

# **THE OPEN MEETINGS LAW A REVIEW**

**5<sup>th</sup> Annual District Clerk Conference  
NYS School Boards Association**



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# TABLE OF CONTENTS

<b>Corporate Identity and Legal Authority of a School Board .....</b>	<b>1</b>
Legal Status of a School Board .....	1
Internal Structure of a School Board .....	1
Legal Authority of a School Board .....	1
Legal Authority of Individual School Board Members.....	3
<b>Board Meetings in General.....</b>	<b>4</b>
Types and Frequency of Board Meetings.....	4
Quorum Requirement .....	5
Meeting Agendas.....	6
Meeting Minutes .....	6
Public Access to Meeting Minutes .....	7
Amendment to Meeting Minutes .....	8
Public Participation at Board Meetings.....	8
Public’s Right to Record School Board Meetings .....	10
<b>Issues Concerning the Open Meetings Law .....</b>	<b>11</b>
Basic Legal Requirements.....	11
Applicability of the Law to Board Committees.....	12
Meeting Notice Requirements .....	13
Posting of Materials Requirements.....	14
Exempt Meetings.....	16
Consequences for Violations of the Open Meetings Law .....	16
<b>Executive Sessions .....</b>	<b>18</b>
Basic Rules .....	18
Participation in an Executive Session .....	20
Taking Action in Executive Session.....	21
Special Rule for Audit Committees.....	21

## **CORPORATE IDENTITY AND LEGAL AUTHORITY OF A SCHOOL BOARD**

### *Legal Status of a School Board*

1. A school board is a *corporate body* that oversees and manages a public school district's affairs, personnel and properties (§§ 1601, 1603, 1701, 2502(1), 2551).
2. As a corporate body, a school board is a legal entity that has an existence distinct and apart from its members. As such, it has the capacity for continuous existence without regard to changes in its membership. In general, the legality of a school board's contracts, policies and resolutions do not depend on its individual members.

### *Internal Structure of a School Board*

1. A school board is composed of members who are elected by the residents of the school district that the board oversees, except in some city school districts where board members are appointed by the city's mayor.

Not more than one member of a family sharing the same household may be a member of the same school board in any school district (Educ. Law § 2013 (3); *Matter of Rosenstock*, 40 N.Y.2d 563 (1976); Opn. Atty. Gen., 48 St. Dep't Rep. 779 (1933); Opn. Atty. Gen., 48 St. Dep't Rep. 132 (1933)).

2. Members of a school board elect one of their own as president at the board's annual organizational meeting (§ 1701).
3. At its discretion, a school board may provide for the election of a vice president, who exercises the duties of the president in case of the president's absence or disability. If the office of school board president becomes vacant, the vice president acts as president until a new president is elected (§ 1701).

### *Legal Authority of a School Board*

1. The purpose and authority of a school board are found in New York's Education Law and other state laws applicable to municipal corporations and public officers.
2. "A board of education has no inherent powers and possesses only those powers expressly delegated by statute or necessarily and reasonably implied there from" (*Appeal of McKenna*, 42 Ed. Dept. Rep. 54 (2002); *Appeal of Rosenkranz*, 37 Ed. Dept. Rep. 330 (1998); *Appeal of Bode*, 33 Ed. Dept. Rep. 260 (1993)).
3. As a corporate body, a school board must transact business by adopting resolutions or motions at a duly convened meeting.
  - a. A duly convened meeting requires that a quorum of the board be present at the meeting. A majority of the board (more than half) constitutes a quorum (Gen. Constr. Law § 41). For example, three members in a five member board

constitute a quorum of that board, and four members constitute a quorum in a seven member board.

- b. A school board's resolutions and motions must be duly adopted by a majority of the whole board, not simply a majority of those board members present (Gen. Constr. Law § 41; *Matter of Coughlan v. Cowan*, 21 Misc.2d 667 (1959); *Appeal of Instone-Noonan*, 39 Ed. Dept. Rep. 413 (1999); *Matter of Ascher*, 12 Ed. Dept. Rep. 97 (1972); Opn. Of Counsel #70, 1 Ed. Dept. Rep. 770 (1952); see also *Appeal of Greenwald*, 31 Ed. Dept. Rep. 12 (1991)). For example, if a board has five members and three are present at a meeting, all three would have to vote in favor of a resolution for it to pass; a two-to-one vote would not be sufficient.

However, under certain circumstances (as set forth by statute), a supermajority, rather than a majority, of the board is required for the following types of action:

- (1) employing or appointing to tenure a teacher who is a relative of a school board member either by blood or marriage (2/3 vote required) (N.Y. Educ. Law § 3016(1); Opn. State Comp. 80-34; see also *Appeal of Gmelch*, 32 Ed. Dep't Rep. 167 (1992)).
  - (2) determining that standardization on a particular type of equipment or supplies is in the best interest of the district (3/5 vote required) (Gen. Mun. Law §103(5)).
  - (3) discontinuing a designated textbook within five years of adoption (3/4 vote required) (N.Y. Educ. Law § 702).
  - (4) placing a proposition before the voters for an object or purpose for which bonds may be issued, such as a capital project (3/5 vote required) (Local Fin. Law §33.00).  
*Note: This would be the case where bond counsel requires that the board approve the bond resolution prior to going to the voters for approval of the capital project. Otherwise a majority vote would be sufficient.*
  - (5) employing a school board member as school physician (2/3 vote required) (Gen. Mun. Law §802(1)(i)).
  - (6) making an emergency expenditure from the district's Repair Reserve Fund (2/3 vote required) (Gen. Mun. Law §6-d(2)).
- c. School board meetings must be conducted in accordance with the requirements of the Open Meetings Law (Pub. Off. Law § 103 *et. seq.*; see also, N.Y. Educ. Law § 1708).

### *Legal Authority of Individual School Board Members*

1. Individual school board members have no inherent powers by reason of holding office (see Gen. Constr. Law § 41; *Coughlan v. Cowan*, 21 Misc.2d 667 (1959); *Appeal of Silano*, 33 Ed. Dept. Rep. 20 (1993); *Matter of Bruno*, 4 Ed. Dept. Rep. 14 (1964)).
2. Absent a specific delegation of authority by the school board to act as the representative of the board for a particular purpose, individual board members have no greater rights or authority than any other qualified voter of the district (*Id.*).

For example, individual school board members have the same right as parents or district residents to visit the schools in accordance with the procedures that apply to the public in general. They need board authorization to enter schools for official purposes, such as for building inspection or interviewing staff (*Appeal of Silano, Matter of Bruno*).

