violence had been the victim of bullying in the school setting.

The law was amended in 2004 to mandate that schools provide a tangible remedy to the problem of bullying. In 2010, the Legislature repealed and reenacted the majority of RSA 193-F, expanding the scope of the bill to include cyberbullying. See N.H. Laws of 2010, Chapter 155 (enacting HB 1523).

a. Definitions

The Pupil Safety and Violence Prevention Act contains several definitions, including the following:

- Bullying: a single incident or pattern of incidents involving a written, verbal, or electronic communication, or a physical act or gesture, or any combination thereof, directed at another pupil which:
 - Physically harms a pupil or damages the pupil's property; or
 - Causes emotional distress to a pupil; or
 - Interferes with a pupil's educational opportunities; or
 - Creates a hostile educational environment; or
 - Substantially disrupts the orderly operation of the school.
- Bullying also includes "actions motivated by an imbalance of power based on a pupil's actual or perceived personal characteristics, behaviors, or beliefs, or motivated by the pupil's association with another person and based on the other person's characteristics, behaviors, or beliefs." See RSA 193-F:3, I(a)-(b).

Note: When bullying constitutes a "pattern of incidents" it may give rise to a duty to refer that student for special education and related services or for Section 504 accommodations. See e.g. N.H. Ed. 1105.02 (discussing child find).

- Cyberbullying: conduct defined in paragraph I of this section [the definition of bullying] undertaken through the use of electronic devices. RSA 193-F:3, II.
- Electronic devices: include but are not limited to, telephones, cellular phones, computers, pagers, electronic mail, instant messaging, text messaging, and websites. RSA 193-F:3, III.
- Perpetrator: a pupil who engages in bullying or cyberbullying. RSA 193-F:3, IV.
- School property: all real property and all physical plant and equipment used for school purposes, including public or private school buses or vans. RSA 193-F:3, V.
- Victim: a pupil against whom bullying or cyberbullying has been perpetrated. RSA 193-F:3, VI.

Bullying or cyberbullying occurs when "an action or communication as defined in RSA 193-F:3:

- a. Occurs on, or is delivered to, school property or a school-sponsored activity or event on or off school property; or

- b. Occurs off of school property or outside of a school-sponsored activity or event, if the conduct interferes with a pupil's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event."

RSA 193-F:4, I.

b. Policy Requirements

The board of trustees of a chartered public school must adopt a written policy prohibiting bullying and cyberbullying. RSA 193-F:4, II. The law contains numerous requirements pertaining to the development of the policy and the contents of the policy. RSA 193-F:4, II, IV.

Founders' Policy, JZB, contains the following procedures:

- The Director is responsible for receiving complaints of alleged bullying, and upon receipt of a report the Director shall commence an investigation within 5 school days of the reported incident and complete the investigation within 10 school days of receiving the initial report;
- Any employee or individual contracting with Founders who witnesses, receives a report of, or has knowledge or belief that bullying may have occurred shall inform the Director/designee, as soon as possible, but no later than the end of the school day;
- Any student who believes he/she has been the victim of bullying should make a report to the Director/designee, or any faculty or staff member;
- Any parent who witnesses, receives a report of, or has knowledge or belief that bullying may have occurred shall inform the Director/designee or any employee or designee as soon as possible.

The intent of the investigation is to identify whether the alleged bullying/cyberbullying is substantiated or unsubstantiated.

The policy includes specific time periods for the required notification(s) and investigation, as well as recommendations pertaining to remediating substantiated incidents of bullying.

When a perpetrator or victim is identified as a student with an educational disability, the Director's response to remediate any substantiated incident of bullying or cyberbullying may need to be presented to the sending district LEA and the IEP Team. The IEP Team may need to amend or augment the response in a manner necessary to

ensure that the perpetrator and/or victim receives a free, appropriate public education, while still taking appropriate measures to remediate bullying.

Similarly, if the Student has a Section 504 Plan, the remediation may require referral to the Section 504 Team for review and revision of accommodations.

3. Restraint and Seclusion: RSA 126-U

In 2010, the New Hampshire legislature adopted a comprehensive law, “Limiting the Use of Child Restraint Practices in Schools and Treatment Facilities.” See RSA 126-U. The law was adopted in response to nationwide concerns regarding the use of restraints by schools and other facilities. See e.g., Letter to Dodd, 55 IDELR 20 (U.S. DOE Dec. 8, 2009) (requesting that Congress consider the following principles in the context of any legislation pertaining to restraint and seclusion: “Behavioral interventions must be consistent with the child’s right to be treated with dignity and to be free from abuse, regardless of the child’s educational needs or behavioral challenges; Every instance of physical restraint and seclusion should be appropriately monitored to ensure the safety of the child, other children, teachers, and other personnel; Teachers and other personnel should be trained regularly on the appropriate use of restraint and seclusion and the use of effective alternatives, such as positive behavioral interventions and supports; Parents should be informed of the policies on restraint and seclusion at their child’s school or other educational setting, as well as applicable State or local laws; Parents should be notified promptly following the use of restraint or seclusion and any such use should be documented in writing; policies regarding the use of restraint and seclusion should be reviewed regularly and updated as appropriate; Legislation should apply to all children, not just children with disabilities; Legislation should promote the collection of data that would enable teachers, staff, and other educational personnel to understand and implement the preceding principles”).

