IN THE STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:

WASHOE COUNTY SCHOOL DISTRICT
BOARD OF TRUSTEES.

OPEN MEETING LAW OPINION
FILE No. 14-031

BACKGROUND

In her complaint Karen Dunaway (Ms. Dunaway) alleged that on October 28, 2014, she was prevented from completing her public comment to the Washoe County School District Board of Trustees (Trustees) in violation of the Open Meeting Law (OML), Nevada Revised Statute (NRS) Chapter 241.010 and Trustee Public Comment Rules set out at Item 1.05 on the Trustees' agenda. The Trustees' meeting agenda Item 1.05 cited Board Policy 9034, that restricts all persons to three minutes of public comment per item, but it allows the public to speak on topics not specifically addressed elsewhere on the agenda.

Ms. Dunaway filed her complaint alleging that both Trustees' Vice President Barbara McLaury (Ms. McLaury), who was acting as President of the Board, and Board Counsel, Randy Drake (Mr. Drake), prevented her from making comments about the termination of former School Police Chief Mike Mieras, because her comments were deemed inappropriate, and because Superintendent Pedro Martinez¹ (Mr. Martinez) had not received required notice that his character and/or professional competence would be discussed. Ms. Dunaway also alleges that the reason for stopping her comment was legally insufficient and was wrongly applied to her as a member of the public. We agree with her.

Representatives from the Office of the Attorney General have reviewed the audio/video recording, agenda, and minutes of the Board's public meeting held on October 28. The Office

¹ Pedro Martinez was present during the meeting sitting next to Barbara McLaury who chaired the meeting.
of the Attorney General also interviewed Ms. Dunaway and reviewed the Board of Trustees’ response prepared by its counsel Mr. Drake.

FACTS

Ms. Karen Dunaway attended a meeting of the Washoe County Board of School Trustees on October 28, 2014. She rose to offer public comment at the beginning of the meeting. After speaking for a couple of minutes to the Board, Ms. Dunaway addressed Superintendent Martinez directly and said she wanted to comment on her experience with him at a meeting he called with school police employees following his firing of School Police Chief Mike Mieras. She accused Superintendent Martinez of giving inaccurate and misleading information during that meeting also attended by other district employees. She added that the statistics he used to bolster his reasons for the firing were skewed based on “accusing innuendo.” She was unable to finish this sentence because Mr. Drake and Vice President McLaury stopped her from making any further comment about superintendent Martinez.

Mr. Drake interrupted her comment, and at the same time Vice President McLaury called for a “point of order,” saying her remarks were inappropriate. Mr. Drake told Ms. Dunaway she was alleging things that required notice to Superintendent Martinez under the Open Meeting Law before she could make those remarks.²

Trustee Dave Aiazzi quickly and vehemently pointed out that the statutory requirement to provide notice to a person before discussing the person’s character, alleged misconduct, or professional competence applied only to members of a public body when discussing a person during a public meeting. NRS 241.033. He informed the rest of the Trustees and counsel that in this situation where Ms. Dunaway, who is not a member of a public body, was speaking during public comment, notice was not required and she should be allowed to finish.

Vice President McLaury, who was presiding over the meeting, had turned twice in her chair to face Mr. Drake, who was sitting only a few feet from her and slightly behind her and silently mouthed some words which appeared to have been a signal to Mr. Drake to stop

² NRS 241.033 requires that a public body provide written notice to the person whose character, professional competence, alleged misconduct, or health is discussed, if the public body intends to consider any of these matters.
Ms. Dunaway’s comment. Within a few seconds Mr. Drake stopped Ms. Dunaway’s comment, apparently at the direction of the Chair.

Even after Trustee Aiazzi’s comments, Vice President McLaury said only that she was uncomfortable. She did not respond to Trustee Aiazzi’s explanation nor did she seek further counsel from Mr. Drake about Trustee Aiazzi’s view that notice was not needed. She said simply that she was uncomfortable and asked Ms. Dunaway to put her comments in writing. She nodded in agreement when Ms. Dunaway asked if her comment was being cut off. No other Trustee, besides Mr. Aiazzi, spoke whether in agreement with or to disagree with Vice President McLaury and Mr. Drake.

By the time Ms. Dunaway stopped her comment, she had been speaking for several minutes. The remainder of the meeting continued without incident.

