

**SCHOOL BOARDS MUST ENACT NEW POLICY TO ENABLE
REMOTE PUBLIC MEETING OPTION**

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Introduction

At the onset of Maine’s recent COVID-19 state of civil emergency, the Legislature enacted a statute that for the first time authorized school boards and other public bodies to utilize telephonic and video technology to hold their meetings remotely.¹ This statute, codified as Section 403-A of Maine’s Freedom of Access Act (the “FOAA”), was only temporary, containing an automatic “sunset” provision. Under this provision, the authority under Section 403-A to hold public meetings remotely was tied to the duration of the pandemic, to end 30 days following the Governor’s termination of the state of civil emergency. Effective June 30, 2021 the Governor declared the end of the COVID-19 emergency conditions, which fixed the termination date of Section 403-A on July 30, 2021.

While only a temporary enactment, Section 403-A did enable public bodies such as school boards to conduct critical public business – safely and in the open – during the emergency conditions. In fact, this brief experiment was so successful that the Legislature decided to enact permanent authority to hold remote public meetings even after the emergency conditions ended.

On June 21, 2021, the Governor signed into law “An Act Regarding Remote Participation in Public Proceedings” (“the Act”).² The Act amends the FOAA and became effective immediately on June 21 because it was an emergency bill.³ Going forward, the Act defines the permissible methods and conditions for boards to hold remote participation meetings. It imposes a number of requirements and limitations on remote public meetings. Some of these are new. In particular, Section 403-A had authorized remote meetings under pandemic conditions that no longer exist. In the absence of pandemic conditions and going forward, the Act requires the public body to enact a governing policy establishing the qualifying conditions for remote public meetings.

What “Methods” are Permissible for Remote Public Meetings?

The Act permits public meeting participation by “remote methods.” Remote methods are to include only telephonic or video technology that allows simultaneous reception of information. Whereas (replaced) Section 403-A also permitted “electronic or other similar means,” the only means permitted under the Act are telephone or video technologies. To leave no doubt that the means going forward under the Act are to be more restrictive than under Section 403-A, the Act affirmatively states that “text-only” means – such as email, text messages, or chat functions – are expressly prohibited for public proceedings.⁴

¹ 1 M.R.S.A. §403-A.

² P.L. ch. 290, approved June 21, 2021, and codified as 1 M.R.S.A §403-B.

³ Unless enacted as an emergency, legislation does not become legally effective until the 90th day following the end of the legislative session in which it is enacted. The Act took effect immediately on June 21 as emergency legislation, but Section 403-A continued in effect until July 30, creating an overlap period when both laws were legally effective. The preamble of the new legislation itself notes that that section 403-A would continue in effect until its automatic repeal date. The matter is not free from doubt, but the preamble language suggests that a public board might rely upon 403-A instead of the Act for compliance purposes during this brief “overlap period.”

⁴ The Act permits other means when necessary to provide reasonable accommodation to a person with a disability.

How May the School Board Implement the New Policy Requirement for Remote Participation?

The Act establishes several new legal requirements for board members to participate remotely. First and most critically, the board must adopt a remote participation policy before holding remote participation meetings under the Act. Section 403-A did not require a policy to hold remote participation meetings.

The Maine School Management Association has crafted a new sample policy, *BED, Remote Participation in School Board Meetings* for your school board's consideration. The policy can be accessed [here](#).

To adopt the remote meeting policy, the Act requires that a board must receive public input at a properly noticed public hearing. Technically, this would allow the policy to be adopted as an action item at the same board meeting as that hearing. An expedited process to adopt the new remote meeting policy may be desirable for a school board to have the remote meeting option in place as quickly as possible. The board may wish to consider holding a special meeting to accomplish this.

To adopt a new remote meeting policy quickly, a school board may need to navigate around its own existing procedures on the adoption of new policies. Otherwise, these policies might require second readings or other processes before adoption of the new policy (for example *BG, School Board Policy* and *BG-R, Policy Adoption Procedure*).

