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August 4, 2021

RE: *File No. 21-M-117; Nebraska State Board of Education; Multiple Complainants*

Following the June 4, 2021, meeting of the Nebraska State Board of Education in Kearney, multiple complaints were registered with this office alleging violations of the Open Meetings Act ("Act"), Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2020), amended 2021 Neb. Laws LB 83, §§ 11-14, by members of the State Board of Education ("Board"). We followed our normal practice and sent notice of all complaints received on or before June 10, 2021, to the Board through the Commissioner of Education, Matthew L. Blomstedt, Ph.D., and requested a response. We subsequently received a response from Commissioner Blomstedt on July 7, 2021. We have now completed our review of the complaints and the response we received from Commissioner Blomstedt. Our findings and conclusion in this matter are set out below.

FACTS

Our understanding of the facts in this matter is based upon the complaints received, together with Commissioner Blomstedt's response, and the published agendas, minutes, and video recordings of Board meetings.

The Board conducted a business meeting on June 4, 2021, in Kearney. The published agenda for the meeting contained an agenda item labeled "public comment period," with subheadings "2.2 Public Comment (5 minutes)" and "2.2.A. In accordance with Board Policy B9, potential action by the board on public comment time limits." The published agenda for the Board's two business meetings prior to the June 4 meeting (May 7, 2021 in Kearney and April 2, 2021 in Lincoln) show the same notice of potential action in accordance with Board Policy B9. No similar notice appears on any other published agenda for at least the past two years.

At the April 2, May 7, and June 4 business meetings, the Board required completion of a "sign-in" card, made available at the meeting site, as a prerequisite to addressing the Board during the public comment period. At each of these three meetings, the Board determined the total number of persons permitted to speak during the public

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comment period by the number of sign-in cards received at the point in time that agenda item 2.2 was reached. Copies of the sign-in cards received for the June 4 meeting show that the card required only the name of the individual wishing to speak. Other information, i.e., name of organization, topic, contact information, and comments/suggestions, were optional. The sign-in cards contained no requirement that individuals state whether they supported or opposed any agenda item or the subject matter on which they sought to be heard. The sign-in card contained a statement that “[t]he Board may adjust and set the total amount of time for public and individual comment. A timer will be set for each testifier. When signaled, please conclude your remarks immediately.”

According to the draft minutes and video recording of the June 4 meeting, when the Board came to agenda item 2.2.A, it adopted a motion to “limit public comment to two minutes per person to include the six individuals speaking on topics other than the Health Standards and the first 75 individuals speaking on the Health Standards.” According to Commissioner Blomstedt, “one hundred fifty-four (154) persons signed up for public comment.” The net effect of this motion was that seventy-three (73) individuals were prevented from addressing the Board. All of the complaints received by this office pertain to the inability by the respective complainant to participate in the public comment period as a result of the passage of this motion.

According to the approved minutes of the May 7 meeting, when the Board reached agenda item 2.2.A, it adopted a motion to “limit the total amount of time for public comment at this meeting to a maximum of two and a half hours of speaking time (not to include transition time between speakers and breaks), and to reduce the amount of time for each speaker from 5 minutes to 2 minutes. The cut off time will be what has been received at this time.”

According to the approved minutes of the April 2 meeting, upon reaching agenda item 2.2.A, the Board attempted two motions, both of which failed. The first motion limited each speaker to three minutes and the second limited the “Public Comment Period on Health Education Standards to two minutes per individual” Ultimately, the Board unanimously adopted a third iteration of the motion “to approve limiting the Public Comment Period on Health Education Standards to two minutes per individual and close the availability to sign up to speak beyond that has been ended at 10:04 a.m. . . .”

Regarding these prior meetings in which the Board invoked a limitation on public comment based on Bylaw B9, Commissioner Blomstedt stated:

Eighty-one (81) persons signed up for public comment at the April meeting. To allow for these persons to address the Board, a motion was made and passed that limited the speaking time to two minutes per person. Such persons did speak for a total period of approximately three hours and 36 minutes. At the May meeting, seventy-five (75) persons signed up to participate in public comment. Again, a motion was made and passed to

limit individuals' time to two minutes each. Public comment lasted approximately three hours and seven minutes.

State Board Bylaw B9, "*Public Participation at Board Meetings*," provides in relevant part:

The published agenda of the majority of regular meetings of the State Board shall contain an item identified as Public Comment Period. This period may be available to any person who wishes to address the State Board on any subject within its authority including items appearing on the agenda except for contested cases as described below.

Each individual speaking to the Board will be required to complete a "Sign-in" card to identify him or herself. Persons speaking to the Board during Public Comment must identify themselves and may hand out printed materials to the Board but may not use any other form of media. Each person may address the Board for up to five minutes.

* * *

The Board President may also choose to allow public comment at any time during a meeting and, in the case of public comment to be provided using video/audio technologies, may choose to limit the number of persons who can address the Board at a meeting using this method. A majority of members present and voting may also choose to allow, terminate or reduce the time for public comment at any time.

(Emphasis added.)

ANALYSIS

Neb. Rev. Stat. § 84-1408 (2014) states that it is "the policy of this state that the formation of public policy is public business and may not be conducted in secret." The Nebraska open meetings laws are a statutory commitment to openness in government. *Wasikowski v. Nebraska Quality Jobs Board*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Steenblock v. Elkhorn Township Board*, 245 Neb. 722, 515 N.W.2d 128 (1994); *Grein v. Board of Education of the School District of Fremont*, 216 Neb. 158, 343 N.W.2d 718 (1984). "The purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable." *Pokorny v. City of Schuyler*, 202 Neb. 334, 339, 275 N.W.2d 281, 284 (1979). The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public. *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007).

