

# **River Valley School District**

## **School Boards and the Law**

**October 23, 2023**

*Eileen A. Brownlee*

**Fennimore Office**

1038 Lincoln Avenue

Fennimore, Wisconsin 53809

(608) 822-3251

[ebrownlee@boardmanclark.com](mailto:ebrownlee@boardmanclark.com)



# **BoardmanClark**

## **I. SCHOOL BOARDS AND SCHOOL BOARD MEMBERS**

### **A. Role of the School Board.**

#### **1. Wis. Stat. § 120.12 - School Board Duties**

“The **school board** of a common or union high school district shall:

- a. Subject to the authority vested in the annual meeting and to the authority and possession specifically given to other school district officers, have the possession, care, control, and management of the property and affairs of the school district, except for property of the school district used for public library purposes under s. 43.52.
- b. 26 more duties listed

#### **2. School Board Powers**

##### **a. Wis. Stat. § 120.13 – School Board Powers**

“The **school board** of a common or union high school district may do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions, activities for the benefit of pupils, and including all of the following:”

- b. Delegable powers v. non-delegable powers.

### **B. Board Functions.**

#### **1. Quasi-legislative functions**

- a. Policy making.
- b. Budget responsibility.

#### **2. Quasi-judicial functions**

- a. Student expulsions.
- b. Nonrenewal of teacher contracts.
- c. Grievance Procedure decisions.

#### **3. Oversight**

- a. Administration of Board Policies.
- b. Performance of Delegated Duties.
- c. Hiring and evaluating district administrator.

- d. Monitoring student achievement.

**C. Role of School Board Members.**

- 1. Trustees With Fiduciary Responsibilities.
  - a. School board members must act in the best interests of the district and never for their own personal interests.
  - b. As trustee of the public, a public officer owes an undivided duty to the public he/she serves and is not permitted to place himself/herself in a position which will subject him/her to conflicting duties or expose him/her to the temptation of action in any manner other than in the best interests of the public. 58 Wis. Op. Att’y. Gen. 247 (1969).
- 2. Individual Board Member Rights and Duties.
  - a. Develop a vision for the schools and establish a structure to achieve that vision.
  - b. Engage in advocacy on behalf of students and their schools.
  - c. Channel complaints to the appropriate process or personnel.
  - d. School board members should be prepared for and regularly attend meetings.
  - e. Board members should vote unless required to abstain because voting will create a conflict of interest or the appearance of impropriety.
  - f. An individual board member has the right to act in an official capacity only at a legally noticed meeting of a quorum of the Board unless otherwise authorized by the Board or policy.
  - g. Individual board members have no greater rights than anyone else to visit school buildings during the school day. Wis. Stat. §120.13(35).

**II. OPEN GOVERNANCE.**

**A. Public Records Law.**

- 1. General principles.

- a. Subject matter, not location, determines if a record is a public record.
  - b. Duty to retain.
  - c. Duty to disclose upon request.
2. Disclosure of personal emails, blogs, Facebook groups, etc.
- a. Any email regarding matters within the authority of the school board are subject to Wisconsin Public Records Law and must be retained and released as required by law. This is true regardless of whether the school board member is using a private email address or a district email address.
  - b. A board member's personal blog entry can be a public record if it pertains to matters within board authority.
  - c. A board member's Facebook group can be a public record if the group discusses matters within board authority, even if the group is set to private or "friends-only."
  - d. After receiving a request for a public record, the board's record custodian must respond "as soon as practicable and without delay." Wis. Stat. § 19.35(4).
  - e. Consequences for violations.
    - i. If the board's records custodian, fails to release public records, the board can be liable for attorney fees, damages of not less than \$100 and costs to the requestor if the request prevails on an action of mandamus. Wis. Stat. § 19.37(2)(a). The court may also award punitive damages if the custodian has arbitrarily and capriciously denied a response to a public records request. Wis. Stat. § 19.37(3). In actions brought by the Attorney General or the county district attorney, the board may also be liable for a forfeiture of up to \$1,000 in addition to costs.
    - ii. An individual who alters, falsifies, destroys, or conceals public records with intent to injure or destroy is guilty of a Class H felony. Wis. Stat. §§ 946.72; 943.38.
3. Requests by board members for records.

