

# Robbins Schwartz

## Newly Elected School Board Members Training

**Webinar**  
**May 15, 2021**

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## NEWLY ELECTED SCHOOL BOARD MEMBERS TRAINING WEBINAR

**MAY 15, 2021**

### **AGENDA**

8:30 a.m. – 10:20 a.m.

#### **GENERAL SESSION**

Tort Immunity Act and Immunities for Elected Officials  
Avoiding Problems with the Open Meetings Act  
Ethics, Gift Ban and Fiduciary Duties

10:20 a.m. – 10:30 a.m.

#### **Break**

10:30 a.m. – 11:45 p.m.

#### **RESUME GENERAL SESSION**

Parliamentary Procedures Made Easy  
Construction Project Oversight  
The Freedom of Information Act

11:45 a.m. – 12:00 p.m.

#### **Break**

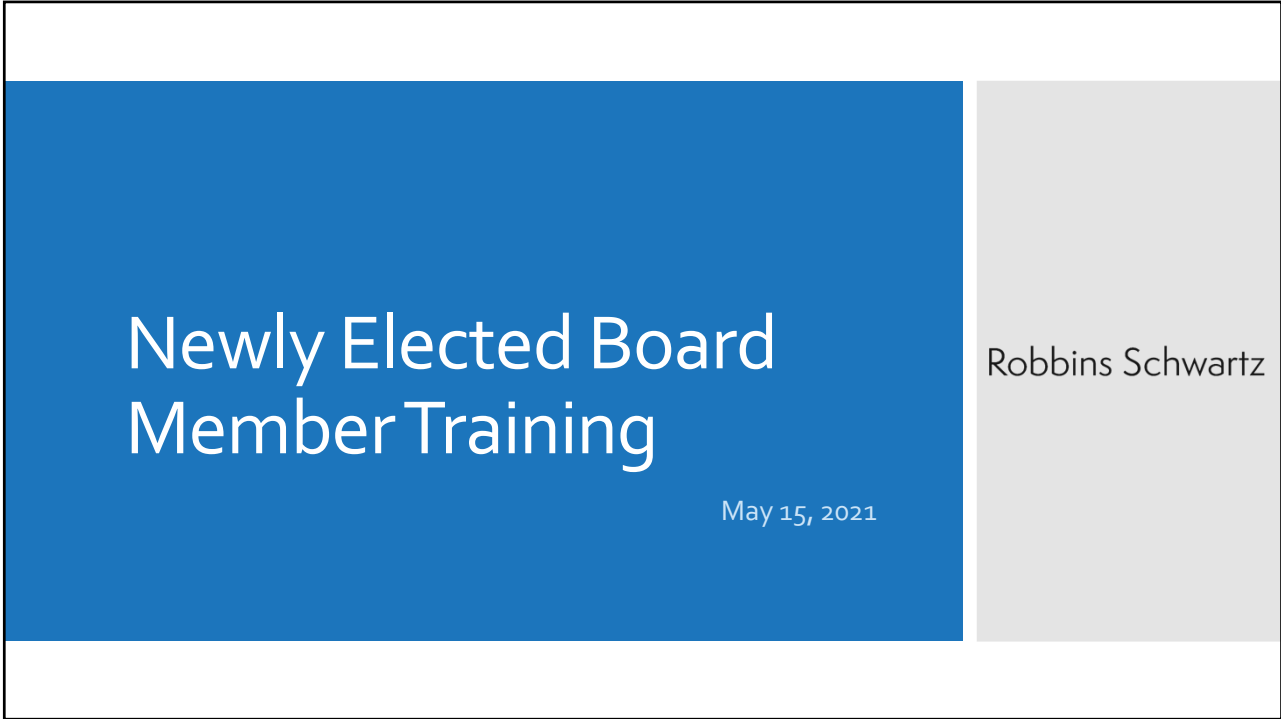
12:00 a.m. – 1:00 p.m.

#### **RESUME GENERAL SESSION**

Collective Bargaining  
PERA Overview  
School Boards and Student Discipline

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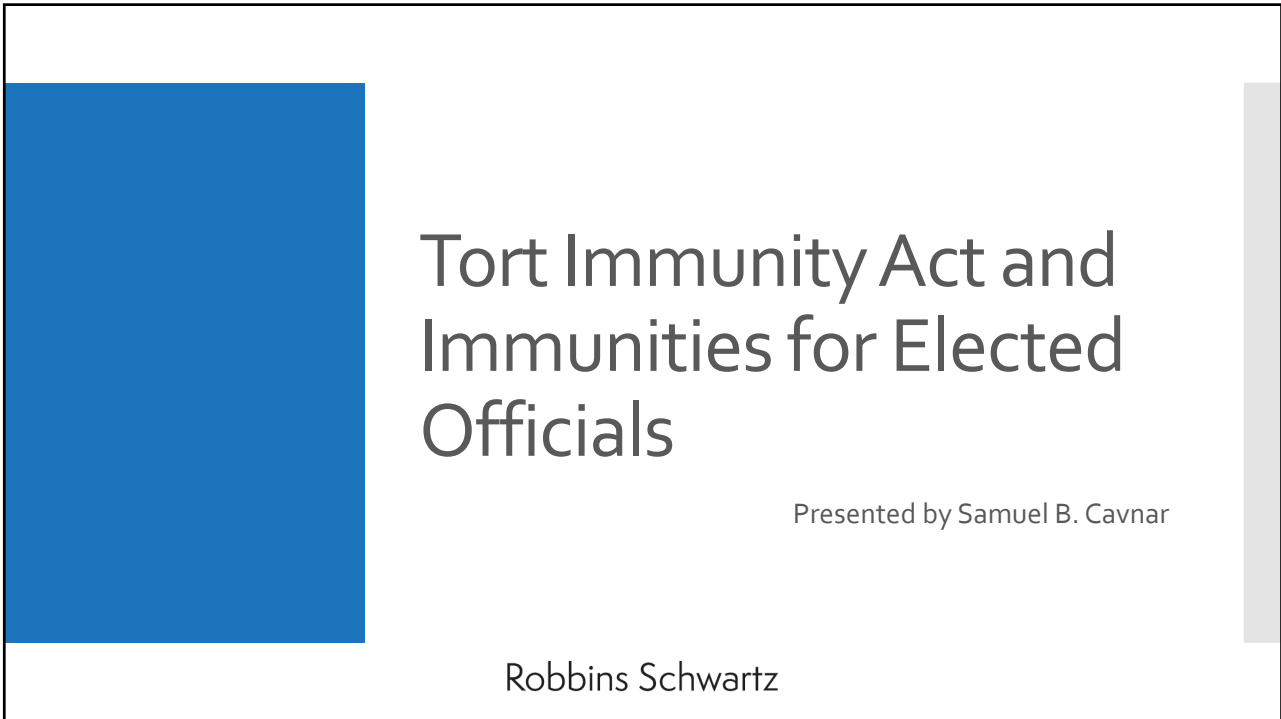


Newly Elected Board  
Member Training

May 15, 2021

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Tort Immunity Act and  
Immunities for Elected  
Officials

Presented by Samuel B. Cavnar

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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.


## History, Background, and Purpose

- The Act protects all local governments including school districts, Board members and public employees from liability arising from the operation of the government and to prevent and/or limit awards of public funds to plaintiffs for damages in personal injury commonly called tort cases.
- A public entity is liable in tort to the same extent as a private party unless an immunity provision applies. *Trtanj v. City of Granite City*, 379 Ill. App.3d 795 (5th Dist. 2008).

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## General Matters

- Punitive Damages 
  - Section 2-102 of the Act prohibits a school district from being liable for punitive or exemplary damages in any action brought against it.
  - School Board members are also immune from punitive damages under Section 2-102 so long as the action at issue arose out of or took place during the school board members' capacity as a public official.

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## General Matters

- *Illinois School Code Protection (105 ILCS 5/24-24)*
  - Section 24-24 of the School Code states that teachers, other certified educational employees, and any other person providing related services for students, regardless of whether they are a certified employee, are responsible for maintaining discipline in the schools.
  - This mandate extends beyond the physical building and includes school grounds which are owned or leased by a board of education and used for school purposes and activities.
  - The School Code further states in all matters related to student discipline, those individuals stand in relation of parents and guardians to the students.
  - A parent can only be liable in tort for willful and wanton conduct towards their child. Accordingly, a school employee providing services for a child can only be liable in tort for willful and wanton conduct, and is immune from allegations of negligence.
  - Legislature's intent: (1) shield public officials from damages for decisions that, in hindsight, turned out to be wrong, and (2) to prevent the diversion of public funds from their intended purpose of supporting schools.

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## General Matters

- **Statute of Limitations**
  - Section 8-101(a) of the Act states that the statute of limitations for a lawsuit against a local public entity, its board members or employees must be commenced within a year from the date of the injury. Note the supremacy clause for federal claims impacts the Statute of Limitations.



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## Common Categories of Immunity



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## Discretionary Immunity

- Section 2-201 states:
  - “Except as otherwise provided by statute, a public employee serving in a position involving the determination of policy or exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting within the exercise of such discretion even though abused.”

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## Discretionary Immunity

- Determination of policy and exercise of discretion
  - To seek immunity under Section 2-201, a public employee's action must be both a determination of policy and exercise of discretion.
  - Just about every public official has some discretion in the way they perform their job duties "even if it involves only the driving of a nail."
  - The key question becomes whether the determination made by the employee was a policy determination which is unique to their particular public office.
- Discretionary Act
  - Are those which are unique to a particular public office.
  - Differ from "ministerial acts" which are actions that a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act.

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## Discretionary Immunity

Discretionary Acts	Ministerial Acts
<ul style="list-style-type: none"> <li>• When a fire marshal plans a fire drill, he bears the sole and final responsibility for planning and executing the fire drill and is not acting under a legal mandate to perform his duties in a prescribed manner. Therefore, he is acting within his discretion in determining how, when, and where to hold fire drills and is entitled to immunity if an individual is injured during one of them. <i>See Harinek</i>, 181 Ill.2d 335 (1998).</li> <li>• The determination of whether school bullying has occurred and what the appropriate actions are to address that bullying are decisions within the discretion of school administrators. <i>See Hascall v. Williams</i>, 2013 IL App (4<sup>th</sup>) 131131 (4<sup>th</sup> Dist. 2013).</li> </ul>	<ul style="list-style-type: none"> <li>• A Board of Education no longer has discretion when they are informed that an employee is sexually abusing a student because they are mandated to report that conduct under the Abused and Neglected Child Reporting Act. <i>See Doe v. Dimovski</i>, 336 Ill.App.3d 292 (2<sup>nd</sup> Dist. 2003)</li> <li>• The act of repairing the roadway is considered a ministerial duty because it was done "in a proscribed manner, in obedience to the mandate of legal authority" as opposed to the decision over whether to undertake public improvement projects, which are discretionary in nature.</li> </ul>

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## Discretionary Immunity

- Determination of Policy
  - An employee is making policy decisions when those decisions require the employee or school district to balance competing interests and to make a judgment call as to what the best solution is to best serve each of those interests.



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## Discretionary Immunity

- Section 2-201 offers absolute immunity, and there is no exception for willful and wanton conduct.
- Section 2-109 of the Act states:
  - “A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.”
- School districts can seek immunity by use of the immunity of its employees.

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## Supervision Immunities



- Section 3-108 states:
  - Except as otherwise provided by this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.
  - Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code, or regulation, and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury.

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## Supervision Immunities

- The theory behind this Section of the Act is that governments cannot employ sufficient staff to provide an error-proof level of supervision.
- Section 3-108(a) will immunize an employee who is negligent while undertaking to supervise an activity on public property.
- Section 3-108(b) will immunize an employee who does not attempt to supervise an activity on public property unless:
  - The employee has a duty to provide supervision imposed by law and
  - The employee acts willfully and wantonly in failing to supervise.

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## Supervision Immunities

- There is no distinction between discretionary and ministerial duties with regard to supervisory immunity.
- The term “public property” under Section 3-108 is not restricted solely to public property owned by that specific defendant. The term public property will extend to any public property where supervision is provided.
- The term “supervision” in Section 3-108 is construed broadly, and includes direction and teaching.
- Examples of duties imposed by common law, statute, ordinance, code or regulations.
- The term “willful and wanton”

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## Defamation and Libel Immunity

- Section 2-106 states:
  - “A local public entity is not liable for an injury caused by an oral promise or misrepresentation of its employee, whether or not such promise or misrepresentation is negligent or intentional.”
  - Section 2-106 pertains only to public entities and only addresses oral, not written misrepresentations.

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## Defamation and Libel Immunity



- Section 2-107 states:
  - “A local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous or for the provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material.”

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## Defamation and Libel Immunity

- Section 2-210 states:
  - “A public employee acting in the scope of his employment is not liable for an injury caused by his negligent misrepresentation or provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material.”

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## Adopting or Enforcing an Enactment of Law



- Section 2-103 states:
  - “A local public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.”
  - Provides blanket immunity to a public entity for failure to enforce any law, even if the public entity’s conduct was willful and wanton.

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## Adopting or Enforcing an Enactment of Law

- Section 2-205 states:
  - “A public employee is not liable for an injury caused by his adoption of, or failure to adopt, an enactment, or by his failure to enforce any law.”
  - This immunity applies only to public employees who fail to enforce an enactment or law, not for employees who attempts to enforce an enactment or law, but does so poorly.
  - Provides immunity even if the public employee acted willfully and wantonly.

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## Adopting or Enforcing an Enactment of Law



- Section 2-202 states:
  - “A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.”
  - The immunity is limited and not every act or omission by a public employee is immunized.

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## Inspection

- Section 2-105 states:
  - “A local public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, **other than its own**, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.”
  - This provision codifies a longstanding common law principal that a public entity generally owes no duty to a particular person to enforce governmental ordinances, permit requirements, or other regulations.
  - This immunity applies even when a public entity acts willfully and wantonly.

