



OFFICE OF THE ARIZONA ATTORNEY GENERAL

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SOLICITOR GENERAL'S OFFICE
GOVERNMENT ACCOUNTABILITY UNIT

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August 13, 2021

By Email and Certified Mail, Return Receipt Requested

Jennifer MacLennan, Esq.
Gust Rosenfeld
One East Washington, Suite 1600
Phoenix, AZ 85004-2553

Re: Open Meeting Law and the Litchfield Elementary School District Governing Board

Ms. MacLennan:

As you know, the Office of the Arizona Attorney General (the "Office") received complaints alleging that the Litchfield Elementary School District (the "District") and its Governing Board (the "Board") violated the Arizona Open Meeting Law (A.R.S. § 38-431 *et. seq.*) in connection with: a member of the Board allegedly discussing a non-agendized topic and the formation and meeting of an advisory or subcommittee that has not abided by the Open Meeting Law. The Office received additional complaints about a member of the Board holding up a sign saying "not true" during a public comment period. The Office has concluded its review of the aforementioned complaints and the Office's determinations are detailed below.

Violations

1. The Diversity Empowerment Team.

A complaint in this matter alleged that the District violated the Open Meeting Law through the formation and meeting of the Diversity Empowerment Team. The question is whether the Diversity Empowerment Team qualifies as a "public body" under the Open Meeting Law. Under the circumstances here, the Office finds that it does.

A.R.S. § 38-431(7) provides that "[p]ublic body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body." The Arizona Agency Handbook further provides that "[a] special or standing committee may consist of members of the public body who have been appointed by or authorized to act for the

public body.” *Ariz. Agency Handbook* § 7.3.6. “The fact that a committee consists, in whole or in part, of persons who are not members of the public body does not affect its status as a public body subject to the Open Meeting Law.” *Id.* “Any question whether the Open Meeting Law applies to a certain public body likewise should be resolved in favor of applying the law.” *Id.* § 7.2.2.

Here, the Board authorized the District’s superintendent to establish a Diversity Empowerment Team. The Diversity Empowerment Team was a committee comprised of at least eleven District employees and one member of the Board. It appears that the primary purpose of the Diversity Empowerment Team was to advise the Board on curriculum policy and to prepare an equity statement for Board adoption. The work of the Diversity Empowerment Team in creating an equity statement was not conducted through meetings open to the public. The District and Board cannot avoid the requirements of Arizona’s Open Meeting Law by authorizing its superintendent to form a committee to create district-wide policy that is later presented to the Board in final form for adoption. This is particularly true where the committee is comprised of at least one member of the Board. Allowing the Board to do so would be inconsistent with the broad scope and purpose of Arizona’s Open Meeting Law.

At minimum, the Diversity Empowerment Team is an instrumentality of the District and the Board, and is thus a public body subject to the Open Meeting Law. *See Ariz. Agency Handbook* § 7.3.3 (listing factors that indicate an entity is an instrumentality of a public body). Here, the Diversity Empowerment Team was created by the superintendent, was comprised almost entirely of District employees (and one Board member), and its purpose was to provide a specific, district-wide recommendation that the Board would later take legal action on. Due to the District’s level of control over the Diversity Empowerment Team (i.e. by both employing and appointing its members and defining the scope of the Team’s authority), its ultimate purpose of creating District policy recommendations, and that the nature of developing district policy is a power typically reserved to the Board, the Diversity Empowerment Team is an instrumentality of the District. The Diversity Empowerment Team is thus a public body subject to the OML. By failing to hold the Diversity Empowerment Team’s meetings in public, the Board violated the Open Meeting Law.

On April 23, 2021, after significant community criticism, Superintendent Gunning wrote to District families to update them on the District’s “diversity, equity, and inclusion (DEI) work.” Superintendent Gunning explained that “[t]hanks to feedback from our community, it is clear that the goals that were presented at the March 2021 Governing Board meeting need revision.” Finally, Superintendent Gunning assured District families that the District would not be adopting critical race theory or the 1619 Project: “I must continue to stress unequivocally that we are not adopting Critical Race Theory or the 1619 Project. That has never been nor will it be part of this conversation.”

Similarly, despite prior adoption of the equity statement in December 2020, the Board held a public “study session” about the equity statement on April 27, 2021. The minutes for that meeting reflect that “all five Board members feel we need more community involvement with the equity work and how do we hear from our entire community.” One method the Board should

have used to hear from its community on such an important policy matter prior to its adoption is strict adherence to the Open Meeting Law, which is primarily intended to allow constituents to monitor and have input on important government decisions. Few government responsibilities are more important than the education of children and the issue of how to educate children about discrimination and race is important and complex. Parents and other community members should be given significant opportunity for input on school curriculum or policies that have any possibility of being viewed as “characteriz[ing] the United States as irredeemably racist or founded on principles of racism (as opposed to principles of equality) or that purport to ascribe character traits, values, privileges, status, or beliefs, or that assign fault, blame, or bias, to a particular race or to an individual because of his or her race.”¹

In fact, the Arizona Legislature this session passed legislation forbidding schools from using public monies “for instruction that presents any form of blame or judgment on the basis of race, ethnicity, or sex” or which teaches that “an individual, by virtue of the individual’s race, ethnicity or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously.” See A.R.S. § 15-717.02 (effective September 29, 2021). And the Attorney General has statutory authority to enforce the statutory restrictions on such instruction. *Id.* § 15-717.02(E). Similarly, the U.S. Department of Education recently released new information replacing previous language that had encouraged schools to teach critical race theory and would have given preferential treatment when awarding grants if they did so.