- a. Board members, as individual citizens, may make public records requests just like any other member of the public.
  - b. Board policy may grant board members additional access to records necessary to fulfill their public duties.
    - i. Board policy may grant access to statistics, reports and other data that are readily available and not confidential by submitting a request to the district administrator.
    - ii. Requests for information that require significant time and resources could be channeled to a board committee or the district administrator to determine if proper.
    - iii. Documents requested by an individual board member should be shared with the entire board.
    - iv. If an individual board member requests records that a member of the public would not have access to, policy should allow the district administrator, the records committee (if established by the board), and legal counsel to determine whether the documents should be released.
  - c. State and federal student records law.
    - i. School officials may view educational records when they have a legitimate educational interest in doing so without violating the federal Family Educational Rights and Privacy Act (FERPA). The United States Department of Education generally interprets the term school officials to include board members.
    - ii. Individual board members may violate FERPA if they access students' educational records without a legitimate educational purpose or without the consent of the students' parents.
    - iii. The Wisconsin Supreme Court has not decided if an individual board member, as opposed to the board as an entity, has authority under Wisconsin law to view pupil records.
4. Open records and open meetings; social media

***One Now Wisconsin v. Kremer and Knight First Amendment Institute at Columbia University v. Trump***

Both cases involved public officials blocking access to their Twitter accounts.

- a. Neither case was an open records or open meeting case, rather, the plaintiffs claimed that their first amendment rights were being violated on the basis that blocking them was viewpoint discrimination.
- b. The courts in each case held that the Twitter accounts were limited public fora and were used by each of the defendants for purposes related to their governmental offices. They could not, therefore, block individuals or groups from either viewing or participating in the Twitter dialogue because of different political philosophies or conflicting viewpoints. The U. S. Supreme Court, on April 5, 2021, vacated the decision in the case involving President Trump as moot. However, two new cases were accepted by the U. S. Supreme Court last spring and will be decided next term.

## **B. Open Meetings Law.**

1. A meeting of a governmental body is convened whenever there is a purpose to engage in governmental business, and the number of members present is sufficient to determine the body's course of action. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).
  - a. For example, the school board cannot modify the adopted budget without a two-thirds vote. If a board has seven members, three members constitute a negative quorum. If three board members met by themselves to discuss their dissatisfaction with a proposed budget adjustment, it would constitute a meeting of a governmental body.
  - b. A walking quorum can also be established if members participate in a series of meetings among separate groups of members each with less than a quorum to discuss business and come to tacit or express consensus over an issue that will come before the entire board. A walking quorum can occur over the phone, email, social media, or text messaging. A walking quorum also violates open meetings law.

**Example:** Board members A and B discuss a new policy and agree it's a good idea. No problem. Board member A tells Board member C what Board member A and B discussed. Board member C agree that it is a good idea. No problem. Board member C brings the subject up with Board members D and E, and they agree as well. Problem.

**Example:** Board members A and B, who are members of a 4-member policy committee, discuss a new policy and agree it's a good idea. Problem.

**Example:** Board members A and B discuss the possible termination of an employee. Problem, but not from an open meeting standpoint; from a due process standpoint.

- c. Board members should not conduct official business through electronic mail, text messages or other written communication even if the board provides members of the public with a complete copy of those communications.
2. When a board moves to closed session, the board is representing to the public that a specific statutory exception to the Open Meetings Law applies to the discussion. Wis. Stat. § 19.85.
- a. Board members should recognize this responsibility and limit their deliberations in closed session to these narrow exceptions.
  - b. Closed sessions must be properly noticed in advance of the meeting. Wis. Stat. § 19.84(2).
    - i. The notice should cite the particular statutory exemption for the closed session and must be detailed enough to reasonably apprise the public of the subject matter of the closed session.
    - ii. The amount of notice that is sufficient must be reasonable under the circumstances considering three factors:
      - (a) The burden of providing more detailed notice,
      - (b) Whether the subject is of particular public interest, and
      - (c) Whether it involves non-routine action that the public would be unlikely to anticipate.
  - iii. A recitation of the text of the statutory exemption is insufficient notice.
  - iv. Broad categories such as “personnel” or “contracts” are insufficient.

*State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, 301 Wis. 2d 178, 732 N.W.2d 804.