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## Inspection



- Section 2-207 states:
  - “A public employee is not liable for an injury caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, **other than that of the local public entity employing that person**, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.”
  - This provision does not immunize a public employee from injuries resulting from an inadequate or negligent inspection of property belonging to the public entity.
  - This immunity applies even when a public entity acts willfully and wantonly.

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## Adoption of a Plan

- Section 3-103 states:
  - “A local public entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the plan or design has been approved in advance of the construction or improvement by the legislative body of such entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved. The local public entity is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it is not reasonably safe.”
  - A public employee is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property.

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## Act or Omission of Another

- Section 2-204 states:
  - “Except as otherwise provided by statute, a public employee, as such and acting within the scope of his employment, is not liable for an injury caused by the act or omission of another person.”
  - Allegations that governmental employees are personally vicariously liable for another employee’s acts are barred by this provision of the Act.
  - There is a special duty exception to 2-204. To invoke the special duty exception, a plaintiff must prove:
    - A unique awareness of a particular danger or risk to which Plaintiff was exposed
    - Specific acts or omissions
    - Specific acts that are affirmative or willful in nature
    - Injury to Plaintiff while under the direct and immediate control of municipal employees or agents.

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## Hazardous Recreational Activity

- Section 3-109 states:
  - “Neither a local public entity or a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so, failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.”



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## Hazardous Recreational Activity

- Hazardous Recreational Activity is defined as:
  - “A recreational activity conducted on property of a local public entity which creates a substantial risk of injury to a participant or spectator.”
- Section 3-109 does not limit liability if:
  - The public entity or public employee fails to warn or guard against a dangerous condition that it has actual or constructive notice of, but the participant does not have notice of; or
  - Willful and wanton conduct.
- An activity performed during the course of a compulsory class, such as physical education is not a “recreational activity” within the meaning of Section 3-109.

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## Injuries from the Use of Public Property

- Section 3-102 states:
  - Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to **maintain its property in a reasonably safe condition** for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in the manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injuries unless it is proven that it had actual or constructive notice of such a condition that is not reasonably safe in reasonably adequate time, prior to an injury, to have taken measures to remedy or protect against such a condition.



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## Injuries from the Use of Public Property

- A public entity does not have constructive notice of a condition of its property that is not reasonably safe within the meaning of Section 3-102(a) if it establishes either:
  - The existence of the condition and its character of not being reasonably safe **would not have been discovered by an inspection system** that was reasonably adequate considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property; or
  - The public entity maintained and operated such an inspection system with due care and did not discover the condition.

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## Injuries from the Use of Public Property



- Intended and Permitted Users:
  - A governmental entity owes a duty of care only to those persons whom the entity intended and permitted to use the property.
  - If the plaintiff is not an intended and permitted user of the property, the entity does not have a duty and cannot be liable for any injury.
  - Intended and permitted users of public property are determined on a case by case basis and courts look at the property to determine the intended use.
  - A use that is intended would seem to imply that the use is also permitted. But the reverse is not always true -- a permitted use does not automatically mean that the use was also intended. As an example, although bicycles may be permitted to be used in various places -- such as sidewalks -- they are not always intended to be used on the public property where the bicyclist was injured. But, where bicycles are both permitted and intended uses -- such as a designated bike trail -- the local public entity has a duty to maintain that property in a reasonably safe condition for those users.

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## Injuries from the Use of Public Property

- Notice of condition:
  - For a public entity to have “actual notice,” they must have **actually known of the condition**, or been advised of the specific unsafe condition.
  - Constructive notice under Section 3-201(a) is established where the condition existed for such a length of time, or was so conspicuous, that authorities exercising reasonable care and diligence might have known of it. This is determined on a case by case basis.
  - A plaintiff must plead specific facts establishing actual or constructive notice. Conclusory allegations will not sustain a claim of either actual or constructive notice.

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## Other Provisions to Be Aware Of

- Section 7 pertains to tort liability under agreements between local public entities
  - A local public entity may agree with another entity as to the manner in which liability for a function or service will be allocated or shared.
  - This issue should be included in a resolution, contract, lease, ordinance, or other written form.

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## Other Provisions to Be Aware Of

- Section 2-206:
  - Replicates the immunity granted to public entities by Section 2-104 and applies it to public employees.

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## Indemnification of Employees and Elected Officials

- Section 2-302:
  - If any claim or action is instituted against an employee (**broadly defined to include elected and appointed officials**) of a local public entity based on an injury allegedly arising out of an act or omission occurring within the scope of his employment as such employee, the entity may elect to do any one or more of the following:
    - Appear and defend against the claim or action;
    - Indemnify the employee or former employee for his court costs or reasonable attorney's fees, or both, incurred in the defense of such claim or action;
    - Pay, or indemnify the employee or former employee for a judgment based on such claim or action; or
    - Pay, or indemnify the employee or former employee for, a compromise or settlement of such a claim or action.
  - It is hereby declared to be the public policy of this State, however, that no local public entity may elect to indemnify an employee for any portion of a judgment representing an award of punitive or exemplary damages.

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Questions?



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# Avoiding Problems with the Open Meetings Act

Presented by Catherine R. Locallo

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## What is a "Meeting" and What is a "Public Body"?



A majority of a quorum of a public body may not meet to discuss public business without complying with the Open Meetings Act ("OMA").



For a seven-member board, a quorum is four and a majority of a quorum is three.



A "meeting" includes communication in person or by video or audio conference, phone call, e-mail, other electronic messaging, or "other means of contemporaneous interactive communication."

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## What is a "Meeting" and What is a "Public Body"?

- If no public business is discussed, it is not a "meeting."
- However, if public business is discussed, then the gathering qualifies as a meeting. Notice must be posted and minutes must be kept.
- "Public body" also includes committees. If the board creates a two-member (or three-member) committee to deal with a particular topic, the committee must post notices and agendas for its meetings and keep minutes.

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## What Type of Meeting Notice Must be Given?

- A public body must give public notice of the schedule of its regular meetings (including dates, times, and places) at the beginning of each calendar or fiscal year.
- If a change is made in regular meeting dates, at least 10 days' notice must be given by publication in a newspaper of general circulation in the public body's service area and must also be posted in the principal office of the public body or (if no such office exists) at the building in which the meeting is to be held.
- The public body must also post an agenda for each regular and special meeting at least 48 hours in advance of the meeting, at the principal office of the public body, at the meeting location and on the public body's website.
- Public bodies are to supply a copy of the notice of their regular meetings, and of any special, emergency, rescheduled regular, or reconvened meetings, to any news medium that has filed an annual request for such notice.

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## Must a Topic be on the Agenda to be Discussed at that Meeting by the Board?

- The OMA states that "the requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda."
- The Illinois Appellate Court has held that this language means that items not specifically listed in a regular meeting agenda may only be deliberated and discussed by boards - not acted upon - at that meeting.
- Boards are strongly advised to be sure that any matter to be voted upon is included on their regular meeting agendas.
- An amended agenda which adds new proposed action items should be posted and sent to requesting news media at least 48 hours ahead of the meeting.

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**REQUIRED**

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## What Type of Notice Must be Given for Action Items?

- The agenda must set forth the general subject matter of any final action to be taken at the meeting.
- Final action at a meeting shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted.

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## What Topics May the Board Discuss in a Closed Meeting?

- The OMA requires public bodies to meet in public, unless an exception to the requirement of open meetings applies.



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## What Topics May the Board Discuss in a Closed Meeting?

- The exceptions most commonly relevant for our purposes provide that a board of education hold a closed meeting to discuss the following subjects:
  - Appointment, employment, compensation, discipline, performance, or dismissal of specific employee(s) of the district or legal counsel for the district.
  - Collective negotiating matters between the district and its employees or their representatives, or deliberations concerning salary schedules for one or more classes of employees.
  - Selection of a person to fill a public office, as defined in the Open Meetings Act, or to fill a vacancy in a public office whose occupant the district has legal authority to appoint, or the discipline, performance or removal of the occupant of a public office whom the district has legal authority to remove.

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## What Topics May the Board Discuss in a Closed Meeting?



- A board may hold a closed meeting to discuss the following subjects:
  - Purchase or lease of real property for the use of the district, including meetings held to discuss whether a particular parcel should be acquired.
  - Setting a price for the sale or lease of property owned by the district.
  - Sale or purchase of securities, investments or investment contracts.
  - Security procedures, school building safety and security, and the use of personnel and equipment to respond to an actual, a threatened, or a reasonably possible danger to the safety of employees, students, staff or public property.

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## What Topics May the Board Discuss in a Closed Meeting?

- A board may hold a closed meeting to discuss the following subjects:
  - A student disciplinary case (or cases).
  - Placement of a student(s) in special education programs and other matters relating to individual students.
  - Litigation, when an action against, affecting or on behalf of the district has been filed and is pending before a court or administrative tribunal, or when the district finds that an action is probable or imminent, in which case the basis for the finding must be recorded and entered into the minutes of the closed meeting.

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## What Topics May the Board Discuss in a Closed Meeting?

- A board may hold a closed meeting to discuss the following subjects:
  - Self-evaluation, practices and procedures or professional ethics, when the board is meeting with a representative of a statewide association of which the district is a member.
  - Discussion of minutes of meetings lawfully closed under the Open Meetings Act, whether for purpose of approval by the district of the minutes or semi-annual review of the minutes.
  - Meetings between internal or external auditors and governmental audit committees, finance committees, and their equivalents, when the discussion involves internal control weaknesses, identification of potential fraud risk areas, known or suspected frauds, and fraud interviews conducted in accordance with generally accepted auditing standards of the United States of America.

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## What Procedure Should the Board Follow To Go Into Closed Session?

- A motion to go into closed session must cite the OMA exceptions which authorize that particular closed session.
- A roll call vote taken in open session is needed to go into a closed meeting.
- The board may properly convene in closed session during any meeting to discuss statutorily permitted topics if it follows the above procedures, even if the agenda for that meeting does not list a closed session.

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## How Detailed Should Closed Meeting Minutes Be?



- The Open Meetings Act requires public bodies to keep minutes of all meetings, including at a minimum:
  - The meeting date, place, and time.
  - Board members recorded as present or absent.
  - A "summary of discussion on all matters proposed, deliberated, or decided", with a record of any votes taken.

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## How Detailed Should Closed Meeting Minutes Be?

- Minutes of closed sessions are subject to these same content requirements.
- It is **not** acceptable for your closed session minutes to simply say “the Board discussed the Johnson lawsuit.”
  - The minutes must summarize the discussion about the lawsuit, as by indicating who brought the matter up and what they asked the board to consider.

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## How Detailed Should Closed Meeting Minutes Be?

- The OMA does not require detailed recounting of extended discussions or that every board member’s comments be reported.
- The minutes-taker should try to capture the gist of the discussion and focus on the most important comments.
- The OMA exceptions listed as topic headings in the closed session minutes should match the exceptions cited in the open session motion to hold the closed meeting.

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## What Does the OMA Say About Recording Meetings?

- The OMA allows anyone to tape record or photograph **open** meetings.
- The public body may make "reasonable regulations" governing these activities but may not selectively prohibit recording at certain times.
- The OMA requires public bodies to make and maintain audio or video recordings of their closed meetings.

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## How Should We Review and Release Closed Meeting Minutes and Tapes?

- The board must review closed session minutes and tape recordings every 6 months and release closed meeting minutes which no longer need to be kept confidential.
- If closed meeting minutes are not released, the board must make a specific finding in the record that the need for confidentiality still exists.
- Tape recordings may be destroyed after 18 months provided the minutes have been approved and that there is no pending litigation about a subject discussed on that particular recording.

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## May a Board Member Attend a Meeting by Video Conference or Telephone Call?

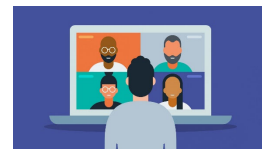
- A quorum of the board must be physically present at the actual location of the meeting. Absent members may not “call in” to make up a quorum.
- Absent members may participate electronically **only**:
  - In accordance with the requirements set forth in OMA Section 7(e) if the Governor or Director of IDPH has issued a disaster declaration related to public health concerns and the public body is covered by the disaster declaration; OR
  - if specifically allowed by the public body under adopted rules on the subject.
- Section 7(e) Requirements:
  - In-person meeting is not practical or prudent due to the disaster;
  - Confirm that members can hear one another;
  - Verify that attendees can hear all discussion, testimony or roll call vote;
  - In-person attendance of one board member, chief legal counsel or chief administrative officer unless not feasible due to disaster;
  - All votes by roll call;
  - 48-hours notice of the meeting (unless bona fide emergency); and
  - Maintain a verbatim recording of the meeting

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## May a Board Member Attend a Meeting by Video Conference or Telephone Call?

- If allowed by the public body under rules adopted on the subject, an absent member may be permitted to participate electronically only if he or she is prevented from physically attending the meeting due to:
  - Personal illness or disability;
  - Employment purposes;
  - Business of the public body; or
  - A family emergency or other emergency.
- A member who wishes to attend electronically must notify the “recording secretary or clerk” of the board before the meeting unless it is “impracticable” to do so.



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## Board Member Electronic Communications as Public Records

- Under the Illinois Freedom of Information Act, “public records” include all records and other documentary materials pertaining to the transaction of public business, “regardless of physical form or characteristics, having been prepared by or for, or *having been used by, received by, in the possession of, or under the control of any public body*”. 5 ILCS 14/2(c)
- Electronic records relating to public business are “public records” subject to disclosure under FOIA even if they are generated on a public official’s personal electronic device or e-mail account:
  - ...[W]hether information is a ‘public record’ is not determined by where, how, or on what device that record was created; rather, the question is whether that record was prepared by or used by one or more members of a public body in conducting the affairs of government.

