

Bowles Rice

ATTORNEYS AT LAW

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Superintendents Attending Executive Sessions

Question: *Does the county superintendent have a right to attend every executive session held by the school board? What if the board wants to discuss something that involves the superintendent and doesn't want the superintendent to know what is said?*

Answer: *West Virginia school law requires that the superintendent "shall serve as the secretary of the county board and attend all meetings of the county board or its committees, except when the tenure, salary or administration of the county superintendent is under consideration."*

The law draws no distinction between regular and special meetings of the school board. Nor does it distinguish between those portions of board meetings that are held in public and those held in executive session. The superintendent, as secretary, is required to attend all of them, except when the superintendent's own "tenure, salary or administration" is under consideration.

Although the superintendent, as the board's secretary, is not obligated to attend a meeting held to consider his or her "tenure, salary or administration," the law does not prohibit the superintendent from doing so. Presumably the school board can decide whether to include or exclude the superintendent when an executive session is held to discuss such an issue.

Note, however, that in one circumstance the board might not get to decide whether to include or exclude the superintendent from an executive session held to consider his or her "tenure, salary or administration." The reason is that the Open Meetings law allows a school board to meet in executive session to consider "matters arising from the appointment, employment, retirement, promotion, transfer, demotion, disciplining, resignation, discharge, dismissal or compensation of a public officer or employee," but only if the public officer or employee does not request an open meeting.

By exercising his or her right to make the board consider such a matter in an open meeting rather than in executive session, a superintendent might then hear the board's discussion on the topic.

Two final points

First, the law that requires the school board to formally evaluate its superintendent states that the board must go into executive session to do so. Because the law is so clear on that point, it appears that the county superintendent cannot use the Open Meetings law, quoted above, to force the school board to consider the evaluation in a public session. The evaluation law trumps the Open Meetings law on this point. Additionally, even though the evaluation of a superintendent may arguably implicate the superintendent's "tenure, salary or administration," the same law about superintendent evaluations arguably entitles the superintendent to attend the executive session to learn the evaluation results.

Second, in spite of their duties as secretary, some superintendents have a practice of not attending a certain type of executive session, even though the board is not considering the superintendent's "tenure, salary or administration." This occurs when, at the conclusion of a student or employee hearing, the school board dismisses the hearing participants in order to consider in executive session whether to agree or disagree with the administration's recommended disposition of the case.

Superintendents who don't attend these post-hearing board discussions say that they want to prevent suspicion that they used the occasion to unfairly influence the board's decision with information or argument that was not presented during the hearing. To remove any doubt about whether they engaged in that kind of activity and possibly violated the student's or employee's right to due process, they physically leave the room where the discussion takes place and rejoin the meeting only when the school board returns to public session.

Other superintendents believe that their duties as the board's secretary require them to attend an executive session during the board's post-hearing discussion. They understand, however, that they may later have to prove in a grievance or court case that they did not use the occasion to unfairly influence the board's decision in violation of the student's or employee's due process rights. (Of course, if the student or employee does not request a hearing or does not appear at the hearing, then there would appear to be no due process issue. The superintendent can arguably attend and vigorously participate in any executive session held by the board to determine the student's or employee's fate.)

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Howard Seufer brings a wealth of experience to a range of legal matters for school districts. Having advised and represented all 55 of West Virginia's county boards of education over the last 40 years, his work in public education has made a lasting impact in the areas of school board governance, board/superintendent relations, business and finance, human resources and student rights and responsibilities.