- d. No motion to convene in closed session may be adopted unless the presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions by which such closed session is claimed to be authorized. No business may be taken up at any closed session except that which relates to matters contained in the presiding officer's announcement of the business to be considered. Wis. Stat. § 19.85(1). If you anticipate reconvening in open session, the meeting notice must inform the public of that fact and, when going into closed session, the presiding officer must provide an approximate time for reconvening in open session.

### **III. PARLIAMENTARY PROCEDURE**

#### **A. Motions**

1. A main motion is the one which brings business before the school board. Only one main motion may be considered at any given time. Most other motions are related to the main motion in one way or another. Procedurally, the main motion is usually the last one to be addressed by the board after all subsidiary, incidental and privileged motions have been resolved.
2. A subsidiary motion assists the school board in disposing of a main motion. There are a broad range of subsidiary motions. The most common subsidiary motion is one to amend the main motion. Other types of subsidiary motions include motions to indefinitely postpone a motion, lay a motion on the table, and commit (or refer) a motion to a committee. A subsidiary motion does not expressly adopt or reject a main motion based on its merits.

#### **B. Main Motion Basic steps**

1. The purpose of a main motion is to produce action by the board. A main motion must be voted on by the board before any action is adopted. Usually (and preferably), no discussion or debate should occur until member of the body has made a main motion. The proper form of a motion should include the exact wording of the motion.
2. All motions should propose affirmative action, rather than negative action.
3. A main motion must receive a second in order to allow further discussion or debate by the board. If a motion does not receive a second, the chair may restate the motion and ask for a second, otherwise the motion should not be considered.



4. Once a main motion is made and seconded, the chair should state the motion and open the floor for debate. At that time, board members may debate the motion, propose amendments to the motion, or propose other procedural motions which would dispose of the main motion.
5. After a main motion has been made and seconded, if the board member who made the motion wishes to alter the wording of the motion, the member can ask for unanimous consent to modify the motion. However, if any board member objects, the board member who made the motion must then bring a motion to amend the original motion.
6. In order to pass, a main motion must receive a majority vote of the members present, unless there are other requirements set by statute, by-laws, or board policy. An abstention usually is not counted in the vote total. A vote can be deemed passed when a plurality of the votes actually cast are in the affirmative, even though one or more members abstain (or even cast and no majority vote results, as long as the total votes cast provide a quorum).
7. It should be noted that, during a meeting, a main motion which raises the same question that was previously answered cannot be introduced. A board member cannot present the same question as a motion previously disposed of during the same meeting other than to bring a motion to rescind the previous motion or to amend something previously adopted. A motion to reconsider the previous motion may also be in order.

### **C. Amendments**

1. An amendment is a subsidiary motion which modifies the wording of a main motion pending before the governmental body.
2. An amendment may be made to a main motion as soon as the motion is made and seconded and the floor is open for debate. An amendment may be made by any board member who has been recognized by the chair by saying, "I move to amend the motion by (insert substance of the amendment)." There are three ways to amend a motion: i) inserting words, ii) striking words, and iii) striking and inserting words.
3. Once an amendment is properly passed, it only revises the main motion in front of the board. The board must then either consider other amendments or vote on the main motion as amended.
4. An amendment which would have the same result as voting against the main motion is out of order. For example, if the main motion is that the board employ John Doe as an elementary teacher, it would be out of order for an amendment to change the motion to specify that the board not

employ John Doe as an elementary teacher, since that would be the same result as voting against the main motion.

5. Nothing has been adopted by virtue of an amendment to a main motion. Adoption only occurs once the main motion passes.
6. It is not uncommon in meetings for another board member to suggest a “friendly amendment” to make a slight modification to the main motion. If the person who made the motion agrees with this change in the wording, and the person who seconded the motion agrees to the change, the chair should state the new motion. If the person who initially seconded the motion wishes to withdraw his second, the person who suggested the “friendly amendment” is considered the second to the motion.
7. An amendment must receive a second in order to be debated by the board and must be voted on before the main motion can be voted upon. Passage of an amendment does not adopt the motion. If an amendment is not passed, the main motion is not modified and when board members vote on the motion, they will vote only on the motion in its original form.