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## “Do’s and Don’t’s” of Board Member E-mail Communications

- Do's (Permitted E-mail Communications)
  - An e-mail communication involving only two board members who do not discuss any confidential information.
  - An e-mail message broadcast to all board members for which no response is required.
  - An e-mail communication soliciting a response but directing that response be made to the original sender only and not copied to the other board members.
  - E-mail communications for purposes other than discussing public business (such as to confirm location of a board retreat).

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## "Do's and Don't's" of Board Member E-mail Communications

- Don't's (Prohibited or Inadvisable E-mail Communications)
  - A majority of a quorum (or more) of board members participating in an on-line chat room for the purpose of discussing public business.
  - E-mail messages broadcast to all board members which are made for the purpose of discussing public business and which solicit responses.
  - Discussion of any confidential information via e-mail.

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## What Training is Required for Elected and Appointed Members of a Public Body Under the OMA?



- Each public body must designate employees, officers and/or members to receive OMA electronic training provided by the Public Access Counselor (OMA Designees).
- The annual on-line training provided by Public Access Counselor can be found at <http://foia.ilattorneygeneral.net/default.aspx>.
- Public Act 97-504 (effective January 1, 2012) extended this training requirement to each elected or appointed member of a public body subject to the OMA.
- Newly elected or appointed members of public bodies must complete the training no later than the 90th day after the date they take any required oath of office (or assume their responsibilities as a member of the governmental body, if no oath is required), and must file a certificate of completion issued by the PAC with the public body.

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## What Happens if You Violate the OMA?

- Private citizens can enforce the OMA by suing for a court order to enjoin a public body from violating the Act, or to void actions taken in a manner which violated the Act.
  - In such cases, a prevailing plaintiff can have his attorney's fees paid by the public body.
- Private citizens can also file a Request for Review with the Illinois Attorney General's Public Access Counselor.
- The State's Attorney can pursue civil remedies or criminal sanctions.

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Questions?



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# Ethics, Gift Ban, and Fiduciary Duties

Presented by Samuel B. Cavnar

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## Introduction

- Public officers are expected to adhere to the highest standards of ethical conduct.
- When private interests compete with the performance of duty, a conflict of interest arises.
- Conflicts of interest are prohibited by common law and statute.



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## Prohibited Interests in Contracts

- Public officers may not have an interest in contracts with the governmental body they serve, subject to a few, limited exceptions.
- Public Officer Prohibited Activities Act, 50 ILCS 105/3(a).
- Contracts made in violation of the Illinois conflict of interest statutes are void.

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## Exceptions Allowing Interests in Contracts

- Interested members may contract with an entity in which the interested member has less than a 7 ½ % share in the ownership.
- Interested members may contract when the amount of the contract does not exceed \$2,000 and the total amount of all contracts is not over \$4,000.
- Any contract where interested member has less than a 1 % share in the ownership.
- Public utility service contracts.



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## Common Law Conflicts of Interest

- Faithful performance of official duties is best secured if governmental officers are not called upon to make decisions that could result in a personal advantage or disadvantage to their individual interests.
- Common law conflicts of interest may exist even in circumstances that do not violate the Illinois conflict of law statutes.

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## Common Law Conflicts of Interest

- Direct conflict of interest cases:
  - Public officers may not have an interest directly in their own names in any contract work, or business of the public body, with a few limited exceptions.
- Conflicts of interest:
  - The existence of an actual executed contract is not always necessary to find a conflict of interest violation.



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## Common Law Conflicts of Interest

- Indirect Conflicts of Interest:
  - Public officers may not be interested **indirectly** in the name of any other person, association, trust, or corporation in any contract, work, or business of the public body, or in the sale of any article.

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## The State Officials and Employees Ethics Act



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## Introduction

- The affirmative requirements of the State Official and Employees Ethics Act are more limited as applied to municipalities and local governments.



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## Introduction

- An ethics ordinance or resolution adopted by a governmental entity in accordance with Section 70-5 will prohibit:
  - Employees from intentionally performing any prohibited political activity during any compensated time
  - Employees from intentionally misappropriating any government property
  - Elected officials, department heads, supervisors or employees from intentionally misappropriating the services of any government employee by requiring the employee to perform any prohibited political activity
  - Employees from being required at any time to participate in any prohibited political activity in consideration for being awarded any additional compensation or employee benefit
  - Employees from being awarded any additional compensation or employee benefit in consideration for the employee's participation in any prohibited political activity

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## Prohibited Political Activity

- Employees are prohibited from intentionally performing prohibited political activity during any compensated time, including lunch time.
- Compensated time does not include vacation, personal, or compensated time off.



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## Prohibited Political Activity

- Prohibited political activities include:
  - Preparing for, organizing, or participating in any political meeting, political rally, political demonstration or other political event.
  - Soliciting contributions, including but not limited to the purchase of, selling, distributing, or receiving payment for tickets for any political fundraiser, political meeting, or other political event.
  - Soliciting, planning the solicitation of, or preparing any document or report regarding anything of value intended as a campaign contribution.
  - Planning, conducting, or participating in a public opinion poll in connection with a campaign for elective office or on behalf of a political organization for political purposes or for or against any referendum question.
  - Surveying or gathering information from potential or actual voters in an election to determine probable vote outcome in connection with a campaign for elective office or on behalf of a political organization for political purposes or for or against any referendum question.

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## Prohibited Political Activity



- Prohibited political activities include:
  - Assisting at the polls on election day on behalf of any political organization or candidate for elective office or for or against any referendum question.
  - Soliciting votes on behalf of a candidate for elective office or a political organization or for or against any referendum question or helping in an effort to get voters to the polls.
  - Initiating for circulation, preparing, circulating, reviewing, or filing any petition on behalf of a candidate for elective office or for or against any referendum question.
  - Making contributions on behalf of any candidate for elective office in that capacity or in connection with a campaign for elective office.
  - Preparing or reviewing responses to candidate questionnaires in connection with a campaign for elective office or on behalf of a political organization for political purposes.
  - Distributing, preparing for distribution, or mailing campaign literature, campaign signs, or other campaign material on behalf of any candidate for elective office or for or against any referendum question.

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## Prohibited Political Activity

- Prohibited political activities include:
  - Campaigning for any elective office or for or against any referendum question.
  - Managing or working on a campaign for elective office or for or against any referendum question.
  - Serving as a delegate, alternate, or proxy to a political party convention.
  - Participating in any recount or challenge to the outcome of any election, except to the extent that under subsection (d) of Section 6 of Article IV of the Illinois Constitution each house of the General Assembly shall judge the elections, returns, and qualifications of its members.

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## Prohibited Political Activity



- Campaign contributions may not be solicited, accepted, offered or made on State property by officials, employees, candidates or lobbyists. 5 ILCS 430/5-35.
- “State property” means any building or portion thereof owned or exclusively leased by the State or any State agency at the time the contribution is solicited, offered, accepted, or made.” 5 ILCS 430/5-35.

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## Gift Ban

- Employees, their spouses and family members living at home may not intentionally solicit or accept gifts from prohibited sources. 5 ILCS 430/10-30.
- A “gift” is defined as “any gratuity, discount, entertainment, hospitality, loan, forbearance, or other tangible or intangible item having monetary value.”

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## Gift Ban

- A “prohibited source” includes any person or entity:
  - Who is seeking official action by the officer or employee or an officer, State agency or other employee who is directing the employee;
  - Who does business or seeks to do business with an officer or employee or an officer, State agency or other employee who is directing the employee;
  - Who conducts activities regulated by an officer or employee or an officer, State agency or other employee who is directing the employee;
  - Who has interests that may be substantially affected by the performance or non-performance of the official duties of the officer or employee;
  - Who is registered or required to be registered under the Lobbyist Registration Act; or
  - Who is an agent of, a spouse of, or an immediate family member who is living with a “prohibited source.”



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## Gift Ban

- Exceptions to the Gift Ban include:
  - Gifts available on the same conditions to the general public;
  - Anything for which market value is paid;
  - Lawfully made campaign contributions;
  - Educational material or missions;
  - Travel expenses for a meeting to discuss business;
  - Gifts from a relative;
  - Gifts given on the basis of personal friendship;
  - Food or refreshments not exceeding \$75 per person in value on a single calendar day;
  - Intra-governmental and inter-governmental gifts;
  - Bequests, inheritances, and other transferances at death; and
  - Any item or items from any one prohibited source during any calendar year having a cumulative total of less than \$100.00.

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## Gift Ban

- How to determine the “value” of a gift:
  - One of the exceptions to the gift ban is anything for which the official or employee pays the market value.
  - This suggests that the proper value of a gift is not what the gift costs the giver, nor the subjective value that the employee places on the gift, but rather what the “market” would pay for the gift.



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## Criminal Offenses

- **Official Misconduct - 720 ILCS 5/33-3**
  - A public officer or employee commits misconduct when, in his official capacity he commits any of the following acts:
    - Intentionally or recklessly fails to perform any mandatory duty as required by law; or
    - Knowingly performs an act which he knows he is forbidden by law to perform; or
    - With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or
    - Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

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## Public Contracts (Bid Rigging)

- The statute prohibits public officials from:
  - Knowingly disclosing to any interested person any information related to the terms of a sealed bid
  - Knowingly conveying to any person any information concerning the specifications for such contract or the identity of any particular potential subcontractors
  - Either directly or indirectly, knowingly informing a bidder or offeror that the bid or offer will be accepted or executed only if specified individuals are included as subcontractors
  - Knowingly awarding a contract based on criteria which were not publicly disseminated via the invitation to bid

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## Public Contracts (Bid Rigging)

- The statute prohibits public officials from:
  - Knowingly either:
    - providing, attempting to provide or offering to provide any kickback;
    - soliciting, accepting or attempting to accept any kickback; or
    - including, directly or indirectly, the amount of any kickback prohibited by paragraphs (1) or (2) of this subsection (a) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to any unit of State or local government for a public contract.
  - Receiving an offer of a kickback, or has been solicited to make a kickback, and failing to report it to law enforcement officials
  - Participating, sharing in, or receiving directly or indirectly any money, profit, property, or benefit through any contract with the municipality, with the intent to defraud the municipality.

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## Fiduciary Duties



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## Role of Individual Board Members: Fiduciary Duties

- Duty of Care
  - Well-informed.
  - Ask questions necessary to exercise independent judgment.
  - Prudent person with reasonable care, skill, and caution.
    - What would an "ordinarily prudent person" do in a similar position under similar circumstances?
  - Reliance on expert knowledge.

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## Role of Individual Board Members: Fiduciary Duties

- Duty of Loyalty.
  - Interests of the District ahead of individual goals.
  - Prohibition on acting out of self-interest.
  - Focus on the future of the District's reputation, mission, core values, and financial strength.
  - Commitment to institution's long-term success.
  - Confidentiality of Board business.



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## Role of Individual Board Members: Fiduciary Duties

- Duty of Obedience
  - True to advancing the District's mission.
  - Act consistently with that mission to ensure that limited District resources are not utilized contrary to that mission.

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Questions?



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Break



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# Parliamentary Procedures Made Easy

Presented by Catherine R. Locallo

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## What is Parliamentary Authority?

- Parliamentary authority is the written rules governing the presentation, discussion and voting on business before a body of persons that meet to deliberate and determine matters as a group.
- How meetings are conducted is largely left for the board to decide for itself.

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The a-b-c's of  
Parliamentary Procedure



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## What is Parliamentary Authority?

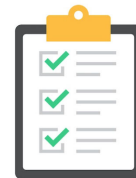
- For school boards, parliamentary authority comes from the following sources:
  - Illinois law (requirements that are imposed by state law and that must be obeyed)
    - The Open Meetings Act (5 ILCS 120/1)
  - Specific board policies (policies that a board adopts to govern itself)
  - Published parliamentary authorities adopted by boards such as Robert's Rules of Order (these are usually adopted as part of a board's specific policies or to govern residual issues that the specific board policies do not adopt)

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## Order of Business

- The first order of business at each meeting of the board of education shall be the calling to order by the president.
- Thereafter, the order of the agenda may generally be as follows:
  - Roll call
  - Pledge of Allegiance
  - Petitions and communications
  - Public Comment
  - Awards and recognitions
  - Public hearings
  - Consent Agenda



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## Order of Business

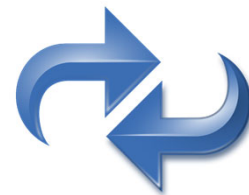
- Thereafter, the order of the agenda may generally be as follows (continued):
  - Reports and recommendations
  - Closed session
  - Old business
  - Award of bids and other items of expenditure
  - Ordinances and resolutions
  - New business
  - Adjourn

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## Order of Business

- Change of Agenda Item Order: The president may, at their discretion, or at the request of a board member, change the order of an item or items on the agenda with the consent of the board of education.



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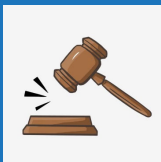
## Order of Business

- Item(s) Not on Agenda: The failure to specifically list a matter on the agenda shall not preclude discussion of any matter that is germane to a general topic listed on an agenda or meeting notice.
- Final action shall not be taken on an item not on the agenda.
  - If final action is taken on an item not on the agenda, the item should be placed on the agenda for ratification at the next regularly scheduled meeting of the board of education.

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## Robert's Rules of Order



- About a hundred years ago, Col. Henry Robert wrote the first edition of his Rules of Order, a guide for management of assemblies, conventions and meetings.
  - *Robert's Rules of Order* is considered the "Bible" for professional parliamentarians and those charged with running meetings.
  - However, they are like the Bible in another way: there are as many editions of Robert's Rules as there are authors willing to make a buck "translating" and "revising" Col. Robert's original work.
  - There are also competitor parliamentary authorities written by Sturgis and Demeter.

