

Confidential, Attorney-Client Privileged Memorandum

To: Metro Bureau Board

Fr: George P. Butler

Da: April 10, 2019

Re: Virtual Board Member Participation at Board Meeting – OMA mandates that this be facilitated for board members absent due to military duty but does not require or prohibit it for other kinds of absences.

Effective March 29, 2019, Section 3 of the Open Meetings Act, MCL 15.263, was amended to require the facilitation of the virtual attendance and participation at a school district board of education meeting by a board member who is absent due to military duty.

This amendment has raised the perennial question of whether virtual participation is legal for members absent due to some other reason.

The relevant sections of the OMA implicated read as follows:

MCL 15.262(b)

“Meeting” means the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy

MCL 15.263

- (1) All meetings of a public body shall be open to the public and shall be held in a place available to the general public. ...
- (2) All decisions of a public body shall be made at a meeting open to the public. For purposes of any meeting subject to this subsection ... the public body shall establish the following procedures to accommodate the absence of any member of the public body due to military duty:
 - (a) Procedures by which the absent member may participate in, and vote on, business before the public body, including, if feasible, procedures that ensure 2-way communication.
 - (b) Procedures by which the public is provided notice of the absence of the member and information about how to contact that member sufficiently in advance of a meeting of the public body to provide input on any business that will come before the public body.
- (3) All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public.

NEOLA, a public school district board of education bylaw and policy service provider, has circulated a new, proposed bylaw for adoption that reflects the above, military duty exception. That proposed bylaw, like many currently in place and,

specifically, the NEOLA one which it amends or replaces, also allows a board to opt to permit its president to allow remote participation for other reasons.¹

As to the broader question of whether it is legal to permit the virtual participation of a Board member absent for some other reason, as stated above, the NEOLA form of bylaw leaves this to the discretion of a board president and thereby, confirms that this is a legal option for a board just as prohibiting virtual participation for reasons other than military duty would be.

In this regard, the law has been clear for some time now that a board of education can permit the virtual attendance and participation of an absent board member through telephone or video conferencing provided that at all times during the member's virtual participation, he or she can hear and be heard by the public in attendance at the meeting.

The current state of the law requires that meetings be held and attended by the members of the public body at a place to which the public has access. Public body member participation and/or attendance via remote means such as by telephone or video conferencing do not appear to be illegal in terms of the express wording of the Act² or any judicial interpretations of it. So long as a meeting is held in a manner which enables the public to hear and be heard (attend and participate), if not to see and be seen (the preferred state of affairs), such that the participating members of the public body are also known along with their respective positions, views, actions and/or decisions, the dictates of the Act will apparently be met. What has confused the public on this issue is that the position of the State's Attorney General has reversed on this issue over time. At first, the Attorney General issued an opinion prohibiting virtual participation. In Op. Atty. Gen. 1977, No. 5183 at page 32, the Attorney General unequivocally stated that a meeting via teleconferencing would be a violation of the Act. Conversely, in Op. Atty. Gen. 1995, No. 6835, the Attorney General held that videoconferencing is an acceptable means of conducting a meeting provided the attendance and participation requirements of the Act are met. In fact, in that opinion, the Attorney General stated that such meeting methods may actually serve to enhance and broaden access and participation. The bottom line is that in the latter opinion the Attorney General expressly recognized that nothing in the Act

¹ Please also note that NEOLA has not apparently proposed a corresponding policy to implement the procedures for a member absent because of military duty to follow to virtually participate in a board meeting. Any such policy need only provide as follows:

The Board hereby directs and delegates to the administration the implementation of the following procedures to accommodate the absence of any member of the board due to military duty:

- (a) Procedures by which the absent member may participate in, and vote on, business before the public body, including, if feasible, procedures that ensure 2-way communication.
- (b) Procedures by which the public is provided notice of the absence of the member and information about how to contact that member sufficiently in advance of a meeting of the public body to provide input on any business that will come before the public body.

² And now mandated as an option where the member's absence is due to military duty.

or any of the judicial decisions interpreting the Act prohibit such virtual meetings. At least one case (Goode v Dept. of Social Services, 143 Mich. App. 756(1985) lv. den. 424 Mich. 882 (1986)) has held that the Act does not prohibit meetings via teleconferencing and that such a method "actually increases the accessibility of the public to attend, as now more than one location is open to the public [and] [w]hile we recognize that to actually see and observe ... is desirable, we do not find it necessary." Id.