#### **D.     Subsidiary Motions**

A subsidiary motion is one which would dispose of the main motion without it being adopted or rejected. All subsidiary motions must be acted upon before the main motion. If a subsidiary motion is passed, the main motion is affected. Examples of some of the most common subsidiary motions are:

1. Postpone Indefinitely. A motion to postpone indefinitely kills the main motion during that meeting and avoids any vote on that question. A motion to postpone indefinitely can be applied only to a main motion. During the debate on the motion to postpone indefinitely, the merits of the main motion can be debated. The adoption of a motion to postpone indefinitely indirectly rejects the main motion but is not technically a decision on the merits of the main motion.
2. Commit or Refer. A motion to commit (or refer) is more often phrased as a motion to refer a matter to committee. A matter may be referred to a particular committee.
3. Postpone to a Certain Time. A motion to postpone to a certain time (or to postpone definitely) differs from the motion to postpone indefinitely. The motion to postpone to a certain time places the main motion back in front of the body at that particular time.

4. Lay on the Table. If a motion passes to lay another motion on the table, that motion is temporarily deferred until it is brought off the table for consideration. More commonly referred to as a motion to “table,” it should not be used to kill a measure or to avoid dealing with it.
5. Motions That Bring a Question Again Before the Assembly
  - i. Take From The Table. In order to take a motion from the table, there must already be a motion on the table from earlier in the same meeting or from a previous meeting.
  - ii. Rescind. The effect of a motion to rescind is to strike out, or nullify, an entire motion that was previously passed. A motion to rescind may be made by any member of the board, regardless of how that member voted on the original motion. Additionally, there are no specific time limits on making or voting on a motion to rescind. If passed, the previous motion is negated. Not every action can be rescinded. For example, when something has been done as a result of the vote on the original motion that is impossible to undo, a motion to rescind is out of order. If notice of the motion to rescind has been given to all board members, a simple majority of board members present is needed to pass the motion. If no prior notice has been given, a two-thirds majority of members present, or a simple majority of the full board is required.
  - iii. Amend Something Previously Adopted. The motion to amend something previously adopted revises only a portion of the main motion which was adopted or substitutes a different version of that motion.
  - iv. Reconsider. A motion to reconsider enables a majority, within a limited time and without advance notice, to bring back for more consideration a motion upon which a vote has already been taken. To avoid abuse by a defeated minority, a motion to reconsider can only be made by a member who voted with the prevailing side but can be seconded by anyone. No matter what vote was necessary to adopt the original motion, a motion to reconsider requires only a simple majority for passage. A motion to reconsider must be made on the same day as the original motion. However, a motion to reconsider can be debated and voted on a later date. Once made, a motion to reconsider results in the suspension of all actions arising from the vote on the original motion. This suspension lasts until (1) the motion to reconsider is voted on and (if the motion passes) reconsideration of the original motion is completed or (2) the suspension period expires. For school boards which hold regular

meetings monthly, the suspension period expires upon adjournment of the next regular meeting.

- v. **Renewal.** If a motion is made and disposed of without being adopted and is later allowed to come before the board after being made again by any member in essentially the same connection, the motion is said to be renewed. Renewal of motions is limited by the basic principle that an assembly cannot be asked to decide the same, or substantially the same, question twice during one session—except through a motion to reconsider a vote or a motion to rescind an action or in connection with amending something already adopted. Any motion that is still applicable can generally be renewed at any later session, except where a specific rule prevents its renewal.

#### **IV. CONFLICTS OF INTEREST**

##### **A. Common law doctrine of conflicts of interest.**

1. **General rule.** No board members may vote on any question or contract in which they have a direct, personal, or financial interest. Violation could result in a court setting aside the board member's vote or voiding the board's act entirely.
2. **Incompatibility of offices.**
  - a. No board member can maintain two governmental offices if they impose conflicting duties or create too many conflicts of interest. For example, a board member could not also be an employee. *See Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 347 N.W.2d 614 (Ct. App. 1984).
  - b. The positions of substitute teachers, part-time teachers, paid bus drivers who are district employees, and coaches in the office of school board member are incompatible, despite the fact that the employment is in more time-limited positions.
  - c. **Board members as volunteers.** A school board member may serve as a volunteer coach or a supervisor of an extracurricular activity if:
    - i. No compensation.
    - ii. Abstention from voting on issues that substantially and directly concern the activity.
    - iii. Criminal background investigation by Department of Justice or FBI is submitted to school board.

