

# **INVESTIGATION REGARDING IDAHO STATE BOARD OF EDUCATION**

February 7, 2008

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## **A. Introduction**

On December 12, 2007, Betsy Russell, a reporter with The Spokesman-Review, filed a complaint with our office, seeking an investigation into the Idaho State Board of Education's ("the Board's") potential violation of the Open Meetings Act ("the OMA" or "the Act.") (Appendix A (12/12/07 Complaint).) Specifically, the complaint asserted that the Board may have violated the OMA by taking the following actions:

- discussing, during an executive session on December 6, 2007, budgetary issues and the elimination of Idaho Standards Achievement Test ("ISAT") testing for the 9<sup>th</sup> grade;
- reaching a decision regarding the elimination of 9<sup>th</sup> grade ISAT testing either in the December 6 executive session or in a non-public "serial meeting" following the December 6 executive session;
- failing to specifically delineate in its agenda for the December 6 meeting the reasons it planned to go into executive session; and
- failing to specifically delineate in the minutes of its October 11, 2007 meeting the reasons for going into executive session.

(Id.) Idaho Allied Dailies, an alliance of 16 daily newspapers based in Idaho, submitted a companion complaint on December 19, 2007, incorporating Ms. Russell's complaint by reference. (Appendix B (12/19/07 Complaint).)

## **B. The Open Meetings Act**

The OMA provides that "all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act." I.C. § 67-2342(1). The Board is a "governing body of a public agency" subject to the provisions of the OMA.

Pursuant to the OMA, the Board is permitted to hold an executive session under certain, limited circumstances. An executive session is defined by the Act as "any meeting or part of a meeting of a governing body which is closed to any persons for deliberation on certain matters." I.C. § 67-2341(3). Specifically, the OMA provides:

Nothing contained in this act shall be construed to prevent, upon a two-thirds (2/3) vote recorded in the minutes of the meeting by individual vote, a governing body of a public

agency from holding an executive session during any meeting, after the presiding officer has identified the authorization by specific reference to one (1) or more of paragraphs (a) through (j) of this subsection for the holding of such executive session. An executive session may be held:

(a) To consider hiring a public officer, employee, staff member or individual agent. This paragraph does not apply to filling a vacancy in an elective office;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

(c) To conduct deliberations concerning labor negotiations or to acquire an interest in real property which is not owned by a public agency;

(d) To consider records that are exempt from disclosure as provided in chapter 3, title 9, Idaho Code;

(e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;

(f) To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement;

... or<sup>1</sup>

(j) To engage in communications with a representative of the public agency's risk manager or insurance provider to discuss the adjustment of a pending claim or prevention of a claim imminently likely to be filed. The mere presence of a representative of the public agency's risk manager or insurance provider at an executive session does not satisfy this requirement.

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<sup>1</sup> Subsections (g) through (i) are applicable only to specifically named agencies, none of which include the Board of Education. I.C. § 67-2345(1)(g)-(i).

I.C. § 67-2345(1). The Act specifically prohibits the governing body of an agency from holding an executive session “for the purpose of taking any final action or making any final decision.” I.C. § 67-2345(3).

With respect to minutes pertaining to an executive session, the OMA requires that “[m]inutes of executive sessions shall be limited to a specific reference to the statutory subsection authorizing the executive session and sufficient detail to convey the general subject matter but shall not contain information sufficient to compromise the purpose of going into executive session.” I.C. § 67-2344(2).

Prior to holding a meeting, the Board is obligated by the OMA to post an “agenda notice” of the meeting, “includ[ing] in the notice all agenda items known at the time to be probable items of discussion.” I.C. § 67-2343(1). The Act provides: “If an executive session only will be held, a twenty-four (24) hour meeting and agenda notice shall be given . . . and shall state the reason and the specific provision of law authorizing the executive session.” I.C. § 67-2343(3) (emphasis added)

### C. Factual Background<sup>2</sup>

On December 6, 2007, the Board held a regular meeting at Idaho State University in Pocatello, commencing at 9:00 AM. Board member Blake Hall immediately moved to go into executive session, and the Board voted to do so. (Appendix C (Interview Notes), pp. 8, 10.) Present at the beginning of the executive session were Board members Mr. Hall, Paul Agidius, Sue Thilo, Laird Stone, Richard Westerberg, and Milford Terrell (President of the Board), as well as the Interim Executive Director of the Board of Education, Mike Rush, and the Board’s attorney, Jeff Schrader. Board member Rod Lewis and Superintendent Tom Luna arrived approximately 15-30 minutes into the executive session, and neither was present during the discussion set forth below. (*Id.* at 8, 10-12.)

#### 1. *The Executive Session*

One of the first topics raised at the executive session was the issue of the need to fill several key staff vacancies at the Board, including the positions of Chief Fiscal Officer, Academic Officer, and Executive Director (Mr. Rush is temporarily filling the position while simultaneously holding the position of Director of the Office of Professional Technical Education.) (*Id.* at 1, 4, 7-10.) These staff vacancies have not been filled due to budget constraints dating back to the 2006 budget cycle. (*Id.* at 1, 4, 6-10.) At the December 6 executive session, Board President Milford Terrell noted that the Board was prevented from filling those vacancies due to a financial shortfall of approximately \$800,000. (*Id.*)

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<sup>2</sup> Our office interviewed Board President Milford Terrell, Board members Paul Agidius, Sue Thilo, Blake Hall, Rod Lewis, Laird Stone, and Richard Westerberg, Superintendent Tom Luna, and Interim Executive Director Mike Rush.

There has been no Chief Fiscal Officer at OSBE since Jeff Shinn departed in the spring of 2007, which, according to Board members, has resulted in untimely and inaccurate financial and budgetary information. (See id. at 3-7.) Furthermore, OSBE has had significant turnover in its upper management, including two Executive Directors preceding Mr. Rush in 2006 and 2007, which has hindered the ability of the Board to obtain reliable information. (See id.)

## 2. *Factual Background Regarding ISAT Testing*

As contextual background to the December 6 meeting, it is helpful to understand some of the history of the Board's contract with Data Recognition Corporation ("DRC") regarding ISAT testing. DRC was retained by the Board to develop ISAT testing for grades 2 through 10. The No Child Left Behind Act of 2001 requires testing for grades 3 through 8 and grade 10. However, the Board originally desired to require ISAT testing for grades 2 and 9, as well. The contract price in the DRC contract did not include testing for grades 2 and 9; instead, testing for grades 2 and 9 involved an additional cost above the contract price that the Board ultimately was unable to meet. (Id. at 2, 4-8, 12.) At a special meeting on September 12, 2007, the Board voted, in a public session, to authorize Mr. Rush to renegotiate the contract with DRC to eliminate ISAT testing for the 2<sup>nd</sup> grade. The Board motion in the September 12 meeting authorized Mr. Rush to eliminate 2<sup>nd</sup> grade testing from the contract and to defer expenses associated with 9<sup>th</sup> grade testing into future years. (Id. at 1-2, 4, 6, 8, 11-12.) The Board felt at that time that the anticipated cost savings in renegotiating the contract and some revenue shifting within the OSBE budget would balance the budget for 2007-2008 and that staff positions could be filled. The Board also hoped to retain 9<sup>th</sup> grade ISAT testing by obtaining a supplemental appropriation of funds. (Id.)

