



2024-2025 WPSBA Education Law Workshop

OPEN MEETINGS LAW

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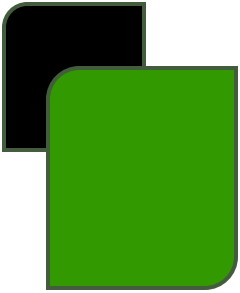
Legislative Declaration of OML

- It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.
- The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it (POL § 100).



Definition of a “Meeting”

- POL 102(1) defines a “meeting” as: the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.
- The term has been expansively interpreted by courts. Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is intent to take action, and regardless of the manner in which the gathering may be characterized.
- A public body, however, is permitted to conduct “retreats” wherein no official business is discussed. A retreat allows a public body to participate in team building, and improve interpersonal relations (OML-AO-4762).
- A public body that meets by chance, socially, or some other “casual encounter,” and absent an intent to conduct public business, no meeting has taken place (OML-AO-4534).



Definition of a “Meeting”

- In *Matter of Gedney Assn. v. City of White Plains*, 147 A.D.3d 938 (2d Dept 2017), a resident challenged a city’s (Common Council) adoption of a SEQRA resolution.
- After a meeting, the city had discussions individually between board members and with the attorney. This resulted in changes to a draft findings report for the SEQRA resolution. At no time was a quorum present.
- Subsequently, the Common Council held a public meeting and adopted the resolution with the revised findings report.
- Court held no violation of the OML occurred.



Committee Meetings

- A meeting of a committee of school board members (two or more) that discusses or conducts public business is subject to the Open Meetings Law (OML-AO-2472).
- Committees that do not consist of school board members and are created solely to advise and make recommendations to the board are not subject to the OML because they have no authority to take final action (OML-AO-4232). For example, a citizens' advisory committee or a superintendent's task force would not be subject to the OML.
- However, if the core component of the committee is board of education members, then this may be sufficient to make the meeting subject to the OML (OML-AO-5068). Same holds true when board members equal or outnumber the remainder of the committee (OML-AO-5068). For example, if a committee consists of three board members and the superintendent, the committee would be subject to OML.
- Nevertheless, committees that do carryout a governmental function, regardless of whether board members are present, are subject to the OML (e.g., audit committee, shared decision making committee).



Committee Meetings

- In OML-AO-5068, a school district established a “Finance Committee” consisting of “three Board members and at least two or more members of the school administration.”
- The purpose of this committee is to provide recommendations to the Board of Education regarding matters relating to the budget and finance of the district.
- The “core” of the committee consisted of members of the board of education.
- “In view of the amendments to the definition of ‘public body,’ we believe that any entity consisting of two or more members of a public body, such as a committee, a subcommittee or ‘similar body’ consisting of 3 members of the Board of Education, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body.”



Exempt Meetings

- The OML does not apply to the following types of meetings:
- Judicial or quasi-judicial proceedings
 - Student suspension / Civil Service Law § 75 deliberations/ transportation appeals (but the vote to uphold or grant the appeal would need to be voted upon in open session)
- Matters made confidential by federal or state law
 - Meetings with a parent to discuss matters made confidential by FERPA
 - Meetings involving the board's attorney to discuss matters protected by the attorney-client privilege
- When a matter is exempted from the OML, a public body need not follow the procedure imposed by the OML (e.g., entry into an executive session)(OML-AO-2727).



Notice of Meetings

- For meetings of public bodies scheduled at least one week prior to the actual meeting, notice “shall be given or electronically transmitted to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting” (POL 104[1]).
- For meetings with less than one week’s notice, notice of the time and place “shall be given or electronically transmitted, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto” (POL 104[2]).
- These notice requirements do not require the same level of publication as a legal notice (POL 104[3]).
- Education Law 1606(3) requires at least 24 hours’ notice of a meeting.
- Majority of a board of education may not dispense with this 24-hour requirement (Matter of Colasuonno, 22 Ed Dept Rep 215 [1982]). However, all members may sign a waiver to authorize the meeting to go forward (id.).
- Scheduling a meeting at 7:30 a.m. is considered “questionable” as it would likely prevent many people from attending (OML-AO-5280 [citing *Matter of Goetchius v. Board of Education*, Supreme Court, Westchester County, New York Law Journal, August 8, 1996]).



Notice of Meeting

- If a meeting will be streamed live over the internet, the public notice for the meeting shall inform the public of the internet address of the website streaming such meeting (POL 104 [5]).
- When a public body can do so, notice of the time and place of a meeting shall also be conspicuously posted on the public body's internet website (POL 104[6]).
- There is also no statute that requires an agenda for a meeting be created; however, board of education policy usually requires it (OML-AO-4889). Further, the creation of an agenda ensures compliance with Public Officers Law § 103(e), as discussed later.



Notice of Meeting Where Video conferencing is Used (Not Under 103-a)

Public Officers Law §104

- If videoconferencing is used to conduct a meeting, the public notice for the meeting shall:
 - a. inform the public that videoconferencing will be used,
 - b. identify the locations for the meeting; and
 - c. state that the public has the right to attend the meeting at any of the locations.
- If a meeting will be streamed live over the internet, the public notice for the meeting shall inform the public of the internet address of the website streaming such meeting.
- When a public body can do so, notice of the time and place of a meeting, shall also be conspicuously posted on the public body's internet website.