Individual school board members have no inherent individual authority either to direct a supervisor to give overtime work to employees. Such an act can be grounds for removal from the school board (*Appeal of Balen*, 40 Ed. Dept. Rep. 479 (2001)).

3. School board members have a right to express their own personal views on school district issues, including the school budget and other propositions. However, school board members who wish to express their personal opinions about issues before the voters must:
  - a. Clearly distinguish their personal views from those of the board they represent. For example, when writing a letter to the editor of a newspaper in support of a voter proposition, school board members must be sure to explicitly state that the letter expresses their personal views (*Appeal of Wallace*, 46 Ed. Dept. Rep. 347 (2007)).
  - b. Not use district funds, facilities or channels of communication to encourage voters to vote in support or against the school budget or any proposition (*Appeal of Johnson*, 45 Ed. Dept. Rep. 469 (2006); *Appeal of Goldin*, 40 Ed. Dept. Rep. 628 (2001); see also *Appeal of Grant*, 42 Ed. Dept. Rep. 184 (2002); *Appeal of Allen*, 39 Ed. Dept. Rep. 523 (2000)).
4. Individual school board members are empowered to call a special meeting of the school board pursuant to Education Law §1606. Any meeting called by an individual school board member must comply with the provisions of the Open Meetings law.

## **BOARD MEETINGS IN GENERAL**

### *Types and Frequency of School Board Meetings*

School board meetings fall into three categories:

1. The annual organizational/re-organizational meeting.
  - a. This is meeting where the board elects and appoints its officers and committees for the coming year and board members take or renew their oaths of office.
    - (1) They also often appoint other personnel, such as the internal auditor, school attorney, records access officer, and records management officer, and designate depositories for district funds and newspapers for required notices (Educ. Law §§ 1701, 2502 (9)(o)).
    - (2) In small city school districts, the board also must set the dates and times for its regular school board meetings (Educ. Law § 2504(2)).
  - b. The date when the annual organizational/reorganizational meeting is held depends on the type of district.
    - (1) Except as otherwise provided by law, union free and central school districts generally must hold this meeting on the first Tuesday in July (Educ. Law § 1707).
    - (2) Small city school districts must hold it during the first week of July (Educ. Law §§ 2504 (1), 2502 (9)(o), 2502 (9-a)(o)).
    - (3) Large city school districts must hold it on the second Tuesday in May (Educ. Law §§ 2563 (1), 2553 (9)(f), 2553 (10)(o)).
    - (4) Central high school districts in Nassau County must hold it on the second Tuesday in July (Educ. Law § 1904).
2. Regular meetings.
  - a. These are the regularly scheduled business meetings held throughout the year.
  - b. The Education Law requires that school boards meet at least once each quarter (Educ. Law § 1708 (1)), although most meet at least once a month.

However, school boards in city districts are required to meet at least once a month, except in New York City (Educ. Law §§ 2504 (2), 2563 (2), 2590-b (1)(b), 2590-e (14)).

3. Special or emergency meetings.
  - a. These meetings are not regularly scheduled. They usually are held to conduct business that cannot wait until the next regularly scheduled meeting.
  - b. They may be called by any school board member (see *Matter of Felicio*, 19 Ed. Dep't Rep. 414 (1980), as long as at least 24 hour advance notice is given to the other board members (Educ. Law § 1606 (3); see also *Application of Bean*, 42 Ed. Dep't Rep. 171 (2002)).
  - c. Although it normally does, there is no requirement that the notice of a special meeting state a proposed agenda (*Matter of Neversink*, 10 Ed. Dep't Rep. 203 (1971); see also *Exmoor House, LLC v Vil. of Millbrook Planning Bd.*, 82 AD3d 763 (2d Dep't 2011)).
  - d. Care must be taken that special board meetings do not usurp the place of regularly scheduled board meetings for the consideration of regular district business, in order to avoid a possible violation of the Open Meetings Law.
  - e. The notice provisions of the Open Meetings Law must be complied with when calling a special meeting.

#### *Quorum Requirement*

1. A quorum of the board is required to conduct a school board meeting and take official action (Gen. Constr. Law § 41)); NYS Department of State, Committee on Open Government OML-AO-4505, Oct 25, 2007).
2. A majority of the entire board, not simply of those present is required for the board to take official action (*Id.*; *Matter of Coughlan v. Cowan*, 21 Misc.2d 667 (1959); *Appeal of Instone-Noonan*, 39 Ed. Dept. Rep. 413 (1999); *Matter of Ascher*, 12 Ed. Dept. Rep. 97 (1972); Opn. of Counsel #70, 1 Ed. Dept. Rep. 770 (1952); see also *Appeal of Greenwald*, 31 Ed. Dept. Rep. 12 (1991)). Note instances where a super majority vote of the board is required was discussed earlier in this outline.
3. A board member's physical presence is required (NYS Department of State, Committee on Open Government, OML-AO-3025, May 1, 1999; see also OML-AO-2779, July 28, 1997; OML-AO-2480, March 27, 1995; *Town of Eastchester v. New York State Board of Real Property Services*, 23 A.D.3d 484 (2<sup>nd</sup> Dep't 2005)).
  - a. School board members may not vote by phone or mail (NYS Department of State, Committee on Open Government, OML-AO-4306, Dec. 18, 2006; see also OML-AO-2779, July 28, 1997; OML-AO-2480, March 27, 1995; *Town of Eastchester v. New York State Board of Real Property Services*, 23 A.D.3d 484 (2<sup>nd</sup> Dep't 2005)).

- b. School board members may not vote by e-mail because this method does not permit the public to “observe” the performance of board members’ public duties (NYS Department of State, Committee on Open Government OML-AO-4306, Dec. 18, 2006; see also *Town of Eastchester, supra.*)
  - c. Videoconferencing is permitted if the public notice of the meeting indicates that videoconferencing will be used, specifies the location(s) for the meeting, and states that the public may attend at any of the locations (Gen Const. Law §41; Pub. Off. Law §§ 102, 103, 104).
4. A series of phone calls or other communications between individual board members that result in a collective decision is not permissible (NYS Department of State, Committee on Open Government, OML-AO-3025, May 1, 1999; see also OML-AO-2779, July 28, 1997; OML-AO-2480, March 27, 1995; *Town of Eastchester v. New York State Board of Real Property Services*, 23 A.D.3d 484 (2<sup>nd</sup> Dep’t 2005)).