In this situation, however, a school board might also have a policy on suspending its policies (for example, *BGF, Suspension of Policy*) or a provision in its internal operating procedures for policy adoption that would allow for this. If so, and if the conditions of the suspension policy exist to allow suspension, an avenue may exist to expedite adoption of the new remote meeting policy. Even when this can occur, the school board must provide the notice and hearing required by the Act. These cannot be suspended.

The newly implemented policy will govern the conditions under which remote participation may occur. Importantly, the policy must state that members “are expected to be physically present for public proceedings except when being physically present is not practicable.” This is also an important new difference. In concept, as COVID-19 emergency conditions no longer exist to justify remote participation, a policy must be implemented establishing other qualifying conditions to justify remote meetings going forward.

What are the Required Elements of the Remote Meeting Policy?

The Act also states certain specific circumstances that a policy “may include” to determine that physical presence is not practicable, such that holding a remote participation meeting is justified. As pertains to a local school board,⁵ these are:

⁵ For statewide boards, the Act also permits “significant distance a member must travel to be physically present” to be a condition justifying remote participation.

- An “emergency” or “urgent issue” requiring the body to meet remotely;
- Illness, other physical condition, or temporary absence from the jurisdiction, such that travel and attendance in person is a significant difficulty for one or more members; and
- Geographic characteristics that impede or slow travel, including islands not connected by bridges.

In considering the policy conditions that justify a remote meeting when we are no longer under a health pandemic, school administrators and board members might consider that the Act establishes a preference for in person meetings over remote meetings. The Act articulates that physical presence is “expected.” Perhaps in-person meetings foster more cooperative and trusting relationships than remote meetings. As school boards consider their remote participation policy, perhaps they will consider not only the flexibility that remote meetings offer, but also the possible “team building” and other interpersonal relationship benefits of in-person meetings.

In constructing a remote meeting policy, school officials might also note that the Act seems to give some flexibility in determining the circumstances when meeting in person is “not practicable.” For example, the Act provides that a policy “may include” the circumstances listed in the Act. As “may” is arguably permissive, its use suggests on the one hand that a policy might draw exceptions to in-person meetings more narrowly than those listed in the Act. On the other hand, perhaps to some extent a local policy might define the exceptions more broadly than the specific circumstances the Act lists, giving greater flexibility for remote attendance.⁶ The fact that the Act does not mandate the circumstances, instead requiring the local boards to implement their own policies, suggests that the Legislature intended to allow boards some discretion to use policy contours that meet their individual needs.

Does the Act Omit Anything the Remote Meeting Policy Might Include?

Notably, the Act is silent on who decides to call a meeting as a remote participation meeting. This might be important for the policy to cover. In some cases, there will be an emergency or urgent situation where the body as a whole may meet remotely. In other cases, a particular member will have a need, such as an illness, a significant condition, or an “out-of-jurisdiction” need, and will request permission to participate remotely. Presumably, the officials authorized to call and notify the public of meetings would receive requests and make these decisions. In still other cases, there will be island schools or perhaps other situations where the remote participation is ongoing. The remote meeting policy should cover these matters.

The Act is also silent on the issue of using electronic or digital signatures for board members attending remotely. There were situations where it was necessary during the pandemic to use electronic or digital signatures. Their continued use when Maine is no longer in a long-term emergency condition created by a pandemic is beyond the scope of this Article. If a school board wishes to have its remote meeting policy cover the use of digital or electronic signatures of remotely attending members, it is important that it have legal counsel review this topic for compliance purposes. Perhaps this could be considered as an amendment to the original policy.

⁶ Some caution here is advisable, remembering that physical presence is to be the rule with remote participation when “not practicable.”

The Act makes no mention of any effect on board member meeting stipends. If members receive mileage for attending meetings, that is something that might be addressed in the remote meeting policy.

What Are the Public's Rights?

