

**OPEN RECORDS AND MEETINGS OPINION
2020-O-06**

DATE ISSUED: July 8, 2020

ISSUED TO: Williston Public School District #1

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jenny Jorgenson asking whether Williston Public School District #1 violated N.D.C.C. § 44-04-19 by holding an unauthorized executive session.

FACTS PRESENTED

On May 6, 2020, the Williston Public School Board for District #1 held a special meeting and entered in an executive session for attorney consultation, pursuant to N.D.C.C. § 44-04-19.1, to discuss enrollment of nonresident students in Williston High School.¹

As a background addressing the need for the executive session, the School Board provides:

WPSD#1's position on nonresident enrollment is relevant to its own students and patrons and also to other public school districts' students and patrons. It has been a controversial topic in and outside the District due to the open enrollment policy's impact on resident and nonresident students. It is presently a topic of discussion with a contiguous school district that does not have a high school and is seeking a solution for their students in need of a high school to attend. WPSD#1's Board and that district's board have held joint meetings to discuss the issue, with both boards appearing to recognize they have differing, and potentially competing, considerations they must take into account, on top of potentially differing interpretations of the relevant legal provisions surrounding open enrollment. WPSD#1 expects there will be unhappy constituents, possible legal challenges, and potential unintended consequences depending on the position it takes on any change in policy.²

¹ Agenda, Williston Pub. Sch Bd. (May 6, 2020); see also Letter from Meredith Vukelic, Att'y at Law, to Att'y Gen.'s Office (May 29, 2020).

² Letter from Meredith Vukelic, Att'y at Law, to Att'y Gen.'s Office (May 29, 2020).

Prior to proceeding into the executive session, the School Board president announced to the public that she wanted to review a previous policy decision and make sure the Board was all on the same page about nonresident high school students and that there was a need to consult with the attorney for any changes to the previous decision.³ The president announced it would hold the executive session for an attorney consultation pursuant to N.D.C.C. § 44-04-19.1.⁴

ISSUE

Whether the executive session the Williston Public School Board for District #1 entered into during its May 6, 2020, special meeting was authorized by law.

ANALYSIS

All meetings of a governing body of a public entity must be open to the public unless otherwise provided by law.⁵ A governing body is authorized to hold an executive session for an “attorney consultation” as defined by N.D.C.C. § 44-04.19.1(5):

"Attorney consultation" means any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable or pending civil or criminal litigation or adversarial administrative proceedings or to receive its attorney's advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity which, if held in public, would have an adverse fiscal effect on the entity. All other discussions beyond the attorney's advice and guidance must be made in the open, unless otherwise provided by law. Mere presence or participation of an attorney at a meeting is not sufficient to constitute attorney consultation.⁶

A previous opinion analyzed the expanded definition of “attorney consultation” implemented during the 2017 Legislative Session:

During the 2017 Legislative Session, the definition of “attorney consultation” was expanded to include instances in which a governing body seeks to “receive its attorney’s advice and guidance on the legal risks, strengths, and weaknesses of an action of a public entity which, if

³ *Id.*

⁴ *Id.*

⁵ N.D.C.C. § 44-04-19.

⁶ N.D.C.C. § 44-04-19(5).

held in public, would have an adverse fiscal effect on the entity.” The amendment recognized that decisions and actions of a governing body may not reach a litigation threshold, but an attorney should be able to provide guidance and advice on how to avoid litigation, or the risks and liabilities associated with a certain, proposed course of action, so governing bodies could make informed decisions. To give such advice in the open may provide a “roadmap” on how to initiate a lawsuit against a public entity, which would result in public funds being spent on litigation, all because the governing body did not receive full advice from legal counsel on the risks and liabilities associated with an action or decision.⁷

The executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(2)(c) and reviewed by this office.

During the executive session, which lasted approximately 27 minutes, the School Board’s attorney discussed and answered questions about changing the policy on enrollment of nonresident students into Williston School District and the risks, liabilities, costs, and potential legal actions that might result, in order for the Board to make an informed decision. The School Board took the information under advisement and did not take any action during the executive session.

The discussion between the School Board and its attorney was the type of conversation anticipated by the changes made to the definition of “attorney consultation” during the 2017 Legislative Session. Therefore, it is my opinion that the executive session was authorized by law.

CONCLUSION

The executive session held during the May 6, 2020, special meeting was an “attorney consultation” authorized by law.

Wayne Stenehjem
Attorney General

sld

cc: Jenny Jorgenson (via email only)

⁷ N.D.A.G. 2018-O-05 (footnotes omitted).