



STATE OF NEBRASKA  
**Office of the Attorney General**

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March 30, 2017

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Re: *File No. 17-M-103; Northwest Public Schools Board of Education;  
Complainant Morgan Johnson et al.*

Dear Ladies and Gentlemen:

This letter is in response to correspondence from each of you received by us in January 2017. You have requested that this office investigate alleged violations by the Northwest Public Schools Board of Education ("Board") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2014, Cum. Supp. 2016). In accordance with our normal procedures, we requested a response from the Board after we received your complaints; we subsequently received a response from the attorneys for the Board, Gregory Perry and Derek Aldridge. We have now had an opportunity to review your allegations and the Board's response, and our conclusions are set out below.

## FACTS

Our understanding of the facts in this matter is based upon your correspondence, supporting materials provided by some of you, and the Board's response and supporting materials. You have made several Open Meetings Act complaints as to the Board's meetings held on December 12, 2016 and January 9, 2017. Collectively, we believe your Open Meetings Act complaints to be:

- (1) The agenda for the meeting of the Board on December 12, 2016 was not sufficiently descriptive to give notice to the public that the Board would vote to close Chapman School;
- (2) The Board did not allow for public comment on the closure of Chapman School and/or any comment was only allowed during "public comment" and not during the agenda item; and
- (3) The Board denied a request by members of the community to be placed on the agenda for the January 9, 2017 Board meeting concerning the closure of the school.

The Board has responded, denying any violation of the Open Meetings Act and providing this office with supporting material concerning the decision made on December 12, 2016 to close Chapman School. This includes background information concerning the Board's process and meetings concerning the school closure that took place in the months preceding the Board meeting on December 12, 2016. The Board has provided documentation to show it held a number of meetings held over the course of more than one year concerning how to restructure the school district for financial savings. The Board also states that hours of public comment was held on December 12, and preceding meetings. Additionally, the Board asserts that there is no violation of the Open Meetings Act with respect to your third complaint concerning the public's request to be on the agenda. Our analysis on each of these issues is found below.

In addition to these complaints, one or more of you submitted additional grievances which do not implicate the Open Meetings Act. These matters include: (1) that the closure of the school should be voted on by the citizens in the school district; (2) whether certain members of the school board have a "legal right to vote"; (3) that the Board has exaggerated cost savings related to the closure of the school; (4) that votes by "advisory members" of the Board are not distinguished in the meeting minutes; and (5) that the Board is violating its policy and "state statute" by listing "advisory members" as part of the "member votes" in its minutes. This office has no general supervisory authority over governmental subdivisions in Nebraska. Consequently, all of these other matters are outside the enforcement authority of this office and will not be addressed herein.

## ANALYSIS

### **Agenda**

Your primary complaint relates to the agenda of the December 12, 2016 meeting and whether it provided proper notice to the public that the Board would vote to close Chapman School. The Open Meetings Act requires that “[a]genda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting.” Neb. Rev. Stat. § 84-1411 (2014).

On its face, the agenda item for December 12, 2016 which stated “District Restructure” and that the Board would “[c]ontinue discussion and develop a plan for the future structure of the District” was insufficient to inform the public that the Board would be discussing and voting upon the closure of Chapman School at the end of the current school year. However, based on the Board’s response, our inquiry cannot end there. The Board has presented evidence that the closure of Chapman School was one of several possibilities the Board discussed over the course of a year, both at Board meetings and in community meetings held with district patrons. The Board began discussing cost savings for the school district in November 2015 at its open meetings and retreats. Following the February 2016 Board meeting, the Board convened a group of community members to provide input to the Board on restructuring the district’s school facilities. Public community meetings were held in September through November 2016 at the district’s schools, including one on November 3, 2016 which drew nearly 300 attendees. At each of these meetings, discussions were held regarding “district restructuring options,” including the closure of one or more schools. The Board informed the public at these meetings that a final decision would be made in late 2016 regarding the district’s facilities.

Following these community meetings, the Board’s open meeting on November 16, 2016 including the agenda item “Discussion on District Restructure.” During this meeting, the Board discussed the input that had been received to date on the district facilities. The December 12, 2016 meeting agenda contained the same agenda item as that found on the November agenda. The Board has estimated that over 100 people attended the December 12, 2016 meeting and public comment was heard for over two hours. After public comment, the Board discussed potential action, ultimately passing the motion to close Chapman School.