- d. As of August 2023, school board members may also serve as volunteer school bus drivers if:
  - i. Hold a valid commercial driver's license.
  - ii. Receive a school bus endorsement from the Wisconsin Department of Transportation.
  - iii. Abstain from voting on issues that directly concern school bus drivers.

**B. Wisconsin Code of Ethics for Public Officials – Wis. Stat. §§ 19.41-.59.**

- 1. No public official may use a public position to obtain financial gain or anything of substantial value for private benefit, for the benefit of immediate family, or for an organization with which the official is associated. Wis. Stat. § 19.59(1)(a).
  - a. Immediate family includes the employee's spouse, child, or parent that receives more than half of his or her support from the board member or provides more than half of the board member's support. Wis. Stat. § 19.42(7)(b).
  - b. According to the former Government Accountability Board (GAB), substantial value means anything more than inconsequential value based on the circumstances. 2008 GAB 03; 2006 Wis. Eth. Bd. 5. There is no specific figure, but decisions have indicated that something worth as little as \$10 could be an item of substantial value under certain circumstances.
- 2. No public official may solicit or accept anything of value if it could reasonably be expected to influence the local official's vote or judgment. Wis. Stat. § 19.59(1)(b).
- 3. No public official may take any official action or use his or her office in a way that substantially affects or produces a substantial benefit for a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest. Wis. Stat. § 19.59(1)(c).

**C. Criminal liability.**

- 1. Criminal liability for misconduct while in public office. Wis. Stat. § 946.12.

2. Criminal liability for private interest in a public contract. Wis. Stat. § 946.13. This statute applies to board members who have a direct or indirect pecuniary interest in contracts with the school district that exceed \$15,000 in a single year.
  - a. This is a strict liability offense; board members can be criminally liable without intent. The law is not directed at corruption but at conduct presenting an opportunity for corruption. *State v. Stoehr*, 134 Wis. 2d 66 (1986).
  - b. The board member can violate this contract in his or her personal or public capacity. For example, the board member can't negotiate a private contract that pertains to a matter that will be before the board. Likewise, the board member could not vote on that contract when it came before the board.
  - c. In *State v. Venema*, 2002 WI App 202, 257, Wis. 534, 650 N.W.2d 898, the court held that a violation occurred as soon as the public official submitted a letter of interest in a contract pertaining to a matter before the public official's committee.
  - d. A violation renders a contract invalid, although the board has the discretion of either voiding the contract or requiring contract enforcement. A board member may also be liable to repay the district for the costs of the invalid contract. *Reetz v. Kitch*, 230 Wis. 1, 22, 283 N.W. 348, 357 (1939).

**D. Discussion and voting.**

1. Courts have recognized a First Amendment right to refrain from voting.
  - a. No state statute requires a school board member to vote on each and every motion that comes in front of the board. However, an Attorney General opinion and an ethics opinion state that a public body is entitled to the active service of its members. By abstaining from voting, without a conflict, a board member is delegating his or her duty to other board members.
  - b. Regardless of a member's right to abstain, frequent abstentions deny the public body the member's active service.
2. When a board member has a conflict of interest, the board member should recuse him or herself from the matter by abstaining from voting on an agenda item. The board member should also abstain from discussing the

item. Finally, it is advisable for the board member to physically leave the room during discussion to avoid any appearance of impropriety.

- a. Other board members cannot force a member to leave the room when discussing matters where the member has a conflict. Wis. Stat. § 19.89.
- b. While the board can't force a member to leave, the law does not prohibit the board or the board president from requesting that a member leave the meeting during a discussion of matter in which the member has a conflict.
  - i. This act recognizes the conflict of interest and the potential impact of that conflict on the board's actions.
  - ii. However, a request that the board member leave does nothing to limit the board's liability or even the board members' individual liability if the member with a conflict does not leave and participates in the action.
  - iii. If a member with a conflict still refuses to abstain or recuse him or herself, the members of the board individually could affirmatively state before voting that he or she has not been influenced by the participation of any board member with a conflict of interest. This is unprecedented but may be one way to limit the appearance of impropriety. This may not be sufficient to insulate the board from liability, so the board must continue to stress recusal.

