*****Massachusetts Board of***

***Elementary and Secondary Education***

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| Paul Sagan*Chair* |  |

# MEMORANDUM

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| **To:** | Members of the Board of Elementary and Secondary Education**Copy:** Mitchell D. Chester, Ed.D. Commissioner  |
| **From:**  | Paul Sagan, Chair, Board of Elementary and Secondary Education |
| **Date:**  | May 12, 2017 |
| **Subject:** | Remote Participation in Board of Elementary and Secondary Education Meetings – Proposed Amendment to Board By-laws |

This memo follows up on our discussion at the April 2017 regular meeting about the possibility of amending the by-laws of the Board of Elementary and Secondary Education to allow members to participate remotely in meetings of the Board and its committees. The Attorney General’s regulations on the Open Meeting Law permit remote participation in certain circumstances. Given the Board’s interest, I asked General Counsel Rhoda Schneider to outline the procedure for us in this memo. Attached are the applicable regulations, an excerpt from the Attorney General’s Open Meeting Law Guide, the proposed amendment to the Board’s by-laws, and a motion for your consideration.

**Adoption of remote participation**

Currently, Board members must attend meetings of the Board or its committees in person to be counted as attending and to vote. The Board’s by-laws permit members to participate in meetings via speakerphone, but members who do so are not counted as attending and may not vote.

The Board last amended its [by-laws](http://www.doe.mass.edu/bese/by-laws.html) in 1996. The Open Meeting Law has been amended since then, and the Attorney General has issued regulations, 940 CMR 29.00, outlining the process for remote participation by members of a public body. Specifically, the Board has authority to vote to allow remote participation by members, subject to certain restrictions. If the Board votes to adopt remote participation, it should also amend its by-laws. These votes require a simple majority. The remote participation option would apply to all subsequent meetings of the Board.

**Permissible reasons for remote participation**

The Attorney General’s regulations (940 CMR 29.10(5)) permit a member to participate remotely if the Chair determines that one or more of the following factors makes the member’s physical attendance unreasonably difficult: (a) personal illness; (b) personal disability; (c) emergency; (d) military service; or (e) geographic distance.

While the Board does not have authority to add additional reasons for remote participation, it may narrow the reasons set out in the regulations – for example, by limiting the number of times per year a member may participate remotely, or permitting a member to use the “geographic distance” reason for remote participation only if the member is out of state.

**Attendance and voting**

The state law on appointment and service of members of the Board is Mass. General Laws c. 15, § 1E. With respect to attendance, the statute says:

If a member is absent from any four regularly scheduled monthly meetings, exclusive of July and August, in any calendar year, his office as a member of said board shall be deemed vacant. The chairman of the board shall forthwith notify the governor that such vacancy exists.

The Board typically holds 10 regular monthly meetings each calendar year. (In some years, the Board holds 11 regular meetings, including one in August – but under the statute, a member's absence from a meeting in July or August does not count against the attendance requirement.) For the 10 regular meetings in the calendar year, a member must attend at least 7 or else the member loses his or her seat.

If the Board adopts a by-law on remote participation and a member participates remotely in a regular meeting as provided in the by-law, that member will be counted as “present” for the meeting. The Attorney General’s regulations (940 CMR 29.10(4) (c)) state that a member of a public body who participates remotely “shall not be deemed absent from the meeting.” The regulations also permit the member to vote. All votes taken during any meeting in which a member participates remotely must be by roll call.

**Minimum requirements for remote participation**

Members of the Board who participate remotely, and all persons present at the meeting location (i.e., Board members, individuals who address the Board, and members of the public), must be able to hear each other clearly. The Attorney General’s regulations permit remote participation via audio or video conferencing, but not via text messaging, instant messaging, email, or web chat without audio. Video conferencing is permitted but is not required. If video technology is used, the remote participant must be clearly visible to everyone present in the meeting location.

A quorum of the Board, including the Chair (or, in the Chair’s absence, the Vice-Chair or other person chairing the meeting), must be physically present at the meeting location.[[1]](#footnote-1)

**Procedures for remote participation**

A Board member who wishes to participate remotely must, as soon as reasonably possible prior to the meeting, notify the Chair of his or her desire to participate remotely and the reason for and facts supporting his or her request.

At the start of the meeting, the Chair must announce the name of any member who will be participating remotely and the reason for his or her remote participation. The statement does not need to include any details about the reason, other than the section of the regulation that permits it. This information must be recorded in the minutes.

