



**Education Client Advisory
July 2008**

**SUPERIOR COURT DECISION HOLDS SCHOOL COMMITTEE'S
EVALUATION OF SUPERINTENDENT IN EXECUTIVE SESSION AS PART
OF CONTRACT NEGOTIATION PROCESS DOES NOT VIOLATE OPEN
MEETING LAW**

In a recent opinion, the Middlesex Superior Court examined the application of the Open Meeting Law to a School Committee's evaluation of the Superintendent of Schools. The Court's decision affirmed the ability of the School Committee to conduct the Superintendent's evaluation in executive session. See District Attorney for the Northern District v. Wayland School Committee, Docket No. 06-4477 (Mass. Super., July 2, 2008).

I. BACKGROUND

The employment contract between the Wayland School Committee and the Superintendent of the Wayland Public Schools set forth the Superintendent's salary in Year 1 of the contract, and provided that the Superintendent's salary for future years "shall be determined by the Committee after the Committee has reviewed [the Superintendent's] performance." In June, 2004, the Chair of the Wayland School Committee emailed the other members of the Committee seeking their input on the Superintendent's performance. Three Committee members responded to the email, providing the Chair with written comments. The Chair compiled these comments into a draft evaluation document, which he distributed to the other members of the Committee prior to their next meeting. At each of their next two meetings, the Committee adjourned



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its open session and re-convened in executive session to discuss the draft evaluation.

Based on its discussions during these executive sessions, the Committee ultimately compiled the Superintendent's final written performance evaluation.

In August, 2005, based on a written complaint from a local newspaper, the Middlesex District Attorney's Office ruled that the School Committee violated the Open Meeting Law by convening in executive session to discuss its evaluation of the Superintendent. The District Attorney ordered the Committee to amend the June 21 and June 28 meeting minutes to reflect the substance of the Committee's discussion over the Superintendent's evaluation, and ordered the Committee to make available to the public the final performance evaluation, the draft performance evaluation, and the written comments of individual Committee members. The Committee amended the meeting minutes to reflect discussion of the Superintendent's evaluation, and made available to the public both the draft and final version of the evaluation. However, when the Committee refused to release the written comments of individual Committee members, the District Attorney filed an action in Superior Court alleging violations of the Open Meeting Law.

II. DECISION

Because the facts were undisputed, the parties filed cross-motions for summary judgment. The primary question before the Court was whether the Committee violated the Open Meeting Law by discussing the Superintendent's performance evaluation in



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executive session, rather than open session. To answer this question, the Court had to determine whether discussing the Superintendent's evaluation fit into one of the nine specifically enumerated purposes for which the Open Meeting Law permits a governmental body to convene in executive session. One of the statute's permissible purposes is to "discuss the reputation, character, physical condition or mental health *rather than the professional competence* of an individual." M.G.L. ch. 39, § 23B (1) (emphasis added). The District Attorney argued that because the Committee was discussing the Superintendent's "professional competence," it convened in executive session in violation of the law. However, the Committee argued that it properly convened in executive session pursuant to a different statutory exception—the one which allows executive sessions to "conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel." M.G.L. ch. 39, § 23B (3).

The Court granted the Committee's motion for summary judgment and issued a declaratory judgment that, under these circumstances, the Committee did not violate the Open Meeting Law. Noting that the Superintendent's employment contract specifically provided that his salary would be determined after the Committee reviewed his performance, the Court held that the Committee's discussion of the Superintendent's evaluation was properly held in executive session as part of contract negotiations with nonunion personnel. With respect to the written comments of individual Committee



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members, the Court held that, even if such comments were considered “deliberations” made in violation of the Open Meeting Law, the Committee cured any such violations by releasing the draft and final evaluation and the minutes of the meetings at which it discussed the evaluation. Thus, the Court declined to order the Committee to make the written comments public.

III. ANALYSIS

The Superior Court’s decision affirms the ability of a School Committee to conduct a Superintendent’s evaluation in executive session, if it is part of the contract negotiation process. The Superintendent’s employment contract in the Wayland case had very specific language tying his salary in future years to the Committee’s annual review of his performance. If a Committee desires to conduct discussions about a Superintendent’s evaluation in executive session, it is advisable to include similar language in their Superintendent’s employment contracts. Such language makes clear that the performance evaluation is a part of the contract negotiation process, and thus permissibly done in executive session under the Open Meeting Law.

If you have any questions regarding this Client Advisory, please contact Kevin Bresnahan, Esq. or the attorney assigned to your account.

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