## **V. STUDENTS**

### **A. Discipline**

#### **1. Due Process**

- a. The right to an education is a constitutional right and can only be removed if basic principles of due process are met. Proceedings must meet standards of fundamental fairness. Both the suspension and expulsion laws of the State of Wisconsin have been upheld many times. In both cases, one opportunity for a hearing is offered to students and parents. In the case of suspensions, one administrative appeal is permitted. In the case of expulsion, all appeals (DPI or court) are decided based on the record developed at the Board hearing.

- b. Participation in extracurricular activities is a privilege. WIAA requires a process for disciplinary action taken against students who participate in sports and requires that disciplinary action be taken under certain circumstances.

## **B. Special Education**

1. Students in special education may be disciplined for infractions of school rules. They may not, however, be suspended or expelled for conduct that is a manifestation of their disability and other disciplinary options are limited.
2. “Suspension” includes removal from a student’s regular programming for more than 10 days in a school year unless the IEP team convenes and modifies a student’s IEP.

## **C. Code of Classroom Conduct**

1. A teacher may remove a pupil from the teacher’s class if the pupil violates the code of classroom conduct adopted by the school board under s. 120.13 (1) (a), Wis. Stats. The teacher may also remove the pupil from his or her classroom if the pupil is dangerous, unruly or disruptive, or exhibits behavior that interferes with the ability of the teacher to teach effectively, as specified in the code of classroom conduct. Special provisions apply when the student is a child with a disability.
2. School boards are required to adopt a code of classroom conduct. The code of conduct is to be developed in consultation with a committee of school district residents that consists of parents, pupils, members of the school board, school administrators, teachers, pupil service professionals, and other residents of the district appointed by the school district. The code of conduct may provide different standards of conduct for different schools and must include:
  - A specification of what constitutes dangerous, disruptive and unruly behavior or behavior that interferes with the ability of the teacher to teach effectively.
  - Any additional grounds for removal of a pupil from class.
  - The procedure for determining the appropriate educational placement of a pupil who has been removed from class.
  - A procedure for notifying the parent and guardian that their child has been removed from class.
3. If a teacher removes a student from class, the teacher must send the pupil to the school principal or his/her designee and notify the school principal or his/her designee immediately of the reasons for the removal. The teacher



must provide the principal or his/her designee, within 24 hours of the pupil's removal, a written explanation of the reasons for the removal

4. The principal has four placement options for the student who has been removed from class:
  - The student may be placed in an alternative education program under s. 115.28 (7) (e) 1, Wis. Stats.
  - The student may be placed in another class in the school or another appropriate place in the school, as determined by the principal or his/her designee.
  - The pupil may be placed in another instructional setting.
  - The pupil may be placed back in the classroom from which he/she was removed if, after weighing the interests of the removed pupil, the other pupils in the class and the teacher, the school principal or his/her designee determines that re-admission to the class is the best or only alternative.

Adapted from:

<https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/schldscplnqa.pdf>

#### **D. Expulsion and Pre-Expulsion**

1. All student discipline is handled by classroom teachers or administratively, other than the expulsion of students.
2. Suspension of students is limited to five (5) days per incident. In the case of students with special educational needs, removal from their regular placement is generally limited to ten (10) days per school year.
3. Expulsion is typically used when the seriousness of student misconduct compels the consideration of removal from school for an extended period of time.
4. In order to help students and families recognize that a student's misconduct has become so serious that expulsion is a consideration, many school districts use pre-expulsion or abeyance agreements to emphasize to students and their parents that the student's behavior has reached a critical point and that interventions beyond mere suspension are required. Why use this level of intervention? It works. In 2009, the Department of Public Instruction completed a case study pertaining to expulsion alternatives. The entire case study can be found at <https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/expulsionalts.pdf>  
The use of pre-expulsion and abeyance agreements resulted in the following:

- Beloit (ATODA Program): Reduced the annual number of expulsions from 117 in 2002-2003 to 36 in 2006-2007, a decrease of about 70%. This is the result of several strategies including the one described above. For the 2006-2007 school year, 53 Beloit students remained in school who might otherwise have been expelled. There has been at least a 90% success rate in students not committing a second or third ATOD offense, and a 90% reduction in expulsions for ATOD offenses. For school year 2007-2008, 92 students had ATODA violations that could have resulted in expulsion. Of this group, 81 students (88%) successfully completed the first offenders' program and remained in school. To date, 100% of these students have not committed a second or third offense. District officials point out that the reduction in the number of expulsions has resulted in additional state aid that would otherwise have been lost.
- Green Bay (All behavior): Decreased the annual number of expulsions from 37 in 2001- 2002 to 14 in 2006-2007, and to only five students in 2007-08, a reduction of 86%. Students who might previously have been expelled are returning to their regular school setting after completing their agreed-upon program and following paths that lead to graduation. Middle and high school building administrators as well as parents are very positive about the abeyance program, which helps to insure a supportive learning environment for all students while assisting policy offenders with their need to grow, develop, and make better decisions. Parents feel a sense of relief that the young person won't be expelled, and a sense of satisfaction with the program and the outcomes for the student.
- The Hudson School District utilizes this type of programming to reduce the number of students referred to the school board for expulsion. In 2006-2007, of the 38 students committing expellable offenses, only 14 were sent to the school board, and of that number, only 11 were expelled. Almost all of those students who are not referred to the school board for expulsion fulfill the requirements as outlined above and are never seen at a pre-expulsion conference again.

## **VI. COMPLAINTS**

### **A. Sources of Complaints**

1. Employees
2. Parents

3. Students
4. Governmental Agencies
5. Community members

**B. Handling Complaints**

1. Is there a law governing the handling of the complaint?
  - a. Nondiscrimination laws
  - b. Civil rights laws
  - c. Employment and labor laws
2. Is there a policy or handbook provision governing the handling of the complaint?
3. Board Questions:
  - a. Do our policies comply with the law?
  - b. Are we complying with the law and our policies?
  - c. Are we insisting that others comply?

**C. Board Compliance**

1. All board members must follow the adopted chain of command and complaint procedures. School boards may adopt a chain of command policy requiring employees to address any matters related to the performance of their job duties or responsibilities with their immediate supervisors, and that a failure to follow such communications protocol can result in the employee being disciplined, regardless of whether or not the content of the employee's communication deals with a matter of public concern. The benefit of such a policy is that it solves problems that occur when a subordinate bypasses an administrator in the chain of command, which can serve to undermine the authority of the administrator.
2. An individual board member does not have the authority to investigate complaints outside of the school district's adopted complaint procedures.
  - a. A board member who receives a complaint from an employee or community member should refer that individual to the formal

complaint procedure or should file a formal complaint on the individual's behalf. The formal complaint process usually requires the board member to report the complaint to the appropriate administrator for study and possible solution.

- b. A board member is not a private investigator, and no board member should get involved with staff member disputes.
- c. Board members who become too engaged and/or involved in a particular complaint risk no longer being impartial if the complaint makes its way to the board for action via the complaint procedure.

3. Why?

- a. Boards expect their employees and students to comply with Board policy. This becomes a less reasonable expectation if the Board declines to do so.
- b. The Board has the authority to revise policies if it finds the policies are not working (unless the revision would create noncompliance with the law).
- c. Insurance covers actions that are done within the scope of one's job responsibilities. Coverage is much more tenuous if a board member wanders into activity that is clearly unauthorized.
- d. There is not much that is black and white in employment law or school law.

Example: A parent reports to a Board member that a teacher has hit his child. The Board member immediately goes to the teacher and demands an explanation. The Board member reports this back to the parent.

Did the Board member think about:

- i. Mandatory reporting?
- ii. A Garrity warning?
- iii. A Weingarten notice or representation?
- iv. Rights afforded to the teacher under the employee handbook or contract?
- v. The teacher disciplinary process and due process?

vi. The fact that the Board member has now foreclosed him/herself from participating in any way other than a witness? *See, Harkness v. Palmyra-Eagle Sch. Dist.*, 157 Wis. 2d 567, 460 N.W.2d 769 (Ct. App. 1990),

vii. Privacy rights of anyone?

What if the teacher denied it? What if the student or parent was lying?