Neither is a series of e-mail communications that effectively results in the taking of official action (see, NYS Department of State, Committee on Open Government, “E-Mail: Food for Thought”).

#### *Meeting Agendas*

- 1. Although it is good business practice to have an agenda for school board meetings, an agenda is not specifically required (*Matter of Kramer*, 72 St. Dep’t Rep. 114 (1951); OML-AO-2750, April 30, 1997).
- 2. The procedures to be followed at school board meetings are left to the policies adopted by the board (*Id.*).

#### *Meeting Minutes*

- 1. Formal minutes shall be taken at all school board meetings (Pub. Off. Law § 106 (1)). The minutes must consist of a record or summary of:
  - a. all motions, proposals, resolutions, and other matters formally voted upon, and
  - b. the result of any vote (*Id.*).
  - c. Bare bones resolutions do not satisfy this requirement (*Mitzner v. Goshen Central School Dist. Bd. of Educ.*, (Sup. Ct, Orange County April 15, 1993); NYS Department of State, Committee on Open Government OML-AO-3472, June 18, 2002). Minutes which indicate that a recommendation was adopted or a contract amended without any information about the content or substance of such recommendation or contract would be inadequate (see NYS Department of State, Committee on Open Government OML-AO-5093 May 1, 2011).

For example, when extending a superintendent’s contract including a description of the specific contract amendments in the minutes will provide an

adequate description of the action taken (NYS Department of State, Committee on Open Government OML-AO-5153, Aug. 18, 2011). It is also recommended to attach a copy of the contract to the minutes to prevent any misunderstanding (*id.*).

- d. Minutes need not constitute a verbatim transcript of everything said at a meeting, but they must meet the requirements of the Open Meetings Law. (NYS Department of State, Committee on Open Government OML-AO-3369, Sept. 25, 2001).
2. Records of votes must include the final vote of each board member on every matter voted on (Pub. Off. Law § 87(3)(a)). Although minutes do not have to include a verbatim account of everything said at a meeting (see above), a board may impose additional requirements by adopting a policy on minutes.
    - a. Secret ballots are not allowed for any purpose (*Smithson v. Illion Housing Auth.*, 130 A.D.2d 965 (4<sup>th</sup> Dep't 1988), *aff'd* 72 N.Y.2d 1034 (1988)); see also, *Perez v. City University of New York*, 5 N.Y.3d 522 (2005)), not even at a board's organizational/re-organizational meeting regarding the election of board President and Vice-President and other officers.
    - b. Records of the final votes of each member of the board may not be destroyed (Pub. Off. Law §§ 87 (3)(a), 106 (1)).
  3. School boards have limited authority to take action in executive session. Where they do have such authority, the minutes of the executive session only need to contain a record of any final determination, the date, and the vote. They do not need to contain any matter that would not be available to the public under the Freedom of Information Law (Pub. Off. Law § 106 (2); *Plattsburgh Pub. Co., Div. of Ottoway Newspapers, Inc. v. City of Plattsburgh*, 185 A.D.2d 518 (3<sup>rd</sup> Dep't 1992)). For example, when a board votes to initiate a disciplinary proceeding against a tenured teacher and there is no determination indicating misconduct yet, minutes reflective of the vote would not have to include reference to or identify the person because the Freedom on Information Law (FOIL) authorizes the withholding of records to the extent that disclosure would result in an unwarranted invasion of personal privacy such as unsubstantiated charges or allegations (NYS Department of State, Committee on Open Government OML-AO-5174 Sept. 7, 2011).

#### *Public Access to Meeting Minutes*

1. Minutes of school board meetings must be made available to the public within two weeks of the date of the meeting. Minutes recording action taken by formal vote at an executive session must be made available within one week (Pub. Off. Law § 106 (3)).
2. Minutes must be made available to the public even if they have not been approved by the board (NYS Department of State, Committee on Open Government FOIL-AO-8543, Nov. 17, 1994)).

3. Minutes can be marked “Draft” if necessary to allow the board to meet the two week publication deadline. (NYS Department of State, Committee on Open Government OML-AO-3799, May 19, 2004). It should be noted that nothing in either the Education Law or the Open Meetings Law requires a school board to approve meeting minutes. However, such an obligation may be imposed by policy.
4. Minutes taken at an executive session where no action was taken by formal vote are not available to the public (*Kline and Sons, Inc. v. County of Hamilton*, 235 A.D.3d 44 (3<sup>rd</sup> Dep’t 1997)).

#### *Amendment to Meeting Minutes*

1. Minutes may be amended to clarify what actually occurred at a meeting, but not to reflect a change of mind which occurred after the meeting.
2. Minutes may be amended or corrected only upon the majority vote of a public body (NYS Department of State, Committee on Open Government OML-AO-4211, June 2, 2006).
3. When a motion is made to rescind or amend minutes previously adopted, the rescission or amendment should be included in the minutes of the meeting at which it is made (see *Robert’s Rules of Order*, 10<sup>th</sup> Ed., §§ 34, 47).
4. Absent evidence of willful or intentional misconduct, unintentional errors in transcription between published board minutes and audio recordings of a meeting regarding the identity of a board member making a motion, or a summary of the board’s discussion on a particular matter will not constitute grounds for removal by the commissioner of education (*Appeal of Lilker*, 40 Ed. Dep’t Rep. 704 (2001)).

#### *Public Participation at Board Meetings*

1. School boards have authority to adopt rules and regulations for the maintenance of public order on school property. However, they may not automatically exclude members of the public from attending school board meetings (*Matter of John Goetschius v. Board of Educ. of Greenburg 11 UFSD*, 244 A.D.2d 552 (2<sup>nd</sup> Dep’t 1997)).
2. The Open Meetings Law requires that public bodies such as school boards make reasonable efforts to hold meetings in rooms that can “adequately” accommodate members of the public who wish to attend (Pub. Off. Law § 103(d)). For example, if the school board anticipates that a particular item on the agenda will prompt greater public attendance at a board meeting than is typical, the board should consider whether the current meeting place can accommodate the anticipated extra attendees. If not, the board should choose another location where the attendance of extra members of the public may be accommodated and provide notice of the new location in accordance with law (See *Frigault v. Town of Richfield Planning Bd.*, 107 A.D.3d 1347 (3d Dep’t

2013); NYS Department of State, Committee on Open Government, OML-AO-5118 June 23, 2011; OML-AO-5210 Dec. 2, 2011).

