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June 20, 2014

Jeff Clarke
P.O. Box 417
Central City, NE 68826

RE: *File No. 13-M-108; Central City Public Schools Board of Education; Jeff Clarke, Complainant*

Dear Mr. Clarke:

This letter is written in response to your correspondence dated May 19, 2013, in which you have requested that this office investigate alleged violations of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 to 84-1414 (2008, Cum. Supp. 2012, Supp. 2013) ("Act"), by the Central City Public Schools Board of Education (the "Board"). As is our normal practice with complaints alleging violations of the Act, we forwarded a copy of your complaint to the public body which is the subject of the complaint. Here we forwarded your complaint to the president of the school board, Dale Palser. On July 15, 2013, we received correspondence from attorneys Kelley Baker and Bobby Truhe, of the law firm Harding & Shultz, who responded on behalf of the Board. We have now had an opportunity to review your complaint and the Board's response in detail. Our conclusion and future action in this matter are set forth below.

Before we begin, we would like to briefly discuss our enforcement authority under Neb. Rev. Stat. § 84-1414 of the Open Meetings Act. This statute gives this office the authority to determine whether a public body has complied with the various procedural provisions of the Act relating to agenda, notice, closed session, voting, minutes, etc. However, while this office does have enforcement authority under the Open Meetings Act, we have no general supervisory authority over local political subdivisions, including school districts. Consequently, we cannot address whether the Board violated its own policy with respect to placing items on the meeting agenda. Nor can we address the Board's disposition relating to any personnel matter, and in particular the controversy surrounding Mr. Garfield's firing as head football coach.

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OPEN MEETING ALLEGATIONS RAISED IN YOUR COMPLAINT

Your complaint arises from three meetings held by the Board on April 22, April 25, and May 1, 2013. Specifically, you state that the Board violated Neb. Rev. Stat. § 84-1412(4) and (7), § 84-1408 and "84-142, paragraph 1" [*sic*]. Based upon our review of your documentation, we have identified the following four allegations against the Board:

1. You allege that the Board violated Neb. Rev. Stat. § 84-1412(4) by holding all three meetings in the elementary school cafeteria, which you believe was inadequate to accommodate the crowds.

2. You allege that the Board violated Neb. Rev. Stat. § 84-1412(7) because a number of attendees, patrons and board members, could not hear the proceedings.

3. You allege that the Board violated Neb. Rev. Stat. § 84-1412 by not allowing certain individuals to get on the meeting agenda.

4. You allege that the Board violated Neb. Rev. Stat. § 84-1412(2) by limiting the public's participation in the meetings.

DISCUSSION

Neb. Rev. Stat. § 84-1408 (2008) of the Nebraska Open Meetings Act states:

> *It is hereby declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.*
>
> *Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies, except as otherwise provided by the Constitution of Nebraska, federal statutes, and the Open Meetings Act.*

The primary purpose of the public meetings law is to ensure that public policy is formulated at open meetings. *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d 551 (1990). The Nebraska public meetings laws are a statutory commitment to openness in government. *Wasikowski v. The Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984).

I. Reasonable Accommodation.

Your first allegation relates to the size of the meeting room. You contend that the Board used the elementary school cafeteria for all three meetings, even though the school gym was fifty feet away, and the performing arts center (which could accommodate over 500 people) was less than a mile from the elementary school. Based on an informal survey taken of individuals who attended one or more of the meetings, which you included with your complaint, nineteen out of 56 surveyed indicated that they had to stand during every meeting and 18 had to stand for part of the meetings.

According to the Board, there is nothing to support a finding that the Board members held the meeting in the elementary cafeteria to circumvent the Act, or knew that the cafeteria would be too small to accommodate the audience. While using the gym was considered because of its additional seating, it was determined that it would be far more difficult to hear in the gym than in the cafeteria. The Board also considered using the performing arts center, but a number of factors—e.g., the notice of the meeting had been advertised for the elementary school—ultimately resulted in rejecting this venue.

