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TO | School Boards & Superintendents

FROM | Porter Foster Rorick LLP

RE | Open Public Meeting Act Changes

DATE | May 12, 2022

Dear Porter Foster Rorick LLP client:

The purpose of this memo is to alert you to new obligations for school board meetings based on recent changes to the Open Public Meetings Act (“OPMA”). On March 24, 2022, the governor signed [ESHB 1329](#). Laws of 2022, ch. 115. Beginning June 9, 2022, the OPMA will require school districts and other public agencies to offer an opportunity for written or oral public comment at all regular meetings at which final action is taken on any matter. In addition, the OPMA now provides statutory guidance on how districts may hold meetings when a federal, state, or local government or agency declares an emergency. The bill also sets forth various aspirational provisions, including encouragement for districts to “make use of remote access tools,” to allow public comment during all their decision-making processes, and to make an audio or video recording of all meetings available online.

The bill does not override any requirements currently in effect pursuant to Governor Inslee’s Proclamation 20-28, *et seq.* In anticipation of the bill going into effect, however, Governor Inslee rescinded Proclamation 20-28, *et seq.*, effective June 1, 2022. See [Proclamation 20-28.16](#).

The changes in the law are described in further detail below.

Public comment at regular meetings at which final action is taken

Beginning June 9, 2022, school districts must provide an opportunity for public comment at or before every regular meeting at which final action is taken, except in an “emergency situation.” § 13(1). The public comment may be taken orally at the meeting, or by providing an opportunity for written testimony to be submitted before or at the meeting. *Id.* If written testimony is accepted, school boards may set a reasonable deadline for the submission of written comment before the meeting and must distribute written submissions to each board member. *Id.* When a member of the public will have difficulty attending a board meeting due to disability, limited mobility, or “for any other reason that makes physical attendance at a meeting difficult,” a board shall, when feasible, provide that individual an opportunity to give oral comment at the meeting remotely if oral comment from other members of the public will be accepted at the meeting. § 13(2). **When deciding how public comment will be accepted,**

boards should consider whether accepting written public comment in lieu of oral public comment might increase efficiency or provide flexibility should a final action item be added to the agenda. Allowing written public comment as a standing procedure may also ensure compliance with the OPMA if a meeting is scheduled without oral public comment on the agenda. Notably, too, if a board accepts only written comment, it need not provide a member of the public an accommodation to provide oral comment remotely.

Districts still have options for how to structure public comment periods. Oral public comment may be scheduled to occur at any point during the meeting; it is not required to be scheduled at the beginning or end of the agenda, nor is it required to be scheduled in conjunction with the place on the agenda where a specific topic is being considered. Boards may determine how public comment is given (orally vs. written); limit each commenter to a maximum number of minutes or limit all public comment to a total maximum number of minutes; limit the amount of public comment per topic (i.e., 10 minutes for Board Resolution #1 and 15 minutes for Change Order #21); permit public comment on items not listed on the meeting agenda; respond to interruptions under RCW 42.30.050; and reject public comment that makes the orderly conduct of a meeting unfeasible. For instance, if 300 people attend a meeting and all want to give public comment, districts are permitted to limit public comment to a select few so it can conduct an orderly meeting. *See* § 13(4).

These changes do not appear to require an opportunity for public comment on every instance of final action that occurs at a regular meeting. The public comment requirement is limited to regular meetings, not specific agenda items. In practice, this means that a school board may amend its agenda to add an item during a regular meeting and take final action on that item during the same meeting without offering an additional opportunity for public comment. However, if an opportunity for public comment was not previously offered because no final action was expected to take place at the meeting and the agenda is amended such that final action will be taken, an opportunity for public comment must be provided. This would not be necessary if written comment was accepted prior to the meeting.

Finally, ESHB 1329 encourages but does not require public comment at special meetings. *See* § 2. A special meeting is a meeting called by the board that is not held according to the board's established schedule. Often, districts will call a special meeting when a matter arises that must be addressed before the board's next regular meeting. Many school districts have a tradition of scheduling a "work study session" at which oral public comment is not taken. If such sessions are not a part of a regular established schedule, they would be considered special meetings and would not require an opportunity for public comment. Alternatively, if such work study sessions qualified as a regular meeting because they are on an established schedule, the board would be in compliance with the new public comment rule by either (a) not considering any final action at the work study session; or (b) accepting written comment in advance of the meeting.

Other changes in effect as of March 24, 2022

Several other provisions of ESHB 1329 took immediate effect on March 24, 2022. These provisions will not have as large an impact as the public comment requirement, but school districts should be aware of the following changes.

