



LEGAL ASPECTS OF EXECUTIVE SESSION

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Introduction

The executive session of Board of Education meeting is supposed to be a sanctuary in which discussion will be shielded from both public and judicial scrutiny.

To secure that protection, great care must be taken in convening executive sessions and maintaining discussions within the permissible reasons for being in executive session.

Introduction

While board of education members may expect that their executive session deliberations are protected by a deliberative process privilege, the courts may not recognize the same.

When the school attorney joins in the executive session the attorney-client privilege may shield the deliberations from discovery in legal proceedings.

When the subject of discussion isn't covered by the permissible reasons for executive session- there is no cognizable executive session privilege.

Introduction

In recent years the Commissioner of Education has noted that maintaining executive session confidentiality is a fiduciary duty of the member of the board of education. (*Appeal of Ziegelbauer, Decision No. 18,145 (2022)*)

This presentation informs how to protect the District and how to protect board members from legal liability based upon missteps in conducting executive session.

Legitimate reasons for being in executive session

- **Public Officers Law §105** reasons
- a. matters which will imperil the public safety if disclosed;
- b. any matter which may disclose the identity of a law enforcement agent or informer;
- c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- d. discussions regarding proposed, pending or current litigation;
- e. collective negotiations pursuant to article fourteen of the civil service law;

Legitimate reasons for being in executive session

- Public Officers Law §105 reasons
 - * f. the medical, financial, credit or **employment history of a particular person or corporation**, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
 - g. the preparation, grading or administration of examinations; and
 - h. the proposed **acquisition, sale or lease of real property** or the proposed acquisition of securities, or sale or exchange of securities held by such public body, **but only when publicity would substantially affect the value thereof.**

The Vote to Convene Executive Session

The Board must avoid using a boilerplate resolution for moving into executive session

A resolution adjourning into executive session must specify the purpose(s) and must not recite all of the reasons why a Board may conduct an executive session. (*Gernatt Asphalt Prods.*, 87 N.Y.2d 668 [1987]).

The vote must be conducted during a duly convened open meeting and the agenda when there is a planned executive session should indicate that it is a proposed executive session (not presuming that a quorum vote will be present to support moving into executive session (*OML-AO-1420*; *OML-AO-2416*)).

Legitimate reasons for being in executive session

- Voting in Executive Session

There are only two permissible reasons for taking action in executive session

- * voting on charges pursuant to Ed. Law §3020-a

- * Arranging for the placement of students with educational disabilities

students

(See Formal Opinion of Counsel [SED No. 239])

Legitimate reasons for being in executive session

An executive session may not be scheduled before a meeting but must occur during a duly convened open meeting (OML-AO-872; OML-AO-1189, OML-AO-1441).

A Board member-elect may be permitted to attend executive session but should be excluded when legal advice is given by an attorney to avoid breach of the attorney-client privilege (OML-AO-3157).

Where a member of the Board has sued or is likely to sue the District, they may be excluded from executive session during the discussion of such matter (OML-AO-3436).

Only litigation that is proposed, pending or current may be discussed in executive session, with the latter two requiring that the title of the case be included in the resolution (OML-AO-2250).

Legitimate reasons for being in executive session

When Litigation is to be discussed:

Only litigation that is proposed, pending or current may be discussed in executive session, with the latter two requiring that the title of the case be included in the resolution (OML-AO-2250).

In the case of proposed litigation, the resolution should refer to discussing litigation strategy regarding the proposed litigation (OML-AO-3646).

When negotiations are to be discussed:

To discuss labor negotiations in executive session, the bargaining unit must be cited in the resolution to adjourn into executive session (OML-AO-4091).

Legitimate reasons for being in executive session

The presence of the Superintendent

The Superintendent of Schools does not have the right to attend executive session by reason of the Open Meetings Law. However, under the Education Law, has the right to be present based upon their right to speak to all matters that come before the Board (OML-AO-4027; OML-AO-3864; Education Law §§ 1711 & 2508).