CONCLUSIONS OF LAW

Nevada’s Open Meeting Law provides the rule of law that resolves the issue in this complaint. NRS 241.033 clearly requires notice to a person only when a public body will hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person. At least one period of public comments made to a public body must allow the public to comment on any topic that is within the public body’s control or jurisdiction, if the topic has not been included elsewhere on the meeting agenda. NRS 241.020(2)(d).

Ms. Dunaway was not a member of a public body; therefore, the notice provisions of NRS 241.033 did not apply to her. Furthermore, her comment concerned action taken by Superintendent Martinez when he fired a district employee. His action was not on the agenda for that meeting, but it was within the scope of a “topic not specifically addressed elsewhere on the agenda.” This requirement is part of the Trustees own public comment agenda rule.

3 NRS 241.033(1) Except as otherwise provided in subsection 7, a public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person or to consider an appeal by a person of the results of an examination conducted by or on behalf of the public body unless it has:
(a) Given written notice to that person of the time and place of the meeting; and
(b) Received proof of service of the notice.
Although the audio/video recording of express statements made at the meeting showed that the reason given by the District counsel for stopping Ms. Dunaway’s comment rested solely on notice provisions of NRS 241.033, Vice President McLaury’s statement that Ms. Dunaway’s comment was “inappropriate” suggests that her view transcended mere failure to provide notice to Superintendent Martinez. Because of her remark and its implication, it is important to cite to the current case law in the Ninth Circuit Court of Appeals that explains the Constitutional parameters of public comment to public bodies like the Board of Trustees.

Courts agree that, when speakers during public comment were permitted to praise the actions of school employees, but were prohibited from making any critical or accusatory comments about the same or other employees, the result is a content-based restriction that violates the First Amendment. Baca v. Moreno Valley Unified Sch. Dist., 936 F. Supp. 719, 725 (C.D. Cal.1996); Leventhal v. Vista Unified School District, 973 F. Supp. 951,958 (S.D. Cal. 1997). The Baca Court, following the decision of the Leventhal Court, held that it is “difficult to imagine a more content-based prohibition on speech than [a] policy, which allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negative[ly] critical) on a particular subject matter . . . . " 936 F. Supp.at 730.

Ms. Dunaway’s comment was laudatory until she said Superintendent Martinez' comments at a meeting with district employees, following the firing of School Police Chief Mike Mieras, were based on inaccurate and misleading information and accusatory innuendo. She added that the statistics he used to bolster his reasons for the firing were skewed based on “accusing innuendo.” After she had made these remarks, her comment was stopped.

“[T]he ability to question the fitness of the community leaders, including the administrative leaders in a school system, especially in a forum created specifically to foster discussion about a community’s school system,” is an important public interest. Bach v. School Board of the City of Virginia Beach, 139 F. Supp.2d 738, 743 (E.D. Va. 2001), citing Leventhal 973 F. Supp. at 958. A policy that “deters individuals from speaking out on an issue
of public importance violates the First Amendment." *Bach,* 139 F. Supp.2d at 743. In this
case, Ms. Dunaway was prevented from speaking out on a matter of public interest directly
related to Superintendent Martinez' fitness.

Chairperson McLaury’s decision to stop Ms. Dunaway’s comment was an
unreasonable restriction on public comment and a violation of Ms. Dunaway’s right to speak
on a matter of public concern. Therefore, this opinion must be placed on the next agenda of
the Washoe County Board of School Trustees as required by NRS 241.0395.⁴

DATED this 26th, day of February 2015.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: 

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⁴ NRS 241.0395 Inclusion of item acknowledging finding by Attorney General of violation by
public body on next agenda of meeting of public body; effect of inclusion.

1. If the Attorney General makes findings of fact and conclusions of law that a public body has taken
action in violation of any provision of this chapter, the public body must include an item on the next agenda
posted for a meeting of the public body which acknowledges the findings of fact and conclusions of law. The
opinion of the Attorney General must be treated as supporting material for the item on the agenda for the
purposes of NRS 241.020.

2. The inclusion of an item on the agenda for a meeting of a public body pursuant to subsection 1 is not
an admission of wrongdoing for the purposes of a civil action, criminal prosecution or injunctive relief.
(Added to NRS by 2011, 2384.)
CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 26th day of February 2015, I deposited for mailing at Carson City, Nevada, a true and correct copy of the foregoing OPEN MEETING LAW OPINION, via U.S. Mail Postal Service addressed as follows:

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