



**STATE OF HAWAII  
BOARD OF EDUCATION**  
P.O. BOX 2360  
HONOLULU, HAWAII 96804

April 2, 2020

TO: Board of Education

FROM: Catherine Payne  
Chairperson, Board of Education

AGENDA ITEM: Board Action on temporary rules of operation to conduct virtual Board meetings

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**I. EXECUTIVE SUMMARY**

- Governor David Y. Ige suspended Chapter 92, Hawaii Revised Statutes (“HRS”), which includes Sunshine Law, as a part of Hawaii’s COVID-19 response.
- The Board of Education (“Board”) should consider adopting temporary rules of operation establishing basic ground rules so that the Board can conduct virtual Board meetings in an orderly fashion.
- The proposed rules of operation balance the need to conduct business under the current pandemic conditions with the Board’s desire to continue to provide transparency and access to the public, as much as possible.

**II. BACKGROUND**

On March 4, 2020, Governor Ige declared an emergency disaster relief period for the State of Hawai‘i for the first time due to the threat of the respiratory illness caused by a novel coronavirus known as COVID-19.<sup>1</sup> On March 16, 2020, Governor Ige issued a supplementary emergency proclamation (“Supplementary Proclamation”), which, among other things, suspended certain statutes “in order for state and county agencies to more effectively provide emergency relief and engage in emergency management functions, including, but not limited to, implementing social distancing measures, as a result of the

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<sup>1</sup> Governor Ige’s March 4, 2020 Emergency Proclamation is available here: [https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation\\_COVID-19.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/03/2003020-GOV-Emergency-Proclamation_COVID-19.pdf).

COVID-19 pandemic[.]”<sup>2</sup> The U.S. Centers for Disease Control and Prevention (“CDC”) define “social distancing” as “remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from others when possible.”<sup>3</sup>

Included in the Supplementary Proclamation is the suspension of Chapter 92, HRS, which includes Sunshine Law, “to the extent necessary to enable boards to conduct business in person or through remote technology without holding meetings open to the public.” The Supplementary Proclamation also provides, in pertinent part, “Boards shall consider reasonable measures to allow public participation consistent with social distancing practices, such as providing notice of meetings, allowing submission of written testimony on agenda items, live streaming meetings, and posting minutes of meetings online. No board deliberation or action shall be invalid, however, if such measures are not taken.”

In addition to Governor Ige’s proclamations, the mayors have issued various orders for their respective counties to ensure social distancing and slow the spread of COVID-19, including, but not limited to, variations of stay-at-home policies.

### III. **DESCRIPTION**

To ensure the Board can still conduct essential business under the current pandemic conditions, the Board should consider adopting the temporary rules of operation (“Rules of Operation”) I am proposing, attached as **Exhibit A**.

The Rules of Operation seek to allow the Board to conduct its business while complying with the various recommendations, guidelines, and orders issued by the CDC, Governor, and mayors to combat the spread of COVID-19. The Board would primarily meet through interactive conference technology<sup>4</sup> (*i.e.*, virtual meetings) and avoid face-to-face interactions as much as possible (see Rule 1). Consequently, the public would not be able to gather and attend Board meetings in a physical meeting location.

To the extent possible, the Board would still provide transparency and access to the public by providing written notice of meetings<sup>5</sup> (see Rule 2), continuing to live stream and record

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<sup>2</sup> Governor Ige’s March 16, 2020 Supplementary Emergency Proclamation is available here: <https://drive.google.com/file/d/1cW-2bGpa4SttxlWYD0y-xFUEBxZYB-Nv/view>.

<sup>3</sup> Based on the CDC’s revised March 7, 2020 definition available in its guidance here: <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>. The CDC’s guidance also defines “congregate settings,” which is included in the definition of “social distancing,” as “crowded public places where close contact with others may occur, such as shopping centers, movie theaters, stadiums.”

<sup>4</sup> HRS Section 92-2, defines interactive conference technology as “any form of audio or audio and visual conference technology, including teleconference, videoconference, and voice over internet protocol, that facilitates interaction between the public and board members.”

<sup>5</sup> HRS Section 92-7 governs notice, which provides, in pertinent part:

“[n]o less than six calendar days prior to the meeting, the board shall post the notice on an electronic calendar on a website maintained by the State or the appropriate county and post a notice in the board’s office for public inspection. The notice shall also be posted at the site of the meeting whenever feasible. The board shall file a copy of the

the audio of meetings (see Rule 5), allowing written testimony on any matters on the agenda<sup>6</sup> (see Rule 6), and continuing to publish minutes of meetings<sup>7</sup> (see Rule 7). The Board, however, would not accept oral testimony during virtual meetings because of the practical, logistical, and technological challenges it presents.

Board members attending a virtual Board meeting would count for quorum purposes and could vote in the same way they do in in-person meetings (see Rule 3). However, the Board would need to recess its meeting if too many Board members lose audio connection and the Board no longer has a quorum of members with an audio connection (see Rule 4). This is consistent with the Board's By-laws,<sup>8</sup> which requires "[a] majority of all the voting members to which the Board is entitled [to] constitute a quorum to conduct business." To the extent necessary, the Rules of Operation will supersede the Board's By-laws. This is to ensure the Board can conduct meetings and operations in a manner consistent with various recommendations, guidelines, and orders issued by the CDC, Governor, and mayors to combat the spread of COVID-19.

The Rules of Operation do not describe how virtual meetings would work; rather, they only set the basic ground rules. Board members, Department and agency staff, and the public may need more details to understand how to participate, which is why the Rules of Operation require the Board Chairperson to establish protocols and procedures to describe the necessary details (see Rule 8).

