

frequently asked questions – a legal perspective

1. Where does the board of trustees get its authority from?

Answer

The School Act. The board of trustees exercises its decision-making authority by passing resolutions. These resolutions must be made by the corporate board at a properly constituted meeting. An individual trustee, even the chair, cannot make decisions for the board without board authority.

When the school board makes a decision it may only act in accordance with the legislation which creates and regulates it. So as delegates, the board of trustees

- *may* do what the legislation says they *may* do
- *must* do what the legislation says they *must* do and
- *must not* do what the legislation says they *cannot* do or does not grant the authority to do.

School boards may also exercise powers fairly implied in, or incidental to, the powers set out in the School Act as well as powers essential to the accomplishment of their expressed objects and purposes.

The board of trustees does not have any general authority. This means, for example, that the board of trustees cannot decide to offer post-secondary education in the province of Alberta.

2. What authority does the School Act grant to the board of trustees?

Answer

A board of trustees has been granted many types of authority to carry out the mandate of providing kindergarten to Grade 12 education within its jurisdiction. The exercise of many powers under the School Act is discretionary. These powers are in relation to the provision of educational services and related incidental matters.

A school board's "powers" are discretionary while its "duties" are mandatory.

Section 60(1) of the School Act describes some of the "duties" of school boards. For example, a school board *must*:

- establish policies respecting the provision of educational services and programs
- maintain, repair, furnish and keep in good order all its real and personal property

Sections 60(2) and 60(3) of the School Act describe some of the "powers" of school boards. For example a school board *may*:

- charge a parent of a student fees with respect to instructional supplies or materials
- make rules respecting activities sponsored or approved by the school board

Trustees representing 44 school boards participated in the June 5, 2007 meeting for the ASBA's Governance Review.



3. Can and how does the board of trustees delegate authority?

Answer

The board of trustees may delegate any act or thing it is required to do or any power that the board may or is required to exercise except for the following matters:

- the power to make a bylaw,
- the power to close a school or school building,
- the power to requisition funds from a municipality, and
- the power to hold a hearing about a teacher transfer.

A board of trustees may only delegate the power to suspend or terminate a teacher to the superintendent.

To delegate authority, a school board must pass a resolution. School boards may delegate parts of board authority to other individuals: employees – particularly the superintendent; a board committee of trustees and/or jurisdiction staff; a school council; and/or a joint committee with another board or a municipality. It is important to make the terms of the delegation clear so the employee or committee receiving the delegation clearly understands its roles and responsibilities and whether it has final decision-making authority.

62

For example, if a school board were to delegate responsibilities to hear recommendations for expulsion to a committee of the board, it would need to empower that committee to make the final expulsion decision. On the other hand, if the school board were to establish a committee to consider transportation issues, this committee would not likely have final decision-making ability – only the ability to make recommendations to the school board.

When making policy or rules, it is important for the board to ensure it has the legal authority to establish the proposed policy. In other words, the board needs to ensure it acts within its jurisdiction, or the policy may be challenged and found unenforceable if made outside of its authority or contrary to the general law.

Many school board policies reference School Act provisions (or other legislation) setting out the statutory grant of authority, which governs making that particular policy. This ensures the question of whether the school board has the authority to make a given policy is considered and answered before the policy is introduced.

The school board is the final decision-maker on board policy, though most boards consult before passing a new policy or amending an existing policy. Sometimes this consultation involves school staff or parents; other times it involves the broader community. School administrators can be helpful in developing policy, by providing rationale for a policy and advice about implementing same.

By definition a policy is a general document. It is impossible to imagine every permutation of events that might be covered by policy – and accordingly most policy sets out guidelines and leaves the specifics to be determined on a case-by-case basis.

In Alberta, school boards use different policy models to describe their decision-making structures, and the roles and responsibilities of the board and its administration. The policy governance model a board chooses is vital to the effective operation of the board and should be considered carefully.

4. What is a school board hearing?

Answer

School boards have the authority and responsibility to adjudicate certain disputes or carry out quasi-judicial hearings, which is the act of decision-making by determining facts and applying a set of rules to those facts.

School board may hold quasi-judicial hearings regarding:

- the transfer, suspension or termination of a teacher or the administrative designation of a teacher (sections 104-109 of the School Act),
- the expulsion of a student (sections 24-25 of the School Act),
- access to, or issues about accuracy or completeness of information in a school record (section 123(4) of the School Act),
- any decision by an employee of a board that significantly affects the education of a student, including, for example, the placement of a student in a special education program, the amount or payment of school fees, whether a particular student is a resident student of that board (sections 123-124 of the School Act), or whether the board will provide supervision for a home education program for the student (section 29 of the School Act).

The School Act contains a "reasonableness" limitation on all actions taken by a school board. Section 2 of the School Act says:

2 The exercise of any right or the receipt of any benefit under this Act is subject to those limitations that are reasonable in each circumstance under which the right is being exercised or the benefit is being received.