The Act contains several provisions which deal with the public's right to speak at open meetings of public bodies, most of which are set out in the following subparts of § 84-1412:

- (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, [or] speaking at . . . its meetings, including meetings held by virtual conferencing.* 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 shall require any member of the public desiring to address the body to identify himself or herself*

(Emphasis added.)

The Board's requirement that members of the public complete a "sign-in" card as a pre-condition for addressing the Board during public comment falls squarely within its authority under the Act.¹ The Board's Bylaw B9 is comprised of reasonable rules limiting the use of time for public comment. We find, however, that the Board's use of sign-in cards and the limitation imposed by the motion it adopted at its June 4 meeting is inconsistent with the Act and the manner in which sign-in cards were used at the Board's prior meetings.

Commissioner Blomstedt states that the purpose of the Board's motion to limit the number of persons addressing the Board on the draft Health Education Standards and to limit each speaker's time to two minutes was "[t]o be consistent with the two prior meetings and to allow the State Board to take up its rather full business agenda that day" However, the Board's June 4 motion is clearly distinguishable from the earlier motions. According to the video recordings of both the April 2 and May 7 meetings, Board members thoroughly discussed limiting the time from five minutes to two minutes per speaker *in order to accommodate* the number of persons who had submitted sign-in cards at each meeting, not to simply limit the total amount of meeting time for public comment in general or specifically relating to the health standards. The April 2 meeting motion refers to a two-minute time limitation per speaker on public comment specifically with

¹ With the enactment of 2021 Neb. Laws LB 83, members of the public wishing to address the public body are now required to identify themselves.

regard to the health standards, and it does not appear that any person wishing to speak on this topic was denied the ability to do so. Likewise, although the motion adopted on May 7 refers to a two-minute time limitation per speaker and a total time limitation of two and half hours of public comment, there was no express limitation on the subject matter in the text of the motion and, according to Commissioner Blomstedt, the Board allowed public comment to exceed the time limit adopted in its motion.

In the present case, the Board specifically limited the number of persons eligible to speak within the text of the motion. The motion was consistent with the prior meetings only to the extent the Board heard public comment from approximately 75-80 individuals. It was entirely inconsistent with the public comment held at the prior meetings since a significant number of individuals who signed up to address the Board on June 4 were denied the ability to do so.

Commissioner Blomstedt indicates that limiting the number of individuals eligible to speak on the health standards to 75 “provid[ed] more certainty to those 75 individuals so as not to have the time run during any breaks or other time that passed with persons not on [sic] actually speaking to the Board.” He states that “[t]his was also consistent with the public comment at the previous two meetings which had generated unusually high numbers of persons wishing to speak.” In our view, the only “certainty” resulting from the motion was realized by the 73 individuals who were denied the opportunity to address the Board. These individuals had no reason to believe, upon arriving at the Board meeting, that they would be denied the ability to be heard, particularly since they were instructed to fill out sign-up cards for this very purpose. Moreover, Commissioner Blomstedt’s statement that “[t]he topic of draft health education standards at no time has been on the agenda for proposed adoption by the Board,” is irrelevant to the Board’s action to limit the number of persons permitted to speak during public comment, as Bylaw B9 expressly states that the public comment period “may be available to any person who wishes to address the State Board *on any subject within its authority* including items appearing on the agenda.” (Emphasis added.)

As noted above, § 84-1412 allows a public body to make and enforce reasonable rules regarding the public’s right to attend and speak at open meetings. The provision of Bylaw B9 that allows the Board by a majority vote of present members to “allow, terminate or reduce the time for public comment” is a reasonable rule and provides a sufficient basis for the motions adopted at the April, May, and June meetings with regard to the limitation of time for public comment, either in the aggregate or per speaker. Arguably, the ability of the Board under Bylaw B9 to “terminate” public comment entirely by a majority vote of present members also allows the Board to limit the total number of persons eligible to speak as it did on June 4. It is for these reasons that we find no clear violation of the Act by the Board.

However, the way the Board handled public comment at its June 4 meeting is not beyond reproach. We fully acknowledge the Board’s purported rationale that since 81 individuals signed up to speak at the April meeting, and 75 signed up in May, it would be

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acceptable to have 75 speak (on the health standards) in June. We believe the Board should have recognized the efforts made by some of these individuals to attend the Board's meeting, e.g., the miles driven to get to the meeting site, the vacation time taken, the babysitter expense, etc. Frankly, we find the Board's treatment of these excluded individuals, who filled out the sign-up cards in anticipation of addressing the Board only to be denied the opportunity, was inconsiderate and disrespectful. We also find problematic the fact that the Board required 73 individuals to provide their names for no valid reason. Because those individuals attended the meeting but were not allowed to address the Board, the Board's action was inconsistent with Neb. Rev. Stat. § 84-1412(3) ("No public body shall require members of the public to identify themselves as a condition for admission to the meeting . . ."). Consequently, while we contemplate no further action regarding the complaints, we will admonish the Board through a copy of this letter to Commissioner Blomstedt that, in the future, the Board should be fully cognizant of the public's right to attend and participate in open, public meetings of the Board, and should seek to avoid arbitrary actions affecting those rights. The Board would be well served to remember the stated intent of the Act when it considers limiting public comment when public comment is otherwise noticed on the Board's meeting agendas.

CONCLUSION

For the reasons discussed above, we plan no further action with respect to these complaints, and we are closing this file. Any complainant who disagrees with our analysis may wish to discuss this matter with a private attorney to determine what additional remedies, if any, are available under the Open Meetings Act.

Sincerely,

DOUGLAS J. PETERSON
Attorney General



Joshua R. Shasserre
Assistant Attorney General

cc: Matthew L. Blomstedt, Ph.D.
Commissioner of Education

28-008-29