Additionally, the Board states that the cafeteria was not too small for the anticipated crowd. The Board states that hundreds of chairs were set up, and more were added when the larger crowd arrived. Board members and administrators who sat in the front saw several open chairs, and when additional chairs were brought in, attendees declined them when offered. The Board further states that although it was not required to move its meetings from its traditional meeting place, it did so to accommodate more patrons. The Board represents that "[it] met in the cafeteria on April 25th and May 1st because it was sufficiently large, administrators could move in additional chairs as needed, and it was close to the administrative offices for the ease of retrieving and copying materials."

The relevant statute, Neb. Rev. Stat. § 84-1412(4), provides:

> No public body shall, for the purpose of circumventing the Open Meetings Act, hold a meeting in a place known by the body to be too small to accommodate the anticipated audience.

Subsection (5) goes on to state that "[n]o public body shall be deemed in violation of this section if it holds its meeting in its traditional meeting place which is located in this state." Neb. Rev. Stat. § 84-1412(5) (2008). In other words, if the Board had held the meetings at issue in the CCPS Board Conference Room, which we understand is the "traditional meeting place" and smaller in size than the cafeteria, there could be no violation of the Act. Here, the Board moved the meeting to a larger venue to accommodate more people. We understand that the venue was not perfect, and some

people had to stand during one or more of the meetings. However, it appears from the information provided that the cafeteria was in fact large enough to accommodate everyone who wished to attend the meetings. No one was turned away. As a result, we are unable to conclude that the Board was trying to circumvent the Open Meetings Act by moving the meeting to the cafeteria, and it appears to us that the Board's actions in this regard were reasonable.

II. The Public's Right to Hear.

Your second allegation relates to the audience members' ability to hear what was being said at the meetings. According to the informal survey, everyone surveyed indicated that they could not hear clearly at one or more of the meetings. You state that no microphones were used during the meetings, even though Board members were asked to speak up and there was a sound system available. You further allege that at the April 22, 2013, meeting, teachers in the audience were unable to hear the discussion, motion, etc. with respect to snow day make up dates. You state that two Board members, Lisa Wagner and Kara Wells, mistakenly voted to require three additional contract days, not one, presumably because of the crowd noise.

The Board represents that the meetings at issue were contentious, particularly the April 22 meeting. According to the Board, "many audience members were cheering, booing, yelling, and shouting interjections during the meetings" and "several patrons intentionally provoked and riled up audience members during their comments." The Board states that at times the crowd noise was so loud that it interfered with the audience members' ability to hear the discussion. Board members raised their voices and even yelled to be heard over the noise, and also waited at times for the crowd noise to subside before continuing discussion. The Board states that classified staff members sitting in the back of the cafeteria indicated they could hear the Board members' discussion.

With respect to the sound system that was not used, the Board indicates that the superintendent tested the system in the cafeteria and gym before the April 22 meeting, but found it "was not designed for that type of amplification and was not working properly." The Board indicates that a larger and more effective sound system has since been purchased, which it is now using. The Board further advises that a recording of the meeting indicates that the two Board members "actively engaged in the discussion on contract days" and that their questions on the subject were clarified by the superintendent. The Board believes that any misunderstanding was a result of the difficulty in computing contract days, not the crowd noise and any inability to hear the discussion.

Neb. Rev. Stat. § 84-1412(7) states that "[t]he public body shall, upon request, make a reasonable effort to accommodate the public's right to hear the discussion and

testimony presented at the meeting." In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Henery v. City of Omaha*, 263 Neb. 700, 705, 641 N.W.2d 644, 648 (2002). The plain language of subsection (7) indicates that a public body must make a *reasonable effort* to accommodate the public's right to hear what is being said at a public meeting. The record indicates that the meeting room was noisy—people were "cheering, booing, yelling, and shouting interjections." The record also reflects that the Board members attempted to speak louder, to the point of yelling in order to be heard. Board members also paused at various times to allow the noise in the meeting room to subside. In addition, we read nothing in the statute that would require a public body to use a microphone or a sound system during a meeting. Under these circumstances, it appears to us that the Board made a reasonable effort to accommodate the public's right to hear. Our conclusion in this regard is generally supported by the legislative history of this provision, which indicates that a reasonable effort to accommodate the public's right to hear at a public meeting does not involve an absolute requirement that all persons present shall be able to hear. Floor Debate on LB 43, 88th Nebraska Legislature, First Session, March 21, 1983, at 1794-1795.