**Technical difficulties**

If technical difficulties arise with respect to the equipment used to permit remote participation, the Chair is encouraged to suspend discussion while reasonable efforts are made to correct the problem. If technical difficulties result in the remote participant being disconnected from the meeting, the time at which the disconnection occurs must be noted in the minutes.

**Revocation of remote participation**

The Board may revoke the adoption of remote participation by a majority vote.

**Proposed approach**

Both the Board and the public benefit from having members physically present for discussion and deliberation at our meetings. For that reason, the approach I am proposing includes the limitations set forth in the Attorney General’s regulations plus some additional limitations:

* Any request to participate in a meeting remotely is subject to approval: by the Board Chair for a request from a member, or by the Secretary of Education for a request from the Board Chair.
* A member, including the Chair, may use the “geographic distance” reason for remote participation only if the member is outside of Massachusetts on the scheduled meeting date, unless the Chair (or Secretary) makes an exception based on the circumstances.
* No more than one member, including the Chair, may participate remotely in any regular or special meeting of the Board.[[2]](#footnote-2)
* A member, including the Chair, may participate remotely in no more than one regular meeting and one special meeting per calendar year.[[3]](#footnote-3)
* Remote participation depends on video conferencing technology being available and working at the meeting site and at the location from which the member (or Chair) is participating. The individual who plans to participate remotely is responsible for testing the video technology in advance to be sure it works. If technical difficulties with the video occur during the meeting, the individual may participate remotely via audio and will be counted as in attendance at the meeting.
* The remote participation option applies to the Board’s regular and special meetings, not to meetings of the Board’s committees.

Attachment 4 is the proposed motion to amend the Board’s by-laws to include the remote participation option as outlined above. I look forward to our discussion of this issue at our meeting on May 23, 2017.

Attachments: Open Meeting Law regulation on remote participation

 Excerpt from Attorney General’s Open Meeting Law Guide

 Draft by-law (proposed new Art. II, Section 8)

 Motion

**Attachment 1: Open Meeting Law Regulations, 940 CMR 29.10 – Remote Participation**

**29.10: Remote Participation**

(1) Preamble. Remote participation may be permitted subject to the following procedures and restrictions. However, the Attorney General strongly encourages members of public bodies to physically attend meetings whenever possible. By promulgating these regulations, the Attorney General hopes to promote greater participation in government. Members of public bodies have a responsibility to ensure that remote participation in meetings is not used in a way that would defeat the purposes of the Open Meeting Law, namely promoting transparency with regard to deliberations and decisions on which public policy is based.

(2) Adoption of Remote Participation. Remote participation in meetings of public bodies is not permitted unless the practice has been adopted as follows:

(a) Local Public Bodies. … .

(b) Regional or District Public Bodies. … .

(c) Regional School Districts. … .

(d) County Public Bodies. … .

(e) State Public Bodies. The state public body must, by a simple majority, vote to allow remote participation in accordance with the requirements of these regulations, with that vote applying to all subsequent meetings of that public body and its committees.

(f) Retirement Boards. … .

(3) Revocation of Remote Participation. Any person or entity with the authority to adopt remote participation pursuant to 940 CMR 29.10(2) may revoke that adoption in the same manner.

(4) Minimum Requirements for Remote Participation.

(a) Members of a public body who participate remotely and all persons present at the meeting location shall be clearly audible to each other;

(b) A quorum of the body, including the chair or, in the chair’s absence, the person authorized to chair the meeting, shall be physically present at the meeting location, as required by [M.G.L. c. 30A, sec 20(d)](http://www.mass.gov/ago/government-resources/open-meeting-law/open-meeting-law-mgl-c-30a-18-25.html);

(c) Members of public bodies who participate remotely may vote and shall not be deemed absent for the purposes of [M.G.L. c. 39, sec. 23D](http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleVII/Chapter39/Section23d).

(5) Permissible Reasons for Remote Participation. If remote participation has been adopted in accordance with 940 CMR 29.10(2), a member of a public body shall be permitted to participate remotely in a meeting, in accordance with the procedures described in 940 CMR 29.10(7), if the chair or, in the chair’s absence, the person chairing the meeting, determines that one or more of the following factors makes the member’s physical attendance unreasonably difficult:

(a) Personal illness;

(b) Personal disability;

(c) Emergency;

(d) Military service; or

(e) Geographic distance.

(6) Technology.

(a) The following media are acceptable methods for remote participation. Remote participation by any other means is not permitted. Accommodations shall be made for any public body member who requires TTY service, video relay service, or other form of adaptive telecommunications.