The process of creating and adopting the policies reflected in the District’s equity statement should have been conducted in the open and consistent with the procedures outlined in the Open Meeting Law, not conducted behind closed doors and presented in final form for approval or rejection by the Board. The Board violated the Open Meeting Law by taking a closed-door approach.

2. The “Not True” Sign.

The Office received other complaints relating to the conduct of Board Member Kimberly Moran during the Board’s April 13, 2021 meeting. Specifically, the complaint alleges that Ms. Moran violated the Open Meeting Law by holding up a sign saying “not true” during public comments critical of the Board’s equity statement. The District, citing A.R.S. § 38-431.01(H), responds that “[t]he Open Meeting Law permits governing board members to respond to direct criticism.”

The District does not dispute that Ms. Moran, on multiple occasions, held up a sign saying “not true” during public comments. The agenda for the Board’s April 13 meeting indicates that “Mrs. Moran interrupted two speakers (Mrs. Schwartz and Mrs. Lott) by holding up a sign while they spoke this evening.” The Board’s only response is that the Open Meeting

¹ See 5/19/2021 Letter from Attorney General Todd Rokita to Secretary Cardona, United States Department of Education, *Re: Comments on Proposed Priorities – American History and Civics Education Docket ID ED-2021OESE-0033* (joined by Attorney General Brnovich and nineteen other attorneys general).

Law permits board members to respond. But that omits an important part of the statute, which actually provides that “[a]t the conclusion of an open call to the public, individual members of the public body may respond to criticism made by those who have addressed the public body.” A.R.S. § 38-431.01(H) (emphasis added). Ms. Moran clearly did not wait until the conclusion of the open call to the public to respond to criticism. Not only were Ms. Moran’s actions inappropriate, they were in violation of the Open Meeting Law.

Non-Violation

A complaint in this matter also alleged that, at a March 3, 2021 public meeting, a member of the Board began to discuss matters that were not on the agenda for that day.

The Open Meeting Law requires that public meeting agendas “shall list the specific matters to be discussed, considered or decided at the meeting.” A.R.S. § 38-431.02(H). Furthermore, a public body “may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.” *Id.* The Arizona Agency Handbook states that the “other matters’ clause of A.R.S. § 38-431.02(H) “provides some flexibility to a public body but should be construed narrowly.” *Ariz. Agency Handbook* 7.7.6. Any “other matters” must be reasonably “related” to the agendized topics. *Thurston v. City of Phoenix*, 157 Ariz. 343, 344, 757 P.2d 619, 620 (App. 1988).

The agenda for the March 3, 2021 public meeting lists item 3B – Discussion and Possible Approval of 2021-2022 Contract Language for Employment Contracts and Work Agreements. Prior to, and during, the meeting, Mr. Hoenack presented his own contract language proposals to address issues he perceived with student performance and an equity statement that the Board had previously adopted. Upon exiting executive session, Mr. Hoenack was given the floor to speak. Mr. Hoenack attempted to explain the reasons why he believed his proposed revisions to the contractual language should be adopted, but was interrupted (including by counsel) while doing so. After reviewing the minutes and video from this meeting, the Office finds that Mr. Hoenack’s statements were sufficiently related to his proposed contract language and the listed agenda item. No violation of the Open Meeting Law occurred.

Remedy

In determining the remedy for the above violations, we considered the complaints, additional submitted supplements, your response, and all documents attached thereto. The Office understands that the Board underwent voluntary training about the Open Meeting Law during the April 13 meeting. The Office trusts that moving forward the Board will heed that training and strictly comply with the Open Meeting Law. The Office requires no further action from the Board at this time, but has noted these occurrences as violations, which will be considered in determining the response to any further Open Meeting Law violations by the Board. *See* A.R.S. § 38-431.07(A). However, Ms. Moran’s actions violating the Open Meeting Law immediately following Open Meeting Law training are extremely concerning. Thus, the Office will require that Ms. Moran re-take the training received by the Board during the April 13 meeting. Please send confirmation of Ms. Moran’s additional training to the Office, through me,

within sixty days of receiving this letter.

This letter relates solely to the disposition of the aforementioned Open Meeting Law complaint; it is not a formal opinion of the Attorney General's Office and should not be cited as authority in other matters.



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Open Meeting Law Enforcement Team