## **VII. CONFIDENTIALITY.**

### **A. Breaches of Confidentiality.**

#### **1. Closed Sessions.**

a. Preserving the Confidentiality of Closed Sessions. 66 Wis. Op. Att’y Gen. 318.

i. “The Legislature, in conferring on governmental bodies the power to hold closed meetings for certain carefully defined purposes, clearly intended that no one should have the right to report a closed meeting under circumstances that might mean that its private and secret nature could be violated.”

ii. This is why individual board members do not have the right to record closed sessions. Recording creates the possibility, or even probability, that the contents of those recordings would be disclosed, defeating the purpose of a closed session.

b. The contents of closed session should remain confidential until the board determines that the contents of the closed session are no longer confidential.

c. Disclosing information that was covered in closed session to others violates the board’s trust and can impair board members’ willingness to discuss items candidly in closed session. Public disclosure of confidential information learned in closed session can result in legal liability for the individual board member.

#### **2. Family Educational Rights and Privacy Act (FERPA)**

a. Generally, school employees and officials may not disclose pupil records without written consent.

- b. Protected pupil records include:
  - i. Progress records,
  - ii. Behavioral records, and
  - iii. Pupil physical health records.
- c. Employment Records and information.
- d. Medical Records - Americans with Disabilities Act (ADA) and Title II of the Genetic Information Nondiscrimination Act (GINA).
- e. Wisconsin Privacy Statute – Wis. Stat. § 995.50(2)(a).

**B. Implications of Breaching Privacy or Confidentiality**

- 1. Disclosure of confidential information could result in prosecution under Wis. Stat. § 946.12 for misconduct in office.
- 2. A board member who knowingly acts outside of his or her duty by disclosing protected information could be engaging in a criminal act that is not protected by the First Amendment.
- 3. Litigation for breaches of privacy rights.

**VIII. CHALLENGES**

**A. Instructional and Library Materials**

- 1. Establish policies on what type of challenges are allowed.
- 2. Be familiar with the law. Ex: Wis. Stat. sec. 43.30(1m) states:

Records of any library which is in whole or in part supported by public funds, including the records of a public library system, indicating the identity of any individual who borrows or uses the library's documents or other materials, resources, or services may not be disclosed except by court order or to persons acting within the scope of their duties in the administration of the library or library system, to persons authorized by the individual to inspect such records, to custodial parents or guardians of children under the age of 16, to other libraries or to law enforcement officers under certain circumstances.

3. State law grants very limited rights to parents to remove their children from certain types of classes and instruction (human growth and development, human sexuality). How do you handle parents who insist on teaching creationism (prohibited by federal case law) or Holocaust denial (Holocaust and other genocide education is required in Wisconsin in the social studies curriculum at least once in grades 5-8 and 9-12)?

**B. Nondiscrimination.**

1. No discrimination allowed in Wisconsin on the basis of race, color, religion, national origin, ancestry, creed, pregnancy, marital status, parental status, sexual orientation, sex or physical, mental, emotional, or learning disability.
2. Ensure that the District has policies and procedure in place for dealing with discrimination, Title IX, reasonable accommodations, etc.

**C. Referenda**

1. Once the Board has decided to hold a referendum (capital projects or operating), the Board and Board members may provide the public with factual information related to the referendum. Board members, in their capacity as Board members, may not advocate or use District resources to advocate for or against the referendum.
2. **Do's**
  - a. Factual information may be prepared and distributed using District funds. Materials such as newsletters, fact pamphlets or sheets and the District's website may be used to disseminate this information.
  - b. Factual information may include information about the rationale for the referendum; what will occur as the outcome of a successful referendum; and what may occur as the outcome of an unsuccessful referendum. However, hyperbole and empty threats should be avoided as they are, by definition, not factual.
  - c. Employees may provide factual information only about the referendum during their paid work time but must avoid express advocacy for or against the referendum during work hours. When not on duty, or while not performing paid work on behalf of the School District, staff members may express any political position regarding the referendum.
  - d. Board members, as individuals, may speak for or against a referendum and may participate in committees or political action

groups that advocate either for or against a referendum. The Board as a whole should avoid advocacy during Board meetings.

- e. The Clerk must provide election-related information to political action committees and groups that are receiving or expending funds for the purpose of advocating for or against the referendum.

3. **Don'ts**

- a. District funds and supplies (including salaries and wages, postage, copying facilities etc.) may NOT be used to advocate for or against the referendum.
- b. District e-mail may not be used to distribute information to advocate for or against the referendum.
- c. Clothes or accessories that advocate for or against the referendum should not be worn by employees in the course of doing paid work whether at or away from school.
- d. Do not permit access to facilities for one group and not another based on the group's point of view.