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## Robert's Rules of Order

- Most board procedures, such as those governing the calling of meetings and content of minutes, are governed by Illinois law rather than by Robert's Rules.
  - Additionally, any specific board policies would supersede conflicting provisions in Robert's Rules.
- The excruciating detail of Robert's Rules is really designed to govern meetings of large assemblies, such as national conventions of professional organizations.
  - When applied to a group of seven board members, most of Robert's Rules becomes superfluous or inapplicable.
  - Robert's Rules itself recognizes that small groups can act somewhat informally and that meticulous compliance with the rules may not always be possible or desirable.
  - Sometimes, however, Robert's Rules saves the day by providing a neat, if sometimes unexpected, resolution of a touchy issue such as how to handle a tie vote.

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## Simplified Rules of Parliamentary Procedure

- Open the Meeting and Sticking to the Agenda:
  - The president calls the meeting to order
  - The president presides over the meeting
  - No surprises – add new matter under "New Business"
  - Use detailed agenda to cover possible issues – including recurring matters
  - No legal requirement to approve agenda (though many boards do) or to add or subtract items, unless the item added will be the subject of final action or the meeting is noticed as a special meeting

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## Simplified Rules of Parliamentary Procedure

- Obtaining the Floor:
  - When a member wishes to speak, the member addresses the president and asks for recognition. The president recognizes the member by announcing their name.
- How a Motion is Made and Handled
- Ending Debate on a Motion aka “Calling the Question”
  - This is a motion to stop debate and vote immediately
  - This is a motion that should be used sparingly as discussion should be encouraged

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## Simplified Rules of Parliamentary Procedure

- Ranking Motions
  - There are certain motions that are privileged in that, while having no relation to a pending question/motion, are of such urgency or importance that they are entitled to immediate consideration.
  - These motions relate to members and meeting organization rather than to particular items of substantive business.

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## Simplified Rules of Parliamentary Procedure

- Common Ranking Motions:
  - To take recess
  - To reconsider
  - To lay on the table
  - To call the question
  - To postpone
  - To amend
  - To adjourn



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## Simplified Rules of Parliamentary Procedure

- Using a Consent Agenda
  - The “consent” portion of an agenda is usually part of an overall board meeting agenda. It is the part of an agenda where several matters will be voted on simultaneously.
  - For school boards, a unanimous vote is required to establish a consent agenda. This means that any member can remove an item from the consent agenda for a separate vote prior to the consent agenda being established.
  - Then a vote is taken on all items together
  - Obviously, a consent agenda is a great way to streamline meetings. If any item will require discussion, it should not be on the consent agenda, but should be a separate item. If it becomes apparent during a meeting that an item requires revision, action should be postponed to a subsequent meeting.

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## Simplified Rules of Parliamentary Procedure

- New Business
  - Any new topics or matters that board members wish to raise that do not require a vote, including the raising of a matter that was brought to the attention of the Board by a member of the public, should be under the agenda item "New Business."



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## Simplified Rules of Parliamentary Procedure

- When is a roll call vote required?
  - If state statute requires
  - A roll call vote is required when voting on: all resolutions and motions creating liability against the public body or authorizing expenditures, and to go into closed session pursuant to the Open Meetings Act
  - When requested by any board member a roll call vote must be taken on a motion and recorded in the minutes
  - When in doubt it is best to err on the side of taking a roll call vote

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## Simplified Rules of Parliamentary Procedure

### • Motions to Reconsider

- Must be made by member who voted with the prevailing side;
- Any member may second it;
- The purpose behind allowing motions to reconsider is to permit correction of hasty, ill-advised or erroneous action or to take into account additional information or a changed situation;
- Motion to reconsider may be made at the same meeting that the vote to be reconsidered was taken and at the next meeting;
- Any motion for reconsideration at a subsequent meeting should specifically be on the agenda;
- Motion for reconsideration may not be made at a special meeting;
- If not made within these timeframes the question dies, but can always be introduced later as a new question.



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## Simplified Rules of Parliamentary Procedure

### • Motions to Table

- A motion to table is really just a motion to postpone a vote, usually to obtain additional information or determine necessity.
- The vote is postponed indefinitely if the motion to table was not specific as to what meeting the agenda item is to be brought from the table;
- The agenda item that was tabled should be on the agenda of the meeting to which it was tabled.

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Questions?



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# Construction Project Oversight

Presented by Samuel B. Cavnar

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## Potential Team Members



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## Program Manager – Owner's Representative

- An entity selected by the owner to help plan the project(s) from both a functional and financial standpoint.
- Engaged for large improvement programs where the construction owner needs to hire a single entity to assist with managing interdependent projects that lead to the completion of the overall program.

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## Program Manager – Owner's Representative

- Concerned with multiple projects as part of an overall improvement program.
- Can assist the project owner with planning and scheduling individual projects with regard to considerations of funding and cash flow, site utilization, and prioritization.

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## Designer - Architect

- Engaged by the construction owner to design the project.
- Duties can possibly include one or more of the other team member's duties, except those of the Contractor(s) or Commissioning Agent.



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## Consultants

- Some standardized design contracts require an Owner to hire geotechnical engineers and/or surveyors directly.
- If the owner does engage the Consultant directly, the scope of the Consultant's services should be closely coordinated with the Designer so that no aspects of the design are left out of the final construction documents.

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## Construction Manager

- Typically provides consulting during the design phase and administration of the construction contracts during the construction phase.



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## Construction Manager Duties

- Project Management Planning:
  - Coordinates project planning meetings between team members
  - Advises on interaction of multiple projects:
    - Cost Management
    - Time Management
    - Quality Management
    - Contract Administration
    - Safety Management
    - CM Professional Practice

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## Contractor(s)

- Build the project (ideally) pursuant to the drawings and specifications prepared by the Designer.
- Responsible for all of the means and methods in implementing the requirements of the construction contract.



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## Contactor(s)

- Depending on many issues, such as size of the project and availability of qualified general contractors, the owner can choose between using a single prime contractor which then subcontracts with other specialty trade contractors, or multiple prime contractors, in which case the owner contracts directly with many of the specialty trade contractors.
- If using a multiple prime contractor agreement, the owner must provide a mechanism for coordinating work among the individual prime contractors.

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## Commissioning Agent

- Assists the other team members in verifying that the facility systems meet the functional and operational needs of the owner.
- Usually involves the mechanical and electrical systems of the building.
- Helps to assure that the building automated controls are working properly so that the HVAC and electrical systems are functioning properly.

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## Engaging the Team Members



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## Anatomy of an RFP

- A Request for Proposal (RFP) is an invitation seeking proposals for services to be furnished under contract to an owner.
- An RFP defines the owner's contractual objectives and expectations and provides the criteria upon which the owner will select the team members best suited to achieve its objectives and meet its expectations.



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## Anatomy of an RFP

- How does an RFP define the owner's objectives and expectations?
  - Introduce the project.
  - Define the scope of the proposed contract.
  - Provide instructions for submitting a proposal:
    - When are the proposals due?
    - To whom must they be submitted?
    - To whom can questions be directed?

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## Anatomy of an RFP

- An RFP should be structured to elicit the following response:
  - A clear commitment from the responding company to provide the services specified in the RFP.
  - An executive summary from the responding company explaining in broad terms its core competencies, areas of expertise, and business philosophy.
  - A summary of qualifications that explains the responding company's experience, qualifications, and capabilities to meet the owner's expectations and achieve the objectives.
  - Several independent references for projects previously completed by the responding company.

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## The Local Government Professional Services Selection Act



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## Purpose of the Act

- "It shall be the policy of the political subdivisions of the State of Illinois to negotiate and enter into contracts for architectural, engineering and land surveying services on the basis of demonstrated competence and qualifications for the type of services required and at fair and reasonable compensation." 50 ILCS 510/1

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## Applicability of the Act



- The Act applies to all “political subdivisions,” which means “any school district and any unit of local government of fewer than 3,000,000 inhabitants, except home rule units.” 50 ILCS 510/3(5).

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## General Requirements of the Act

- Permit architects, engineers, and land surveyors to “annually file a statement of qualifications and performance data with the political subdivision.” 50 ILCS 510/4.

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## General Requirements of the Act

- “Whenever a project requiring architectural, engineering or land surveying services is proposed for a political subdivision,”
  - Mail or e-mail a notice requesting statements of interest from all firms that have current statements of qualifications and performance data on file; or
  - Place an advertisement “in a secular English language daily newspaper of general circulation throughout such political subdivision,” requesting “a statement of interest in the specific project and further requesting statements of qualifications and performance data from those firms which do not have a statement on file with the political subdivision”; or
  - Place an advertisement for professional services on the political subdivision's website requesting a statement of interest in the specific project. The professional services advertisement shall include a description of each project and state the time and place for interested firms to submit its letter of interest, statement of qualifications, and performance.



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## General Requirements of the Act

- Evaluate the firms submitting letters of interest, taking into account:
  - Qualifications
  - Ability of professional personnel
  - Past record and experience
  - Performance data on file
  - Willingness to meet time requirements
  - Location
  - Workload of firm
  - Other qualification-based factors as the political subdivision may determine in writing are applicable.

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## General Requirements of the Act

- DO NOT, prior to selecting a firm for negotiation, “seek formal or informal submission of verbal or written estimates of costs or proposals in terms of dollars, hours required, percentage of construction cost, or any other measure of compensation.”
- Select and rank no less than the three “most qualified” firms.
- Contact “the firm ranked the most preferred and attempt to negotiate a contract at a fair and reasonable compensation, taking into account the estimated value, scope, complexity, and professional nature of the services to be rendered.”



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## General Requirements of the Act

- “[N]egotiate a contract with the highest qualified firm at compensation that the political subdivision determines in writing to be fair and reasonable” taking into account “the estimated value, scope, complexity, and professional nature of the services to be rendered.”
- If negotiations fail, terminate those negotiations and negotiate “with the firm which is next preferred.”
- If the political subdivision is unable to negotiate “a satisfactory contract with any of the selected firms,” then “re-evaluate the architectural, engineering or land surveying services requested, including the estimated value, scope, complexity and fee requirements.”

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## General Exception

- A political subdivision is excused from the selection procedure mandated by the Act when “it has a satisfactory relationship for services with one or more firms.”
- A political subdivision may waive the requirements of the Act “if it determines, by resolution, that an emergency situation exists and a firm must be selected in an expeditious manner,” or if “the cost of architectural, engineering, and land surveying services for the project is expected to be less than \$40,000.”

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## Questions?



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# The Freedom of Information Act

Presented by Catherine R. Locallo

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## Overview of FOIA



- A public record is defined as:
  - “[a]ll records, reports, forms, writings, letters, memoranda, books, papers, maps, photographs, microfilms, cards, tapes, records, electronic data processing records, electronic communications, recorded information and all other documentary materials **pertaining to the transaction of public business**, regardless of physical form or characteristics, having been **prepared by or for, or having been used or being used by, received by, in the possession of, or under the control of any public body.**” ILCS 140/2(c).

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## Overview of FOIA

- All **records of funds** of the State, units of local government, and school districts are public records subject to inspection and copying by the public. 5 ILCS 140/2.5.
- **Certified payroll records** submitted to a public body under Section 5(a)(2) of the Prevailing Wage Act are public records subject to inspection and copying by the public, except that contractors' employees' addresses, telephone numbers, and social security numbers must be redacted by the public body prior to disclosure. 5 ILCS 140/2.10.
- All **settlement and severance agreements** entered into by or on behalf of a public body are public records subject to inspection and copying by the public, subject to applicable redactions. 5 ILCS 140/2.20.

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## Overview of FOIA

- FOIA only provides access to documents; it does not require creation of a new record. *Kenyon v. Garrels*, 184 Ill. App. 3d 28, 32 (4th Dist. 1989).
- FOIA does not require a public body to answer questions, nor does it require a public body to interpret or advise requesters as to the meaning or significance of public records. See 5 ILCS 140/3.3



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## Overview of FOIA

- A public body can require that a request for records be in writing.
- A public body may not require that a requester use a particular form to submit a FOIA request.
- A public body may, but is not required to, respond to oral requests for records. 5 ILCS 3(c).
  - A request can be made anonymously.
  - A public body cannot ask a requester why they want the records, except to clarify whether the request is being made for a commercial purpose.

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## Overview of FOIA



- Each public body shall designate one or more officials or employees to act as its FOIA Officer.
- A FOIA Officer is responsible for receiving requests, ensuring that the public body timely responds, and issuing the responses.
- FOIA Officers are required to successfully complete the electronic training curriculum established by the PAC within 30 days after assuming the position, and on an annual basis thereafter. Successful completion of the required training curriculum within the periods provided shall be a prerequisite to continue serving as a Freedom of Information Officer. The electronic training is available at [http://foia.ilattorneygeneral.net/electronic\\_foia\\_training.aspx](http://foia.ilattorneygeneral.net/electronic_foia_training.aspx).

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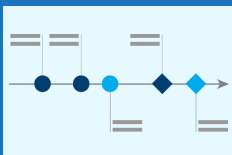
## Overview of FOIA

- A public body must provide a record in electronic format requested by the requester if it is feasible to do so.
- If it is not feasible to do so, then the public body shall furnish it in the format in which it is maintained by the public body, or in paper format at the option of the requester.
- A public body may charge the requester for the actual cost of purchasing the recording medium, whether disc, diskette, tape, or other medium.

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## Timelines for Response



- Generally, a public body has **5 business days** after receipt of a FOIA request to respond to that FOIA request.
- Business days are Monday through Friday, and do not include Saturday or Sunday or legal holidays in Illinois (provided the public body is closed for the holiday). See 205 ILCS 630/17 for the holidays applicable to FOIA responses.