Last year, the law underwent comprehensive amendments, which took effect on September 30, 2014.

The law applies to chartered public schools. See RSA 126-U:1, V(b) (defining “school” as including “a chartered public school governed by RSA 194-B”).

The use of restraint in schools is limited to physical restraint, and under limited circumstances involving transportation, mechanical restraint. RSA 126-U:6; RSA 126-U:12, III.

“Restraint shall only be used in a school . . . to ensure the immediate physical safety of persons when there is a substantial and imminent risk of serious bodily harm to the child or others.” The determination of whether the use of restraint is justified under this section may be made with consideration of all relevant circumstances, including whether continued acts of violence by a child to inflict damage to property will create a substantial risk of serious bodily harm to the child or others. Restraint shall be used

only by trained personnel using extreme caution when all other interventions have failed or have been deemed inappropriate.” RSA 126-U:5, I (emphasis added).

Similarly, seclusion “may only be used when a child’s behavior poses a substantial and imminent risk of physical harm to the child or others, and may only continue until that danger has dissipated.” RSA 126-U:5-a, I (emphasis added).

Seclusion may only be used “by trained personnel after other approaches to the control of behavior have been attempted and been unsuccessful, or are reasonably concluded to be unlikely to succeed based on the history of actual attempts to control the behavior of a particular child.” RSA 126-U:5-a, II (emphasis added).

The law contains detailed requirements pertaining to restraint/seclusion and intentional physical contact, including notice and record-keeping requirements. See RSA 126-U.

4. The Duty to Refer

State and federal law impose upon educators a duty to refer students with particular needs. The two primary areas in which an educator may have a duty to refer a student for evaluation or accommodation arise in the following circumstances:

a. Duty to Refer under the Individuals with Disabilities Education Act (“IDEA”)

The IDEA imposes upon all districts the obligation to promptly find children who may have educational disabilities, and to promptly determine whether or not they have an educational disability through the multi-disciplinary team process. This obligation includes a duty on the part of educators to refer students for evaluation by a multi-disciplinary team. A failure to timely refer and identify a student can translate into a far more difficult task to ensure that the student receives a FAPE.

Chartered public schools have a duty to collaborate with their students’ resident districts, regarding the provision of educational services to students with educational disabilities. See RSA 194-B:11, III.

b. Duty to Refer under Section 504

Section 504 provides that “[n]o otherwise qualified person with a disability shall, solely by reason of the disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance.” 29 U.S.C. § 794. The protections of Section 504 apply to both students and teachers. In order to provide equality of opportunity to disabled students, the school may be called upon to provide affirmative aids, services, or benefits known as “accommodations.”

Section 504 is broader in scope than the IDEA. While the IDEA focuses on an educational disability, Section 504 deals with a more inclusive definition of disability. Simply put, a disability under Section 504 usually consists of a physical or mental impairment which substantially limits one or more of that person's major life activities.

Chartered public schools are prohibited from discriminating against students, and are required to comply with Section 504. See RSA 194-B:3, II(m); Bureau of Special Education FY/13 Memo #10 (Nov. 19, 2012), available at: https://www.education.nh.gov/instruction/special_ed/memos/documents/fy13_memo10_chartered_public_school_funding.pdf.

5. Sexual Harassment: Title IX of the Education Amendments of 1972

Title IX states:

No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.

20 USC 1681(a).

The United States Supreme Court has held that Title IX may be enforced through a private right of action, and that plaintiffs may obtain damages for violations of Title IX. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (damages); Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979) (private right of action). The Court has also held that plaintiffs alleging unconstitutional gender discrimination in schools may bring suit under 42 U.S.C. § 1983, based on the Equal Protection Clause of the Constitution. Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

In addition, Title IX discrimination may occur when there is a "significant gender-based statistical disparity," such as "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified." Franchi v. New Hampton Sch., 2009 DNH 139, 656 F.Supp. 2d 252 (D.N.H. 2009) (citations omitted) (noting that an allegation that a private school "regularly discharges students with eating disorders, resulting in the dismissal of more girls than boys since girls are the ones who usually suffer from them" may be sufficient to state a claim for discrimination under Title IX).

To establish liability under Title IX, a plaintiff must prove the following:

1. That the school receives federal funding;
2. That the student was subject to severe, pervasive, and objectively offensive harassment by other students or by school staff;

3. That the school had actual knowledge of the sexual harassment;
4. That the school was deliberately indifferent to the harassment; and,
5. That the harassment deprived the student of access to educational opportunities or benefits.

Brodeur v. Claremont Sch. Dist., 626 F.Supp.2d 195, 2009 DNH 82 (D.N.H. 2009); see also Fitzgerald v. Barnstable School Committee, 504 F.3d 165 (1st Cir. 2007), reversed on other grounds by 555 U.S. 246 (2009).

