

**JULY, 2013**

***Agreement Updates***

The Department has reviewed the revised collaborative agreements that have been submitted in accordance M.G.L. c. 40, § 4E. We are in the process of responding to specific language on a case by case basis. However, we are offering the following clarification and alternative language to assist in this process. We also recommend that you seek the advice of your local legal counsel.

**Amendments to Collaborative Agreements:**

- Collaborative agreements must state that collaborative agreements and amendments to agreements must be approved by the Board of Elementary and Secondary Education (BESE), not the Commissioner.
- An amendment to the collaborative agreement must be developed to reflect the withdrawal of a member district and the admissions of new member districts. Such an amendment must be approved by a percentage, as stipulated in the agreement of the member school committees/charter school boards and the BESE.
- Where the agreement does not state that an amendment is required when a district withdraws from (or is admitted to) the collaborative, but instead contains language contemplating that the Commissioner “may require” an amendment, the agreement must be revised to state that such withdrawal (or admission) shall *require* an amendment.
- Sections of agreements concerning withdrawal and admission of member districts should include language referencing the section of the agreement that pertains to amendments to the agreement.

**Termination or Dissolution of the Collaborative:**

- Records related to termination of the collaborative must be kept by a school district, not an individual (e.g., not the named treasurer).
- Records relating to individual students should be returned to member or non-member school districts (records would be returned to multiple districts).

**Treasurer:**

- Under M.G.L. c. 40, § 4E “[t]he treasurer of the education collaborative board of directors may make appropriate investments of the money of the collaborative consistent with section 55B of chapter 44.” Several agreements had incorrect (old) citations or qualified the authority of the treasurer in this regard. Our suggestion is to follow the language as stated in the law.

**Board Members/Meetings:**

- The collaborative agreement can restrict their member school committees’ appointed representatives to either superintendents OR school committee members; school committees agree to limit their own authority in this regard by

signing the agreement. However, note that this affects flexibility (particularly where the agreement gives the board the ability to remove an appointed representative from the board and where there is a superintendent-only board). It is acceptable to require a superintendent-only board, and require that the school committee appoint one of its own members in the event of a vacancy during the term of appointment of the superintendent.

- The correct citation for the Open Meeting Law is M.G.L. c. 30A, §§ 18-25. Chapter 39, Sec. 23 A, B, C of the General Laws” has been repealed.
- Minutes must be approved by the full collaborative board. It is acceptable to send the minutes to the individual board members to review prior to a vote to approve such minutes. However the language of the agreement should make it clear that approval shall be by a vote of the collaborative board of directors at an open meeting.
- The Attorney General has issued an FAQ on the calculation of a quorum, which is copied below. Of particular note is the question as to how a public body calculates a quorum when there are vacancies. Based on the FAQ, it appears that a collaborative agreement may define a quorum as a majority of the members serving on the collaborative board.

**“What is a quorum of a public body?”**

The Open Meeting Law defines a quorum as a simple majority of the members of a public body, unless otherwise provided in a general or special law, executive order, or other authorizing provision. G.L. c. 30A, § 18. If a quorum of a public body wants to discuss public business within that body’s jurisdiction, they must do so during a properly posted meeting. See id.”

**“How does a public body determine what constitutes “a simple majority of the members,” for purposes of calculating quorum, when there are vacancies?”**

When there is a vacancy on a public body, a quorum is still measured by the number of members of the public body as constituted. See Gamache v. Town of Acushnet, 14 Mass. App. Ct. 215, 219 (1982) (noting that a Town bylaw established a board of appeals of five members, and a temporary vacancy did not alter that bylaw). However, a general or special law, executive order, or other authorizing provision, such as a provision in the public body’s governing documents, may provide for the quorum of a public body to be a majority of the members serving on the body. See G.L. c. 30A, § 18.

Examples:

**EX 1** A public body has seven (7) members; therefore a quorum is four (4) members. If the same seven-member public body has two (2) vacancies, then there are only five (5) members serving on the public body. By default, a quorum is still measured as four (4) members.

**EX 2** A town creates a seven (7) member public body and, in constituting the public body, sets the quorum as a majority of the members serving on the body. There are two (2) vacancies on the public body, leaving (5) members

serving on the public body. Because the governing document says that quorum is measured as a majority of the five (5) serving members, quorum is now three (3) members.”

See: <http://www.mass.gov/aqo/government-resources/open-meeting-law/oml-faqs/oml-faq-calculation-of-quorum-and-majority.html>.

**Delegation:**

- **Hiring, firing and discipline:** The collaborative law, M.G.L. c. 40, § 4E, authorizes the board of directors of an education collaborative to appoint or employ personnel. The authority to perform a certain act or responsibility cannot be delegated if the performance of such act or responsibility involves the exercise of discretion or judgment as opposed to ministerial functions. Since the decision to appoint or employ specific personnel involves the exercise of discretion, the delegation to hire is inconsistent with the law. Since the authority to terminate is implicit in the authority to hire, the delegation to terminate is also inconsistent with the law. However, since the law is silent on employee discipline, the board of directors *could* delegate the discipline of employees to the executive director.