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## Timelines for Response

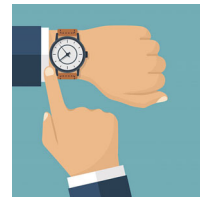
- The time for response may be extended by up to 5 additional business days from the original due date for any of the reasons specified in FOIA Section 3(e). Most often cited for extension:
  - The request requires the collection of a substantial number of specified records;
  - The request is couched in categorical terms and requires an extensive search for the records responsive to it;
  - The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are exempt from disclosure (in whole or in part);
  - The request for records cannot be complied with by the public body within the time limits...without unduly burdening or interfering with the operations of the public body.

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## Timelines for Response

- The requester may voluntarily agree to a longer timeframe for response.
- Failure to timely respond is considered a denial, and the public body **waives the right to assert that the request would be unduly burdensome to comply with or to charge copy fees.**



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## Timelines for Response

- A public body shall respond to a request for records to be used for a **commercial purpose** within 21 business days after receipt. 5 ILCS 140/3.1.
  - “Commercial purpose” means the use of any part of a public record or records, or information derived from public records, in any form for sale, resale, or solicitation or advertisement for sales or services.
  - Requests from news media, not-for-profits, scientific or academic organizations are not for a “commercial purpose.” 5 ILCS 140/2(c-10).
  - If applicable, a public body may charge for search and retrieval efforts in connection with a commercial purpose request. See 5 ILCS 140/6(f).

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## Timelines for Response



- A public body shall respond to a request from a **recurrent requester** within 21 business days after receipt.
  - “Recurrent requester” means a person that, in the 12 months immediately preceding the request, has submitted to the same public body (i) a minimum of 50 requests for records, (ii) a minimum of 15 requests for records within a 30-day period, or (iii) a minimum of 7 requests for records within a 7-day period.
  - This designation does not apply to news media, not-for-profits, scientific or academic organization. 5 ILCS 140/2(g).

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## Timelines for Response

- A public body shall respond to a **voluminous request** within 5 business days after receipt. "Voluminous request" means a request that:
  - (i) includes more than 5 individual requests for more than 5 different categories of records or a combination of individual requests that total requests for more than 5 different categories of records in a period of 20 business days; or
  - (ii) requires the compilation of more than 500 letter or legal-sized pages of public records unless a single requested record exceeds 500 pages. Generally, this designation does not apply to news media, not-for-profits, scientific or academic organizations. 5 ILCS 140/2(h).

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## Timelines for Response

- The "voluminous request" response must notify the requester of the following:
  - That the public body is treating the request as a voluminous request;
  - The reasons why the public body is treating the request as a voluminous request;
  - That the requester must respond to the public body within 10 business days after the public body's response was sent and specify whether the requester would like to amend the request in such a way that the public body will no longer treat the request as a voluminous request;

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## Timelines for Response

- The “voluminous request” response must notify the requester of the following (cont’d):
  - That if the requester does not respond within 10 business days or if the request continues to be a voluminous request following the requester's response, the public body will respond to the request and assess any fees the public body charges pursuant to FOIA Section 6;
  - That the public body has 5 business days after receipt of the requester's response or 5 business days from the last day for the requester to amend his or her request, whichever is sooner, to respond to the request;

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## Timelines for Response

- The “voluminous request” response must notify the requester of the following (cont’d):
  - That the public body may request an additional 10 business days to comply with the request;
  - Of the requester's right to review the public body's determination by the Public Access Counselor and provide the address and phone number for the Public Access Counselor;
  - If the requester fails to accept or collect the responsive records, the public body may still charge the requester for its response pursuant to FOIA Section 6 and the requester's failure to pay will be considered a debt due and owing to the public body and may be collected in accordance with applicable law.

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## Timelines for Response

- If a request continues to be a voluminous request following the requester's response or the requester fails to respond, the public body shall respond, or assert the request is unduly burdensome and provide the requester with an opportunity to narrow, within the earlier of 5 business days after it receives the response from the requester or 5 business days after the final day for the requester to respond to the public body's initial response.
- A public body can charge special fees for a response to a "voluminous request" for records in electronic form. See 5 ILCS 140/6(a-5).

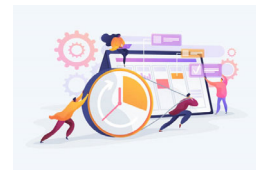
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## Timelines for Response

- If a **categorical request** for records would be **unduly burdensome** for the public body to comply with, the public body must notify the requester in writing of this and provide the requester with an opportunity to narrow within the first 5 business days after receipt of the request or the extended 5 business days, if applicable and an extension letter was sent.

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## Denials for Exempt Content or Records

- The presumption under FOIA is that all records in the custody or possession of a public body are presumed to be open to inspection and copying.
- Any public body that asserts that a record is exempt from disclosure has the burden of proving by **clear and convincing evidence** that it is exempt. 5 ILCS 1.2.

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## Denials for Exempt Content or Records



- Any public body that denies a FOIA request must notify the requester in writing of the decision to deny the request.
- Written denial must include the reasons for the denial, including a detailed factual basis and supporting legal authority for any exemption claims under FOIA Section 7, and the right to seek review of the denial by the Illinois Attorney General's Public Access Counselor (PAC) or in a court of law.
- **The non-existence of a responsive record is not a denial.** Rather, the public body should respond, "[t]here are no records responsive to your request."

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## Review of Denials for Exempt Content or Records

- A requester has 60 calendar days from the public body's final response (or the date the response was due) to file a Request for Review with the PAC regarding the denial of a FOIA request.
- The PAC may:
  - Work to resolve the dispute between the requester and the public body;
  - Issue a non-binding decision finding that the public body did or did not violate FOIA and, if warranted, direct disclosure of records to the requester; or
  - Issue a binding decision finding that the public body did or did not violate FOIA, which is published on the PAC's website.

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## Review of Denials for Exempt Content or Records

- Alternatively, a requester may file a civil action in circuit court for injunctive or declaratory relief within 2 years after the alleged violation took place. 
- If a requester prevails in the litigation, the court will award the requester reasonable attorney's fees.
- In addition, if the court determines that a public body willfully and intentionally failed to comply with FOIA or otherwise acted in bad faith, the Court can award a civil penalty of not less than \$2,500 nor more than \$5,000 for each occurrence.

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Ten General  
FOIA  
Exemptions of  
Particular  
Interest to  
School  
Districts

- **Private information:**

- Unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, home address, personal license plates and personal e-mail addresses, unless disclosure is required by another provision of FOIA, a State or federal law or a court order. 5 ILCS 7(1)(b).

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Ten General  
FOIA  
Exemptions of  
Particular  
Interest to  
School  
Districts

- **Personal information** contained within public records, the disclosure of which would constitute **a clearly unwarranted invasion of personal privacy**, unless the disclosure is consented to in writing by the individual subjects of the information.

- "Unwarranted invasion of personal privacy" means the disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information.
- The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of privacy. 5 ILCS 7(1)(c).

EXEMPT

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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Examples of information upheld by the PAC as exempt from disclosure pursuant to FOIA Section 7(1)(c) include:
  - Names of individuals who submit FOIA requests (if they request anonymity) (upheld on many occasions in pre-authorization decisions issued by the PAC).
  - Dates of birth (upheld on many occasions in pre-authorization decisions issued by the PAC), but not age.
  - Race/ethnicity (2010 PAC 5602).
  - Names, application and application-related information of unsuccessful applicants for employment (2010 PAC 5196; 2010 PAC 5602; 2010 PAC 5653; 2010 PAC 9187; and 2010 PAC 7800).

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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Examples of information upheld by the PAC as exempt from disclosure pursuant to FOIA Section 7(1)(c) include:
  - Educational transcript (2010 PAC 6398, has no bearing on job performance).
  - Employer-issued cell phone numbers (2010 PAC 8685, disclosure could subject staff to excessive calls from the public at all times of the day; could also impair the ability for employees to be contacted for work related reasons).
  - An employee's or board member's personal expenses for meals and entertainment which were not submitted for reimbursement to the public body (2010 PAC 7316, had no bearing on public duties of public employees and is not use of public funds).

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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Examples of information upheld by the PAC as exempt from disclosure pursuant to FOIA Section 7(1)(c) include:
  - An employee's or board member's personal appointments (2010 PAC 7187 and 2010 PAC 9371).
  - Names and other identifying information for persons who express opinions, concerns or complaints to a public body (2010 PAC 8559, citizens have a privacy right in the opinions they express).
  - Medical information (upheld on many occasions in pre-authorization decisions issued by the PAC).

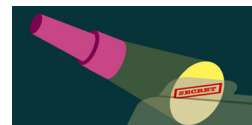
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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Examples of information upheld by the PAC as exempt from disclosure pursuant to FOIA Section 7(1)(c) include:
  - Names of pension fund beneficiaries (2010 PAC 11125, not public employees, so they have a reasonable expectation of privacy).
  - Certain payroll deduction information (i.e., amounts withheld for state and federal taxes; discretionary withholdings and contributions) (2011 PAC 13034, highly personal and does not relate to the obligation, receipt and use of public funds).
  - Employee's law enforcement background check (2010 PAC 9678).

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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Examples of information **not** exempt from disclosure pursuant to FOIA Section 7(1)(c) include:
  - Names, titles, salary and hire date of current or former employees.
  - Employment application and resume of current or former employees.
  - Generally, personnel files.
  - Employee discipline records.
  - Timesheets.
  - Records which reflect a current or former employee's vacation time, sick time, compensatory time, personal time, etc.

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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Examples of information **not** exempt from disclosure pursuant to FOIA Section 7(1)(c) include:
  - Employee photographs.
  - Resignation letter.
  - Employer's "Do Not Hire" list.
  - Resumes and curricula vitae of candidates for public office.



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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body... 5 ILCS 7(1)(f).

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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Examples of information upheld by the PAC as exempt from disclosure pursuant to FOIA Section 7(1)(f) include:
  - Records in "draft" form (per se exempt from disclosure).
  - Memoranda containing recommendations of officials and/or employees of a public body about an individual's continued employment (2010 PAC 6032).
  - E-mails expressing an opinion about a job candidate (2010 PAC 7800).
  - Internal e-mails in which strategy was discussed and deliberated and courses of action were formulated (i.e., new administrator search; policy matters; steps for investigating a complaint).



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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Examples of information upheld by the PAC as exempt from disclosure pursuant to FOIA Section 7(1)(f) include:
  - Pre-decisional notes and other communications used as part of a public body's deliberative process in determining how to proceed with a specific matter (i.e., notes taken by administrators during an investigation).
  - Candidate interview questions (2010 PAC 7800).
  - Candidate rating sheets (2010 PAC 7800).
  - Chart listing candidate's strength and weaknesses (2010 PAC 7800).

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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Proposals and bids for any contract, grant, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person proposing to enter into a contractor agreement with the body, until an award or final selection is made. Information prepared by or for the body in preparation of a bid solicitation shall be exempt until an award or final selection is made. 5 ILCS 140/7(1)(h).
- Closed session meeting minutes. See 5 ILCS 140/7(1)(l).
- Attorney-client privileged communications. See 5 ILCS 140/7(1)(m).
- Records relating to collective negotiating matters between public bodies and their employees or representatives, except that any final contract or agreement shall be subject to inspection and copying. See 5 ILCS 140/7(1)(p).
- Test questions, scoring keys, and other examination data used to determine the qualifications of an applicant for a license or employment. See 5 ILCS 140/7(1)(q).



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## Ten General FOIA Exemptions of Particular Interest to School Districts

- Records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is administered. 5 ILCS 140/7(1)(n).\
- Note: In a 2010 non-binding opinion, the Public Access Counselor (PAC) stated that in order to properly apply FOIA Section 7(1)(n), a public body's adjudication of a disciplinary matter should include, at the very least, the commencement of some type of formal hearing to determine the rights of the employee. See Request for Review 2010 PAC 9662.
- In 2013 the PAC issued a binding opinion concerning documents generated as part of a public body's investigation of alleged employee misconduct and held that records generated during a public body's internal investigation of a matter that did not result in any formal adjudicatory proceeding do not relate to an "adjudication" within the meaning of 7(1)(n), and, therefore, were not exempt from disclosure. See Public Access Opinion 13-011.

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## Ten General FOIA Exemptions of Particular Interest to Community Colleges

- In 2014, the Illinois Appellate Court in *Kalven v. City of Chicago*, 2014 IL App (1st) 121846, held that FOIA Section 7(1)(n) applies to the adjudication of employee grievances and disciplinary cases, and adjudication requires a formalized legal proceeding that results in a final and enforceable decision.
- The records at issue in this case were the Chicago Police Department's Complaint Register files and Repeater Lists, and the Court determined that neither were exempt from disclosure under FOIA Section 7(1)(n).

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Ten General  
FOIA  
Exemptions of  
Particular  
Interest to  
Community  
Colleges

• **Note:**

- In 2016, the Illinois Appellate Court in *Peoria Journal Star v. City of Peoria*, 2016 IL App (3rd) 140838, held that an internal disciplinary report that was created before any adjudication took place and existed independent of any adjudication was merely an investigative report, not an adjudicative one, and that the report later led to disciplinary action did not make it exempt under FOIA Section 7(1)(n).

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FOIA  
Exemptions of  
Particular  
Interest to  
Community  
Colleges

- Information prohibited from being disclosed by the Personnel Records Review Act (PRRA). 5 ILCS 140/7.5(q).
- The PRRA prohibits the disclosure of performance evaluations in response to a FOIA request. See 820 ILCS 40/11.
- An employer shall review a personnel record before releasing information to a third party (except when the release is ordered to a party in a legal action or arbitration) and delete disciplinary reports, letters of reprimand or other disciplinary records which are more than 4 years old. See 820 ILCS 40/8.
- With respect to FOIA requests for discipline documents, written notice may be sent to an employee by first-class mail to the employee's last known address on or before the day the information is divulged. See 820 ILCS 40/7.