The public meetings laws are to be broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). Further, the purpose of the agenda requirement is to give some notice of the matter to be considered at the meeting so that persons who are interested will know which matters will be up for consideration at the meeting. *Pokorny v. City of Schuyler*, 202 Neb. 334, 339-340, 275 N.W.2d 281, 285 (1979) [*“Pokorny”*]. In *Pokorny*, the Nebraska Supreme Court indicated that an agenda item, while technically deficient, may be deemed to have met the statutory requirements

when “viewed in light of the entire record.” *Id.* Similarly, in *Hansmeyer v. Nebraska Public Power District*, 6 Neb. App. 889, 898, 578 N.W.2d 476, 482 (1998), *aff’d*, 256 Neb. 1, 588 N.W.2d 589 (1999) [*“Hansmeyer”*], the court indicated, based upon the *Pokorny* case, that the sufficiency of an agenda item might be measured, at least to some degree, in the context of the other meetings of the public body immediately prior to the public meeting in question. A defective agenda notice can be “cured by a contextual reference to a series of immediately preceding Board meetings where the [issue in question] was discussed under adequate agenda notice.” *Id.* In 2006, however, the Legislature added a requirement that agenda items shall be “sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting.” This change arose out of a sense that lack of specificity in meeting agendas was a major issue of concern around the state. See Government, Military and Veterans Affairs Committee Hearing on LB 898, 99<sup>th</sup> Nebraska Legislature, Second Session (2006) at 19. The intent of this change was to require public bodies to include sufficient detail in their agendas regarding issues to be discussed or acted upon so as to provide information and notice to the public. Floor Debate on LB 898, 99<sup>th</sup> Nebraska Legislature, Second Session, March 28, 2006 at 11701 (Statement of Senator Preister). The history of the amendment indicates the Legislature intended that members of the public not be forced to look at past agendas in order to understand the issues to be discussed at any given meeting or the actions to be taken by a public body. See Floor Debate on LB 898, *supra*. We must balance the decisions in *Pokorny* and *Hansmeyer* with the provisions of the later enacted LB 898.

We have discussed the sufficiency of agenda items in past disposition letters. The Board refers to two such letters in its response to this office. The first was in response to a complaint against the Blue Rivers Area Agency on Aging dated December 15, 2015 (15-M-138). The second is from December 2010 and responded to a complaint against the Washington County Board (10-M-119). Both of these prior disposition letters are distinguishable from the present situation. Whether an agenda item is sufficiently descriptive is primarily a factually-dependent question. In the Blue Rivers matter, the agenda item read “Gage County Nutrition program,” and the public body discussed meal contracts with a third party. We found the agenda item in that case to be sufficiently descriptive. We do not believe the Blue Rivers matter is comparable to the situation presented here. The Washington County matter dealt with whether a public body must indicate on each agenda item whether a vote would be taken. We stated that, as any agenda item on a public body’s agenda is ripe for a vote, a public body did not have to separately indicate a vote would be taken. This disposition letter is not relevant to this case, as you have not complained that you were not aware a vote would be taken.

In the present case, the Board meeting on December 12, 2016 was preceded by a meeting held on November 16, 2016 in which the Board also discussed “district restructuring.” These meetings followed months of meetings with community members and others at which possible district cost saving measures were discussed. “Restructuring” of facilities was included in these discussions. The Board states that

these prior meetings drew up to 300 people. The December 12, 2016 meeting at issue had over 100 in attendance. However, at each of these meetings, only general discussions were held regarding “district restructuring,” with a number of possibilities being discussed, though no action was taken by the Board. We understand the Board’s position that the months of discussion as to what “district restructuring” may mean provided sufficient notice about what could occur at the December 12 meeting. However, we do not agree that the agenda item for that meeting was sufficiently descriptive under the Open Meetings Act. The agenda failed to provide notice as to what specific action might be taken by the Board. While “district restructuring” was sufficient for the prior meetings, at which the Board discussed different possibilities to accomplish cost savings, it was inadequate here. When specific action is to be taken by a public body, an agenda item needs to provide notice to the public as to what that action may be. We do not believe “district restructuring” to be sufficiently descriptive to indicate that the Board would vote to close a school on December 12, 2016. “District restructuring” is too vague and encompassed all the discussion being had by the Board during the year leading up to the December 12 vote. It gave no indication that a final vote would be taken as to one of the many possibilities being discussed. We believe the Board violated the Open Meetings Act on December 12, 2016 as to this agenda item and vote.