First, during a declared emergency, Section 5(1) of the bill provides districts three options for holding board meetings. If a district determines that it can meet with reasonable safety during the declared emergency, it may (1) hold an in-person meeting as it would if the emergency had not been declared. If a district determines that it cannot meet in-person with reasonable safety, it may (2) hold a remote meeting with no physical location using any platform that permits real-time verbal communication, or (3) hold a meeting in-person with limited or no attendance by members of the public due to the declared emergency. Districts must post notice on their websites at least 24 hours prior to the meeting and include instructions on how the public can access the meeting. § 5(4).

The Legislature included an exception for those districts that were holding some of their regular meetings remotely prior to March 1, 2020. In that circumstance, those districts may continue to hold remote meetings in the absence of a declared emergency. § 5(6).

During a remote meeting or an in-person meeting with limited or no attendance by the public, districts must provide an option for the public to listen to the proceedings telephonically or through an alternative that requires no additional cost. § 5(2). If a district does not provide a method for the public to electronically attend a remote meeting or a meeting that has limited public attendance, it may not take any action, except for executive sessions. § 5(3).

Second, though districts still cannot require members of the public to register their name or information as a condition of attending a public meeting, districts can now impose “generally applicable conditions” determined by the board to be “reasonably necessary” to protect the public health and safety or to protect against interruption. § 6. It appears that districts can impose these generally applicable conditions during routine in-person meetings, remote meetings, or meetings at which the physical attendance by some or all members of the public is limited due to a declared emergency. *Id.* For example, ESHB 1329 does not prohibit districts from requiring members of the public to register their name and other contact information as a condition on providing public comment.

Third, in the event of an emergency, districts may determine there is a need for expedited action to “meet the emergency.” Meetings held to meet an emergency appear to be those meetings that are necessary to respond to or resolve issues stemming from the emergency. However, the statutory language does not define the phrase. When expedited action is necessary to meet the emergency, districts may, in addition to holding a meeting at a site different than the regular meeting site, hold a remote meeting without a physical location, or hold an in-person meeting at which attendance by the public is limited due to a declared emergency. § 8. No notice is required for emergency meetings. From the language of Section 8,

it appears that when there is a need for expedited action for an emergency, districts can limit public attendance at a meeting only when there is a declared emergency.

Fourth, the bill makes a couple of minor changes regarding the posting of meeting agendas. Agendas for regular meetings must still be posted at least 24 hours prior to the meeting. However, ESHB 1329 authorizes a district to share a website with, or have its website hosted by, another public agency to post meeting minutes, agendas, budgets, and other records on the website. § 9(1). The bill also now provides that a district does not have to post an agenda if (1) the aggregate valuation of the property within its boundaries equals less than \$400,000,000, (2) the population within its boundaries is less than 3,000 people, and (3) the district confirms with the State Auditor's Office that the cost of posting notices on its own website or on a website it shares with another public agency would cost more than one-tenth of one percent of the district's budget. § 9(2). If you believe your district qualifies for this exemption, we encourage you to reach out to any of the attorneys listed below for assistance.

Fifth, the bill makes a couple of minor changes regarding the posting of meeting notices for special meetings. Notice of special meetings must still be delivered to each newspaper or radio or television station that has filed a written request to be notified of special meetings. Notice must also still be posted on districts' websites and posted prominently at the entrance of districts' principal locations and meeting places (if different than principal location). However, school districts may post notice of a special meeting online when, due to a declared emergency, a district is prevented from holding a special meeting in person with reasonable safety. § 10. As before, notices for special meetings may be dispensed with when (1) a special meeting is called to deal with an emergency involving injury or damage to persons or property or the likelihood of such injury or damage; or (2) time requirements of such notice would make notice impracticable and increase the likelihood of injury or damage. However, ESHB 1329 also provides that notices may be dispensed with when the required notice cannot be posted or displayed with reasonable safety, including when a declared emergency bars or advises against traveling. § 10(4).

Aspirational provisions

ESHB 1329 also encourages, but does not require, school districts to engage in several new practices. First, districts are encouraged to adopt resolutions or policies that establish where and how meetings will be held in the event of an emergency and how the public may access those meetings. § 1. Second, districts are encouraged to use remote access as fully as practicable to encourage public engagement. *Id.* Third, districts are encouraged, even when not required by law, to incorporate and accept public comment during their decision-making process. § 2. Fourth, districts are encouraged to allow the public to observe and participate in district meetings through real-time telephonic or video remote access that does not involve additional cost. § 3. Finally, districts are encouraged to create an audio or video recording of each regular meeting and post the recording online for a minimum of six months. § 4(1).

Conclusion

The information above is intended as a general description of the new legislation, and is not an application of the bill to any specific facts. If you have any questions regarding the new OPMA updates or how your school board should navigate the changes, please feel free to contact any of the attorneys listed below.

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