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**CONFIDENTIAL**

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## Ten Binding Decisions from the PAC

- Failure to respond to a FOIA request and/or failure to respond to the PAC's request for further information in connection with a request for review will result in the issuance of a binding decision by the PAC finding that the public body violated FOIA. There are several "duty to respond" binding decisions issued by the PAC.
- A public body can't charge fees for copies made for its own files of records responsive to a FOIA request. 2010-002.
- A public body's decision to deny a FOIA request must be given in writing to the requestor within the time frame for response under FOIA—verbal communication will not suffice. 2013-003.
- FOIA Section 7(1)(s) does not exempt from disclosure the amount of funds expended to settle a claim on behalf of a public body, even if settlement funds are paid by a governmental self-insurance pool. 2011-004.

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## Ten Binding Decisions from the PAC

- Electronic records relating to the transaction of public business are "public records" subject to disclosure under FOIA even if generated on a public official's private equipment and/or maintained on personal electronic accounts. 2011-006.
- The public body subject to this binding decision filed for administrative review. Ultimately, the Appellate Court held that communications via text message and e-mail between board members during a board meeting are subject to FOIA. *City of Champaign v. Madigan*, 2013 IL App. (4th) 120662.
- Once board members convene a public meeting, they collectively become a public body. Any communication that pertains to public business and sent or received by board members when the public meeting is in session is a public record subject to FOIA.

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## Ten Binding Decisions from the PAC

- For purposes of the “recurrent requester” designation, a public body cannot: (1) combine requests from the same household for purposes of calculating the total number of requests submitted; or (2) count requests for review submitted to the PAC for purposes of calculating the total number of requests submitted. 2012-001.
- FOIA requests may be properly submitted to a public body via personal delivery (e.g., delivery to a board member during a board meeting). Note, however, that personal delivery at any time or place is not acceptable (e.g., a chance encounter on a sidewalk or delivery to a board member’s personal residence). 2012-004.

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## Ten Binding Decisions from the PAC

- Generic description of the nature of legal services performed, attorney initials, time spent on tasks, and rate and dollar amount for legal fees billed to a public body cannot be withheld as attorney-client privileged information. 2012-005.
- Governor’s calendar is a public record subject to disclosure under FOIA because it pertains to public business. 2015-008.

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## Personal Devices and Email Accounts

- On January 28, 2016, CNN submitted a FOIA request to the Chicago Police Department (“CPD”) seeking “all emails related to Laquan McDonald from Police Department email accounts and personal email accounts where business was discussed” for 12 named CPD officers for specified date ranges. CNN sought review of the scope of the CPD’s search for responsive records.
- The PAC determined that the CPD violated FOIA by failing to conduct an adequate search for all emails responsive to the request. Among other things, the PAC concluded that CPD had a duty to search for responsive records contained in the personal email accounts of the named officers since “communications pertaining to the transaction of public business that were sent or received on the CPD employees’ personal e-mail accounts are ‘public records’ under the definition of that term in section 2(c) of FOIA.” The PAC directed CPD to search the personal email accounts of the 12 named officers for responsive documents but noted that CPD may initially conduct this search by asking the named officers whether they maintain any records responsive to the request, and, if so, by requiring the officers to provide copies of the records to CPD’s FOIA officer.

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## Personal Devices and Email Accounts (cont’d).

- The PAC’s decision was upheld by the Court on administrative review. The Court recognized that in order to qualify as a public record, a communication must both (1) pertain to the transaction of public business and also either have been (2) prepared by, (3) prepared for, (4) used by, (5) received by, (6) possessed by, or (7) controlled by a public body. Here, because police officers can act on behalf of the City individually vis-à-vis their employment, they act for the public body whenever their actions pertain to City business. Individual police officers act for the public body whenever they individually do some kind of “public business” (a term that the Court did not define). Thus, any such records on their personal devices are public records of the City.
- The Court differentiated between city council members (elected officials) and police officers (employees) by explaining that, while a public body can act through its employees, agents, and elected officials, some of them (like city council members) can only act collectively while others (like police officers) act for a public body individually, without meetings or quorums. Thus, the holding in *City of Champaign v. Madigan*, 2013 IL App (4th) 120662, that communications from elected officials’ personal electronic devices/accounts are public records only when such communications happen during a meeting at which a quorum is present, remains intact.

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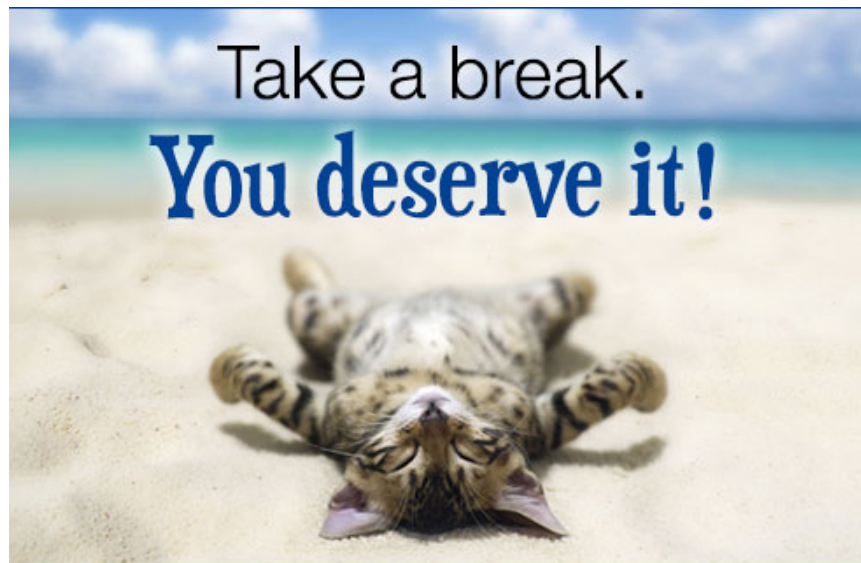
Questions?



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Break



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# Collective Bargaining

Presented by Catherine R. Locallo

Robbins Schwartz

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## Overview of Negotiations Strategies and Techniques

- Planning for Bargaining Using a Traditional Negotiation Format
  - Composition of Bargaining Teams
  - Financial Modeling
  - Review Language Issues
  - Comparables
  - Ground Rules
  - The First Proposal
  - Responses

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## Overview of Negotiations Strategies and Techniques



- Strategic Considerations
  - Use the bargaining table to solve problems.
  - In wage matters, the parties should reach agreement on current placement of unit members at the beginning of negotiations.
  - Be careful of regressive bargaining.
  - Use “package proposals.”
    - Note: Packages tend to be more useful at a later stage of the bargaining process.
  - Use the “supposal” or “what if” convention.

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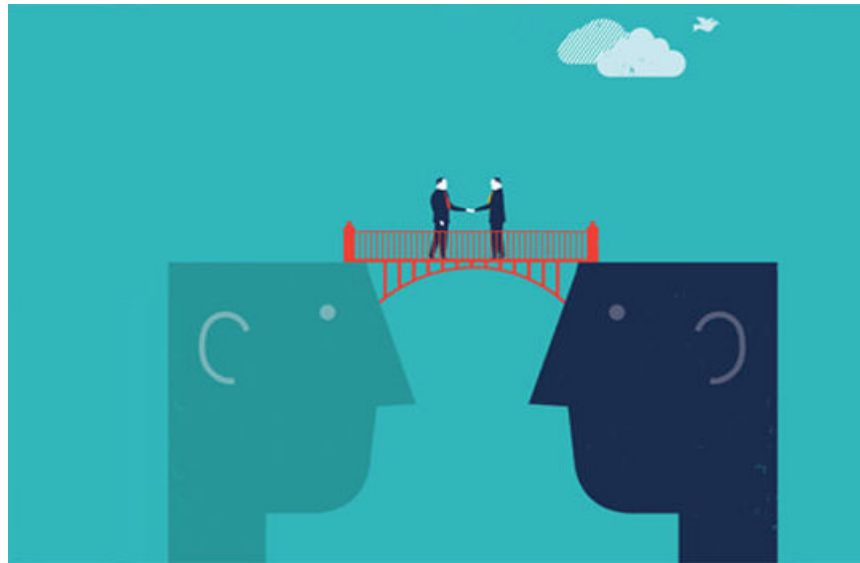
## Overview of Negotiations Strategies and Techniques

- Strategic Considerations
  - Use the “sidebar.”
  - Focus on diminishing expectations.
  - Know your audience.
  - Cost each union financial proposal.
  - Be careful not to send the wrong message.
  - “Sleeping dogs” and “sacred cows.”
    - “Sleeping dogs” avoid proposing changes when the board arguably has retained the right in question
    - “Sacred cows” are contract provisions that appear to be minor but are likely to engender a disproportionately charged response.

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## Negotiations for Successor Collective Bargaining Agreement Using Interest Based Bargaining Format



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## Introduction

- Interest based bargaining (“IBB”) goes by various names including “win-win” and “mutual gains bargaining.”
- IBB dispenses with the use of a chief spokesperson and sequential exchanges of formal written proposals in favor of participation by many individuals and reliance on interest-based problem solving techniques.
- The process relies on:
  - Extensive training of the bargaining teams – generally larger bargaining teams – in problem solving and listening techniques.
  - Commitment of all or most of the members of the board of education to participate in the training and interest based bargaining negotiation sessions.
  - A willingness of all the participants to follow the IBB format and principles.

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## IBB Format



- Advantages:
  - Open exploration and discussion of issues may help promote better understanding and relationships.
  - Union may develop greater appreciation of boards limitations and interests.
  - Process may help dissipate acrimony built up over previous difficult negotiations.
  - The process usually entails an expedited process with a deadline.

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## IBB Format

- Disadvantages:
  - Unrealistic expectations may cause problems.
  - Multiple participants in discussion raise possible contract language problems and grievances.
  - Bargaining history is more difficult to discern and verify.
  - Individuals may be subject to personal attacks if parties do not adhere to interest based bargaining principles.
  - The process demands significant time commitment of all participants. Failure to stay committed to the process may damage, not help, labor relations.

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## IBB Format



- The IBB process uses experienced facilitators to train the participants in the interest based bargaining techniques and help the parties in negotiation sessions work towards consensus solutions issues which have been mutually identified by the parties.
- Training Providers:
  - Federal Mediation and Conciliation Service (FMCS) will provide interest based bargaining training free of charge.
  - The Illinois Education Association and other unions will also provide facilitators.
  - Private facilitators may be used by the parties.

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## IBB Format

### Time commitment:

- Generally the training lasts from one and one-half to two days.

### Focus of training:

- The facilitators will stress maintaining an open mind.
- Board and union negotiators will practice listening techniques and participate in group exercises and negotiation scenarios to demonstrate the benefits of using these techniques.

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## IBB Format

- The process:
  - Participants identify issues of mutual concern.
  - Participants identify the various interests both parties have in the issue. (Participants avoid taking positions on the issues identified.)
  - Participants jointly brainstorm options and solutions. (No judging! No judging!)
  - Participants apply "standards" or criteria to evaluate possible solutions or options. (Now you judge!)
- Note: Even in well-run IBB negotiations, the parties will usually revert to traditional bargaining when trying to resolve salary and problematic economic issues.



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## Salary

- Key Factors in Determining Level of Annual Salary Increases:
  - District's current and projected financial condition.
  - District revenue limitations and constraints.
  - Comparable district wage/salary schedules, benefits packages, and contract settlements
- The Problem with Salary Schedules:
  - The combination of horizontal and vertical schedule movement can yield significant salary increases for an employee without counting any possible increases to the base.
  - Addressing the salary schedule issue in bargaining.
    - Calculate the cost of salary schedule movement
    - Calculate the compounding effect of any increase
    - Consider reconstructing the salary schedule
    - Consider eliminating the schedule

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## Fringe Benefits

### Contract Provisions to Consider:

- Health Insurance
- Retirement – 6% cap issues
- Extra-duty Pay
- Summer Compensation
- Overload Pay
- Reassigned Time

### Controlling and Reducing Benefit Costs:

- Health Insurance Plan design changes
- Reduced retiree health insurance benefits
- Adjust compensation formula
- Reduce amount of reassigned time allocations

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## Fringe Benefits

- Methods to Reduce or Control Employee Health Insurance Benefits Costs:
  - See greater employee percentage
  - Restructure health insurance benefits plan options to include less costly plan options
  - Evaluate the benefits of health savings account (“HSA”)
  - Consider any viable plan design changes
  - Establish a joint health insurance committee

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## Fringe Benefits

- Strategy for Successful Negotiation of Health Insurance Benefits:
  - Research and analyze comparability data
  - Determine the district's average insurance cost increases of the preceding collective bargaining agreement
  - "Build in" the estimated increased costs in health insurance premiums
  - Health insurance benefits provision which includes a cost-sharing formula
    - Examples:
      - Employees pay any premium increase above \_\_ %
      - School district pays \_\_ % of any health insurance premium cost increases from year-to-year (e.g., school district pays 50% of any annual premium increases over the previous contract year).

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## Teacher RIF and Recall Rights



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## The Continuing Impact of SB7

- Primary School Management Objectives:
  - Review SB7/*School Code* compliance
  - Ensure that RIF layoff and RIF recall provisions/procedures conform to SB7 requirements
  - Maintain a consistency between CBA and SB7 provisions
  - Provide definitions of key terms
  - Retain management discretion to implement RIF and reassignment of teachers

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## Joint RIF Committee



- Joint RIF Committee is required to meet annually.
- Little or no contract language concerning the role of the Joint RIF Committee
  - Scope of RIF Committee limited by SB7
    - Criteria for excluding a teacher from Group 2 and placement into Group 3;
    - Alternative definition for Group 4;
    - Inclusion of a performance evaluation rating from another district;
    - Performance ratings determined prior to September 1, 2012;
    - Upon request from a committee member, review of the Sequence of Dismissal List to determine whether there is a trend of more senior teachers receiving lower performance ratings.