## 3. *The Executive Director's Decision*

By mid November 2007, however, no additional funding had been secured, and it ultimately was not possible to defer the costs incurred for developing 9<sup>th</sup> grade testing, resulting in an approximately \$800,000 deficit. Mr. Rush therefore instructed DRC to stop its work on developing the 9<sup>th</sup> grade ISAT testing. Mr. Rush believed that he had the authority to take such action under the motion approved by the Board in the September 12 meeting to renegotiate the DRC contract. He also believed he could not obligate the Board to expenditures in excess of its appropriation. Mr. Rush was aware that Superintendent Tom Luna was scheduled to meet with members of the Joint Finance-Appropriations Committee ("JFAC") in late December 2007 to discuss supplemental funding for the 9<sup>th</sup> grade ISAT testing, but Mr. Rush felt he had no choice but to order DRC in November to stop further work on the 9<sup>th</sup> grade test development, as he was concerned that further significant costs would otherwise be incurred beyond what the Board would be able to pay. Mr. Rush informed Mr. Terrell of the fact that he had asked DRC to halt its work on the 9<sup>th</sup> grade testing, but no Board discussion or action took place at that time.<sup>3</sup> (Id. at 3-6, 13.)

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<sup>3</sup> Mr. Rush updates Mr. Terrell regularly regarding OSBE affairs. (Appendix C, pp. 4-6.)

#### 4. *The Budget Shortfall's Impact on ISAT Testing*

During the December 6, 2007 executive session, Mr. Terrell and Mr. Rush informed the Board members that the budget shortfall continued to stand in the way of filling key staff positions at the Board. In conjunction with that comment, Mr. Terrell and Mr. Rush noted that the Board would probably have to cut 9<sup>th</sup> grade ISAT testing to eliminate the budget shortfall, as dropping 9<sup>th</sup> grade testing from the DRC contract would save approximately \$850,000. (*Id.* at 1-2, 4-5, 7-10.) The discussion regarding the Board vacancies, budget shortfall, and 9<sup>th</sup> grade ISAT testing was very brief, lasting an estimated three to four minutes. (*Id.* at 1, 3, 5, 8.) The justification provided by the interviewed Board members for the Board's brief discussion of the 9<sup>th</sup> grade ISAT testing and budget shortfall in the executive session was that the topic was directly related to the issue of hiring staff at OSBE and the ongoing critical need for key personnel. (*Id.* at 1, 4-5, 7-8, 10.)

#### 5. *No Board Decision or Deliberation During the Executive Session*

The Board did not, during the executive session, deliberate over whether to cut the 9<sup>th</sup> grade testing.<sup>4</sup> Neither was a vote taken nor a final decision made regarding the elimination of 9<sup>th</sup> grade ISAT testing. (*Id.* at 2-3, 5, 7-12.) Rather, Mr. Terrell indicated that Superintendent Luna and Mr. Rush were going to be meeting with the co-chairs of the JFAC Committee the following day<sup>5</sup> to seek a supplemental appropriation, but that the Board would need to meet to make a decision regarding the 9<sup>th</sup> grade testing if JFAC did not approve the needed funds. (*Id.*) Interviewed Board members noted that there was a sense of "inevitability" that the 9<sup>th</sup> grade testing would need to be cut if no supplemental funding could be obtained, but confirmed that no decision to that effect was made on December 6. (*See id.* at 9, 11.)

#### 6. *The Remainder of the Executive Session*

The remainder of the approximately four hour executive session was spent primarily listening to reports from the University of Idaho, Boise State University, and Idaho State University regarding personnel issues, issues pertaining to potential litigation, and issues related to the acquisition of property. (*Id.* at 8-12.) The Board did not discuss

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<sup>4</sup> "Deliberation" is defined by the OMA as "the receipt or exchange of information or opinion relating to a decision, but [not including] informal or impromptu discussions of a general nature which do not specifically relate to a matter then pending before the public agency for decision." I.C. § 67-2341(2). The discussion regarding 9<sup>th</sup> grade ISAT testing at the December 6 executive session was limited to the fact that a decision whether to cut the testing would likely have to be made in the near future. While Board members technically "received information" regarding the general issues of budget concerns and the need to fill staff vacancies at the Board, those issues were of a more "general nature which [did] not specifically relate to" the 9<sup>th</sup> grade testing. At its December 20 public meeting, the Board engaged in a full deliberation and discussion regarding the 9<sup>th</sup> grade testing.

<sup>5</sup> The meeting with JFAC had been re-scheduled from late December 2007 to December 7, 2007.

9<sup>th</sup> grade ISAT testing in the public session following its executive session, nor did Board members discuss the issue in the following days. (Id. at 9-11.)

**7. *The Inaccurate Press Release***

On December 7, 2007, Superintendent Luna and Mr. Rush met with the co-chairs of JFAC but were unable to secure supplemental funding to address the Board's budget shortfall. (Id. at 5.) On December 10, 2007, Mr. Rush and the Board's Chief Communications Officer, Mark Browning, decided to issue notice to the school districts that there would be no 9<sup>th</sup> grade ISAT testing in the spring of 2008. The resulting press release erroneously stated that the Board had eliminated 9<sup>th</sup> grade testing, although a Board decision had not yet been made. According to Mr. Rush, that particular statement was an unintentional error. Mr. Rush is clear that he made a unilateral decision to halt DRC from further work on the 9<sup>th</sup> grade test in order to balance the budget and to avoid further obligating OSBE with respect to additional costs related to 9<sup>th</sup> grade test development. (Id. at 5, 7); (Appendix D (12/10/07 Press Release).) Mr. Rush has further explained that he and Mr. Browning felt an immediate press release was necessary, because teachers from various school districts throughout the State were planning to travel to Boise in January 2008 to provide input into the development and implementation of the spring tests for grade 9, and Mr. Rush did not want school districts making travel plans that would have to be canceled (and possibly incurring costs). (Appendix C, p. 5.) Interviewed Board members expressed that they were surprised by the December 10 press release, as they had not yet made a decision to eliminate 9<sup>th</sup> grade testing. (Id. at 9-12.)

**8. *The Open Meeting Complaints***

Following the above press release, Betsy Russell with The Spokesman-Review filed a complaint with the Attorney General on December 12, 2007, seeking an investigation into the Board's potential violation of the OMA. (Appendix A.) Idaho Allied Dailies filed its companion complaint on December 19, 2007. (Appendix B.)

**9. *The Board Decision to End 9<sup>th</sup> Grade ISAT Testing***

On December 20, 2007, the Board held a special meeting and deliberated, in a public session, the issue of whether to eliminate 9<sup>th</sup> grade ISAT testing. Mr. Rush commenced the discussion by commenting that, knowing that the Board did not have funding, he thought he had the authority to make the decision to notify DRC to stop work on the 9<sup>th</sup> grade testing in November 2007. The Board engaged in a full discussion of the issue during the December 20 meeting, with a fair amount of debate occurring regarding the issue of whether to amend the DRC contract to remove 9<sup>th</sup> grade testing. The Board ultimately voted to do so in a 5-1 vote (with Superintendent Luna voting against the amendment.) The Board then voted to waive its Board rules to allow for not testing grade 9 in the spring and fall of 2008. (Appendix C, pp. 12-13.) Thus, although the Executive Director had directed DRC to stop developing the 9<sup>th</sup> grade ISAT testing in

mid November 2007, the Board did not vote to end 9<sup>th</sup> grade ISAT testing until December 20, 2007. (Appendix C, pp. 3-6, 12-13); (Appendix D.)

**D. Analysis of the Board's Actions**

The focus of this office's investigation is whether the Board violated the OMA, and, if so, whether a "knowing" violation of the OMA can be proven, or whether there was a decision that should be set aside. There were two separate types of activity that merited investigation: (1) whether the Board discussed topics during the December 6, 2007 executive session that were inappropriate for an executive session and/or reached a decision regarding 9<sup>th</sup> grade ISAT testing during the executive session or during a "serial meeting" following the executive session; and (2) whether the Board failed to sufficiently designate, in its agenda and minutes, the relevant subsection(s) in the OMA regarding topics discussed in executive session. As is discussed in detail below, none of the Board's actions warrant the imposition of penalties under the OMA.