(i) telephone, internet, or satellite enabled audio or video conferencing;

(ii) any other technology that enables the remote participant and all persons present at the meeting location to be clearly audible to one another.

(b) When video technology is in use, the remote participant shall be clearly visible to all persons present in the meeting location.

(c) The public body shall determine which of the acceptable methods may be used by its members.

(d) The chair or, in the chair’s absence, the person chairing the meeting, may decide how to address technical difficulties that arise as a result of utilizing remote participation, but is encouraged, wherever possible, to suspend discussion while reasonable efforts are made to correct any problem that interferes with a remote participant’s ability to hear or be heard clearly by all persons present at the meeting location. If technical difficulties result in a remote participant being disconnected from the meeting, that fact and the time at which the disconnection occurred shall be noted in the meeting minutes.

(e) The amount and source of payment for any costs associated with remote participation shall be determined by the applicable adopting entity identified in 940 CMR 29.10(2).

(7) Procedures for Remote Participation.

(a) Any member of a public body who wishes to participate remotely shall, as soon as reasonably possible prior to a meeting, notify the chair or, in the chair’s absence, the person chairing the meeting, of his or her desire to do so and the reason for and facts supporting his or her request.

(b) At the start of the meeting, the chair shall announce the name of any member who will be participating remotely and the reason under 940 CMR 29.10(5) for his or her remote participation. This information shall also be recorded in the meeting minutes.

(c) All votes taken during any meeting in which a member participates remotely shall be by roll call vote.

(d) A member participating remotely may participate in an executive session, but shall state at the start of any such session that no other person is present and/or able to hear the discussion at the remote location, unless presence of that person is approved by a simple majority vote of the public body.

(e) When feasible, the chair or, in the chair’s absence, the person chairing the meeting, shall distribute to remote participants, in advance of the meeting, copies of any documents or exhibits that he or she reasonably anticipates will be used during the meeting. If used during the meeting, such documents shall be part of the official record of the meeting, and shall be listed in the meeting minutes and retained in accordance with [M.G.L. c. 30A, sec. 22](http://www.mass.gov/ago/government-resources/open-meeting-law/open-meeting-law-mgl-c-30a-18-25.html).

(8) Further Restriction by Adopting Authority. These regulations do not prohibit any person or entity with the authority to adopt remote participation pursuant to 940 CMR 29.10(2) from enacting policies, laws, rules or regulations that prohibit or further restrict the use of remote participation by public bodies within that person or entity’s jurisdiction, provided those policies, laws, rules or regulations do not violate state or federal law.

(9) Remedy for Violation. If the Attorney General determines, after investigation, that 940 CMR 29.10 has been violated, the Attorney General may resolve the investigation by ordering the public body to temporarily or permanently discontinue its use of remote participation.

**Attachment 2: Attorney General’s Open Meeting Law Guide**

**Excerpt on Remote Participation**

**May a member of the public body participate remotely?**

The Attorney General’s Regulations, 940 CMR 29.10, permit remote participation in certain circumstances. However, the Attorney General strongly encourages members of public bodies to physically attend meetings whenever possible. Members of public bodies have a responsibility to ensure that remote participation in meetings is not used in a way that would defeat the purposes of the Open Meeting Law, namely promoting transparency with regard to deliberations and decisions on which public policy is based.

Note that the Attorney General’s regulations enable members of public bodies to participate remotely if the practice has been properly adopted, but do not require that a public body permit members of the public to participate remotely. If a public body chooses to allow individuals who are not members of the public body to participate remotely in a meeting, it may do so without following the Open Meeting Law’s remote participation procedures.

**How can the practice of remote participation be adopted?**

Remote participation may be used during a meeting of a public body if it has first been adopted by the chief executive officer of the municipality for local public bodies, the county commissioners for county public bodies, or by a majority vote of the public body for retirement boards, district, regional and state public bodies. The chief executive officer may be the board of selectmen, the city council, or the mayor, depending on the municipality. See G.L. c. 4, § 7.

If the chief executive officer in a municipality authorizes remote participation, that authorization applies to all public bodies in the municipality. 940 CMR 29.10(2)(a). However, the chief executive officer determines the amount and source of payment for any costs associated with remote participation and may decide to fund the practice only for certain public bodies. See 940 CMR 29.10(6)(e). In addition, the chief executive officer can authorize public bodies in that municipality to "opt out" of the practice altogether. See 940 CMR 29.10(8).