3. There is no statutory or regulatory requirement that school boards allow members of the public to speak at school board meetings (*Appeal of Wittenben*, 31 Ed. Dep't Rep. 375 (1992)), even though school board meetings must be open to the public (Educ. Law § 1708 (3); Pub. Off. Law § 103).

a. The commissioner of education encourages school boards to allow citizens to speak on matters under consideration, whenever possible (*Appeal of Wittenben*, 31 Ed. Dep't Rep. 375 (1992)). School boards may limit the time for a member of the public to speak (see *Matter of Kramer*, 27 St. Dep't Rep. 114 (1951)).

b. The commissioner also has indicated school boards do not have to allow non-residents to speak at board meetings, even when there is a board policy allowing district residents to speak (*Appeal of Martin*, 32 Ed. Dep't Rep. 381 (1992)).

The Committee on Open Government concurs with the commissioner that school boards are not required to allow members of the public to speak at board meetings in the first place, but cautions that if a school board permits public participation, it may not discriminate between residents and nonresidents (NYS Department of State, Committee on Open Government, OML-AO-4141, Feb. 24, 2006).

c. One court ruled that a board of education properly limited public discussion at a board meeting about a particular topic when the board made multiple other avenues of communication on the topic available, such as public comment at previous meetings, the opportunity to speak with district officials and sending the board letters and e-mails, and the board felt it had been made fully aware of the public's concerns about the topic (*Curley v. Philo*, 2009 WL 2152323 (N.D.N.Y. 2009)).

d. The presiding officer of a public body also has the ability to limit remarks from the public which are "repetitive" and "offensive". However, a public body cannot limit comments simply because they are negative or critical (NYS Department of State, Committee on Open Government, OML-AO-5296 June 12, 2012).

4. School boards may justifiably restrict the ability of members of the public speaking at their meetings from offering public commentary on matters involving privacy issues otherwise protected by law. That would be the case, for example, when a member of the public wants to engage in a discussion that potentially may disclose information about particular students, even when the disclosure would be made by someone other than a school official (NYS State Department of State, Committee on Open Government, OML-AO-3405, Feb. 8, 2002). Instead, the member of the public wishing to discuss such

a matter may meet with the board in private under the exemption to the Open Meetings Law that applies to matters made confidential by law (*Id.*)

5. School boards may also restrict the use of signs, banners and visual displays brought into a meeting by the public if such material obstructs the view of other attendees, violates the fire code or contains obscene language (NYS Department of State, Committee on Open Government, OML-AO-5296 June 12, 2012).

#### *Public's Right to Record School Board Meetings*

1. As a general rule, people attending a school board meeting have the right to audiotape the meeting. Courts have ruled that there is no justifiable basis for prohibiting the use of unobtrusive, hand-held tape-recording devices at school board meetings (*Mitchell v. Board of Educ. of Garden City UFSD*, 113 A.D.2d 924 (2d Dep't 1985); see also, *Matter of Pelouquin v Arsenault*, 162 Misc.2d 306 (Sup. Ct. Franklin Cty. 1994)).
  - a. A school board bylaw or policy that prohibits the use of recording devices at board meetings violates public policy (*People v. Ystueta*, 99 Misc.2d 1105 (Sup. Ct. Suffolk Co. 1979); see also NYS Department of State, Committee on Open Government, OML-AO-3037, June 18, 1999).
  - b. Use of a tape recorder may not cause public inconvenience, annoyance or alarm, or disturb the meeting (see *Feldman v Town of Bethel*, 106 A.D.2d 695 (3d Dep't 1984)).
2. The Open Meetings Law was recently amended, effective April 1, 2011, to require that public bodies, including school boards, allow meetings to be photographed, broadcast, webcast or otherwise recorded and/or transmitted by audio or video means (Pub. Off. Law § 103(d)).
  - a. School boards may adopt reasonable rules governing the use of cameras and recording devices, but such rules must be written, conspicuously posted and provided to the public upon request (*id.*). The committee on open government adopted model rules regarding this new provision of law which are available on the committee's website at [http://www.dos.state.ny.us/coog/modelregs\\_photo\\_record\\_broadcast.html](http://www.dos.state.ny.us/coog/modelregs_photo_record_broadcast.html).
  - b. Prior to the adoption of this amendment to the Open Meetings Law, the general rule was that people attending board meetings had the right to videotape the meeting and school boards could not prohibit outright the use of cameras (*Csorny v. Shoreham Wading River CSD*, 305 A.D.2d 83 (2d Dep't 2003)). School boards were permitted to regulate the use of cameras to ensure interference with the meeting, but the interference must have been genuine, not based simply on board members' objections to appearing on television to fears of publicly airing comments at a public meeting (*id.*). In light of the amendment to the Open Meetings Law, this guidance is likely still relevant.

## **ISSUES CONCERNING THE OPEN MEETINGS LAW**

### *Basic Legal Requirements*

1. Because school boards are public bodies, the Open Meetings Law applies to them. Pursuant to that law, school board meetings of at least a quorum of the board that are conducted to discuss school district business must be open to the public (Pub. Off. Law § 103 *et seq.*) The Education Law contains a similar requirement (Educ. Law § 1708 (3)).
2. For purposes of the Open Meetings Law, school district business includes not only binding votes by a school board, but also to informal discussions and any activity preliminary to a vote or involving consideration of a matter that could be the subject of board action (Pub. Off. Law § 102; *Goodson Todman Enterprises, Ltd. v. Kingston Common Council*, 153 A.D.2d 103 (3<sup>rd</sup> Dep't 1990); but see *Hill v. Planning Bd. of Amherst*, 140 A.D.2d 967 (4<sup>th</sup> Dep't 1988)). This includes work sessions and planning meetings (*Orange Co. Publications, Div. of Ottoway Newspapers, Inc. v. Council of Newburgh*, 60 A.D.2d 409 (2<sup>nd</sup> Dep't 1978); NYS Department of State, Committee on Open Government OML-AO-4506, Oct. 30, 2007; OML-AO-3709, Nov. 20, 2003; OML-AO-2683, Dec. 11, 1996).
3. The public may be excluded only from properly convened executive sessions (Pub. Off. Law § 105 (2); see also Educ. Law § 1708 (3)), and other meetings expressly exempted under the law (Pub. Off. Law §§ 105(2), 108).
4. By definition, the Open Meetings Law does not apply to casual or chance encounters by school board members that are not intended to conduct business, but only so as long as the encounter does not become an informal conference or agenda session (*Orange County Publications, Div. of Ottoway Newspapers, Inc. v. Council of Newburgh*, 60 A.D.2d 409 (2<sup>nd</sup> Dep't 1978); see also NYS Department of State, Committee on Open Government, OML-AO-5201 Nov. 7, 2011).
5. The Open Meetings Law also does not apply to board developmental retreats, where no school district business is discussed (NYS Department of State, Committee on Open Government, OML-AO-1973, Sept. 13, 1991). For purposes of this exception, a retreat is when a public body “gathers for the purpose of gaining education, training, to develop or improve team building or communication skills, or to consider interpersonal relations” (NYS Department of State, Committee on Open Government, OML-AO-4762 (May 27, 2009); OML-AO-3709, Nov. 20, 2003). For example, a training session explaining the distinction between vision and mission and a process to address development of these statements would be proper for a retreat but the meeting where mission, vision or goals are actually developed involves the discussion of public business and must be open to the public (*Id.*).
6. Board self-evaluation or assessment session may be subject to the Open Meetings Law depending on how the evaluation or assessment is structured. If the session is designed to focus on interpersonal relations and similar matters and no business of the board will