However, while we believe that the Board violated the Open Meetings Act at the December 12, 2016 meeting, that violation has since been cured. Under *Pokorny*, a public body may cure a violation of the Open Meetings Act “by new proceedings commencing at the point where the defect occurred.” 202 Neb. at 341, 275 N.W.2d at 285. We believe the Board has done so. The Board first attempted to cure any possible violation at its January meeting, but was not successful. The motion to ratify the decision to close the Chapman School failed to pass at that meeting. However, at the February 13, 2017 meeting of the Board, another motion was introduced relating to this school. Specifically, the Board passed a motion to “[r]epurpose the Chapman building as a K-5 elementary attendance site and pursue an alternative education site.” Consequently, the action taken by the Board regarding the Chapman school at its February 13, 2017, meeting cured the prior violation of the Open Meetings Act.

### ***Public comment***

Your next complaint is that the public was not permitted to speak at the December 12, 2016 meeting and/or the public was not permitted to speak during the “district restructuring” agenda item. Neb. Rev. Stat. § 84-1412 provides that the public has the right to attend and speak at meetings of public bodies. However, a public body may “make and enforce reasonable rules” as to public participation, including a requirement that the public may address the Board only during a specially designated “public comment” time during the meeting. “A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.” § 84-1412 (2).

Through the years, our office has developed a number of guidelines which we believe govern the public's right to speak at open meetings of public bodies. One of those guidelines is that public bodies in Nebraska generally operate as a form of representative democracy. 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). That is, Nebraska 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. 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. They 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, citizens attending a meeting of a particular public body are not members of that body.

Further, there is no absolute right for members of the public to address a public body at any given meeting or on any given agenda item, so long as there is some time at some meetings set aside for public comment. Public bodies can rightfully refuse to allow public comment at a given meeting, or as they consider a particular agenda item. A public body is not required to allow members of the public to speak at a particular open meeting, or every open meeting, provided that the public body allows the public to address them at some meetings. The public body is not required to allow a citizen to speak during any agenda item other than one designated as "public comment."

Public comment was permitted at the December 12, 2016 Board meeting, and was held for over two hours. Much of that comment concerned "district restructuring." The Board is not required to allow public comment during each particular agenda item. There is no violation of the Open Meetings Act as to this portion of your complaints.

### ***Right to be on the agenda***

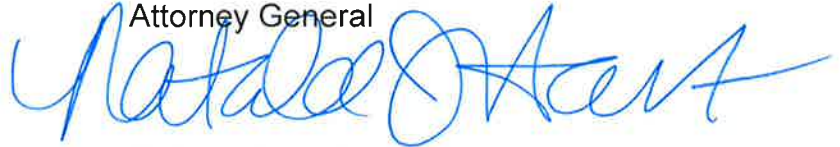
Your final Open Meetings Act complaint relates to a request that one or more of you made to appear on the agenda for the January 9, 2017 meeting of the Board to discuss the Chapman School issue. That request was denied by the Board. As with public comment, the members of the Board are the representatives of the patrons of the school district who elected them. There is no right under the Open Meetings Act for a member of the public to request to be placed on a public body's agenda. Nothing requires a public body to agree to such a request. As the formation of an agenda is entirely within the purview of the Board, the Board has not violated the Open Meetings Act as to this portion of your complaints.

## CONCLUSION

For the reasons stated above, we believe the Board violated the Open Meetings Act as to your complaint regarding the sufficiency of the agenda item on December 12, but not the remainder of your complaints. Additionally, we believe that the Board has cured its violation of the Open Meetings Act and no further action by this office is necessary. If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON  
Attorney General



Natalee J. Hart  
Assistant Attorney General

cc: Derek Aldridge

02-653-29