With respect to the two Board members who voted for the additional contract days, the evidence indicates that they were able to hear sufficiently to make informed decisions.

III. Agendas.

Your third allegation relates to the public's inability to get on the Board's agenda to discuss the coaching personnel issue. You allege that because individuals could not get on the agenda, their participation was restricted and that "[a]udience members were denied a chance to take part in the formation of public policy." While we will not discuss whether the Board violated its own policy with respect to the public's requests to be placed on the agenda, we will discuss your allegation generally in the context of what is required under the Open Meetings Act.

Pursuant to Neb. Rev. Stat. § 84-1411, agendas for public meetings must be presented with the published notice of meeting or, in the alternative, the notice must contain a statement indicating that the agenda is readily available for public inspection at the principal office of the public body. The agenda maintained at the public body shall be kept continually current. Agenda items must be "sufficiently descriptive" to provide the members of the public "reasonable notice of the matters to be considered at the meeting." Except for items of an emergency nature, the agenda cannot be altered within twenty-four hours before the scheduled commencement of the meeting [or forty-eight hours for a meeting of a city council or village board scheduled outside the corporate limits of the municipality]. In addition, Neb. Rev. Stat. § 84-1412(3) provides

that "[n]o public body shall require members of the public to identify themselves as a condition for admission to the meeting nor shall such body require that the name of any member of the public be placed on the agenda prior to such meeting in order to speak about items on the agenda."

However, there is no provision in the Open Meetings Act that requires a public body to place an item on its agenda when requested to do so by a member of the public. These decisions are left to the discretion of the public body. As a result, the fact that individuals might have requested to be placed on the April 25 or May 1 agendas, but were denied by the Board, does not constitute a violation of the Open Meetings Act.

IV. Public Participation and Public Comment.

Your final allegation relates to public participation and public comment. Specifically, you allege that despite all of the efforts to be placed on the agenda, the "only action" allowed at the April 22 meeting was public comment. You indicate that each speaker was limited to three minutes, and that "no answers would be provided to the questions asked, including questions related to policies or process." You allege that the Board violated Neb. Rev. Stat. § 84-1412(2), which states, in pertinent part: "[A body] may not forbid public participation at all meetings." You also take issue with the Board's decision not to allow further public comment at the April 25 and May 1 meetings. You state: "The school board refused the public the opportunity to be on the agenda and participate in the formulation of public policy, especially item 2 of the agenda of April 25, 2013."

The statutory provisions relating to the public's right to speak at public meetings are found at Neb. Rev. Stat. § 84-1412 of the Open Meetings Act. Those particular provisions provide:

> (1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies . . . .
>
> (2) It shall not be a violation of subsection (1) of this section for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings. A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.
>
> (3) No public body shall require members of the public to identify themselves as a condition for admission to the meeting nor shall such body require that the name of any member of the public be placed on the agenda prior to such meeting in order to speak about items on the

agenda. The body may require any member of the public desiring to address the body to identify himself or herself.

Based upon these statutory provisions, along with other applicable authorities, this office has formulated a number of general "rules," which we believe set out the public's right to speak at open meetings of public bodies. Those rules pertinent to your complaint include the following:

1. Public bodies in Nebraska generally operate as a form of representative democracy, i.e., citizens elect individuals to represent them on various boards, commissions, etc., rather than having all who are present at a particular meeting of a public body act as members of that body.[1] Therefore, when members of the public attend meetings of public bodies in Nebraska, they most often attend as *observers*, not members of the body itself. Consequently, members of the public have no right, apart from periods set aside for public comment, to engage in the body's debate, to question members of the body, to comment on particular decisions, or to vote on the issues at hand. Those latter rights go to the members of the public body who ran for and were elected to office. While any particular public body may certainly choose to allow citizens to participate in its meetings in any fashion, citizens attending a meeting of a particular public body are not members of that body.