Deliberate indifference “requires more than a showing that the institution’s response to harassment was less than ideal.” Fitzgerald, 504 F.3d at 171. Instead, it requires a showing that the institution’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.” Brodeur, 626 F.Supp.2d at 209 (citation omitted).

In addition, to “subject a student to harassment, the institution’s deliberate indifference must, at a minimum, have caused the student to undergo harassment, made her more vulnerable to it, or made her more likely to experience it.” Fitzgerald, 504 F.3d at 171 (citation omitted).

B. Duties owed to Employees

In addition to the obligation to maintain the confidentiality of personnel matters, chartered public schools owe duties to their employees. These duties include the following:

1. Indemnification

All chartered public schools are **required to “indemnify and save harmless any person employed by it and any member or officer of its governing board, administrative staff, or agencies, including but not limited to . . . chartered public school trustees, . . . from personal financial loss and expense including reasonable legal fees and costs, if any, arising out of any claim, demand, suit, or judgment by reason of **any act or omission constituting a violation of the civil rights** of an employee, teacher or student, or any other person under any federal law **if** such act or omission was **not committed with malice**, and if the indemnified person at the time of such act or omission was **acting within the scope of employment or office**.”** NH RSA 31:106 (emphasis added).

State law also provides that a “chartered public school . . . **may** by a vote of the governing body **indemnify and save harmless** for loss or damage occurring after said vote any person employed by it and any member or officer of its governing board, administrative staff or agencies including but not limited to . . . chartered public school

*trustees . . . from personal financial loss and expense including reasonable legal fees and costs, if any, arising out of any claim, demand, suit, or judgment by reason of **negligence or other act resulting in accidental injury to a person or accidental damage to or destruction of property if the indemnified person at the time of the accident resulting in the injury, damage, or destruction was acting in the scope of employment or office.***" NH RSA 31:105 (emphasis added).

Founders has adopted a policy requiring the Board to purchase adequate insurance to indemnify Board members, employees and agents of the school for their official actions in service to the school. See Policy BIE – Board Member Indemnification.

2. Title VII

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. 2000e.

Sexual harassment is a form of discrimination that violates Title VII. "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
2. Submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

29 C.F.R. 164.11(a).

3. The Law Against Discrimination

Under New Hampshire's Law Against Discrimination, employers are prohibited from: 1) refusing to hire or employ an individual on the basis of (among other things) sex, or 2) from terminating the employment of an individual on the basis of sex, or 3) discriminating against an employee in compensation or in terms, conditions or privileges of employment, on the basis of sex, unless based on a bona fide occupational qualification. RSA 354-A:7, I. In addition, harassment on the basis of sex constitutes unlawful sex discrimination. RSA 354-A:7, V.

Unwelcome sexual advances, requests for sexual favors, and other

verbal, non-verbal or physical conduct of a sexual nature constitute[s] sexual harassment when:

- (a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- (b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

RSA 354-A:7, V(a)-(c).

IV. *Robert's Rules of Order, Revised*

Robert's Rules of Order ("Rules") exist to facilitate order in the business of the Board. Properly utilized, the Rules ensure due process and fairness in the conduct of a board meeting. However, a board member who is unfamiliar with the Rules can quickly find themselves outmaneuvered through procedural tactics. Therefore, every board member is encouraged to familiarize themselves with the general Rules. The following information is not considered a substitute for understanding the Rules but is simply provided to initiate the educational process with regard to the Rules.

A. The Role of the Chair

Under Robert's Rules the chair presides over the meeting. The chair is responsible for ruling on points of order and for maintaining order in accord with Rules.

B. The Motion

Business is accomplished through the process of advancing a main motion. Simply put, "*A motion is a formal proposal by a member, in a meeting, that the assembly take certain action. The proposed action may be of a substantive nature, or it may consist in expressing a certain view, or directing that a particular investigation be conducted and the findings reported to the [board] for possible further action, or the like.*" See *Robert's Rules of Order, Newly Revised*, Ninth Edition (1990), p. 26. A motion requires a second. To the extent necessary, the chair will then state the motion for the benefit of the board. At that point, the motion is deemed to be pending before the Board and is open to debate and discussion.

C. The Consideration of A Motion

Once the prior motion is before the board, the members are permitted to debate

and discuss the motion. It is the practice of this board to manage all debate and inquiry through the chair. When the debate and discussion appears to have closed, the chair will then put the question to a vote. It is the practice of the board to initially take a voice vote. Upon conclusion of the voice vote, or by request of any member, a roll call vote may take place. The matter is concluded by the chair announcing the vote result.

D. Motions for Reconsideration

Motions for reconsideration are not uncommon in the conduct of a public meeting. Motions for reconsideration are frequently misunderstood. The Rules make it very clear that a motion for reconsideration may only be brought by a member who voted in the affirmative on the underlying motion and who now wishes to reconsider the matter.

E. Motions to Table

On occasion, members may wish to table a pending motion. A motion to table a matter halts consideration of a question and is not debatable. A motion to lay on the table does not permanently dispose of a matter and any member has, at a subsequent point, the right to move to take a question from the table. A motion to table can only be applied to a matter that is actually pending before the board and must be seconded.