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## Joint RIF Committee

- Do not include Joint RIF Committee provisions in the CBA.
  - Union will attempt to expand role of Joint RIF Committee and reduce authority of the Superintendent.
  - Union can negotiate different criteria for RIF Group placement even though deciding criteria is exclusively the role of the Joint RIF Committee placement (not the Union) under SB7.

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## Duty to Bargain

- SB7/Reduction in Force ("RIF")
  - Under Illinois law, an employer's decision to RIF or lay off employees for financial reasons (i.e., cost savings) is a mandatory subject of bargaining
  - An employer should generally decline to agree to contractual restrictions on its ability to RIF or lay off bargaining unit employees

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## Contract Reopeners



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## Non-Contingent Reopener

- A reopener provision is designed to enable the parties the right to reopen the contract at a specified time for a specific purpose
- Note: Non-contingent reopener provisions essentially reduce the duration of a multi-year CBA because only the non-economic terms of the CBA not subject to reopener negotiations remain in effect for the full term of the CBA

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## Contingent Reopener

- A contingent reopener provision allows either party to reopen the CBA only if a specified contingency occurs.
  - Examples:
    - "Pension cost shift" legislation
    - Property Tax "Freeze" legislation
    - "Cadillac" tax or ACA penalties or assessments
  - The district needs to reserve its right during a longer term CBA to reopen negotiations to address the financial impact of unanticipated costs or penalties imposed by state or federal legislation or mandates
  - District should consider negotiating contingent reopeners to allow the contract to be reopened mid-term for limited purposes if the identified contingency occurs
  - An effective negotiation strategy is to condition agreement to a longer term CBA on the union's agreement to contingent reopeners to protect the district's financial risk.

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## Questions?



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# PERA OVERVIEW

Presented by Catherine R. Locallo

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## Introduction

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**The Performance Evaluation Act (PERA)** was promulgated in 2010 and implemented over phases between 2011 and 2016. It has also been amended on a number of occasions, including the last amendment in 2019.

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The objective of the Act is to make performance evaluation more credible and to tie it to terms and conditions of employment.

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## Effect of Unsatisfactory Rating

### Overview:



- Tenured and non-tenured teachers must be rated “excellent,” “proficient,” “needs improvement,” or “unsatisfactory.”
- Ratings drive placement on a school district’s “Sequence of Dismissal” list and increases the chance of dismissal if the school district needs to implement a reduction-in-force.

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## Effect of Unsatisfactory Rating

### • Non-Tenured Teachers:

- Poor ratings may form the basis for a recommendation for non-reemployment if the teacher is not in the final year of probationary service.
- Poor ratings may make a teacher ineligible for tenure. Recommendation for dismissal if the teacher is in the final year of probationary service.

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## Effect of Unsatisfactory Rating



- Tenured Teachers:
  - Placement on a formal remediation plan. School districts have 30 school days to develop and commence the remediation plan.
    - Check Collective Bargaining Agreement (CBA) for shorter time period.
  - Dismissal in accordance with Section 24-12 of the School Code if, at the conclusion of the remediation period, the tenured teacher has not corrected their performance deficiencies.
    - Teacher still has the right to a tenured teacher dismissal hearing.
  - Certification action by State Superintendent for “incompetency” by defining this term as including the receipt of 2 unsatisfactory ratings within a 7-year period.

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## 2019 Amendment

- On August 27, 2019, Public Act 101-591 was signed into law
  - the creation of a local appeals process for “unsatisfactory” ratings issued to teachers (not principals); and
  - that districts, “in good faith cooperation” with its teachers or through “good faith bargaining” with its teachers’ unions, develop and implement an appeals process.
- Governor Pritzker lauded this legislation, stating that it bolsters every teacher’s right to a fair evaluation.

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Public Act  
101-591

- “Beginning with the first school year following the effective date of this amendatory Act of the 101st General Assembly, each school district shall, in good faith cooperation with its teachers or, if applicable, through good faith bargaining with the exclusive bargaining representative of its teachers, develop and implement an appeals process for “unsatisfactory” ratings under Section 24A-5 that includes, but is not limited to, an assessment of the original rating by a panel of qualified evaluators agreed to by the joint committee referred to in subsection (b) of Section 24A-4 that has the power to revoke the “unsatisfactory” rating it deems to be erroneous.

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Public Act  
101-591

- The joint committee shall determine the criteria for successful appeals; however, the issuance of a rating to replace an “unsatisfactory” rating must be determined through bargaining between the exclusive bargaining representative, if any, and the school district.”

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## Effective Date and Application

- The appeals process must be in place “[b]eginning with the first school year following the effective date of this Amendatory Act of the 101st General Assembly...”.
- The effective date of the Act is August 27, 2019.



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## Key Aspects of the New Law for a Local Appeal Process

- New Responsibilities for the PERA Joint Committee:
  - The Joint Committee must be composed of an equal number of management and teacher/union representatives.
  - Joint Committee is required to meet on an annual basis to “review and assess” the effectiveness of the school district’s evaluation plan.
  - Now, the Joint Committee determines who will serve on the panel of qualified evaluators to assess a teacher’s appeal of an unsatisfactory rating.
  - The panel has the power to revoke an unsatisfactory rating it deems to be “erroneous”.

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Questions?



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# School Boards and Student Discipline

Presented by Zaria N. Udeh

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## Introduction



- Nearly six years ago, Senate Bill 100, or Public Act 99-456, made significant changes to student suspension and expulsion authority and procedures. The rationale for the overhaul of Section 10-22.6 related to Illinois school districts' use of exclusionary discipline:
  - Among the many possible disciplinary interventions and consequences available to school officials, school exclusions, such as out-of-school suspensions and expulsions, are the most serious.
  - Limit the number and duration of expulsions and suspensions to the greatest extent practicable, and it is recommended that they use them only for legitimate educational purposes.
  - Ensure that students are not excluded from school unnecessarily, by considering forms of non-exclusionary discipline prior to using out-of-school suspensions or expulsions. 105 ILCS 5/10- 22.6(b-5).

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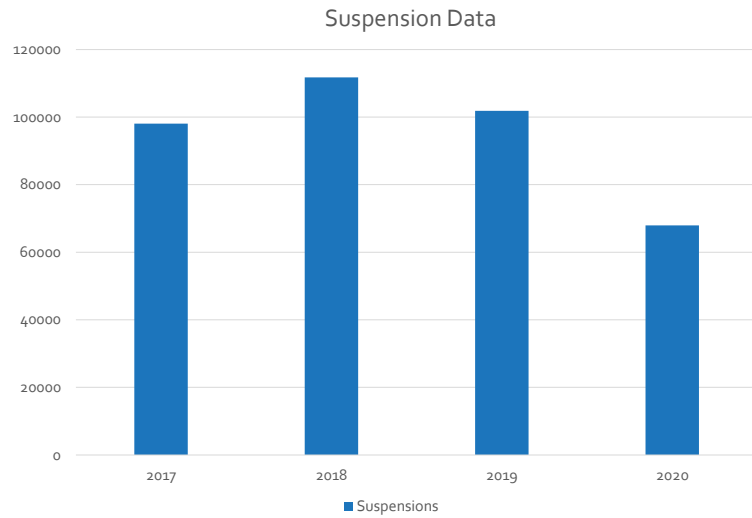
## Where Are We Now?



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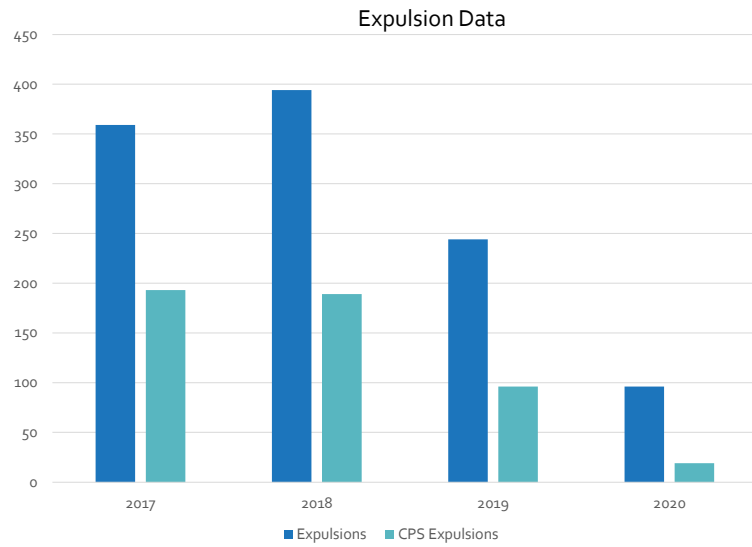
Where Are We Now?



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Where Are We Now?



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## Standards for Suspension and Expulsion



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## Standards for Suspension and Expulsion



- Out of School Suspensions for Three Days or Less
  - May be used only if the student's continuing presence in school would pose:
    - A threat to school safety; OR
    - A disruption to other students' learning opportunities.
  - Whether a student's continuing presence in school would pose a threat to school safety or a disruption to other student's learning opportunities "shall be determined on a case-by-case basis by the school board or its designee."
  - School officials "shall make all reasonable efforts to resolve such threats, address such disruptions, and minimize the length of suspensions to the greatest extent practicable."

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## Standards for Suspension and Expulsion

- Out of School Suspensions for Four or More Days, Expulsions and Disciplinary Removals to Alternative Schools
  - May be used only if:
    - The student's continuing presence in school would either:
      - Pose a threat to the safety of other students, staff or members of the school community; OR
      - Substantially disrupt, impede or interfere with the operation of the school; AND
      - Other appropriate and available behavioral and disciplinary interventions have been exhausted.
    - The determination of whether "appropriate and available behavioral and disciplinary interventions have been exhausted shall be made by school officials."

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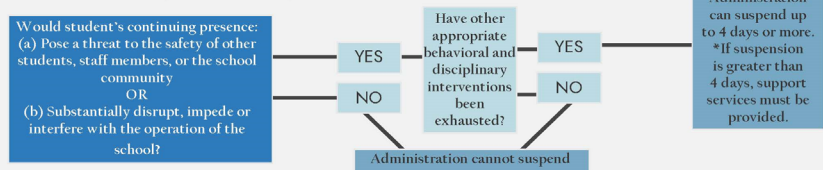
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## Standards for Suspension and Expulsion

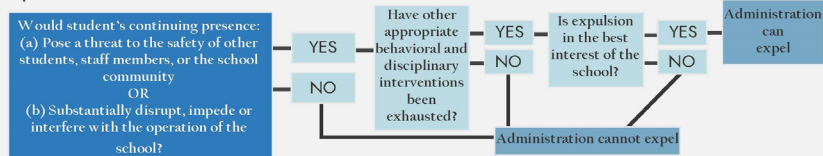
### Out Of School Suspension - 3 days or less