This means that in all actions, including appeals heard by the board, the board must act in a reasonable fashion. Such a limitation arguably exists for any school board notwithstanding this provision, but it is an important provision to be aware of when making decisions as a board.

5. What if I know the person appealing a decision to the school board?

Answer

Administrative law requires a school board to make its decisions impartially. Therefore a decision-maker must not have an actual or apprehended bias for or against a party attending before it.

The Alberta Court of Appeal has divided "bias" into three different categories:

- an opinion about the subject matter so strong so as to produce fixed and unalterable conclusions;
- any pecuniary bias, however slight;
- personal bias, due to association with a party or hostility to a party, to the extent there is a real likelihood of bias or an appearance that justice cannot be done in the circumstances.

Trustees must not breach the duty to avoid "bias" as defined by the Alberta Court of Appeal. Issues of potential bias arise where a trustee is related to a party or is a business partner of a party, or the trustee member or his family or his employer has a financial stake in the outcome of a hearing.

Bias can also arise if a trustee appears to align himself or herself with or against one party. Remember the test for bias is whether a reasonable person, knowing all of the facts, believes there is a "reasonable apprehension of bias".

If you are in doubt about potential bias, the most prudent course of action is to disclose the potential bias to the parties and seek their consent for you to continue to hear the appeal. If the parties do not all consent to you continuing to hear the appeal, the board can hear arguments about whether you should be removed from the panel and vote on that issue prior to hearing the merits of the appeal. Alternatively, you can remove yourself voluntarily and have the remainder of the board hear the appeal.

6. Are there formalities we must observe at board meetings?

Answer

The school board may only make a decision or establish a policy at a properly constituted meeting of the board which means:

- The board must achieve quorum. If a meeting or hearing doesn't have a quorum of the board, the trustees present may not simply have a staff member or some member of the public fill in for the missing board member.
- Only the trustees attending the board meeting may vote on any matter. Participation via telephone or other audiovisual means is not explicitly permitted by the School Act.
- The board chair presides over board meetings.

Often a school board will adopt rules of procedure such as Robert's Rules to govern how business is to be conducted at board meetings.

7. Are school board meetings and hearings open to the public?

Answer

For the most part, board meetings are public. However, the board of trustees is not required to hold a hearing or a meeting in public, or to discuss in public every item which may come before it. Section 70(3) of the School Act sets out when a board may hold a meeting of the board in camera: when a majority of the trustees are "of the opinion that it is in the public interest to hold the meeting or a part of the meeting in private for the purpose of considering any matter".

Most appeal hearings before a school board will be private. This includes hearings about student expulsion or any personnel matters, which are generally dealt with in private, due to the fact that personal information about the affected person is discussed in the hearing and it is not appropriate to carry out that discussion in public. There are also several circumstances where the Freedom of Information and Protection of Privacy Act will prevent the board from discussing matters in public. (See discussion below.) The board may recess, deliberate and make its decision in private, but then must make a resolution to go back into the public meeting, and make in public any resolution arising from the private discussion. The resolution ought to be worded in a way that does not inappropriately reveal personal information about individuals or other private information.

8. What, if any, information must be kept confidential?

Answer

Pursuant to the Freedom of Information and Protection of Privacy Act (FOIP) a trustee must keep all personal information and any records that contain personal information about an individual confidential. All information that a trustee receives that may pertain to the mandate and functions of the school board are considered records under the control of the school board. Therefore, things such as employee information, student information or information contained in letters sent to the school board must be kept confidential and may only be released in accordance with FOIP. Each school board has a FOIP officer who is familiar with the workings of FOIP. Each school board has policy concerning retention and destruction of records that must incorporate or satisfy FOIP obligations. Documents and letters received by the trustee in their capacity as trustees must be processed and treated pursuant to the board's FOIP rules. Many boards have policies dealing with the receipt and processing of such documentation, which should be carefully adhered to in order to avoid any inadvertent disclosure of third party information that may be placed initially in the hands of an individual trustee. Trustees must take an oath of office that requires they act in the best interests of the corporation. Information received in confidence must be respected and not disclosed to members of the public or taken advantage of for personal gain. To take financial advantage of information received as a trustee is a disqualifying event under the School Act, and a trustee who does so could be required to account for profits made on the basis of information that came to the knowledge of the trustee while acting in a fiduciary position. Similarly, a trustee should not disclose confidential deliberations relating to school board business to anyone including family, friends, constituents and the public generally. While meetings of the board are to be held in public, the board is able to meet in camera (in private) in certain circumstances. Pursuant to section 70(3) of the School Act, when a majority of the trustees present at a meeting of the board are of the opinion that it is in the public interest to hold the meeting or a part of the meeting in private for the purpose of considering any matter, the board may, by resolution, exclude any person from that meeting. Matters typically dealt with in in camera sessions would include personnel matters, real estate matters and legal advice. A similar provision allowing for the protection of local public body confidences is found in FOIP and similarly allows a board to protect the substance of its deliberations in specified circumstances.