2. Under the language found in § 84-1412(2), public bodies must set aside some time at some of their meetings for members of the public to address them, and we strongly encourage public bodies in Nebraska to allow public comment as frequently as possible. Public comments may be accepted on a particular agenda item or during a specified public comment period. The Act does not require that a public comment period be offered at any particular point in a meeting, and if and when public comment will be part of a meeting is at the discretion of the public body.

3. Since § 84-1412(2), in effect, requires public bodies to set aside *some* time at *some* of their meetings for members of the public to address them, the statute does not create an absolute right for members of the public to address a public body at any given meeting or on any given agenda item. Consequently, public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda item, provided that they do offer opportunities for citizens to speak to them on other occasions.

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[1] *See Distinctive Printing and Packaging Company v. Cox,* 232 Neb. 846, 443 N.W.2d 566 (1989); *State ex rel. Strange v. School District of Nebraska City*, 150 Neb. 109, 33 N.W.2d 358 (1948).

4. Public bodies have the right to make *reasonable* rules for those members of the public who choose to address them. That includes setting reasonable time limits for public comment.

5. Public bodies may not require that the name of any member of the public be placed on the agenda prior to a meeting in order for that person to speak about items on the agenda at that meeting. *See* § 84-1412(3). However, that statutory provision does not appear to apply to discussion, by members of the public, of items not already on the agenda. Under those circumstances, it appears that public bodies may require that those persons seek to be placed on the agenda prior to the meeting in which they wish to speak.

6. Public bodies should set aside some time at some of their meetings for members of the public to address them *on any topic whatsoever*, as long as those comments are not obscene or threatening in any way. Public bodies should not use the agenda process to deny public comment on any particular topic, and public bodies may not refuse to hear comments on any particular topic during a public comment period.

As you can see, your rights as an audience member attending a Board meeting do not extend to engaging or questioning the members of the Board, to commenting on particular decisions, to voting on the issues at hand, or taking part in the formation of Board policy. You are there primarily to observe the Board, and to make public comment if you choose, when it is offered by the Board. In the present case, the Board held a public comment period at its April 22, 2013, meeting, during which "substantial public comment" was received. As indicated above, § 84-1412(2) does not require that a public body have a public comment every time it meets—so long as it sets aside some time at some of it meetings for this purpose. Moreover, we believe that allowing members of the public three minutes to address the Board was permissible under § 84-1412(2), which allows a public body to make reasonable rules relating to the conduct of persons speaking at public meetings. Consequently, there is nothing in your particular allegations that would lead us to conclude the Board violated the Act.

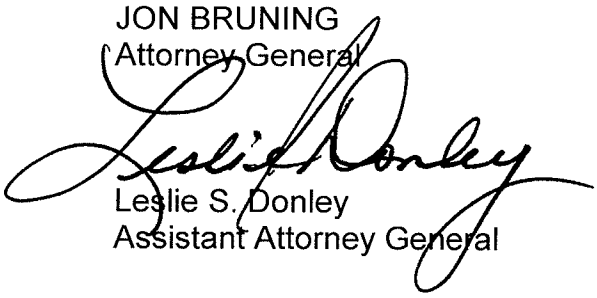
Finally, you allege that Board member Malm told principals of the district not to attend the April 25, 2013, meeting, which effectively denied "[t]he public and other school board members . . . the opportunity to question the principals on the review of policies." Again, as Rule No. 1 instructs, members of the public are not entitled, during the course of a public meeting, to question Board members, and in this instance, school district staff. And even if Mr. Malm did tell the principals to stay away from this meeting, his conduct does not constitute a violation of the Open Meetings Act.

CONCLUSION

Since we have determined that the Central City Public Schools Board of Education did not violate the Open Meetings Act with respect to the meetings held on April 22, April 25, and May 1, 2013, no further action by this office is appropriate at this time. Consequently, we are closing this file. If you disagree with our analysis under the Open Meetings Act, you may wish to discuss this matter with your private attorney to determine what additional remedies, if any, are available to you under those statutes.

Sincerely,

JON BRUNING
Attorney General



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