**1. *The Board's Topics of Discussion During the 12/6/07 Executive Session***

Idaho Code § 67-2345(1) sets forth the topics that may be discussed in an executive session. The bulk of the Board's four hour executive session on December 6, 2007 consisted of topics that fell under Section 67-2454(1), including personnel matters under Subsections (a) and (b), deliberations regarding the acquisition of real property under Subsection (c), and matters involving potential litigation that fell under Subsection (f). I.C. § 67-2345(1)(a)-(c), (f); (Appendix C, pp. 8-11.)

**a. Idaho Code § 67-2345(1)(a): The Exemption for Hiring Decisions**

Of most concern with respect to the OMA, however, was the Board's three to four minute discussion regarding the need to fill certain key staff vacancies with OSBE, which led to the related statements that: (1) the Board was unable to fill those vacancies because of an ongoing \$800,000 budget deficit; and (2) that cutting 9<sup>th</sup> grade ISAT testing might be the only alternative available to address the budget deficit if no supplemental funding could be attained. The OMA provides that "[a]n executive session may be held [t]o consider hiring a public officer, employee, staff member or individual agent." I.C. § 67-2345(1)(a).

The Board discussed the above topics believing that they fell under this Subsection. (Appendix C, pp. 1, 4, 5, 7-8, 10.) The need to fill certain key staff vacancies could be deemed to fit under Subsection (a), as the issue pertains to the consideration of whether to hire "a public officer, employee, staff member or individual agent." *Id.* Similarly, the related comment that staff vacancies could not be filled because of budget issues necessarily falls under the same Subsection, because a determination to hire directly relates to a determination not to hire.

There is a question, however, as to whether the exemption set forth in Idaho Code § 67-2345(1)(a) is intended to encompass general discussions such as the above with

regard to the broad question of whether to fill vacancies or if the exemption was instead intended to cover only specific hiring decisions. In other words, there is a question as to whether the exemption covers the general decision to fill a vacancy with anybody, or if the exemption only applies to a specific hiring decision with regard to a specific individual or group of individuals. This office encourages those subject to the OMA to interpret the Act's provisions cautiously and narrowly. However, the legislative history is silent on the particular question presented here, and there is no Idaho case law on point. Thus it would be impossible to prove an intentional violation of the Open Meeting Act with respect to this issue, particularly as the Board's attorney advised the Board that this was a proper use of the executive session. (Appendix C, pp. 3-6, 9, 11.)

Within the context of the discussion regarding the filling of vacancies within the Board, it was noted that 9<sup>th</sup> grade ISAT testing might have to be cut to fix the budget issues, thus allowing the Board to fill those positions. This discussion, although tangentially linked to the discussion to fill vacancies within the Board, was one step further removed from the type of topic that would clearly fall under Subsection (a) hiring issues. See I.C. § 67-2345(1)(a). However, this appears to have been an inadvertent expansion of the topic of Board vacancies, an expansion that does not clearly violate the OMA, as the case law is silent on this issue.

In discussing – albeit briefly – the issue of 9<sup>th</sup> grade ISAT testing as it related to the Board's general financial issues, the Board may have crossed over the line from a personnel topic appropriate for discussion in executive session to a topic that would have been better relegated to the public portion of the meeting. As noted above, however, no Idaho case law discusses the boundaries of Subsection (a), so it is not entirely clear whether discussion of the ISAT testing, which related at least tangentially to hiring issues, actually violated the Act. See id. Also significant is the fact the Board's brief commentary regarding the topic does not appear to have constituted an actual deliberation regarding the issue of elimination of 9<sup>th</sup> grade testing. The commentary actually reflects a realization of the breadth and depth of the budget shortfall by noting its impact on other areas. Most importantly, based on this office's investigation, no decision was made by the Board in the executive session (or at any time thereafter until a formal discussion and vote took place at the Board's December 20, 2007 public meeting). (Appendix C, pp. 2-3, 5, 7-13.) Instead, the discussion regarding the 9<sup>th</sup> grade testing at the executive session consisted only of the comment that 9<sup>th</sup> grade testing might have to be cut if supplemental funding could not be obtained, in light of the need to fill numerous vacant positions, and that a discussion and decision regarding this issue would have to be undertaken by the Board at a later date. (Id. at 1-2, 4, 5, 7-10.)

b. Penalties Under the OMA

In enforcing the OMA, the Attorney General may seek two penalties in the event of a violation of the OMA. First, the Attorney General can seek a declaration that an action be declared null and void if it occurs as a result of a deliberation or decision made at a meeting that violates the Act. I.C. § 67-2347(1). Second, the Attorney General can seek a \$150 fine against “[a]ny member of the governing body . . . who knowingly

conducts or participates in a meeting which violates the provisions of this act . . .” I.C. § 67-2347(2) (emphasis added).

In the case at hand, neither of the above remedies is appropriate under the circumstances. With respect to nullification of an action (presumably the action of eliminating 9<sup>th</sup> grade testing), the Board’s action was not “a result of a deliberation or decision made at” the December 6, 2007 executive session. I.C. § 67-2347(1). Instead, Mr. Rush made the unilateral decision to halt DRC’s work on the 9<sup>th</sup> grade testing prior to the December 6 meeting, in his capacity as the Interim Executive Director, and the Board later deliberated and made its formal decision to eliminate the 9<sup>th</sup> grade testing altogether in a public meeting on December 20, 2007.<sup>6</sup> (Appendix C, pp. 2-12.) The erroneous December 10 press release notwithstanding, no actual deliberation or decision regarding the 9<sup>th</sup> grade ISAT testing took place on December 6. (Id.); (Appendix D.) In fact, had a supplemental appropriation been approved, Mr. Rush could have ordered DRC to recommence development of the 9<sup>th</sup> grade test. (Appendix C, p. 7.) Thus, it would not be appropriate to seek nullification of the decision made at the December 20 meeting based upon the Board’s December 6 meeting. I.C. § 67-3247(1).

Furthermore, even if the Board’s brief discussion of the ISAT testing during the December 6, 2007 executive session were deemed to constitute “deliberation” on the issue, the Idaho Supreme Court has held that “where deliberations are conducted at a meeting violative of the Open Meetings Act but no firm and final decision is rendered upon the questions then discussed, the impropriety of that meeting will not taint final actions subsequently taken upon questions conscientiously considered at subsequent meetings which do comply with the provisions of the act.” State v. City of Hailey, 102 Idaho 511, 514, 633 P.2d 576, 579 (1981); see also Baker v. Indep. Sch. Dist. of Emmett, No. 221, 107 Idaho 608, 611, 691 P.2d 1223, 1226 (1984) (same);<sup>7</sup> Peterson v. Franklin County, 130 Idaho 176, 181-82, 938 P.2d 1214, 1219-20 (1997) (holding that, because a final decision on a matter was made at a meeting that complied with the OMA, the resulting action could not be nullified, regardless of whether earlier meetings had violated the Act).

With respect to the \$150 fine that may be imposed against a Board member “who knowingly conducts or participates in a meeting which violates the provisions of this act,” there is no evidence that the Board members participated in a knowing violation of the OMA when they briefly commented that 9<sup>th</sup> grade ISAT testing might have to be

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<sup>6</sup> Additionally, this office has long maintained that boards may take corrective action at any time with regard to the Open Meeting Law. Thus, even if a violation were to have been found, the Board’s subsequent meeting on December 20, 2007 would have cured the alleged violation that occurred in the December 6, 2007 executive session. Even though a decision made in the December 6, 2007 executive session could have been nullified, the December 20, 2007 decision appears to have been reached properly. However, as addressed above, no decision was reached in the December 6, 2007 executive session.