be discussed it will be exempt from the Open Meetings Law. However, if the evaluation/assessment instead focuses on board members' duties and authorities then it will be subject to the Open Meetings Law ((NYS Department of State, Committee on Open Government, OML-AO-4322 (Feb. 12, 2007); OML-AO-2294 (Dec. 22, 1993)).

#### *Applicability of the Law to Board Committees*

1. Meetings of a committee or subcommittee consisting solely of school board members that discusses or conducts public business are subject to the Open Meetings Law (Pub. Off. Law § 102; NYS Department of State, Committee on Open Government, OML-AO-2588, Mar. 28, 1996; OML-AO-2472, Feb. 23, 1995; see *Syracuse United Neighbors v. City of Syracuse*, 80 A.D.2d 984 (1981)).

In addition, according to the Committee on Open Government if a majority of a committee consisting solely of board members meets and is joined at the same table by board members who are not on the committee, to discuss school district business, the committee meeting then becomes a meeting of the board if those present constitute a quorum of the board (NYS Department of State, Committee on Open Government OML-AO-4057, Oct. 19, 2005). That would not be the case if the additional board members attended the committee meeting only as observers (*Id.*; see also NYS Department of State, Committee on Open Government OML-AO-3329 June 26, 2001).

2. Meetings of advisory committees that do not consist exclusively of school board members, and are created solely to advise and make recommendations to the board are not subject to the Open Meetings Law because they have no authority to take final action (NYS Department of State, Committee on Open Government, OML-AO-4232, July 21, 2006; see *Jae v. Board of Educ. of Pelham UFD*, 22 A.D.3d 581 (2<sup>nd</sup> Dep't 2005), *lv. to app. denied*, 6 N.Y.3d 714 (2006); *Goodson-Todman Enters., Ltd. v. Town of Milan*, 151 A.D.2d 642 (2<sup>nd</sup> Dep't 1989); *Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force*, 145 A.D.2d 65 (2<sup>nd</sup> Dep't 1989)).

An exception would exist if the core membership of the advisory group consists of board members. In such a case, the additional non board members who sit on the committee do not change the essential character of the entity- which is that of a public body subject to the Open Meetings Law. (NYS Department of State, Committee on Open Government, OML-AO-5068, Mar. 18, 2011; OML-AO- 4158, Mar. 15, 2006).

3. District-wide shared-decision-making committees are subject to the Open Meetings Law because they perform a governmental function to the extent that school boards may not adopt a shared-decision-making plan without their collaboration and participation (NYS Department of State, Committee on Open Government, OML-AO-3329, June 26, 2001; OML-AO-2456, Jan. 31, 1995).
4. School-based shared-decision-making committees are subject to the Open Meetings Law depending on their responsibilities. That would be the case if:

- a. a district’s shared decision making plan provides them with decision making authority (NYS Department of State, Committee on Open Government, OML-AO-3329, June 26, 2001; OML-AO-3625, Jan. 17, 2001).
- b. a school-based shared decision making committee has authority to make recommendations the school board must consider before taking action, even when the board does not have to follow its recommendations (NYS Department of State, Committee on Open Government OML-AO-3329, June 26, 2001).

(For additional guidance on whether a particular committee or group is subject to the Open Meetings Law, see *Perez v. City University of New York*, 5 N.Y.3d 522 (2005)).

### *Meeting Notice Requirements*

1. Pursuant to the Open Meetings Law, school boards must give public notice of their meetings (Pub. Off. Law § 104 (1)). By comparison, the Education Law does not include a similar requirement (*Matter of Thomas*, 10 Ed. Dep’t Rep. 108 (1971)).

The notice requirements are intended to ensure that all efforts are made to notify the public of the meeting. Failure to do so does not give effect to the Open Meetings Law’s goal of ensuring public deliberation and vote (*Phillips v. County of Monroe*, 18 Misc.3d 1127(A) (N.Y. Sup. 2007))

2. For board meetings scheduled at least one week in advance, school boards must give notice of the time and place of any board meeting to the news media, and conspicuously post such notice in one or more designated public locations at least 72 hours before the meeting (Pub. Off. Law § 104 (1)).
3. For meetings scheduled less than a week in advance, notice of the time and place of the meeting must be given to the news media “to the extent practicable” and posted conspicuously a reasonable time before the meeting (Pub. Off. Law § 104 (2); *Previdi v. Hirsch*, 138 Misc.2d 436 (Sup. Ct. Westchester Co. 1988)).

Using the internet to post meeting notices and contacting various news media to alert the public of a meeting called with less than two days notice, were found to satisfy the notice requirement in a case where the record showed members of the public were present at the meeting and were permitted to comment on the subject of the meeting (*Phillips v. County of Monroe, supra*).

4. If the district has the ability to do so, it must conspicuously post notice of the time and place of board meetings on the district’s website (Pub. Off. Law § 104(5)). According to the only court to interpret this statutory requirement, entities subject to the law “must comply with internet posting mandates of the Open Meetings Laws in as timely a manner, and as consistently, as possible” (*Matter of Rivers v. Young*, 26 Misc.3d 946 (Westchester Co. 2009)). In making this determination, the court relied upon the sponsor’s memo for the amendment which stated “[websites] should be

comprehensively updated and revised as frequently as possible (*Id.*, citing N.Y. Spons. Memo., 2009 A.B. 3169).

