

1 of the Attorney General also interviewed Ms. Dunaway and reviewed the Board of Trustees'
2 response prepared by its counsel Mr. Drake.

3 **FACTS**

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

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

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

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

27 _____
28 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.

1 Ms. Dunaway's comment. Within a few seconds Mr. Drake stopped Ms. Dunaway's comment,
2 apparently at the direction of the Chair.

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

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

12 CONCLUSIONS OF LAW

13 Nevada's Open Meeting Law provides the rule of law that resolves the issue in this
14 complaint. NRS 241.033 clearly requires notice to a person only when a public body will hold
15 a meeting to consider the character, alleged misconduct, professional competence, or
16 physical or mental health of any person.³ At least one period of public comments made to a
17 public body must allow the public to comment on any topic that is within the public body's
18 control or jurisdiction, if the topic has not been included elsewhere on the meeting agenda.
19 NRS 241.020(2)(d).

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

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26 ³ NRS 241.033(1) Except as otherwise provided in subsection 7, a public body shall not hold a meeting
27 to consider the character, alleged misconduct, professional competence, or physical or mental health of any
28 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.

1 (1.05; October 28, 2014.)

2 Although the audio/video recording of express statements made at the meeting showed
3 that the reason given by the District counsel for stopping Ms. Dunaway's comment rested
4 solely on notice provisions of NRS 241.033, Vice President McLaury's statement that Ms.
5 Dunaway's comment was "inappropriate" suggests that her view transcended mere failure to
6 provide notice to Superintendent Martinez. Because of her remark and its implication, it is
7 important to cite to the current case law in the Ninth Circuit Court of Appeals that explains the
8 Constitutional parameters of public comment to public bodies like the Board of Trustees.

9 Courts agree that, when speakers during public comment were permitted to praise the
10 actions of school employees, but were prohibited from making any critical or accusatory
11 comments about the same or other employees, the result is a content-based restriction that
12 violates the First Amendment. *Baca v. Moreno Valley Unified Sch. Dist.*,
13 936 F. Supp. 719, 725 (C.D. Cal.1996); *Leventhal v. Vista Unified School District*, 973 F.
14 Supp. 951,958 (S.D. Cal. 1997). The *Baca* Court, following the decision of the *Leventhal*
15 Court, held that it is "difficult to imagine a more content-based prohibition on speech than [a]
16 policy, which allows expression of two points of view (laudatory and neutral) while prohibiting
17 a different point of view (negative[ly] critical) on a particular subject matter"
18 936 F. Supp.at 730.

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

24 "[T]he ability to question the fitness of the community leaders, including the
25 administrative leaders in a school system, especially in a forum created specifically to foster
26 discussion about a community's school system," is an important public interest. *Bach v.*
27 *School Board of the City of Virginia Beach*, 139 F. Supp.2d 738, 743 (E.D. Va. 2001), citing
28 *Leventhal* 973 F. Supp. at 958. A policy that "deters individuals from speaking out on an issue

1 of public importance violates the First Amendment." *Bach*, 139 F. Supp.2d at 743. In this
2 case, Ms. Dunaway was prevented from speaking out on a matter of public interest directly
3 related to Superintendent Martinez' fitness.

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

8 DATED this 26th, day of February 2015.

9 Sincerely,

10 ADAM PAUL LAXALT
11 Attorney General

12 By:


13 GEORGE H. TAYLOR
14 Senior Deputy Attorney General
15 Open Meeting Law
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23 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.**

24 1. If the Attorney General makes findings of fact and conclusions of law that a public body has taken
25 action in violation of any provision of this chapter, the public body must include an item on the next agenda
26 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.

27 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

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

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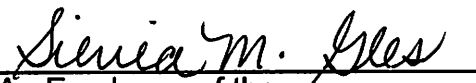
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