The evaluation of the superintendent and his/her contract may take place in executive session, but discussing the criteria for hiring a new superintendent should take place at an open meeting (OML-AO-2459; OML-AO-2695).

Legitimate reasons for being in executive session

Meetings with other governments

Two governmental bodies may not hold a joint meeting in executive session (OML-AO-3646).

Where the governments are joint defendants or respondents in a litigation they may meet together privately with their attorneys

Receiving legal advice from an attorney need not take place at an open meeting or even in an executive session. However, decision making about the litigation must occur at a meeting (e.g. executive session discussion and action by public vote) (OML-AO-1376).

Legitimate reasons for being in executive session

Are there any restricted meeting days or times of day?

Meetings are not prohibited on holidays or weekends (OML-AO-2458).

Meetings held in the early morning hours (e.g. 7:20 AM) have been cited as being inconsistent with the law and unreasonable (OML-AO-3828). So to meeting on Sunday Morning at 8:30 AM. (OML-A0-5062

Meetings with the School Attorney

A meeting with legal counsel is exempt from the Open Meetings Law requirements pursuant to Public Officers Law §108(3) due to the long standing common law existence of attorney-client privilege in New York state.

The meeting may occur during executive session.

Meetings with the School Attorney

The privilege applies only in connection with communication related to facts of which the attorney was informed by the client, without the presence of strangers (non-clients) for the purpose of securing primarily either an opinion on law or legal services in some legal proceedings (*People v. Belge*, 59 AD 2d 307 [1977]).

Meetings with the School Attorney

Transitioning from received legal advice to board of education deliberations

“...the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, if at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting.” *Robert Freeman; (OML-AO-4622)*

Executive Session Privilege in Defending Litigation

As a matter of State Law, executive session discussions, for the purposes described in the Open Meetings Law (POL §105[1][d]) (discussions regarding proposed, pending or current litigation); are privileged and may not be disclosed by those attending the executive session.

As regards matters being litigated in federal court, the state privilege may not be recognized under the legal doctrine of comity and disclosure of executive session discussions may be ordered under the Federal Rule of Civil Procedure §26. (*Buon v. Newburgh Enlarged City School District* Case No. 21-cv-5623, S.D.N.Y.[2023])

Executive Session Privilege in Defending Litigation

- While the federal court may be expected to invoke the discovery rule of Rule 26 “*allowing parties to obtain discovery regarding any non-privileged matter that is relevant to any parties’ claim or defense and proportional needs of the case*”, the state law attorney-client privilege will be recognized in the federal courts to shield executive session content based upon federal decisional law.

Executive Session Privilege in Defending Litigation

For litigation in federal court, for attorney advice given in a board of education executive session to be deemed privileged (subject to the state law recognized attorney-client privilege):

“the predominant purpose should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer.” (*In Re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007))

Executive Session Privilege in Defending Litigation

In *Buon*, the federal litigation involved advice regarding alleged retaliation regarding the terms and conditions of employment of a building principal who had a previous litigation pending against the school district. While discussion included administrators comments about the employee the predominant purpose of the executive session was to obtain legal advice regarding litigation and the law that informed the personnel transactions.

Attorney-client privilege was found by the court to apply in the case so as to preclude further inquiry by regarding executive session discussion regarding the plaintiff's employment through in the discovery process.

Executive Session Privilege in Defending Litigation

Take aways about personnel litigation matters and executive session discussion:

* The legality of proposed changes in assignments, including transfers, job title changes, tenure area rights and level of benefits for employees subject to adverse employment action should involve the presence and advice of the school attorney or insurance company assigned counsel.

* The resolution for convening the executive session should include to receive advice from the school attorney or other legal counsel.

* As always- don't take notes in executive session.

Avoid using “Personnel” as a reason to convene executive session””

Due to the insertion of the term "particular" in §105(1)(fa) discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered. Matters of policy that affect personnel, consideration of the budget or the creation or elimination of positions, for example, typically cannot validly be considered in executive session. (OML-AO-3478)