<sup>7</sup> This area of the law is somewhat unsettled, due to intervening amendments to the Act and inconsistent case law. Regardless, however, this office finds that the Board did not engage in “deliberation” on the topic of ISAT testing during the December 6, 2007 executive session.

eliminated to address budget concerns. I.C. § 67-2347(2) (emphasis added). In fact, the evidence clearly indicates that the Board members thought that the executive session was in compliance, rendering proof of a knowing violation impossible. The Attorney General cannot pursue a civil penalty against the Board members simply because the meetings violated the OMA; rather, they had to have acted knowingly. Id.

The Idaho Supreme Court has created a “good faith exception” within the context of the Open Meeting Law. State v. Yzaguirre, 144 Idaho 471, \_\_\_, 163 P.3d 1183 (2007). Addressing the issue of whether members of a Commission were subject to the civil penalty set forth in Section 67-2342, the Yzaguirre Court held:

The legislature’s inclusion of the word “knowingly” in the statute indicates that it intended to condition the availability of a civil penalty on the defendant’s mental state. The State’s interpretation would make the Commissioners strictly liable for any violation of the open meeting law simply for having conducted or participated in the meeting. If the legislature had intended this result, there would have been no need to reference a mental state because conducting and participating are intentional acts. “Knowingly” implies something more than a voluntary act; under the State’s interpretation it becomes surplusage. In order to give meaning to every term, the statute must be interpreted to require knowledge that the meeting violated the open meeting law.

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... Idaho Code § 67-2347(2) specifies that the individual must act “knowingly.” By its plain language, the statute imposes a civil penalty only where the participant was aware the meeting violated the open meeting law.

The Commissioners are not subject to civil penalties unless, when they held the executive session, they knew it was not in compliance with the open meeting law. Knowledge of a violation may be inferred, but it is a prerequisite to liability under I.C. § 67-2347(2). The Commissioners claim they honestly believed the executive session complied with the open meeting law. Taking the Commissioners’ allegations to be true, the State is not entitled to judgment as a matter of law. However, the mental state of the Commissioners or any individual Commissioner is a question of fact to be determined.

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Although there was a violation [regarding the lack of written minutes], the Commissioners are not subject to a civil penalty unless they were aware of the violation when they held the meeting. Because the Commissioners denied any knowledge of a violation, judgment on the pleadings is not proper. A factual determination of their state of mind remains.

Yzaguirre, 144 Idaho 471, \_\_\_, 163 P.3d at 1190-91 (emphasis added). The Court further rejected the argument that ignorance of the law should not serve as an excuse to the “knowing” requirement of the Act. (Id. at 1191.)

The Supreme Court has thus set a very high standard of proof in order to secure civil penalties against individuals pursuant to the OMA. The “good faith exception” established in Yzaguirre requires that an individual must not only act purposefully in committing the underlying act, but also that the individual must have actual knowledge that the underlying act is wrong at the time the act is taken.<sup>8</sup>

In this case, the interviewed Board members repeatedly expressed their individual beliefs that the Board had taken no action in violation of the OMA. (Appendix C, pp. 7, 9, 11.) Their statements appear to be sincere, and the fact that the cursory discussion regarding 9<sup>th</sup> grade testing related to personnel concerns, a proper topic on the agenda for the executive session, further bolsters their contentions that they did not believe their actions to be in violation of the OMA. This is particularly true given that – as mentioned previously – no Idaho case law has specifically discussed the boundaries of Idaho Code § 67-2347(1)(a).

Furthermore, although the Board’s attorney Jeff Schrader discussed the general parameters of what could be discussed within the executive session, he did not warn the Board members to avoid the topic when it briefly arose in the session. (Id. at 3-6, 9, 11.) As this area constitutes an open question of law, this office cannot determine that Mr. Schrader’s advice would not be upheld by a court of competent jurisdiction. According to the Board members, Mr. Schrader is diligent about bringing up concerns about the appropriateness of particular topics for inclusion in the executive session. (Id. at 3-6, 9,

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<sup>8</sup> A review of cases from other jurisdictions supports the argument that a civil penalty may not be appropriate under the facts presented here. For example, in Miller v. City of Tacoma, 979 P.2d 429, 436 (Wash. 1999), the court held that a civil penalty was not warranted against city council members, even though the city council voted by secret ballot in an executive session in direct violation of Washington’s open meeting law, because the council members thought they were acting inappropriately under the law. In another Washington case, the court held that faculty of the University of Washington School of Law should not receive a civil penalty under the open meeting act, even though they engaged in violations of the act, because the faculty had been erroneously advised by counsel that their actions were not in violation of the act. Cathcart v. Anderson, 517 P.2d 980, 985 (Wash. Ct. App. 1974); see also Tanner v. Town Council of Town of E. Greenwich, 880 A.2d 784, 799 (R.I. 2005) (holding that a civil fine should not be assessed because the council members did not knowingly violate the act); Suburban Hosp., Inc. v. Maryland Health Res. Planning Comm’n, 726 A.2d 807, 813-14 (Md. 1999), *vacated on grounds of mootness* (holding that only knowing violation of the open meeting law warrants individual liability.)

11, 13.) Thus, Mr. Schrader's lack of any expressions of concern also supported the Board members' belief that they were acting appropriately. Indeed, particularly given the lack of case law to provide direction on this particular issue, Mr. Schrader himself was likely operating under the sincere belief that the topic was encompassed by Section 67-2347(1)(a). Thus, even if the Board's discussion of the 9<sup>th</sup> grade testing in the executive session somehow crossed over the line from Section 67-2347(1)(a) to a topic more appropriate for public discussion, there is no evidence that the Board was actually aware of that fact.

In sum, nullification of the Board's decision to eliminate 9<sup>th</sup> grade ISAT testing would not be appropriate, as the decision was made during a public meeting on December 20, 2007, not at a meeting that violated the OMA. Neither would pursuit of civil fines be appropriate, as there is no evidence that the Board members knowingly violated the OMA at the December 6 executive session. It may be appropriate, however, to strongly suggest to the Board that it undergo specific training on the OMA to avoid future discussions during executive sessions that walk a fine line between those topics that are permitted in an executive session and those that are not.

## 2. *The Board's Discussions Following the Executive Session*

The complaints received by this office additionally alleged that the Board may have engaged in a "serial meeting" following the December 6 executive session, during which the Board deliberated about and/or made a decision regarding the elimination of 9<sup>th</sup> grade ISAT testing. (Appendix A.)

Neither the OMA itself nor Idaho case law has specifically addressed whether a series of discussions, with each discussion held between Board members constituting less than a quorum of the Board, can constitute a "meeting." Other jurisdictions addressing the issue, however, have predominantly held that serial meetings, e-mails, letters, or telephone calls of less than a quorum of a public body does violate those jurisdictions' open meeting laws if the individuals communicating with each other intended to deliberate and/or reach a decision through those serial communications. See, e.g., Del Papa v. Bd. of Regents of the Univ. & Cmty. College Sys. of Nevada, 956 P.2d 770, 778-79 (Nev. 1998); Esperanza Peace & Justice Center v. City of San Antonio, 316 F.Supp.2d 433, 474, 476-77 (W.D. Texas 2001); Wood v. Battle Ground Sch. Dist., 27 P.3d 1208, 1217-18 (Wash. Ct. App. 2001); Blackford v. The Sch. Bd. of Orange County, 375 So.2d 578, 580 (Fl. Dist. Ct. App. 1979); Stockton Newspapers v. Members of the Redev. Agency, 214 Cal. Rptr. 561, 562, 565-66 (Cal. Ct. App. 1985); Brown v. The E. Baton Rouge Parish Sch. Bd., 405 So.2d 1148, 1155 (La. 1981); Booth Newspapers, Inc. v. Univ. of Michigan Bd. of Regents, 507 N.W.2d 422, 430 (Mich. 1993). Attorneys General from other states have agreed that a "walking quorum," or serial meetings of less than a quorum of a public body, can constitute a "meeting" under their open meeting laws. See, e.g., 1985 Nev. Op. Atty. Gen. 90, 1985 WL 195281 (Nev.A.G.); Kan. Atty. Gen. Op. No. 98-26, 1998 WL 190416 (Kan.A.G.). Additionally, this office issued an opinion on May 23, 1994, concluding that serial meetings may violate the OMA. (See [http://www2.state.id.us/ag/ops\\_guide\\_cert/1994/g052394.pdf](http://www2.state.id.us/ag/ops_guide_cert/1994/g052394.pdf) (last visited Jan. 30, 2008).)