5. Under the Education Law, school board members must receive at least 24 hours notice of any board meeting (Educ. Law § 1606 (3); see also *Application of Bean*, 42 Ed. Dep't Rep. 171 (2000)).
  - a. A majority of the board cannot dispense with notice of a board meeting to other members. Furthermore, a good faith effort must be made to give actual notice of the meeting to each board member. Failure to do so may invalidate any action taken at the meeting (see *Matter of Colasuonno*, 22 Ed. Dep't Rep. 215 (1982)).
  - b. Individual board members may waive the 24 hour notice requirement in case of an emergency (*Id.*; *Matter of Carlson*, 11 Ed. Dep't Rep. 284 (1972)). Action taken at a board meeting for which a board member did not receive the required notice may be sustained if the board member signs an affidavit waiving the notice requirement (*Matter of Board of Educ. of UFSD No. 1 of the Town of Hume*, 29 St. Dep't Rep. 624 (1923)).
  - c. It is advisable that in situations where 24 hours notice cannot be given, each board member sign a waiver of notice to be entered in the minutes.
6. Boards of education should be careful to schedule meetings at a time when the public can attend. The scheduling of a meeting at 7:30 am in the morning was determined to be inappropriate because it does not facilitate attendance by the public (*Matter of Goetchius v. Board of Education*, Supreme Court, Westchester Co. New York Law Journal, Aug. 8, 1996; see also NYS Department of State, Committee on Open Government, OML-AO-5280 May 4, 2012).

#### *Posting of Materials Requirements*

1. While the notice requirements of the Open Meetings Law do not require the subject matter of a meeting to be included in the notice, the law does require school boards to make the documents scheduled to be discussed at a board meeting available upon request, to the extent practicable as determined by the school board, both prior to and at the meeting during which the records will be discussed. (Pub. Off. Law §103(e)).
  - a. The school district may charge a fee for the copies consistent with the rules under FOIL. Copying fees up to 25 cents per page, or other amount prescribed by law (such as fees for an hourly employee who is needed to prepare the requested record), may be charged for the actual of reproduction, excluding fixed overheads (Pub. Off. Law §87(1)(b)(iii), (c)).
2. Records which must be made available include:
  - a. Records available pursuant to a Freedom of Information Law (FOIL) request

- b. Any proposed resolution, law, rule, regulation, policy or any amendment thereto (Id.).
- 3. If a school district maintains a website which is regularly and routinely updated and utilizes a high speed connection, the records to be discussed at a board meeting must also be posted to the website prior to the meeting, to the extent practicable (Pub. Off. Law §103(e) see also NYS Department of State, Committee on Open Government OML-AO5282 May 4, 2012).
  - a. A public body may not have to post records which are voluminous and come into a public body's possession shortly before a meeting due to the volume of materials and the effort needed to scan the papers in order to convert them to electronic format. However, if voluminous records are prepared and submitted electronically they would have to be posted to the website (Q&A on Disclosure of Records Scheduled to be Discussed during Open Meetings available at: <http://www.dos.ny.gov/coog/QA-2-12.html>).
    - i. If records are generated too close in time to the start of the public meeting to be posted on line it is recommended that the public body provide paper copies at the meeting (NYS Department of State, Committee on Open Government OML-AO-5235 Jan. 24, 2012).
    - b. Draft minutes are not required to be posted to the website unless they are scheduled to be discussed as opposed to merely being the subject of a motion (NYS Department of State, Committee on Open Government OML-AO-5241 Feb. 13, 2012).
- 4. FOIL specifically exempts certain records from mandatory disclosure. As such, any documents falling under one of those categories that the board is scheduled to discuss would not be disclosed pursuant to Public Officers Law §§87(2); 103(e). Note that some documents may only be partially exempt such that the portion of the document would be redacted but the rest of the document must be available.
- 5. Records which will be discussed as part of an executive session and items on a consent agenda need not be posted or shared. (*Q&A on Disclosure of Records Scheduled to be Discussed during Open Meetings*).
- 6. A draft policy which is scheduled to be discussed by the board must be disclosed.

To the extent that a draft document is not a proposed policy, resolution, law or rule but is scheduled to be discussed during an open meeting, portions of the material may be subject to disclosure. Draft documents would generally fall under the category of "intra-agency material" which are largely exempt from disclosure. Portions of such documents that include statistical or factual tabulations or data; instructions to staff that affect the public; or final agency policy or determinations would need to be disclosed and posted online pursuant to Public Officers Law §103(e).

7. Memoranda, research materials and similar documentation that may have been prepared in support of or opposition to a proposed resolution, law, rule, or policy need not be disclosed or posted to the school district website (*Q&A on Disclosure of Records Scheduled to be Discussed during Open Meetings*).

#### *Exempt Meetings*

1. The Open Meetings Law exempts from coverage certain types of meetings. In the case of school boards, these include:
  - a. judicial or quasi-judicial proceedings, and
  - b. matters made confidential by federal or state law (Pub. Off. Law § 108 (3)).

Therefore to discuss a matter exempted from the Open Meetings Law a school board does not need to follow the rules and procedures that relate to entry into executive session (*Brown v. Feehan*, 125 A.D.3d 1499 (4<sup>th</sup> Dep't 2015); NYS Dep't of State, Committee on Open Government OML-AO-5446 (February 24, 2015)).

2. A meeting where a school board reviews the transcript and evidence presented at a student disciplinary hearing when parents appeal their child's suspension to the board would be considered a quasi-judicial proceeding. However, a board vote to uphold or modify the suspension must take place in open session at a meeting conducted under the Open Meetings Law (see *Cheevers v. Town of Union, unreported*, (Sup. Ct. Broome Co., Sept. 3, 1998)).
3. An example of an exempt meeting involving a matter made confidential by federal law is a meeting to discuss student records. The federal Family Educational Rights and Privacy Act (FERPA) prohibits school officials from divulging, without parental consent, education records that are specifically identifiable to a particular student or students (20 U.S.C. § 1232(g)). Therefore, a board may meet in private with parents who wish to discuss concerns that require presentation of private student records (NYS Department of State, Committee on Open Government OML-AO-3863, Sept. 3, 2004).
4. An example of an exempt meeting involving a matter made confidential by state law is a meeting between a board of education and the board's attorney that is protected by attorney-client privilege under New York's Civil Practice Law and Rules (CPLR § 4503; *Brown v. Feehan, supra*; for a review of the nature and scope of the privilege itself, see *Appeal of Goldin*, 40 Educ. Dep't Rep. 628 (2001)). In order to preserve attorney client privilege school boards need to be cautious about including guests in meetings with the attorney so that privilege is not waived (*Ballard v. New York Safety Track LLC*, 126 A.D.3d 1073 (3d Dep't 2015)).