Videoconferencing

- There is no authority to participate in a meeting via telephone (OML-AO-5575).
- However, board of education members may participate in a meeting through videoconferencing assuming statutory requirements are met.
- If a school district has the technical capability to conduct a meeting with videoconferencing, “a blanket prohibition on the use of attendance and participation via that method [by a board member] would be inconsistent with the OML” (OML-AO-5575).




Videoconferencing (Not Under POL §103-a)

- Board member participating through videoconferencing may participate in a location that may be somewhat impractical for the public attend (e.g., homes, airport, hotel room) (OML-AO-5535).
- However, the public must still be permitted to attend from any location and the location must be posted in the meeting's notice.
- The primary meeting location(s) (e.g., the board room), must still comply with POL 103(b) (barrier free access) and 103(d) (location must reasonably accommodate potential audience). The meeting room must enable the board members to be seen and heard by the public in attendance.




Videoconferencing Under the Optional Provisions of Public Officers Law §103-a

- When a quorum is present at the “same physical location or locations where the public can attend,” a board of education may use videoconferencing to conduct its meetings when the following additional criteria are met:
- Has passed a resolution after a public hearing authorizing this method;
- Written procedures (e.g., a policy) consistent with the law have been established and posted on the school district’s website;
- Members of the board “shall be physically present at any such meeting unless such member is unable to be physically present at any such meeting location due to ‘extraordinary circumstances’ ... [or a disability] where such disability renders such member unable to participate in-person at any such meeting location;



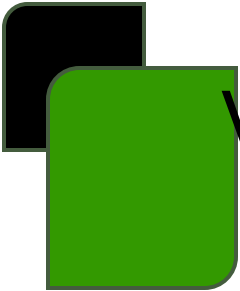
Videoconferencing Under Public Officers Law § 103-a

- Except for executive sessions, the board must ensure that its members can be heard, seen, and identified while the meeting is being conducted;
- The minutes of the meeting shall reflect which members participated remotely;
- the public notice for the meeting shall inform the public that videoconferencing will be used, where the public can view and/or participate in such meeting, where required documents and records will be posted or available, and identify the physical location for the meeting where the public can attend;




Videoconferencing Under Public Officers Law § 103-a

- **The board shall provide that each meeting conducted using videoconferencing shall be recorded and such recordings posted or linked on the public website of the public body within five business days following the meeting, and shall remain so available for a minimum of five years thereafter. Such recordings shall be transcribed upon request;**
- if videoconferencing is used to conduct a meeting, the board shall provide the opportunity for members of the public to view such meeting via video, **and to participate in proceedings via videoconference in real time where public comment or participation is authorized and shall ensure that videoconferencing authorizes the same public participation or testimony as in person participation or testimony;**
- A board electing to utilize videoconferencing to conduct its meetings must maintain an official website.
- Expires and deemed repealed as of July 1, 2026
- Does not affect the “old way” of videoconferencing.



Videoconferencing Under Public Officers Law §103-a

- The in-person participation requirements shall not apply during a state disaster emergency declared by the governor, or a local state of emergency proclaimed by the chief executive of a county, city, village or town, if the board determines that the circumstances necessitating the emergency declaration would affect or impair the ability of the public body to hold an in person meeting.
- Open meetings of a board that are broadcast or that use videoconferencing shall utilize technology to permit access by members of the public with disabilities consistent with the 1990 Americans with Disabilities Act (ADA), as amended, and corresponding guidelines.



Videoconferencing Under Public Officers Law § 103-a

- Extraordinary circumstances include:
- disability, illness, caregiving responsibilities, or any other significant or unexpected factor or event which precludes the member's physical attendance at such meeting
- An event precluding presence at a meeting is generally required to be “significant or unexpected.”
- Informal advisory opinion: Would a Board of Education member’s request to participate in a meeting via videoconferencing under the extraordinary circumstances exception be permissible if the reason were: board member’s child had to retake a regents in the summer, which resulted in the board member having to shift her vacation days, causing her to not be in town for the Board of Education meeting? No.



Records Scheduled to be Discussed

- On October 19, 2021, Governor Hochul signed into law Chapter 481 of the Laws of 2021 which amends § 103(e) of the OML to require that certain records to be discussed at an open meeting be made available, to the extent practicable, at least twenty-four hours prior to the meeting.
- If a school district maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable at least twenty-four hours prior to the meeting.
- The obligation to make records available to the public upon request “prior to or at the meeting” and to post the records on the agency or public body website “prior to the meeting” has been in effect since February 2012.
- This amendment simply places a 24-hour minimum time frame for making those records available.