In the case at hand, however, the evidence does not support the conclusion that the Board members engaged in a serial meeting regarding the elimination of 9<sup>th</sup> grade ISAT testing. Several Board members commented that they had not engaged in any discussion regarding the 9<sup>th</sup> grade testing between the December 6 executive session and the December 20 meeting. In fact, the Board members (with the exception of President Milford Terrell) were not even involved with the December 10 press release, which surprised most Board members with its erroneous indication that a decision had been made to eliminate the testing. (Appendix C, pp. 1-3, 8-13.)

The only indication of limited discourse regarding the 9<sup>th</sup> grade ISAT testing between the two Board meetings are: (1) Superintendent Luna's statement that he received an e-mail copy of the December 10 press release on his blackberry; and (2) Board Member Sue Thilo's statement that there had been an e-mail discussion among Board members regarding the need to schedule a special meeting to address the issue. (*Id.* at 2, 13.) Neither of these narrow exchanges rose to the level of a deliberation regarding 9<sup>th</sup> grade testing. Instead, Board members were provided copies of the press release and took steps to schedule a public meeting to discuss and vote upon the issue. Unlike the type of communications addressed in the above-cited case law regarding serial meetings, these communications did not involve actual deliberation upon or decision-making regarding the issue at hand, but instead involved communications regarding scheduling a future public meeting.

### 3. *The Board's Agenda and Minutes Regarding its Executive Sessions*

A further issue raised in the complaints submitted to this office is the assertion that the Board failed to sufficiently identify in its agenda the topics to be discussed at its December 6, 2007 executive session and similarly failed to sufficiently identify in its minutes for its prior meetings the topics discussed during executive sessions. Attached to Ms. Russell's complaint was the Board's agenda for its December 6 meeting, which stated the following:

Pursuant to Idaho Code Section 67-2345(1), the State Board of Education will meet in executive session to discuss one or more of the following: (a) to consider hiring a public officer, employee, staff member or individual agent; (b) to consider the evaluation, dismissal or disciplining of, or complaints or charges brought against a public officer, employee, staff member or individual agent, or public school student; (c) to conduct deliberations concerning labor negotiation or to acquire an interest in real property which is not owned by a public agency; (d) to consider records that are exempt from public inspection; (e) [t]o consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations; (f) to consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation.

(Attachment to Appendix A (Agenda re 12/6-12/7/07 Meeting).) The complaint also included an attachment of the Board's minutes from its prior meeting of October 11, 2007, which noted that the Board voted unanimously to go into executive session and which stated the following:

In executive session, the Board did one or more of the following: (a) considered hiring a public officer, employee, staff member or individual agent; (b) considered the evaluation, dismissal or disciplining of, or complaints or charges brought against a public officer, employee, staff member or individual agent, or public school student; (c) conducted deliberations concerning labor negotiation or to acquire an interest in real property which is not owned by a public agency; (d) considered records that are exempt from public inspection; (e) considered preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations; (f) considered and advised its legal representatives in pending litigation or where there is a general public awareness of probable litigation.

(Attachment to Appendix A (Minutes re 10/11/07 Meeting).)

a. The Board's Minutes

As discussed earlier, the OMA requires that "[m]inutes of executive sessions shall be limited to a specific reference to the statutory subsection authorizing the executive session and sufficient detail to convey the general subject matter but shall not contain information sufficient to compromise the purpose of going into executive session." I.C. § 67-2344(2) (emphasis added). Notably, the example provided with Ms. Russell's complaint of the Board's October 11, 2007 minutes appears to be typical. (Attachment to Appendix A.) A review of the Board's minutes, posted on its official website, reveal that the Board appears to insert the above-quoted language in its minutes as a matter of course with respect to its executive sessions.<sup>9</sup>

However, the Idaho courts have not addressed the issue of what, exactly, the legislature intended by requiring, in the minutes, "specific reference to the statutory subsection . . . and sufficient detail to convey the general subject matter" of an executive session.<sup>10</sup> Id. Technically, the Board has made "specific reference to the statutory

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<sup>9</sup> See <http://www.boardofed.idaho.gov/meetings/minutes/2007/index.asp> (last visited Jan. 9, 2008). As of the date of this Memorandum, the Board had not yet posted its minutes for its meetings of December 6, 2007 and December 20, 2007.

<sup>10</sup> The Court has noted that "[m]inutes of executive sessions may be limited to material the disclosure of which is not inconsistent with the provisions of section 67-2345, Idaho Code, but shall contain sufficient detail to convey the general tenor of the meeting." Fox v. Estep, 118 Idaho 454, 455, 797 P.2d 854, 855 (1990). This implies that something beyond mere reference to

subsection(s)” 67-2347(a) through (f) in its minutes. Reference to these subsections may fulfill the requirement of providing “sufficient detail to convey the general subject matter” of the session. I.C. § 67-2344(2). Notably, as is demonstrated by the Board’s discussions during its executive session of December 6, 2007, the Board often does discuss issues during a single session that fall under several of these listed categories. (See Appendix C, pp. 8-11.)

The Board would do better, however, to avoid inserting a duplicative and general, “catch-all” reference to Section 67-2347(1) in its minutes. Instead, the Board should attempt in future to focus its minutes on those subsections that are actually applicable to the executive session and to include some additional details regarding the general subject matter of topics discussed in executive sessions.

It is certainly not clear, given the lack of interpretive case law, whether the Board’s minutes violated the OMA. Neither nullification of an action nor pursuit of individual civil fines are merited under these circumstances for what may be a violation, particularly where the evidence contradicts a “knowing” violation of the Act. Training on the OMA could serve to address this particular issue and ensure that future minutes are clearly compliant with the Act.

b. The Board’s Agenda

Prior to holding a meeting, the Board is obligated by the OMA to post an “agenda notice” of the meeting, includ[ing] in the notice all agenda items known at the time to be probable items of discussion.” I.C. § 67-2343(1). The Act provides: “If an executive session only will be held, a twenty-four (24) hour meeting and agenda notice shall be given . . . and shall state the reason and the specific provision of law authorizing the executive session.” I.C. § 67-2343(3) (emphasis added). In the case at hand, the Board’s December 6 meeting did not involve only an executive session, but also included a public session. Thus, Section 67-2343(3) is inapplicable to the Board’s December 6 agenda. In addition, the Board stated, in the agenda for the December 6 meeting, that the executive session was authorized by Idaho Code § 67-2347(1)(a)-(f). (Attachment to Appendix A.) Thus, it appears that the agenda complied with Section 67-2343(1).

E. Conclusion

Following this office’s investigation of the matter, which included a review of the minutes, agendas, and audio recordings of the Board’s meetings, as well as personal interviews with all Board members, this office has reached the following conclusions:

- (1) The Board’s actions may have constituted a non-knowing violation of the OMA;

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the general categories set forth in Section 67-2345(1) may be required, but the Court has not explicitly held that to be the case.