Local legal counsel should review any language relating to the delegation of power in collaborative agreements to ensure compliance. Alternatively, we would recommend clarifying any such delegation with the following condition “...that the board will “delegate...to the executive director ... **to the extent permitted by applicable law and regulation...**”.

- **Treasurer:** The collaborative board can delegate to the treasurer the causing of an audit since this action is not an action that requires the exercise of discretion.
- **Entering into contracts:** Regarding a provision in an agreement which allows the board of directors to delegate to the executive director the authority to enter into contracts for the purchase of supplies and materials and for the leasing of land, buildings and equipment, since the collaborative law does not specifically provide that such acts must be carried out by the collaborative board, this provision of an agreement is not inconsistent with the law.

**Discretion of Executive Director:**

- Where an agreement includes that an action will be taken at the discretion of the executive director (such as a surcharge for non-member districts), and a collaborative board vote is required for that same action, it was recommended that language be changed to state “upon the recommendation of the executive director and vote of the [collaborative] board.”

**Miscellaneous Provisions:**

- **Conditions of Membership:**

Where conditions of membership in an agreement include consequences that could result in removal of a member school committee from the collaborative, termination of an appointed representative, and/or termination or other limitation of an appointed representative's voting rights on behalf of the member school committee, procedures offering due process and notice to the member school committee must also be included in the agreement.

- Net Earnings Language: Where an agreement has language prohibiting the payment of net earnings to collaborative board members we recommend the following:

*“No part of the net earnings of the collaborative shall inure to the benefit of any member of the board of directors, trustee, director, officer of the collaborative, or any private individual (except that reasonable compensation may be paid for services rendered to or for the collaborative by a private individual who is not a member, trustee, director or officer of the collaborative), and no member of the board of directors, trustee, or officer shall be entitled to share in the distribution of any of the assets upon dissolution of the collaborative .”*

- 501(c)(3) and related language: We recommend the following language related to Section 501(c)(3) of the Internal Revenue Code:

- “Notwithstanding any other provision of these articles, the Collaborative is organized exclusively for **educational** purposes, as specified in Section 501(c)(3) of the Internal Revenue Code, and shall not carry on any activities not permitted to be carried on by any entity exempt from Federal income tax under Section 501 (c) (3) of the Internal Revenue Code.”

- “No substantial part of the activities of the Collaborative shall be carrying on of propaganda, or otherwise attempting to influence legislation, or participating in, or intervening in (including the publication or distribution of statements), any political campaign on behalf of any candidate for public office.”

OR

“No substantial part of the activities of the Collaborative shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Collaborative shall not participate in or intervene in (including the publication or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office.”

- Non-discrimination Clauses: We recommend the following language for non-discrimination clauses:

1. “The XYZ Collaborative does not discriminate on the basis of race, color, sex, gender identity, religion, national origin, disability or sexual orientation and ensures that all students have equal rights of access and equal enjoyment of the opportunities, advantages, privileges and courses of study.”

“The XYZ Collaborative is an Equal Opportunity Employer.”

OR

2. The Collaborative does not discriminate on the basis of race, sex, color, religion, sexual orientation, gender identity, age, disability and national or ethnic origin in the administration of its educational policies, administrative policies, scholarship or loan programs, athletic and other school administered programs or in employment. The Board's policy of nondiscrimination will extend to students, staff, the general public, and individuals with whom it does business
- Superintendency Unions: Where a superintendency union is listed in an agreement, the reference should be deleted and replaced with the names of the member school committees, as only member school committees can be parties to the collaborative agreement.

Other:

- The collaborative agreement must contain all the provisions that are required by the law and the regulations. It is not sufficient for such requirements to be included in “bylaws” or “policies,” that are “incorporated” by reference into the collaborative agreement.
- Roles of employees cannot overlap with roles on collaborative board, such that the Treasurer or Executive Director cannot be officers of the board (even if they are called “treasurer” or “secretary,” and even if the executive director acts as executive secretary.)
- Where “Commissioner” and “Department” appear in agreements, please ensure that they are first referenced as “Commissioner of Elementary and Secondary Education” and “Department of Elementary and Secondary Education” (can state, “herein, the Commissioner/Department” afterwards.)

**Model Agreement – Revisions / Clarifications:**

*We are currently updating and revising the model agreement. In the meantime, please take note of the following clarifications:*

- For clarity, we recommend the following language (or similar) in collaborative agreements: “This collaborative agreement shall not be effective until approved by the member school committees, member charter school boards and the

Massachusetts Board of Elementary and Secondary Education.” The underlined language is not currently included in the Model Agreement.

