



## **No More Capacity Limits For In-Person Board of Education Meetings**

On March 11, 2021, Governor Murphy issued Executive Order 230, which increased indoor capacity limits for certain businesses and further increased general limitations on indoor and outdoor gatherings. However, Executive Order 230 also indicates that any State-issued capacity limits do not apply to board of education meetings, by stating as follows: “Legislative proceedings of State, county, or local government, including local Boards of Education, and State and local judicial proceedings are not subject to the capacity limits on gatherings in this or any other applicable Executive Order.”

Accordingly, it has now been definitively confirmed that New Jersey school boards may hold their meetings in-person, without being subject to any restrictions on how many attendees are present in-person. While Executive Order 196, which imposes capacity limits on certain activities, provides an exemption for “Legislative proceedings of state, county, or local government, including local Boards of Education, and state and local judicial proceedings” from the capacity limits on gatherings in this or any other applicable Executive Order,” Executive Order 230 has rescinded Executive Order 196, and restates that school boards are not required to adhere to any current capacity limits on indoor gatherings when conducting in-person public meetings. Nevertheless, school boards should also review the following considerations when preparing to hold in-person meetings, as social distancing and other safety considerations are still required. Implementing the social distancing requirements may still result in space limitations even though there is no State mandated capacity limitation.

As discussed below, boards of education should review the applicable requirements of the Executive Orders and the Department of Community Affairs Emergency Regulations governing remote meetings, N.J.A.C. 5:39-1 et seq. and adopt a resolution so that the public is aware of the type of meeting to be held, and any rules to be adhered to including, but not limited to, social distancing and mask wearing.

### **1. Face Coverings Requirement**

Face coverings still must be worn by any individuals attending in-person board meetings, subject to medical exemptions. Executive Order 122, issued on April 8, 2020, and Executive Order 152, issued on June 9, 2020, remain in effect and provide that all attendees at an indoor gathering must wear face coverings at all times except where it would inhibit the individual’s health, where the individual is under two (2) years of age, or when a face covering is impracticable, such as during eating or drinking. Therefore, all attendees at any in-person board of education meeting must wear a face covering throughout the meeting, unless any of the above exceptions apply.

An individual claiming a medical exemption to the face covering requirement cannot be asked about the claimed health condition or asked to produce documentation. If an individual who appears for an in-person meeting is not wearing a face covering, it is permissible to offer the individual the opportunity to attend and participate in the meeting by using a virtual platform, but it is not

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permissible to require that the individual wear a face covering as a condition of attending or participating in an in-person meeting, nor to request information or documentation about his or her claimed medical condition.

## **2. Virtual Meeting Attendance for Individuals Who Cannot Wear Face Coverings**

Nevertheless, school districts should offer an opportunity to virtually attend and participate in any in-person board meetings for any individuals whose medical condition precludes wearing a face covering. While some of these individuals may insist upon attending and participating in-person if the board is meeting in-person, many may prefer to participate for purposes of protecting their own health and the health of other in-person attendees. In order to provide the option for individuals who have a medical condition that prevents wearing a face covering to participate in in-person board meetings via virtual means, it is recommended that school boards continue to offer the opportunity to participate in any in-person board meetings virtually. In addition to allowing individuals with health conditions that preclude wearing a face covering to participate in board meetings held in-person, offering all members of the general public a “virtual option” for board meeting attendance will also ensure that anyone who is simply not comfortable appearing in-person for a board meeting will still have a full and fair opportunity to attend and participate in the board’s in-person meetings, notwithstanding any ongoing public health concerns they may have.

## **3. Social Distancing Requirements**

The social distancing requirements set forth in Executive Order 152, which was issued on June 9, 2020, also remain in effect, notwithstanding the removal of capacity limits on in-person board of education meetings under Executive Order 230. Paragraph 1(g) of Executive Order 152 provides as follows with respect to indoor gatherings that take place on public or private property: “If there are individuals organizing or maintaining the gathering, they should, where applicable, demarcate six feet of spacing in the area of the gathering to demonstrate appropriate spacing for social distancing, such as through the placement of cones, flags, or other markings.”

Because the social distancing requirements provided in Executive Order 152 are still in effect, school boards remain obligated to comply with this directive to arrange appropriate spacing for social distancing at in-person meetings, unless and until the State directs any changes to the provisions contained in previous executive orders pertaining to distancing requirements for public meetings. In addition, school districts should be mindful that the emergency regulations pertaining to public meetings remain in effect as well.

Specifically, the Department of Community Affairs Emergency Regulations, N.J.A.C. 5:39-1.3 describes the circumstances under which a local public body may hold a remote public meeting during a declared emergency for conducting public business, and states as follows in subsection (b):

If, during a declared emergency, a local public body holds a physical meeting in a location where, pursuant to State and/or Federal guidelines meant to mitigate the risk of a contagious infection, the

declared emergency necessitates capacity restrictions reducing the number of individuals that can be present in the meeting room to an amount below that reasonably expected for the public meeting by the governing body, the local public body must either hold the public meeting at another location with adequate capacity for the reasonably expected attendance by the public or hold the public meeting as both an in-person meeting and a remote public meeting. As set forth at N.J.A.C. 5:39-1.4(c), ***no in-person meeting shall proceed if the room capacity does not permit any member of the public to attend.***

Similarly, N.J.A.C. 5:39-1.4(c) requires that for any local public body meeting held in-person, members of the public cannot be prohibited from attending in-person as well. Therefore, prior to conducting any in-person meetings, school boards would be well-advised to carefully consider the facilities and space in which they plan to hold each meeting, and the extent to which any available technology may be used to allow attendees to view a meeting in an “overflow” room, if necessary, and to re-enter the meeting room at the appropriate time for purposes of actively participating in the public comment portions of the meeting.

The Busch Law Group will continue to provide legal updates on these and other significant issues related to board of education meetings as a result of COVID-19, as necessary. Should you have any questions or concerns, our attorneys are always available to assist you.

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