- (2) Even if a violation occurred, it does not give rise to the penalties (nullification and a fine) provided for under the Act, for the reasons set forth below;
- (3) No decision was made in the December 6 executive session;
- (4) The evidence is unambiguous that the Board members believed the executive session was held in compliance with the OMA;
- (5) Although 9<sup>th</sup> grade ISAT testing was briefly discussed within the executive session, it was discussed in the context of revenue shortfalls that precluded the filling of staff vacancies;
- (6) The press release issued on December 10, 2007 was inaccurate;
- (7) Since no decision was made during the executive session, the remedy under the Act to void a Board action is inappropriate;
- (8) In light of the “good faith exception” created by the case of State v. Yzaguirre, a knowing violation of the Act cannot be proven;
- (9) Absent a knowing violation, no fine can be imposed under the Act;
- (10) The Board’s minutes setting forth the reasons for past executive sessions may have been too broad, and the Board should avoid including such broad provisions in their future minutes;
- (11) The Board’s agenda for the December 6 executive session was appropriate;
- (12) The Board would benefit from receiving training on the Open Meeting Act;  
and
- (13) The Board accepts this office’s recommendation and will schedule Open Meeting Training in the near future.

Consistent with these findings, the office considers this investigation and matter closed.

**APPENDIX "A"**

# THE SPOKESMAN-REVIEW

BOISE BUREAU

Betsy Russell  
Reporter

RECEIVED

DEC 12 2007

December 12, 2007

OFFICE OF THE ATTORNEY GENERAL  
GOVERNMENTAL & FISCAL LAW DIVISION

Lawrence Wasden  
Idaho Attorney General  
700 W. State St.  
Boise, ID 83720-0010

Dear Attorney General Wasden:

Please consider this letter a complaint against the State Board of Education for violation of the Idaho Open Meeting Law. In my work as a reporter, I have learned that the board, during a nearly four-hour executive session last Thursday, Dec. 6<sup>th</sup>, in Pocatello, discussed matters that do not fall under the executive session exemptions from the Idaho Open Meeting Law. These included the ending of Idaho Standards Achievement testing for 9<sup>th</sup> graders throughout the state of Idaho this spring. This is a significant public policy change and also a move designed to save the board's budget more than \$800,000. Other issues regarding the State Board of Education's budget also apparently were discussed in executive session, in violation of the Idaho Open Meeting Law. In addition, board members may have conferred individually in a "serial meeting" between that date and Monday, when the board announced that it was ending ISAT testing of 9<sup>th</sup> graders in Idaho, effective immediately. No board meeting had occurred between Thursday and Monday.

When I questioned this in the course of my reporting on Tuesday afternoon, the board changed course and suggested that no final decision on the testing issue had been made — despite the announcement of one a day earlier and public statements from both the board president and the state superintendent of public instruction commenting on the decision — and that the board might still take the testing issue up again in its January meeting or an as-yet unscheduled special meeting prior to the January meeting.

In the board's agenda for its Dec. 6 meeting, an executive session was listed, but the reasons given for going into executive session were merely "to discuss one or more of the following," followed by a listing of six executive session exemptions allowed under the Open Meeting Law, A through F. The board did not specify under which exemption(s) it

was acting. Also, in its minutes of its Oct. 11, 2007 meeting, the board noted that it held a similar executive session, running from 10 a.m. to 1:30 p.m., at that meeting, and the only information given in its minutes is that, "In executive session, the Board did one or more of the following," followed again by a listing of all six possible exemptions (please see attached). The board did not specify under which of the exemptions it held an executive session, nor the general subject matter addressed.

It appears that the State Board of Education is violating the Idaho Open Meeting Law by not specifying under which exemption it is holding a closed session; by not keeping minutes of executive sessions that include "a specific reference to the statutory subsection authorizing the executive session and sufficient detail to convey the general subject matter;" and by discussing public policy issues including student testing and the board's budget in closed session in violation of 67-2345.

As a reporter, my only interest in filing this complaint is in ensuring compliance with the law in the public interest. Important matters of public policy in our state should be decided in public, as our law requires. It is my hope that investigation and enforcement actions taken as a result of this complaint will result in better future compliance with the law.

Thank you very much.

Sincerely,

A handwritten signature in cursive script that reads "Betsy Russell".

Betsy Z. Russell, reporter  
On behalf of The Spokesman-Review

Attachments:

- Agenda, State Board of Education meeting, Dec. 6-7, 2007
- Minutes of Oct. 11, 2007 SBOE meeting/executive session
- SBOE bylaws ("All meetings of the Board are conducted and notice thereof provided in accordance with the Idaho Open Meeting Law.")
- Article, The Spokesman-Review, Dec. 12, 2007

## STATE BOARD OF EDUCATION MEETING

December 6 - 7, 2007  
Idaho State University  
Rendezvous Complex  
Pocatello, Idaho



Thursday, December 6, 2007, 9:00 a.m.

### EXECUTIVE SESSION (Closed to the Public)

Pursuant to Idaho Code Section 67-2345(1), the State Board of Education will meet in executive session to discuss one or more of the following:

- (a) to consider hiring a public officer, employee, staff member or individual agent. This paragraph does not apply to filling a vacancy in an elective office;
- (b) to consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against a public officer, employee, staff member or individual agent, or public school student
- (c) to conduct deliberations concerning labor negotiations or to acquire an interest in real property which is not owned by a public agency;
- (d) to consider records that are exempt by law from public inspection
- (e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;
- (f) to consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation.

EXECUTIVE SESSION ITEMS MAY BE DISCUSSED AND ACTED UPON, IF APPROPRIATE, IN OPEN SESSION.

Thursday, December 6, 9:00 a.m. (following Executive Session)  
Friday, December 7, 8:00 a.m.

### BOARDWORK

1. Agenda Review / Approval
2. Minutes Review / Approval
3. Rolling Calendar / Approval

### OPEN FORUM

## **CONSENT AGENDA**

### **BAHR – SECTION I – HR**

1. Boise State University - New Positions & Changes to Positions
2. Idaho State University - New Positions & Changes to Positions
3. University of Idaho - New Positions & Reactivated Positions

### **BAHR – SECTION II - FINANCE**

4. Lewis Clark State College - Request for Fee Waiver Increase – 2<sup>nd</sup> Reading -  
V.T.2.b - Waiver of Nonresident Tuition, Intercollegiate Athletics.

### **PPGAC**

5. Alcohol Permits Issued by University Presidents

### **IRSA**

6. Distribution of \$500,000 for Advanced Opportunities

## **DEPARTMENT OF EDUCATION – Tom Luna**

### **Regular Agenda**

1. Superintendent's Update
2. I-Stars
3. Data Warehouse
4. Math Initiative
5. Update on Colleges of Education

## **AUDIT COMMITTEE – Rod Lewis (Chair), Richard Westerberg and Sue Thilo**

1. College & University Audit Presentation – Moss Adams

**BUSINESS AFFAIRS & HUMAN RESOURCES – Laird Stone (Chair), Richard Westerberg, and Blake Hall**

**Section I – Human Resources**

1. University of Idaho – Personnel Matter

**Section II – Finance**

1. College of Western Idaho – FY2008 Funding
2. Medical Education Study Report
3. Boise State University – Aquatics Complex Project
4. Boise State University – Turf Replacement Project
5. Boise State University – Redirect Bond Proceeds
6. Boise State University – Purchase of NMR Spectrometer
7. Boise State University – Purchase of X-Ray Photo Spectrometer
8. University of Idaho – Kibbie Dome Life Safety Improvement Project
9. University of Idaho – Kibbie Dome Life **Non**-Safety Improvement Project
10. University of Idaho –Capital Project Authorization Increase