#### *Consequences for Violations of the Open Meetings Law*

1. If a court determines a public body failed to comply with the Open Meetings Law it may declare that the public body violated the Open Meetings Law and/or may declare void any action taken in relation to such violation in whole or in part, without prejudice to its

reconsideration at a meeting held in compliance with the law. (Pub. Off. Law § 107 (1); *Zehner v. Board of Educ. of Jordan-Elbridge CSD*, 29 Misc.3d 1206 (Onondaga Co. 2010); *Genatt Asphalt Products v. Town of Sardinia*, 87 N.Y.2d 668 (1996); *Matter of MCI Telecomm. Corp. v. Public Serv. Comm'n of the State of New York*, 231 A.D.2d 284 (3<sup>rd</sup> Dep't 1997)).

A court that determines a public body has violated the Open Meetings Law may require the members of the public body to participate in training sessions conducted by staff of the committee on open government (Pub. Off. Law § 107(1)).

To invalidate an action already taken by a school board, complainants alleging a violation of the Open Meetings Law must show they were prejudiced by the board's failure to comply with the law (*Smithson v. Illion Housing Auth.*, 130 A.D.2d 965 (4<sup>th</sup> Dep't 1988), *aff'd* 72 N.Y.2d 1034 (1988); *Matter of Inner-City Press/Community on the Move v New York State Banking Board*, 170 Misc.2d 684 (1996)).

That required showing was made in a case where a district resident who prevailed in an appeal to the commissioner challenged the school board's failure to authorize in open session the district's own appeal from the commissioner's

2. In any proceeding brought concerning a violation of open meeting law courts have discretion to award costs and reasonable attorney fees to the prevailing party (Pub. Off. Law § 107 (2); see also *Matter of Gordon v. Village of Monticello*, 87 N.Y.2d 124 (1995); *Matter of Orange County Pubs. Div. of Ottaway Newspapers Inc. v. County of Orange*, 120 A.D.2d 596 (2<sup>nd</sup> Dep't 1986); *Ballard v. New York Safety Track*, 126 A.D.3d 1073 (3d Dep't 2015); *Cunney v Bd. of Trustees of Vil. of Grand View*, 72 A.D.3d 960 (2<sup>nd</sup> Dep't 2010); *Stephenson v Bd. of Educ. of Hamburg Cent. School Dist.*, 31 Misc. 3d 1227 (Sup Ct Erie Co. 2011)).

However, a court shall award costs and attorney's fees to a successful complainant if the court determines a vote was taken in material violation of the law or that substantial deliberations relating thereto occurred in private prior to such vote, unless there was a reasonable basis for a public body to believe a closed session could properly have been held (Pub. Off. Law §107(2)).

## **EXECUTIVE SESSIONS**

### *Basic Rules*

1. An *executive session* is a portion of a school board meeting that is not open to the public. It is permitted only for a limited number of specific purposes that include the following subjects:
  - a. Matters which will imperil the public safety if disclosed.
  - b. Any matter that 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 that would imperil effective law enforcement if disclosed.
  - d. Discussions involving proposed, pending, or current litigation.
  - e. Collective negotiations pursuant to Article 14 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 exams.
  - h. The proposed acquisition, sale or lease of real property or the proposed acquisition, sale, or exchange of securities, but only when publicity would substantially affect the value of these things (Pub. Off. Law § 105 (a-h)).
  
2. An executive session can take place only upon a majority vote of the total membership of the board taken at an open meeting (Pub. Off. Law § 105 (1)).

- a. Because it can be convened only upon a majority vote of the board in an open public meeting, a school board cannot schedule an executive session in advance (e.g. Executive Session at 6:30 p.m. and Public Meeting at 7:00 p.m.) (NYS Department of State, Committee on Open Government OML-AO-3339, July 23, 2001).

However, the meeting's agenda can indicate that there is a "Proposed executive session, subject to Board approval" or that "It is anticipated that the Board will act upon a resolution to convene an executive session (NYS Department of State, Committee on Open Government OML-AO-2426, Nov. 23, 1994).

- b. The motion to go into executive session must identify the subject matter of the executive session with particularity (*Zehner v. Board of Educ. of Jordan-Elbridge*

CSD, 29 Misc.3d 1206 (Onondaga Co. 2010); *Gordon v. Village of Monticello*, 207 A.D.2d 55 (3<sup>rd</sup> Dep't 1994), *rev'd on other grounds*, 87 N.Y.2d 124 (1995); NYS Department of State, Committee on Open Government OML-AO-3478, June 26, 2002).

(1) It is insufficient to merely regurgitate the statutory language such as "discussions regarding proposed or pending litigation, without identifying the particular litigation (*Daily Gazette v. Cobleskill*, 111 Misc.2d 303 (Sup. Ct. Schoharie Co. 1981)); NYS Department of State, Committee on Open Government OML-AO-5259, Mar. 8, 2012; OML-AO-3654, July 10, 2003).

(2) There is no authority to go into executive session for the purpose of discussing "personnel matters". A school board does not need to identify who it is going to talk about, but it must disclose what it is going to talk about (e.g. "to discuss the discipline of a particular employee" such motion would not need to identify the employee's name or title) (see NYS Department of State, Committee on Open Government, OML-AO-5259, Mar. 8, 2012; OML-AO-3478, June 26, 2002).

(3) There is no authority to go into executive session to discuss the qualities and qualifications that the Board is seeking in a superintendent, as well as the process which the board intends to utilize to conduct a superintendent search (*Zehner v. Board of Educ. of Jordan-Elbridge CSD*, 29 Misc.3d 1206 (Onondaga Co. 2010)).

c. There is no time limit on the length of an executive session other than that imposed by good judgment and the reasonable exercise of discretion (*Matter of Thomas*, 10 Ed. Dep't Rep. 108 (1971)).

However, school boards do not want to waste the public's time by making them wait, because doing so fosters bad public relations. Therefore, a school board may wish to schedule proposed executive sessions later in the meeting, make a motion for same during the meeting, or state the estimated time when it expects to return to the open session of the meeting (see NYS Department of State, Committee on Open Government OML-AO-2426, Nov. 23, 1994).

d. The taping of an executive session is improper and violates the confidentiality that is encompassed in an executive session (*Stephenson v. Bd. of Educ. of Hamburg CSD*, 31 Misc.3d 1227 (Erie Cnty. 2011)).