Note about Local Commissions on Disability: [omitted]

**What are the permissible reasons for remote participation?**

Once remote participation is adopted, any member of a public body may participate remotely if the chair (or, in the chair’s absence, the person chairing the meeting) determines that one of the following factors makes the member’s physical attendance unreasonably difficult:

* Personal illness;
* Personal disability;
* Emergency;
* Military service; or
* Geographic distance.

**What are the acceptable means of remote participation?**

Acceptable means of remote participation include telephone, internet, or satellite enabled audio or video conferencing, or any other technology that enables the remote participant and all persons present at the meeting location to be clearly audible to one another. Text messaging, instant messaging, email and web chat without audio are not acceptable methods of remote participation. Note that accommodations must be made for any public body member who requires TTY service, video relay service, or other form of adaptive telecommunications.

**What are the minimum requirements for remote participation?**

Any public body using remote participation during a meeting must ensure that the following minimum requirements are met:

1. A quorum of the body, including the chair or, in the chair’s absence, the person chairing the meeting, must be physically present at the meeting location;
2. Members of a public body who participate remotely and all persons present at the meeting location must be clearly audible to each other; and
3. All votes taken during a meeting in which a member participates remotely must be by roll call vote.

**What procedures must be followed if remote participation is used at a meeting?**

At the start of any meeting during which a member of a public body will participate remotely, the chair must announce the name of any member who is participating remotely and which of the five reasons listed above requires that member’s remote participation. The chair’s statement does not need to contain any detail about the reason for the member’s remote participation other than the section of the regulation that justifies it. This information must also be recorded in the meeting minutes.

Members of public bodies who participate remotely may vote and shall not be deemed absent for purposes of G.L. c. 39, § 23D. In addition, members who participate remotely may participate in executive sessions but must state at the start of any such session that no other person is present or able to hear the discussion at the remote location, unless the public body has approved the presence of that individual.

If technical difficulties arise as a result of utilizing remote participation, the chair (or, in the chair’s absence, person chairing the meeting) may decide how to address the situation. Public bodies are encouraged, whenever possible, to suspend discussion while reasonable efforts are made to correct any problem that interferes with a remote participant’s ability to hear or be heard clearly by all persons present at the meeting location. If a remote participant is disconnected from the meeting, the minutes must note that fact and the time at which the disconnection occurred.

**Attachment 3: Draft By-law**

to be added to Article II of the [Bylaws of the Board of Elementary and Secondary Education](http://www.doe.mass.edu/bese/by-laws.html)

**Article II. Meetings of the Board**

**Section 8. Remote Participation**

1. Board members are strongly encouraged to be physically present at meetings.
2. To the extent consistent with the Open Meeting Law and the Attorney General’s regulations (940 CMR 29.00), a Board member, including the Chairperson, may participate remotely in no more than one regular meeting and one special meeting per calendar year. All such requests are subject to approval by the Chairperson; provided that any such request from the Chairperson is subject to approval by the Secretary of Education. If the Chairperson is participating remotely, the Chairperson shall not preside over the meeting.
3. Any member who wishes to participate remotely must, as soon as reasonably possible prior to a meeting, notify the Chairperson or, in the Chairperson’s absence, the Vice-chairperson, of the member’s desire to do so and the reason for and facts supporting the request.
4. Permissible reasons for participating remotely are limited to the following: (i) personal illness; (ii) personal disability; (iii) emergency; (iv) military service; or (v) geographic distance, provided that the member is outside of Massachusetts on the scheduled meeting date. The Chairperson or Secretary may grant an exception to (v) based on the circumstances.
5. No more than one member may participate remotely in any regular or special meeting of the Board.
6. Remote participation depends on video conferencing technology being available and working at the meeting site and at the location from which the member is participating. The member is responsible for testing the video technology in advance to be sure it works. If technical difficulties with the video occur during the meeting, the member may participate remotely via audio and will be counted as in attendance at the meeting.
1. In each instance that the Attorney General’s regulations include a requirement relating to the chair, the regulations permit the vice-chair to act in the chair’s stead if the chair is absent. [↑](#footnote-ref-1)
2. If additional members participate remotely, they will not be counted in attendance at the meeting and may not vote. [↑](#footnote-ref-2)
3. A member (or Chair) who has reached the one-meeting limit may participate remotely in another meeting or meetings in that calendar year, but will not be counted in attendance and may not vote. [↑](#footnote-ref-3)