**PLANNING, POLICY & GOVERNMENTAL AFFAIRS – Blake Hall (Chair), Laird Stone, and Paul Agidius**

1. Presidents' Council Report
2. Idaho State University Progress Report
3. Idaho State School for the Deaf and Blind – Agency Report
4. Idaho State Historical Society – Board Appointments
5. Boise State University – Building Name

**INSTRUCTION, RESEARCH & STUDENT AFFAIRS –Sue Thilo (Chair), Rod Lewis, and Tom Luna**

**Higher Education**

1. Discussion on Board Policy III.I. Roles and Missions
2. Reconsideration of Idaho State University's Mission Statement
3. New Instructional Unit: BSU- Musculoskeletal Research Institute
4. Higher Education Research Council Appointments
5. Native-American Higher Education Committee Update
6. ID/WA Reciprocity Agreement
7. Federal Academic Competitiveness Grant Program-Idaho's Proposal for a Rigorous High School Program of Study & the National Science & Mathematics Access to Retain Talent (SMART) Grants
8. First Reading, Deletion of Board Policy III.D. Official Calendars

**OTHER / NEW BUSINESS**

If auxiliary aids or services are needed for individuals with disabilities, or if you wish to speak during the Open Forum, please contact the Board office at 334-2270 no later than two days before the meeting. While the Board attempts to address items in the listed order, some items may be addressed by the Board prior to or after the order listed.



STATE BOARD OF EDUCATION  
TRUSTEES OF BOISE STATE UNIVERSITY  
TRUSTEES OF IDAHO STATE UNIVERSITY  
TRUSTEES OF LEWIS-CLARK STATE COLLEGE  
BOARD OF REGENTS OF THE UNIVERSITY OF IDAHO  
STATE BOARD FOR PROFESSIONAL-TECHNICAL EDUCATION  
TRUSTEES FOR THE IDAHO SCHOOL FOR THE DEAF AND THE BLIND

DRAFT MINUTES  
STATE BOARD OF EDUCATION  
October 11, 2007  
Lewis-Clark State College  
Williams Conference Center  
Lewiston, Idaho

A regular meeting of the State Board of Education was held October 11, 2007 at Lewis-Clark State College in Lewiston, Idaho. Board President Milford Terrell presided. The following members were present:

Present:

Milford Terrell, President  
Sue Thilo, Secretary  
Laird Stone  
Tom Luna, State Superintendent

Paul Agidius, Vice President  
Rod Lewis  
Richard Westerberg

Absent: Blake Hall

EXECUTIVE SESSION

**M/S (Agidius/Thilo):** To move into Executive Session, pursuant to Idaho Code Section 67-2345(1), on October 11, 2007 at 10:00 a.m. *A roll call vote was taken; motion carried unanimously.*

**M/S (Luna/Agidius):** To go out of Executive Session at 1:30 p.m. *Motion carried unanimously.*

In executive session, the Board did one or more of the following: (a) considered hiring a public officer, employee, staff member or individual agent; (b) considered the evaluation, dismissal or disciplining of, or complaints or charges brought against a public officer, employee, staff member of individual agent, or public school student; (c) conducted deliberations concerning labor negotiation or to acquire an interest in real property which is not owned by a public agency; (d) considered records that are exempt from public inspection; (e) considered preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations; (f) considered and advised its legal representatives in pending litigation or where there is a general public awareness of probable litigation.

**D: Meetings**

1. The Board holds at least four (4) regular meetings annually. A quorum of the Board consists of a simple majority of the total membership of the Board. If there is a vacancy on the Board, a quorum will consist of a simple majority of the currently filled positions. A quorum of the Board must be present for the Board to conduct any business.
2. The Board will maintain a 12-month running meeting schedule. To accomplish this, the Board will, at each of its regularly scheduled meetings, update its 12-month running schedule of Board meetings, provided, however, that the Board by majority vote, or the Board president after consultation with Board members, may reschedule or cancel any meeting.
3. The Board may hold special meetings by vote of a majority of the Board taken during any regular meeting or by call of the Board president.
4. All meetings of the Board are held at such place or places as may be determined by the Board.
5. All meetings of the Board are conducted and notice thereof provided in accordance with the Idaho "Open Meeting Law." An executive session (a closed meeting) of the Board may be held upon a two-thirds vote of a quorum of the Board for the purpose of considering (a) appointment of an employee or agent, (b) employee evaluation or termination or hearing of complaints and disciplinary action, (c) labor negotiations or acquisition of private real property, (d) records that are exempt from public inspection, (e) preliminary negotiations on matters of trade or commerce, or (f) matters of pending or probable litigation as advised by its legal representatives.

## Index

- A. Membership
- B. Office of the State Board of Education
- C. Powers and Duties
- D. Meetings
- E. Rules of Order
- F. Officers and Representatives
- G. Duties of Board Officers
- H. Committees of the Board
- I. Committee-of-the-Whole

- J. Presidents' Council
- K. Agency Heads' Council
- L. Adoption, Amendment, and Repeal of Bylaws

#### Additional Resources

- User Guide (.pdf)
- Role & Mission
- Strategic Plan
- Tracking Table
- Guidance Memorandums
- Mandatory Student Health Insurance

Some of the documents here are available in Adobe Acrobat Reader format. A copy of Adobe's Acrobat Reader or plug-in for your browsers is required to read these documents. One can be obtained free of charge by visiting the following website:  
<http://www.adobe.com/products/acrobat/readstep2.html>

**SPOKESMANREVIEW.COM**

Wednesday, December 12, 2007

## State moves to cut ninth-grade ISAT

### Board president cites cost savings

Betsy Z. Russell

Staff writer

December 12, 2007

BOISE – Idaho ninth-graders won't take the state's standardized tests this spring because of a budget shortfall, the state Board of Education announced this week.

However, the board hasn't taken a vote to make that change, and discussed the matter during a closed session at its Pocatello board meeting last Thursday in apparent violation of the Idaho Open Meeting Law, which allows closed meetings only for specific purposes.

The testing change is controversial because students must pass the 10th-grade version of the Idaho Standards Achievement Test to graduate from high school.

"It seems kind of ludicrous when as sophomores the test starts to count in earnest, they give them a year off as freshmen," said state Sen. John Goedde, R-Coeur d'Alene, chairman of the Senate Education Committee.

Goedde added that eliminating the ninth-grade test is "not one of those items that's allowed in executive session. ... It would have been much better if the discussion had been held in open session and the public would have had a chance to hear."

Idaho will save \$826,320 this year by not testing ninth-graders this spring, the board estimated. Annual testing of third-through eighth-graders is required by the federal No Child Left Behind Act, though Idaho chooses to test those students twice a year, in spring and fall. The state board voted in September to eliminate second-grade testing, and some educators are pushing for the elimination of the fall tests for all grades.

Board spokesman Mark Browning said the board's contract with an outside vendor for the testing included third- through eighth-graders as a central part of the contract, with ninth-grade testing as an add-on.

Browning said the board discussed various options in the executive session, but he said no final decision was made there.

The public announcement, however, was clear. "The Idaho State Board of Education announced today that they have eliminated the 9th-grade test as part of the Idaho Standards Achievement Test in both the spring and fall testing windows, effective immediately," it said, adding later, "The change is due to unforeseen contractual costs associated with the test."

Even discussion of the matter in executive session – whether or not a final decision was reached – would have violated the Open Meeting Law, since it doesn't fall under any of the law's exemptions from open meeting requirements. Those exemptions include hiring, firing or disciplining a public employee, conducting labor negotiations and plotting legal strategy in litigation involving the agency.

"All I know is that I have been given every assurance that nothing was discussed in there that was outside the bounds of the law," Browning said.