- Section VI.B of the model agreement currently states that: “The New England Educational Collaborative shall be a governmental entity.” Since M.G.L. c. 40, § 4E actually states that a collaborative is a “**public entity**”, we recommend using the term “public entity” instead of “governmental entity.”
- Section VI.C of the model agreement currently states that: “The board shall be vested with the authority to enter into agreements with non-member districts or other collaboratives to establish mutually beneficial programs and services or pricing arrangements.” In order to ensure that there is no confusion about the authority of the board to enter into contracts with its own members, we recommend adding “**member districts**” to this section. This is particularly true since the regulations contemplate entering into memoranda of understanding with host public school districts concerning the coordination of services and the use of space.
- Section VI.D.3 of the model agreement will be revised to state something similar to: “[The board shall be responsible for:...] ensuring that any borrowing, loans, or mortgages are cost-effective, necessary to carry out the purposes for which the collaborative is established, in the best interest of the collaborative and its member districts, and consistent with the terms of this agreement, **including the provisions of Section VII. C**”. We do not want this responsibility of the board to be read in isolation, and do not want the term to be understood to conflict with the borrowing terms in Section VII.C, pertaining to borrowing, loans and mortgages.
- Section VI.I of the model agreement currently states: “The board shall review the effectiveness of such policies to ensure currency and appropriateness, and may establish a subcommittee to do so.” This language has caused some confusion about the responsibility of the board (vs. the subcommittee) to ensure the currency and appropriateness of its policies. Since this responsibility is the board’s responsibility and cannot be delegated to a subcommittee, the model agreement will be changed to state something similar to: “The board shall review the effectiveness of such policies to ensure currency and appropriateness, and may establish a subcommittee to **make recommendations to the board concerning such policies.**”
- Section VII.A.1 of the model agreement currently states: “Membership dues shall be assessed to each member district on July 1 of each year. The amount will be assessed on a pro rata population basis, as determined annually by a majority vote of the board.” Upon further examination of this language, it has been determined that the “pro rata basis” should be clarified. Accordingly, the model

agreement will be revised to state something similar to: “Membership dues shall be assessed to each member district on July 1 of each year. The amount will be assessed on a pro rata population basis, **based on the number of students from each member district attending the collaborative programs (or based on the population of each school district as of the previous October 1 SIMS report)**, as determined annually by a majority vote of the board.”

- Similarly, sections VII.E.1(h) and (i) in the model agreement will be changed to reflect something similar to the following bolded language:
    - Each member district shall be charged membership dues which shall be based on a proportional share of the administrative and overhead costs of the collaborative, **based on the number of students from each member district attending the collaborative programs (or based on the population of each school district as of the previous October 1 SIMS report)**.
    - As applicable, capital costs shall be included in the budget and each member district shall be charged a proportional share, **based on the number of students from each member district attending the collaborative programs (or based on the population of each school district as of the previous October 1 SIMS report)**.
  - Please remember that you need not use this particular proration method, but to the extent that you indicate that tuition, fees, membership or non membership dues or fees or capital costs will use a proration method, you must explain what the proration will be based on.
- 603 CMR 50.07(8) states in part, as follows:

**“Borrowing:** The collaborative, by an appropriate vote of the board of directors, may borrow money or enter into short- or long-term agreements or mortgages, provided that when the borrowing or short- or long- term agreements or mortgages are for the approved acquisition or improvement of real property:

- (a) the collaborative board of directors shall provide notice to each member district within 30 calendar days of applying for real estate mortgages; and
- (b) the collaborative board of directors shall discuss its intent to apply for a real estate mortgage at a public meeting of the board of directors prior to the meeting of the collaborative board of directors at which the final vote is taken.”

The model agreement includes conflicting language about this; in one place (the orange block citing regulations on page 9) the highlighted word “or” above is correct; in another (Section VII.C.2) the model agreement states “and” instead of “or.” Please ensure that agreements correctly cite the language provided above.

- Section VII.D of the model agreement currently states: “Surplus Funds: Unexpended general funds at the end of the fiscal year plus any previous year’s surplus funds, as determined through the financial statements, will be considered cumulative surplus.” In order to clarify the definition of general funds, the model agreement will be changed to something similar to: “Surplus Funds: Unexpended general funds, **as defined in 603 CMR 50.00**, at the end of the fiscal year plus any previous year’s surplus funds, as determined through the financial statements, will be considered cumulative surplus.”
- Section VII.F of the model agreement will be revised to include more detail about the “method and timeline for notification and payment of tuition, membership dues and fees-for-service,” as required by 603 CMR 50.03(5)(b)9. We remind you that the agreement should include a method (e.g., invoice), a timeline (e.g., monthly, quarterly) and payment terms (e.g., payments are due upon receipt of invoices).
- Section IX.D of the model agreement currently states: *The collaborative board may provide for the deferral of the admission of a new member district until July 1 of the subsequent fiscal year.* The regulations, however, state that: “**The authorizing votes** may provide for the deferral of said admission or withdrawal until July 1 of a subsequent fiscal year.” 603 CMR 50.03(4)(b). Upon further examination, this was interpreted to mean that **all of the votes** associated with the amended agreement must provide for the deferral of an admission or withdrawal, which includes the votes of the collaborative board, as well as the votes of the member school committees and the Board of Elementary and Secondary Education. Accordingly, the language in the model agreement will be changed to state something similar to: “The ‘amendment’ [or ‘votes of approval’] may provide for the deferral of the admission [or withdrawal] of a new member district until July 1 of the subsequent fiscal year.”