Records Scheduled to be Discussed

- Applies to records subject to FOIL or any “proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting”
- This applies to those records, or portions thereof, that are public under FOIL (OML-AO-5380)
- Does not apply to records discussed entirely in executive session, as those records were not discussed “during an open meeting,” and does not apply to those records on a consent agenda
- If, for example, a resolution is prepared less than an hour before a meeting, it may not be practicable to post the resolution online prior to a meeting (OML-AO-5564). However, to the extent able, such items should be made available at the meeting.



Records Scheduled to be Discussed

- In *Hofstra University v. Nassau County Planning Commission*, 80 Misc.3d 1237(A) (Sup Ct, Nassau County 2023), *rev'd other grounds* 231 A.D.3d 1025 (2d Dept 2024), court invalidated a resolution.
- Court found that agency failed to “provide to the public a copy of the resolution prior to the meetings” held on three separate occasions. The resolution adopted on the third meeting was discussed at all three meetings and thus, per the court, “was clearly the ‘subject of discussion.’ ”
- Agency’s argument that the resolution was not written down and, therefore, there was no need to share it was deemed “untenable”.
- Court found that the failure to post the resolution was “an attempt to avoid public scrutiny” and invalidated the resolution.



Minutes

- Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon (POL 106[1]).
- Minutes are required in executive session when a “formal vote” is done (POL 106[2]) In school districts and BOCES only for voting Ed Law §3020-a charges and arranging for special education placements (usually done in the open meeting with ID numbers. (Opinion of Counsel Letter No. 239, 16 Ed. Dept, Rep, 457[1976])
- Meeting minutes “shall be” available to the public within two weeks (one week for executive session minutes). Minutes shall also be posted on a district’s website.
- Nothing in the law requires that minutes be approved (OML-AO-4146). This is usually a policy requirement



Minutes

- “Minutes must be sufficiently descriptive to enable the public and others (i.e., future School Board members), upon their preparation and review perhaps years later, to ascertain the nature of action taken by an entity subject to the Open Meetings Law, such as the School Board” (OML-AO-5093)



Executive Session

- An executive session allows a board of education to meet without the public.
- Public Officers Law 105(1) provides the statutory basis for entering into an executive session:
 - 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;



Executive Session

- e. collective negotiations pursuant to article fourteen of the civil service law;
- 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.



Executive Session

- A motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held (OML-AO-5419).
- It is insufficient to merely regurgitate the statutory language for entering into executive sessions. For example, it is insufficient to call for a motion to enter into executive session to discuss “proposed, pending, or current litigation.” Instead, the resolution must identify “with particularity” the pending, proposed, or current litigation to be discussed (OML-AO-5259). A proper resolution would be: “I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Board of Education” (id.).



Executive Session

- “If the Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the Board, the motion might not need to identify that person or entity, but it should clearly indicate that the discussion will involve the litigation strategy” (OML-AO-5644)
- Entering into executive session to discuss “personnel” is also improper. The resolution must state with particularity the reason for entry. A proper resolution would be: “I move to enter into executive session to discuss the employment history of a particular person (or persons)” (OML-AO-5259).



Executive Session

- A board of education must open in public session and the pass a resolution in public session to authorize entry into executive session. There is no authority to start an executive session prior to a meeting (OML-AO-4889).
- A board of education is authorized to notify the community that it intends to make a motion to enter into executive session at a set time, assuming it is after the start of a meeting (OML-AO-4889).



Executive Session

- Board of Education members are authorized to attend executive sessions. The board may further authorize other individuals to attend (POL 105[2]) The superintendent of schools has the right to attend executive session based upon Education Law provisions to address matters before the board (except about their employment)
- “Typically, those persons other than members of public bodies who are authorized to attend are the clerk, the public body’s attorney, the superintendent in the case of a board of education, or a person who has some special knowledge, expertise or performs a function that relates to the subject of the executive session.” (OML-AO-4344)
- If there is a dispute as to whom should attend, the board may vote on the issue in public session (OML-AO-4854)



Executive Session

- However, no formal resolution is required to invite someone to attend an executive session (*id.*).
- Although non-BOE members may attend executive session, the confidentiality of executive session must be maintained. Thus, it may be inappropriate to invite certain individuals to executive session. For example, the Commissioner admonished a school board for permitting a non-member to be present when discussions relating to confidential personnel discussions or student specific discussions were taking place and the non-member had no legal responsibility towards such information (*Appeal of Whalen*, 34 Ed. Dept. Rep. 282, Decision No. 13,310[1994]).



Executive Session

- It is well-settled that a board member's disclosure of confidential information obtained at a properly-convened executive session of a board meeting violates General Municipal Law §805-a(1)(b) and may constitute grounds for a board member's removal from office pursuant to Education Law §306 (Appeal of Paladino, Decision No. 17,147)
- The Commissioner has also recognized that disclosure of confidential information may not form the basis of a removal application where: (1) information learned during the course of a properly convened executive session warranted referral to [law enforcement]; (2) a board collectively decided to release confidential information from an executive session; or (3) an individual board member was compelled to disclose confidential material pursuant to law in the context of a judicial proceeding (*id.*).
- Disclosure of information from executive session that should have been discussed in public and thus is not confidential would not result in removal (see, e.g., *Appeal of Rivers*, Decision No. 17,989).



Questions?