### Out Of School Suspension - 4 days or more

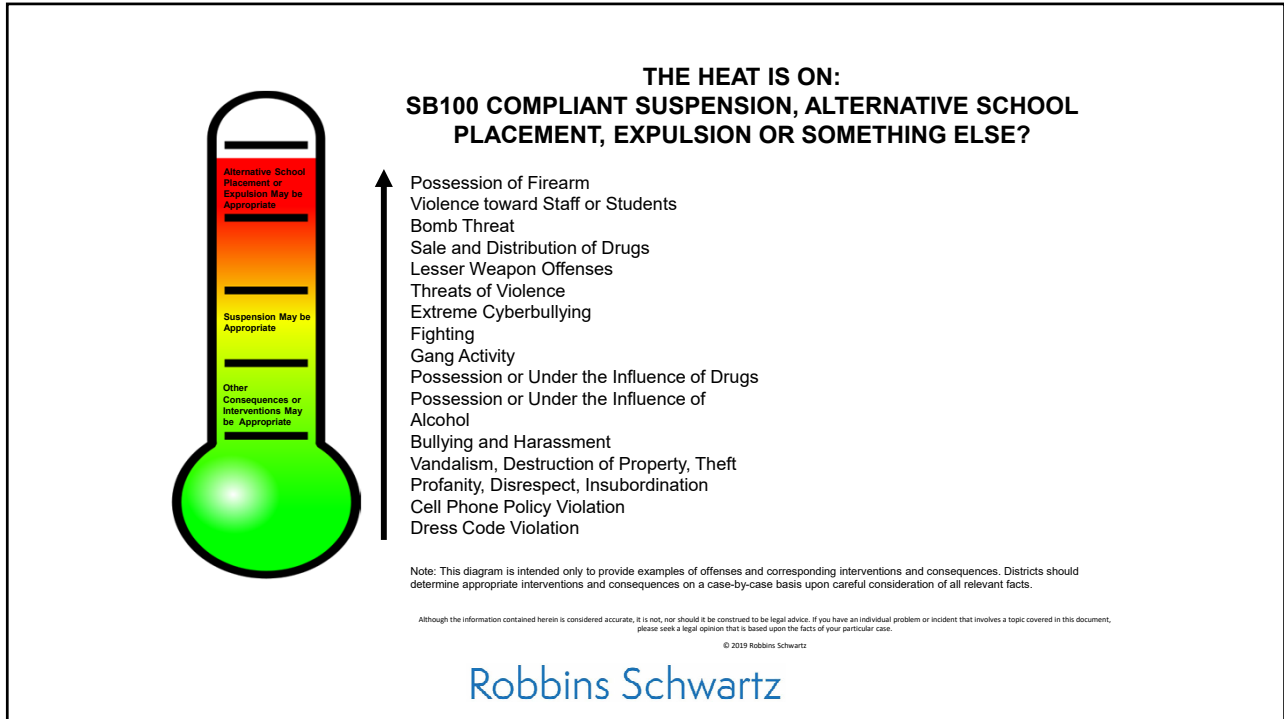


### Expulsion

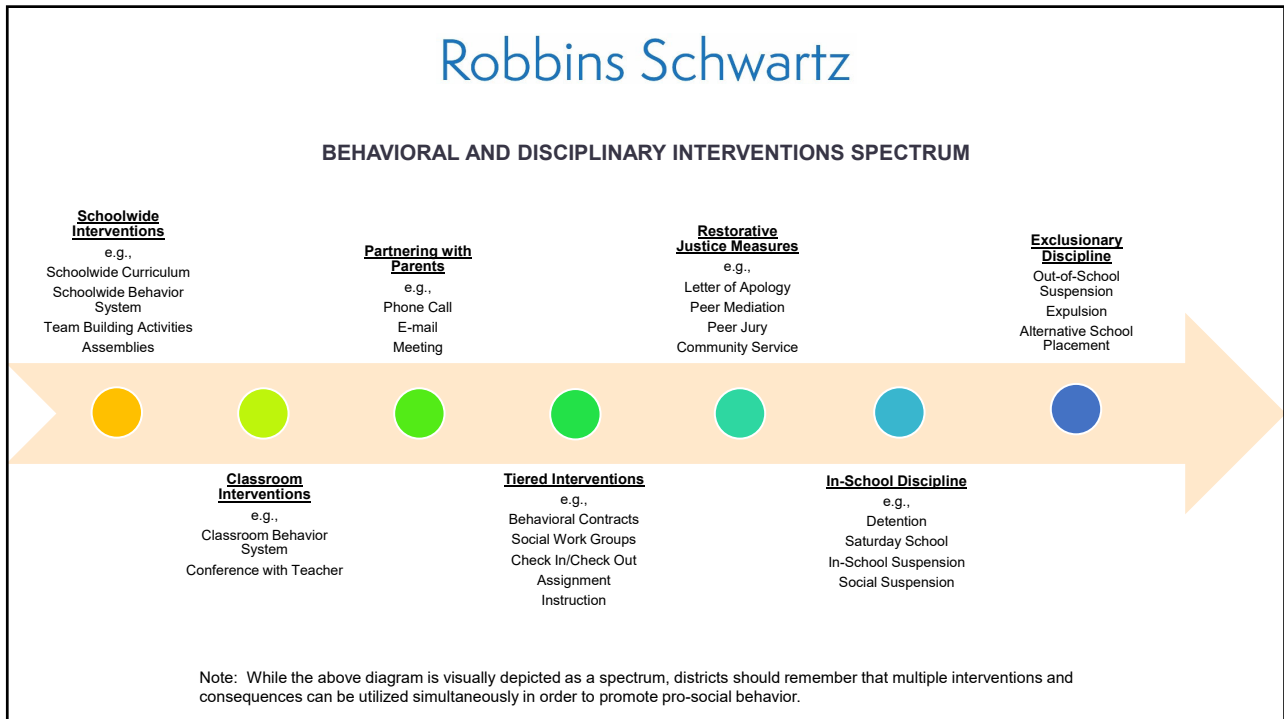


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## Support Services for Suspension and Expulsion

- Support Services for Students Suspended for More than Four School Days and for Expelled Students
  - Students who are suspended out-of-school for longer than four school days must be provided appropriate and available support services during the period of their suspension.
  - A school district may refer students who are expelled to appropriate and available support services.
  - The determination of “appropriate and available support services shall be determined by school authorities.”

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## Re-engagement Policy for Suspension and Expulsion

- Facilitating the Re-engagement of Students Who Are Suspended, Expelled or Returning from Alternative School
  - Districts must “create a policy to facilitate the re-engagement of students who are suspended out-of-school, expelled, or returning from an alternative school setting.”



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## Missed Assignments for Suspension and Expulsion

- Requirements Related to Missed Assignments
  - Students who are suspended from school must have the opportunity to make up work for equivalent academic credit.
  - Students who are suspended from the school bus who do not have alternate transportation to school must have the opportunity to make up work for equivalent academic credit. It is the parent's responsibility to notify school officials that a student suspended from the school bus does not have alternate transportation to school.

homework

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## Standards for Suspension and Expulsion

- Specific Prohibitions
  - School officials may not advise or encourage students to drop out voluntarily due to behavioral or academic difficulties.
  - A student may not be issued a monetary fine or fee as a disciplinary consequence, though this shall not preclude requiring a student to provide restitution for lost, stolen, or damaged property.
  - School boards may not institute "zero tolerance" discipline policies which require administrators to suspend or expel students for particular behaviors unless specifically required by federal or state law.

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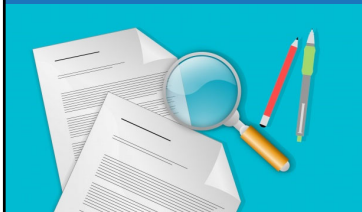
## Standards for Suspension and Expulsion in Remote Learning

- Discipline in the Context of Remote Learning
  - SB 100 still applies
  - The Student Code of Conduct still applies
  - Staff and administration will need to address student discipline issues in the remote learning environment consistent with District policies and procedures while analyzing the unique circumstances and nature of the impact in the remote environment

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## Standards for Suspension and Expulsion



- Board Motions/Written Decisions Related to Expulsions and Suspension Review Requests
  - If a suspension review hearing is requested for a suspension of three days or less, the Board of Education's written decision related to the review of the suspension and the school administrator's letter to the parents/guardians confirming the decision of the Board of Education must:
    - Detail the specific act of gross misconduct resulting in the decision to suspend; and
    - Include a rationale as to the specific duration of the suspension.
    - Consider student confidentiality when formulating the Board motion.

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## Standards for Suspension and Expulsion

- Board Motions/Written Decision Related to Expulsions and Suspension Review Requests
  - If a suspension review hearing is requested for a suspension of four days or more, the Board of Education's written decision related to the review of the suspension and the school administrator's letter to the parents/guardians confirming the decision of the Board of Education must:
    - Detail the specific act of gross misconduct resulting in the decision to suspend;
    - Include a rationale as to the specific duration of the suspension;
    - Document whether other behavioral and disciplinary interventions were attempted or whether it was determined that there were no other appropriate and available interventions; and
    - For suspensions of more than four days, document whether appropriate and available support services were provided during the period of suspension, or whether it was determined that there are no such appropriate and available services.
  - Consider student confidentiality when formulating the Board motion.

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## Standards for Suspension and Expulsion



- Board Motions/Written Decision Related to Expulsions and Suspension Review Requests
  - If a student is expelled, the Board of Education's written decision related to the recommendation for expulsion and the school administrator's letter to the parents/guardians confirming the decision of the Board of Education must:
    - Detail the specific reasons as to why removing the student from the learning environment is in the best interest of the school;
    - Include a rationale as to the specific duration of the expulsion; and
    - Document whether other behavioral and disciplinary interventions were attempted or whether it was determined that there were no other appropriate and available interventions.
  - Consider student confidentiality when formulating the Board motion.

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## Professional Development Requirements

- Districts must make reasonable efforts to provide ongoing professional development on the adverse consequences of exclusion and justice system involvement, effective classroom management strategies, culturally responsive discipline and developmentally appropriate disciplinary methods that promote positive and healthy school climates to:
  - Teachers;
  - Administrators;
  - School board members;
  - School resource officers; and
  - Staff.



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## MOU with Law Enforcement

- Memorandum of Understanding with Law Enforcement
  - School districts are encouraged to create memoranda of understanding with local law enforcement agencies that clearly define law enforcement's role in schools. 105 ILCS 5/10-20.14(b).



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Questions?



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*Thank you!*



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Samuel Cavnar represents school districts, community colleges, municipalities, and various other public entities, along with private clients including owners, developers, general contractors, subcontractors, and various other commercial interests. Sam is an experienced negotiator of commercial and construction-related contracts, and he regularly counsels clients in the areas of board governance, bidding, procurement, tort immunity and risk management. Sam has been appointed Special Assistant State's Attorney in several matters involving construction-related transactions and litigation. Sam has successfully prosecuted and defended numerous lawsuits related to defaults, delays, extras, liquidated damages, design and construction defects, performance issues, non-payment and other similar commercial claims.

### **AWARDS**

Illinois "Rising Star", by Super Lawyers Magazine, in the area of Construction Litigation (2012-2017)

### **RECENT PUBLICATIONS**

"How Public Sector Entities Can Protect Themselves in Premise Liability Cases," *Chicago Daily Law Bulletin* (2018)

"Property Tax Exemption for Charitable Remains Gray Area," *Chicago Daily Law Bulletin* (2017)

Contributing author, "Organization, Finance, and Property," *Illinois School Law*, IICLE (2017)

"School District and Zoning Exemptions," *Chicago Daily Law Bulletin* (2015)

### **RECENT PRESENTATIONS**

*Navigating the Public Bidding and Contract Process*, IAPD/IPRA Soaring to New Heights Conference (January 2020)

*Statutory Requirements and Ethical Considerations for Public Officials*, Illinois GFOA Annual Conference (September 2019)



### **PRACTICE AREAS**

Commercial Transactions  
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### **EDUCATION**

J.D., Wayne State  
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Supreme Court of  
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Catherine is approved by the Illinois State Board of Education to provide school board member training.

### AWARDS

Illinois "Rising Star," Employment & Labor Law (2015-2018)

### RECENT PUBLICATIONS

"CBA Provision Clearly Rebutted At-Will Employment Presumption for IT Employee," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Employer's Judgment and Job Description Defeat Failure To Accommodate Claim," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Recent Department of Labor Opinion Letters: Pay for Training and Travel," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Sexual Harassment Prevention Training Compliance Required Before New Year," *Employment and Labor Law Flashpoints*, IICLE (2020)

"Will 'Scabby the Rat' Live To Fight Another Day?" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Superintendent's Police Report is Protected Speech" *Employment and Labor Law Flashpoints*, IICLE (2020)

"Changing the Landscape: Abusive Conduct Not Protected Under NLRA" *Employment and Labor Law Flashpoints*, IICLE (2020)

"COVID-19 Changes to Claims for Unemployment Benefits in Illinois" *Employment and Labor Law Flashpoints*, IICLE (2020)



### PRACTICE AREAS

Education Law  
Labor & Employment  
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J.D., *cum laude*, The John  
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Order of John Marshall

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U.S. Court of Appeals for  
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U.S. District Court for the  
Central District of Illinois

U.S. District Court for the  
Northern District of Illinois

Supreme Court of Illinois

“Seventh Circuit: Jury, Not Judges, Must Decide Coach’s Sex Discrimination Claim” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Examining DOL Rule on New Employee Leave Rights” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Better Safe Than Sued – Issuing Timely FMLA Notices” *Employment and Labor Law Flashpoints*, IICLE (2020)

“Unions Strike Back Through Amendments to Illinois Public Labor Acts” *Employment and Labor Law Flashpoints*, IICLE (2020)

“First Amendment Protections Get Broader for Government Employees,” *Chicago Daily Law Bulletin* (2016)

"Regulatory Changes to the Illinois Wage Payment and Collection Act," *Justinian Society Newsletter* (2015)

"New FOIA Amendments to Ease Burden on Public Bodies," *Justinian Society Newsletter* (2015)

“Illinois Supreme Court Determines Arbitration Award Ordering Reinstatement of a Paraprofessional was Binding Because the Award ‘Drew Its Essence’ from the CBA,” *Justinian Society Newsletter* (2014)

“When the Music Stops, Why Not Require Certain Title VII Plaintiffs to Find a Chair on Which to Rest Their Complaint,” *The John Marshall Law Review*, (2009)

#### **RECENT PRESENTATIONS**

*Is PERA Dead?? Implementation of a Local Appeals Process for Unsatisfactory Ratings*, IASPA Annual Conference (January 2020)

*A Workshop on Compliance with the Open Meetings Act and Illinois Freedom of Information Act*, LUDA Annual Conference (October 2019)

*Community College Trustees Training Session*, ICCTA (June 2019)

#### **ORGANIZATIONS**

Chicago Bar Association

Illinois Council of School Attorneys

Illinois State Bar Association

National Council of School Attorneys

Secretary, Justinian Society of Lawyers

Co-Chair, Justinian Society of Lawyers Endowment Fund Scholarship Committee

Member, Oakton Community College Paralegal Advisory Committee

Member, Triton College School of Business Advisory Legal Committee

Member, Board of Directors, Glenview Stars Hockey Association

UNICO National

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Zaria practices in the area of education law focusing in the areas of special education and students issues. Zaria counsels school districts with respect to IEP meetings, 504 accommodations, OCR, ISBE, and IDHR complaints, due process hearings, residency and homeless dispute hearings, student discipline matters, board policy and student handbook review, FOIA requests, student record compliance and contract review. Zaria also counsels community colleges on student related issues.

Prior to joining Robbins Schwartz, Zaria worked for the Chicago Public School District, where she represented the district as a special education attorney in due process matters and special education disputes.

### **RECENT PUBLICATIONS**

"Medical Cannabis at School Wins Legislative OK," Chicago Daily Law Bulletin (2018)

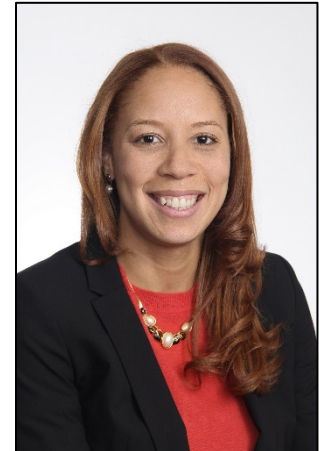
### **RECENT PRESENTATIONS**

*Use of Restraint & Seclusion: The Risks & Challenges Districts Face*, IAASE (October 2018)

*Legal Update in Special Education*, Superintendent Leadership Conference (June 2018)

*Current Trends Related to Placement and LRE: A Review of Recent Guidance from the Courts*, IAASE (February 2018)

"Free Speech" Issues on Public College Campuses, ICCSSO (January 2018)



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Education Law  
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J.D., DePaul University  
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Supreme Court of the  
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