3. Pursuant to the General Municipal Law school board members, district officers and employees may not disclose confidential information acquired by them in the course of their official duties (Gen. Mun. Law § 805-a(1)(b)).

a. The General Municipal Law does not define the term "confidential information". According to one state court, interpretation of what is confidential in the school

context is best left to the commissioner of education (*Komyathy v. Board of Educ. Wappinger CSD No. 1*, 75 Misc.2d 859).

According to the commissioner of education, matters discussed in a lawfully convened executive session are confidential and their disclosure constitutes a violation of the General Municipal Law's prohibition as well as a violation of a school board member's oath of office, which subject a school board member to removal from the board (*Application of Nett and Raby*, 45 Ed. Dep't Rep. 259 (2005)). There would be no such violation where a board collectively decides to release such information, or where an individual board member is compelled to disclose such information pursuant to law in the context of a judicial proceeding (*Id.*).

- b. A state supreme court held that taping of an executive session is improper and violates the confidentiality of the executive session (*Stephenson v Bd. of Educ. of Hamburg Cent. School Dist.*, 31 Misc. 3d 1227 (Sup Ct Erie Co. 2011)).

Note: The Executive Director of the Committee on Open Government has stated that information discussed in executive session may be disclosed unless a specific statute confers or requires confidentiality (NYS Department of State, Committee on Open Government OML-AO-4489, Sept. 20, 2007; see also OML-AO-3463, May 28, 2002; OML-AO-3449, April 30, 2002; OML-AO-3219, Oct. 26, 2000). However, the commissioner considers that view a "narrow interpretation of the term 'confidential'" (*Application of Nett and Raby*).

- c. The Family Educational Rights and Privacy Act, also known as the "Buckley Amendment" or "FERPA" prohibits the disclosure of personally identifiable information about a student without prior consent from the student's parent or the student if the student is 18 years of age, unless one of the exceptions specified in the law and its implementing regulations apply (20 U.S.C. § 1232g(b)(2)(B); *Owasso Independent School Dist. No. I-0111 v. Falvo*, 534 U.S. 426 (2002); *Taylor v. Vermont Dep't of Education*, 313 F.3d 768 (2<sup>nd</sup> Cir. 2003)).

#### *Participation in an Executive Session*

1. All members of the school board and "any other persons authorized by" the board may attend an executive session (Pub. Off. Law § 105 (2)). The Education Law contains a similar provision (Educ. Law § 1708 (3)).
  - a. A school board does not have to formally vote to approve the attendance of executive session invitees (NYS Department of State, Committee on Open Government, OML-AO-3864, Sept. 7, 2004).
  - b. Neither does a board have to identify in its motion to enter into executive session the individuals whom the board has invited to attend (*Matter of Jae v. Board of Educ. of Pelham UFSD*, 22 A.D.3d 581 (2<sup>nd</sup> Dep't 2005); *lv. to app. denied*, 6 N.Y.3d 714 (2006)).

2. It is important that a school board exercise discretion in deciding whom to invite into executive session because of confidentiality issues.

For example, the attendance at executive session of a former school board member who was awaiting the results of an appeal to the commissioner regarding his lost reelection was in conflict with laws providing for the confidentiality of personnel and student records (*Appeal of Whalen*, 34 Ed. Dep't Rep. 282 (1994)).

It would be permissible to invite the district clerk, board attorney, superintendent or a person having some special knowledge, expertise or function that relates to the subject of the executive session (NYS Department of State, Committee on Open Government OML-AO-4344, March 7, 2007).

#### *Taking Action in Executive Session*

1. With certain limited exceptions, no official action can be taken on issues discussed in executive session without first returning to open session (see *Matter of Crapster*, 22 Ed. Dep't Rep. 29 (1982)).

- a. One such an exception includes voting on charges against a tenured teacher (Educ. Law § 3020-a (2); *Sanna v. Lindenhurst Board of Educ.*, 85 A.D.2d 157 (2<sup>nd</sup> Dep't 1982), *aff'd*, 58 N.Y.2d 626 (1987); *United Teachers of Northport v. Northport UFSD*, 50 A.D.2d 897 (2<sup>nd</sup> Dep't 1975); *Matter of Cappa*, 14 Ed. Dep't Rep. 80 (1974); Formal Opn. of Counsel No. 239, 16 Ed. Dep't Rep. 457 (1976)).

Section 3020-a requires that school boards meet in executive session to both discuss disciplinary charges against a tenured teacher and to vote on whether probable cause exists to commence disciplinary proceedings against the employee (Educ. Law § 3020-a (2); Formal Opn. of Counsel No. 239, 16 Ed. Dep't Rep. 457 (1976)).

- b. No court has ruled yet whether a school board may take action in executive session on matters made confidential by other laws such as the federal Family Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, but see *Cheevers v. Town of Union, unreported*, (Sup. Ct. Broome Co., Sept. 3, 1998)) indicating that a school board must vote to uphold or modify a student's suspension in an open session.

2. No public body, including a school board, may vote to appropriate money during an executive session (Pub. Off. Law § 105 (1)).

#### *Special Rule for Audit Committees*

1. Notwithstanding any provisions of the Open Meetings Law and other laws to the contrary, a school district's audit committee may conduct an executive session pursuant to the Open Meetings Law in order to:
  - a. meet with the external auditor prior to commencement of the audit

- b. review and discuss with the auditor any risk assessment of the district's fiscal operations developed as part of the auditor's responsibilities under governmental auditing standards for financial statement audit and federal single audit standards if applicable, and
  - c. receive and review the draft annual audit report and accompanying draft management letter and, working directly with the auditor, assist the trustees or board of education in interpreting such documents (Educ. Law § 2116-c (7)).
  - d. The special rules for executive sessions by audit committees are limited to the enumerated matters dealing with the external audit. There is no authority for an audit committee to enter executive session to discuss matters relating to the internal audit (NYS Department of State, Committee on Open Government, OML-AO-4625, May 9, 2008).
2. A school board member who is not a member of the audit committee may be allowed to attend an executive session of the audit committee if authorized by a board resolution (*Id.*).
3. According to the Committee on Open Government the audit committee performs a governmental function pursuant to Education Law §2116-c and is therefore a public body subject to all aspects the Open Meetings Law, not just the rules for conducting an executive session (NYS Department of State, Committee on Open Government OML-AO-4093, Dec.. 14, 2005; OML-AO-4257, Sept. 11, 2006).