The Act gives the public a number of protections. The remote attendance policy cannot permit board members to attend remotely but disallow that meeting option to the public. Importantly, however, the right of the public to attend remotely exists “when members of the body participate by remote methods.” In other words, the policy is not required to provide remote means to the public for an in-person-only meeting, that is, when no members of the body are permitted to participate by remote methods. Furthermore, the Act provides that when a public board allows or is required to provide an opportunity for public input during a particular proceeding that is held remotely, then the board shall provide remote means of communication between the public and the body.⁷ As Section 1001(20) of Title 20-A requires a period for public comment on school and education matters at school board meetings, a school board’s remote public meeting policy should take this into account.

It also appears to be the case that the public always has the right to attend in-person, except when the remote public meeting is due to an emergency or urgent situation that requires the body as a whole to meet by remote methods. This represents another important difference from Section 403-A, as that law did not require boards to preserve this in-person right of the public when any meeting was held remotely.

The public is also entitled to public notice. The public notice requirement of Title 1, section 406 applies equally to remote meetings as to in-person meetings. When the public is permitted to attend remotely, the notice must provide both the means for the public to access the meeting remotely and the location to attend in-person.

The Act also requires the public body to make all documents and materials considered by the board available to the public that attend remotely “to the same extent customarily available to members of the public who attend the proceedings of the public body in person, as long as additional costs are not incurred by the public body.” The body may provide the documents “electronically or otherwise.” This language – “to the same extent,” rather than “by the same means” – suggests that posting printed material on the website in advance with the agenda is sufficient, even though the board also distributes hard copies to the public attending in person. It also suggests that video presentations or PowerPoint presentations may need to accommodate remote viewers, not in-person viewers only.

⁷ For individuals with disabilities, the board may provide reasonable accommodations.

Remote Meetings: Voting and Quorum

The Act's quorum and voting requirements are similar to the temporary law being replaced. A remote board member is present for purposes of quorum and voting. Votes must be by roll call vote. If video technology is used, the Act specifies that votes must be "seen and heard" by the public and other board members; if audio technology is used, the votes must be "heard."

Meetings of the Voters to be In-Person

During the COVID pandemic, school units adopted budgets throughout the state by emergency means designed to avoid large budget meetings of voters. Where used, the emergency procedures replaced the voter budget meeting with some combination of a remote hearing and/or a referendum vote. These remote budget hearings, however, were not conducted under Section 403-A, but rather under the Governor's emergency orders, which expire effective July 30.⁸ Going forward, school units will all revert to their usual budget procedures, which typically involve in-person budget meetings of voters.⁹

The Act makes no provision for holding remote school budget meetings of voters. It and Section 403-A both expressly exclude only town meetings and RSU budget meetings from the remote process. Both are silent on remote meetings in various other contexts where voters act on behalf of their schools. These omitted contexts include CSD budget meetings, certain CTE region budget meetings, and certain AOS budget meetings. This is probably a legislative oversight. It would be prudent to assume that boards should not use remote meetings for any school purpose that requires voter approval, absent legal advice to the contrary for a specific situation.

Conclusion

In summary, our Legislature has built on the effectiveness of remote public meetings that it had authorized on a temporary basis and of necessity during the COVID-19 emergency conditions. Section 403-A sunsets automatically on July 30, but the Act operates as its successor, a welcome amendment to the FOAA. The Act authorizes public boards to meet remotely when conditions warrant. Boards must first implement a policy that satisfies requirements of the Act. The policy must provide for board members to be physically present unless that is not practicable. The Act provides the public with various rights so that accessibility to remote public meetings is meaningful. School boards and school officials may continue to have a remote meeting option when circumstances justify, but are responsible for the remote meetings to conform to the new requirements of this FOAA amendment.

⁸ See Exec. Order 8 (August 27, 2020) *as amended by* Exec. Order 8-A (January 1, 2021). The termination date of this order is 30 days after the expiration of the COVID-19 emergency conditions. *See also* Exec. Order 40 (June 30, 2021) (confirming various order expiration dates).

⁹ Except in "municipal school units" whose charters establish a council as the legislative body. In these, the council meeting replaces the budget meeting of voters. Councils may hold meetings remotely like school boards.