

Emergency Waivers Memo 4.20.2020

In recognition of the continuing public health emergency, Governor Hutchinson has authorized the Division of Elementary and Secondary Education, (DESE) to extend the statutory and rule waivers for the remainder of the public health emergency. We still recommend checking the waivers list regularly to see if additional statutes or rules have been added. A copy of the list may be downloaded at:

<http://dese.ade.arkansas.gov/divisions/communications/covid-19-information/temporarily-suspended-dese-rules-draft>

Included in the list of statutory waivers are six relevant to school board meetings: the requirement for boards to meet monthly while school is in session (A.C.A. § 6-13-619(a)(1)(a)); the requirement for board members to be physically present to be counted for establishing a quorum and to vote (A.C.A. § 6-13-619(c)(1)(A)) along with the requirement for the district to have adopted a policy for board members to attend remotely (A.C.A. § 6-13-619(d)(1)); the requirement for a quorum of a board to be physically present to enter executive session (A.C.A. § 6-13-619(c)(3)); and the restriction on a board member attending remotely from being able to participate in and vote on matters discussed in executive session (A.C.A. § 6-13-619(d)(3) and (4)). Based on these waivers, below are some answers to common questions we've been receiving:

Q: How long are the waivers for?

A: The Governor has authorized DESE to provide the statutory and Rule waivers for the remainder of the public health emergency. ASBA will continue to monitor the waivers and will send out additional emails when necessary.

Q: Do we have to hold our regularly monthly meeting?

A: Not during the period of the waiver.

Q: If the entire board is using remote means to attend the meeting, do we still have to provide space for the public to attend?

A: Not necessarily. The requirement for the public to have a reasonable opportunity to witness the board's discussion comes from the Freedom of Information Act (A.C.A. § 25-19-106) rather than the education statutes. The Arkansas Attorney General Opined in AG Opinion 2006-152 that whether or not a reasonable opportunity was provided is going to depend on all of the circumstances surrounding the meeting. The current public health emergency along with the directives from the Arkansas Health Department are factors that should be included when determining what has to be provided. Based on these very exceptional and limited circumstances, we would recommend that if you choose to fully go entirely remote, including public participation, that notifications to the public about the board holding a meeting inform the public of the exact manner and process of the public to be able to remotely attend the board meeting, are accomplished through multiple notification methods (email, phone call, website posting), and include information on how a recording of the meeting will be provided to interested individuals upon request.

Q: Are we still required to record our meetings?

A: Yes. As with the requirement for there to be an opportunity for the public to attend the meeting, the requirement for the meeting to be recorded comes from the Freedom of Information Act (A.C.A. § 25-19-106) rather than from the education statutes. We would advise district administration to have

discussions with district IT staff on the best methods to use for recording the meeting as well as discussing with the members of the board as to what options provided by district IT would work best for them.

Q: Are we required to provide a link or access information for individuals to access the meeting conference call/digital meeting method if the board is meeting remotely?

A: Yes unless you provide a live stream of the meeting. A.C.A. § 25-19-106 requires that the general public be provided the opportunity to attend the meeting; this is especially true if the individuals submit a specific request to be provided the access information; however, if you provide a live stream of the meeting, you may provide information on how the live stream may be accessed instead. You are not required to, and should not, provide access information to the public for the executive session.

Q: Are we required to live stream the meeting if we are all meeting remotely?

A: You are only required to live stream the meeting if your standard operating procedures call for the meeting to be live streamed and the method you are using allows for live streaming. If you would ordinarily live stream your meeting but the method you use does not allow for live streaming, then you will need to make an extra effort to make sure that information on how the public can attend the meeting remotely is provided.

Q: Are we allowed to enter executive session during a meeting where all board members are attending remotely?

A: Yes. If you choose to enter an executive session with all board members attending remotely, make sure that the method you use ensures that no outside individuals will be able to overhear the executive session discussion. Be sure to discuss with your IT staff ways to allow for the executive session to occur that still allow for the primary meeting event to occur while the board members are in executive session so that members of the public will be able to tell immediately that the board has exited executive session but will not be able to overhear the executive session.

Q: Are we still restricted to using remotely attending board members to meet the quorum requirement to a maximum of three times?

A: Not during the duration of the waivers.

Q: Are we able to hold meetings dealing with personnel before 5:00 P.M.?

A: Not at this time. The statutory language restricting meetings dealing with personnel matters to being after 5:00 P.M. (A.C.A. § 6-13-619(a)(3)) has not been waived as of April 17, 2020.