It is important to emphasize the temporary nature of these Rules of Operation. Due to real and serious public health concerns, the Supplementary Proclamation allows the Board to supersede Sunshine Law (see Rule 9), and while the Rules of Operation would allow the Board to operate safely, they also would reduce public access and transparency, namely by prohibiting oral testimony and some or all in-person meeting attendance. Thus, the

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notice with the office of the lieutenant governor or the appropriate county clerk's office and retain a copy of proof of filing the notice, and the office of the lieutenant governor or the appropriate clerk's office shall timely post paper or electronic copies of all meeting notices in a central location in a public building; provided that a failure to do so by the board, the office of the lieutenant governor, or the appropriate county clerk's office shall not require cancellation of the meeting. The copy of the notice to be provided to the office of the lieutenant governor or the appropriate county clerk's office may be provided via electronic mail to an electronic mail address designated by the office of the lieutenant governor or the appropriate county clerk's office, as applicable."

<sup>6</sup> HRS Section 92-3 governs testimony, which provides, in pertinent part: "[t]he boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item."

<sup>7</sup> HRS Section 92-9 governs when and how minutes need to be made available to the public, which provides, in pertinent part:

"[t]he minutes shall be made available to the public by posting on the board's website or, if the board does not have a website, on an appropriate state or county website within forty days after the meeting except where such disclosure would be inconsistent with section 92-5; provided that minutes of executive meetings may be withheld so long as their publication would defeat the lawful purpose of the executive meeting, but no longer."

<sup>8</sup> The Board's By-laws are available here: [http://boe.hawaii.gov/Documents/By-Laws%20\(amended%202019-07-18\).pdf](http://boe.hawaii.gov/Documents/By-Laws%20(amended%202019-07-18).pdf)

Rules of Operation would only be in effect as long as the Governor deems the suspension of Sunshine Law necessary for boards to conduct business safely (see Rule 10).

#### **IV. RECOMMENDATION**

I recommend that the Board, through approval by at two-thirds of its members, adopt the Rules of Operation proposed in my submittal. While not necessarily required, I recommend approval by at least two-thirds of our membership (*i.e.*, at least six Board members) because any amendments to the Board's By-laws (currently the Board's main internal operating document) require approval from at least that many Board members, and the Rules of Operation supersede the By-laws.

**Proposed Motion: Move to adopt the temporary Rules of Operation, attached as Exhibit A to Board Chairperson Catherine Payne's memorandum dated April 2, 2020.**

**Exhibit A**

**Proposed Temporary Rules of Operation of the Board of Education**

## **Temporary Rules of Operation of the Hawai'i Board of Education**

On March 4, 2020, Governor David Y. Ige issued an emergency proclamation (the "Proclamation") declaring a disaster emergency relief period due to the COVID-19 pandemic. On March 16, 2020, Governor Ige issued a supplementary emergency proclamation (the "Supplementary Proclamation") suspending Chapter 92, Hawaii Revised Statutes ("HRS"), "to the extent necessary to enable boards to conduct business in person or through remote technology without holding meetings open to the public."

To comply with the Supplementary Proclamation and "engage in emergency management functions, including, but not limited to, implementing social distancing measures" while still providing as much transparency and access to the public as practicable, the Board of Education (the "Board"), through approval by at least two-thirds of its total membership, is instituting the temporary Rules of Operation herein. The Rules of Operation, effective immediately upon the approval of the Board, are as follows:

1. The Board shall hold its meetings by interactive conference technology as defined by Section 92-2, HRS. To the extent possible, the Board shall conduct its meetings in a manner that avoids face-to-face interaction among and between Board members, Board staff, and other meeting participants and attendees.
2. To the extent possible, the Board shall continue complying with Section 92-7, HRS, regarding written public notices of its meetings, provided that notices may not include a physical location. The locations where participating Board members will be physically present shall not be disclosed or accessible to the public unless the location is intended to be open to the public.
3. Any Board member participating in a meeting by interactive conference technology shall be considered present at the meeting for the purpose of determining compliance with the quorum and voting requirements of the Board.
4. A meeting shall be recessed when audio communication cannot be maintained with a quorum of members and shall be terminated when audio communication cannot be reestablished with a quorum of members.
5. To the extent possible, the Board shall make a live stream and recording of the audio of each its meetings accessible to the public unless the Board encounters

technological difficulties or the Board is unable to manage the live stream in a reasonable manner.

6. The Board and its standing committees shall continue affording all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item, consistent with Section 92-3, HRS. The Board and its standing committees shall prohibit any oral testimony at its meetings to prevent technological or other disruptions and ensure the Board is able to conduct its business.
7. To the extent possible, the Board shall continue complying with Section 92-9, HRS, regarding minutes of meetings.
8. The Board Chairperson shall establish protocols and procedures, consistent with these Rules of Operation, for the conduct of meetings by interactive conference technology applicable to the general business, special, and standing committee meetings of the Board.
9. Pursuant to and in accordance with the authority afforded by the Supplementary Proclamation, these Rules of Operation supersede Chapter 92, HRS, and any related administrative rules where applicable. Where these Rules of Operation conflict with bylaws or other rules or policies of the Board, these Rules of Operation control.
10. These Rules of Operation shall be in effect only for the duration of the disaster emergency relief period declared by the Proclamation, and as subsequently extended by supplementary proclamations, or until the Governor ends the suspension of Chapter 92, HRS, whichever shall occur first.