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October 28, 2021

RE: *File No. 21-M-129; Lincoln Public Schools Board of Education; Multiple Complainants*

Following the August 10, 2021, meeting of the Lincoln Public Schools Board of Education ("Board"), 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, 2021 Neb. Laws LB 83, §§ 11-14), by members of the Lincoln Public Schools ("LPS") Board. We followed our normal practice and sent notice of all complaints received to the Board through the Board President, Connie Duncan, and requested a response. We subsequently received a response on September 8, 2021 from the Board's attorney, James Gessford. We have now completed our review of the complaints and the response we received from Mr. Gessford. Our findings and conclusion in this matter are set out below.

ALLEGED VIOLATIONS

Upon review of the complaints, we have identified two alleged violations of the Open Meetings Act, as follows:

1. The Board denied members of the public access to its meeting on August 10, 2021; and
2. The Board did not allow all members of the public wishing to speak at the August 10, 2021 meeting the opportunity to do so.

FACTS

Our understanding of the facts in this matter is based upon the complaints received and the Board's response, which included several attachments. Five individuals filed complaints with our office regarding the Board's August 10, 2021 meeting. Complainants alleged they were not allowed seating at the meeting and were forced to stand outside with their children in one-hundred-degree heat while waiting to speak. One complainant alleged he was not allowed the opportunity to speak at the meeting.

In its response, the Board states the August 10, 2021 meeting was held at the LPS District Offices (“LPSDO”) located at 5905 O Street, Lincoln, NE, which is its traditional meeting place. Prior to COVID-19, the meeting room (“board room”) was configured to allow approximately seventy (70) persons to attend. While directed health measures (DHM) were in place, the board room was configured to meet the six (6) foot social distancing requirements. It allowed for forty (40) seats in the viewing area—eighteen (18) reserved for senior LPS staff and twenty-two (22) for members of the public. Although no DHMs were in place on August 10, 2021, LPS continued to follow social distancing guidelines as recommended by public health organizations at the time. Because more than twenty-two members of the public had attended meetings in the months preceding August, the Board developed a plan to accommodate a larger than usual number of attendees and speakers. LPS designated two overflow rooms in the basement of the LPSDO—Rooms B and C. Room B had a seating capacity of twenty-four (24) persons and Room C had a seating capacity of forty-two (42) persons. Both overflow rooms had video and audio feeds to allow persons to see and hear the Board meeting. Room B was used for members of the public who were willing to wear masks and Room C was for maskless individuals. The overflow rooms were segregated due to several health and intimidation concerns expressed by members of the public. Prior to these complaints, LPS did not separate the overflow rooms between the masked and maskless. Room C was filled to capacity; however Room B was not filled to capacity. In addition to the overflow rooms, LPS broadcasts Board meetings on LNKTv public access television, the LPS website, YouTube, and Vimeo. Broadcasting information is available on LPS’ website.

Regarding public comment, the Board states it had two public comment periods at the August 10, 2021 meeting. The August 10, 2021 meeting agenda confirms this. The first public comment period was early in the meeting, before any business agenda items were discussed by the Board. The second was later in the meeting, after all business agenda items had been discussed. Upon entering the LPSDO, an LPS staff member greeted all visitors and asked if the person wished to speak at the meeting. If the person wished to speak, they were directed to fill out a “blue card” and check in with a staff member at a nearby desk. The blue card included an option for the person to provide an email address and phone number so that LPS officials could contact the person when it was his or her turn to speak. Persons wishing to speak were also given information on how to stream the meeting from their mobile device as well as how the public comment period was conducted. LPS staff entered the contact information of all individuals wishing to speak into a computer database. LPS staff notified speakers it was their turn by announcing their names aloud in the overflow rooms or outside overflow space. If LPS staff was provided a telephone number or email address, persons were also notified that way. The first public comment period was held for just over one (1) hour. No time limit was placed on the second public comment period. All persons wishing to speak were allowed to do so. However, some individuals who had initially indicated they wished to speak chose not to do so.

ANALYSIS

Meeting Access

Complainants allege they were not allowed inside access to the Board meeting and were forced to stand outside. In its response, the Board states that it took reasonable health measures at the August 10, 2021 meeting due to the COVID pandemic. Specifically, the Board states it was following public health guidelines which recommended physical distancing of at least six feet of separation between individuals. Accordingly, the Board reduced the occupancy in the board room to ensure six feet of distance was maintained between individuals. The Board continued to meet in its normal meeting place known as the board room. The Board created two overflow rooms which broadcast the meeting live and livestreamed the meeting in several locations. All individuals wishing to speak were given the opportunity to do so.

First, based on the Board's response, it does not appear true that complainants were denied inside access to the meeting. The Board, as well as several complainants, confirmed that overflow Room B was not at capacity. Therefore, meeting attendees could have been seated inside if they wished. However, the complainants chose to stand outside versus sit in Room B because they did not wish to wear a mask. Even assuming complainants were denied inside access, it still would not be a violation of the Act. Neb. Rev. Stat. § 84-1412(2) allows public bodies to "make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings" We recently addressed the use of overflow rooms in File No. 20-M-138.¹ In that matter, the Columbus City Council ("Council") utilized overflow rooms at a board meeting to ensure social distancing was maintained. A DHM was in effect for the County at the time, however, it did not apply to "city operations" and thus it did not apply at the Council meeting. Although a DHM was not in effect at the Council meeting, we noted that "given the threat to public health recognized in the DHM, as well as other widely recognized sources of information on the risk of transmission to COVID-19 at that time, it was not unreasonable for the Council to request the public to maintain social distancing and accommodate some attendees by use of an adjacent room." Similarly, the measures taken by the Board at the August 10, 2021 meeting were done to comply with recommended health measures and were not unreasonable considering the circumstances. The Board's measures ensured all individuals attending were able to view the meeting live and were able to speak if they wished. Further, Neb. Rev. Stat. § 84-1412(4) provides that "[n]o 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." Neb. Rev. Stat. § 84-1412(5) further provides "[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

¹ See File No. 20-M-138; Columbus City Council; John Harms, *Petitioner* (June 11, 2021), accessible at <https://ago.nebraska.gov/disposition-letters>.

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state.” Since the Board held its August 10, 2021 meeting in its regular meeting location, i.e., board room, it did not violate this portion of the Act.

Public Comment

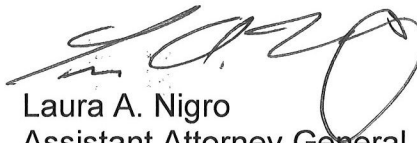
Neb. Rev. Stat. § 84-1412(1) states that “the public has the right to attend and the right to speak at meetings of public bodies” One complainant, Charles Altman, alleged he was denied the opportunity to address the Board at the August 10, 2021 meeting. However, the evidence shows that all members of the public wishing to speak could do so. The Board offered two public comment periods, and the second period did not have a time limit. Members of the public wishing to speak were identified and filled out a blue card. They were then notified by LPS staff when it was their turn to speak. The Board denies that complainant Mr. Altman was denied the opportunity to speak. The Board states that Mr. Altman filled out a blue card and was entered into the speaker database. However, LPS staff members recall Mr. Altman demanding to be let out of the building prior to speaking. Accordingly, Mr. Altman chose not to speak and was not prevented from speaking by the Board. The Board did not violate this portion of the Act.

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



Laura A. Nigro
Assistant Attorney General

cc: James Gessford

35-262-29