The board's attorney, Deputy Attorney General Jeff Schrader, declined to comment, referring questions to Browning.

Late Tuesday afternoon, Browning said the press release he sent out Monday might have mischaracterized the status of the decision, and that the board still might discuss the ninth-grade testing issue at its next regular meeting in January or in a special meeting before then. Current state board rules require the ninth-grade testing.

"I should have written that to say that the executive director of the office of the state board has announced that he has ordered work on the ninth-grade test to be stopped," Browning said.

The board took no action on the ninth-grade testing issue following Thursday's four-hour closed session, nor did the item

appear on the board's agenda for the meeting.

Four board members didn't return a reporter's calls Tuesday. A fifth board member, Sue Thilo of Coeur d'Alene, declined to comment on the executive session.

Bob Cooper, spokesman for the Idaho Attorney General's office, said he couldn't comment on whether the board had violated the law. "We have a law enforcement responsibility with regard to state agencies, so if there is a complaint, it would be our responsibility to investigate and thus inappropriate for us to comment prior to receiving any complaint," he said.

Goedde said there was "a mess-up in the budget this year" that led to the shortfall for testing, and that he doesn't fault the state board for canceling this spring's ninth-grade test. "What I'm hoping is they'll find a way to put it in the budget for next year and continue it in the budget thereafter," he said.

Thilo said she, too, hopes ninth-grade testing can be restored in future years. State Superintendent of Schools Tom Luna, who serves on the state board, issued a statement, saying, "This is unfortunate. We understand the importance of ninth-grade testing, but like any state agency, the state Board of Education must be fiscally responsible with taxpayer dollars and spend within its budget. We are hopeful we will start testing ninth grade again in future years."

The ISAT tests students on reading, language usage and math. Fifth-, seventh- and 10th-graders also are tested on science. The computerized test, which takes students about 90 minutes to complete, is used to determine whether each Idaho school is making "adequate yearly progress" under the No Child Left Behind law.

Luna's spokeswoman, Melissa McGrath, said he missed part of the board meeting and wasn't there when the ninth-grade testing was discussed.

## **APPENDIX “B”**

**WRIGHT WRIGHT & JOHNSON PLLC**

**Steven J Wright, P.A.\***  
**Aaron J. Tolson\*\***  
**Andrew M. Wayment**

**477 SHOUP AVENUE, SUITE 109**  
**P.O. BOX 50578**  
**IDAHO FALLS, IDAHO 83405-0578**  
**(208) 523-4433**  
**(208) 523-4400 FAX**

**David A. Johnson, P.A.**  
**Roger B Wright, P.A.**  
*of Counsel*

\* Also admitted in Texas  
\*\* Also admitted in Montana

**Kristi L. Richardson**  
*Certified Paralegal*

**RECEIVED**

**DEC 20 2007**

**OFFICE OF THE  
ATTORNEY GENERAL**

December 19, 2007

Lawrence G. Wasden  
Idaho Attorney General  
700 W State St.  
Boise, Idaho 83720-0010

**VIA FAX - (208) 334-2530**

Re: State Board of Education/Idaho open meeting laws

Dear Attorney General Wasden:

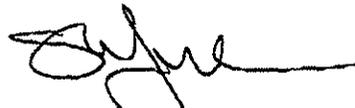
On behalf of Idaho Allied Dailies, an alliance of 16 daily newspapers based in Idaho or having a significant readership here, this letter is intended to serve as a companion complaint to the complaint filled by Betsy Russell of the Spokesman-Review for apparent violation by the State Board of Education of Idaho's open meeting law. Idaho Allied Dailies incorporates by reference the substance of the complaints set forth in Ms. Russell's complaint to you dated December 19, 2007.

As do you, Idaho Allied Dailies takes very seriously the obligation of our government to comply with the open meeting law and respectfully requests that this matter be immediately investigated and appropriate remedies applied. I also respectfully request that you advise me, on behalf of Idaho Allied Dailies, of the result and consequences of your investigation.

We thank you for your anticipated immediate attention to this matter.

Very truly yours,

WRIGHT WRIGHT & JOHNSON, PLLC



Steven J Wright  
Attorney at Law

SJW/jw  
cc: client

**APPENDIX “C”**

**APPENDIX C:**  
**INTERVIEW NOTES**

**Interview Notes**

**Kathie Brack - Interviewer**

**Board Member Sue Thilo** – Telephone interview, 12/17/07

Ms. Thilo does not believe any formal action was taken by SBOE with respect to 9<sup>th</sup> grade ISAT testing at the 12/6/07 SBOE meeting. The matter was discussed informally and briefly in the executive session via a` vis the ongoing personnel problems at OSBE. Mike Rush raised dropping 9<sup>th</sup> grade testing in the executive session as a possibility in order to balance the OSBE budget to enable OSBE to hire staff.

The week before the 12/6 meeting Mr. Terrell advised SBOE Executive Committee members of the \$850,000 budget shortfall. Mr. Terrell was apprised of this by Mr. Rush. Ms. Thilo serves on the Executive, Auditing and ERSA Committees. She is unsure which of the SBOE committees would address ISAT testing issues, but thinks it could be a matter for the ERSA or State Dept. of Education Committees or it could be a contractual issue. There was no discussion of ISAT or 9<sup>th</sup> grade testing in the public portion of the meeting because it had been addressed in the executive session and no decisions had been made. The matter was discussed “peripherally” as it relates to the personnel issues (several open positions) at OSBE, caused by the budget shortfall.

Interim Executive Director, Mike Rush, continues to serve as the Director of the Office of Professional Technical Education (PTE) and his salary comes from the appropriation for PTE. The vacancies at OSBE have not been filled due to the budget deficit. Mr. Rush has been looking for ways to cure the shortfall so OSBE staff positions can be filled. One budget balancing option discussed briefly in the 12/6 Executive Session was to renegotiate the DRC contract (again) and drop the 9<sup>th</sup> grade testing portion.

Ms. Thilo does not know whether SBOE received legal advice regarding the discussions in the executive session. There was no discussion of the agenda of the non-public meeting by the Executive Committee in advance of the meeting. Mr. Terrell sets the agenda for all SBOE meetings. The non-public discussion related to personnel matters, largely concerning personnel issues at BSU and ISU. The discussion related to OSBE personnel vacancies and the inter-related budget deficit was brief. She believes that Mr. Rush had the authority to renegotiate the contract with DRC to cure the budget shortfall and solve the OSBE hiring problems. There were no formal directions by SBOE to Mr. Rush as to how to resolve the personnel problems; she believes Mr. Rush may have acted on Mr. Terrell’s instructions.

Ms. Thilo does recall the 9/12 SBOE meeting and the discussion related to grade 2 testing. She does not know why the deletion of grade 9 testing was handled differently than the deletion of grade 2 testing. She does not know why the motion passed at the 9/12 meeting did not cure the entire OSBE shortfall as discussed. She learned at a lunch

meeting with Mr. Terrell on November 15 of the additional approximately \$850,000 shortfall. She does not know who or how the shortfall was discovered, but speculated that the DFM Analyst (Jane McLaren) could have discovered it.

She does not believe SBOE has (as of the date of the interview) formally waived the policy requiring grade 9 testing. She stated that action has not been formally "ratified" by SBOE and that action needs to be taken. She does not know who issued the 12/10 press release announcing that 9<sup>th</sup> grade testing was being dropped.

Ms. Thilo does not know why the budget deficits were not discovered earlier, stating that SBOE depends on OSBE staff, and since there have been so many vacancies at OSBE, many tasks have not been performed and several matters have not been addressed. She believes, based on Mr. Rush's representations on 12/6/07 that dropping the 9<sup>th</sup> grade assessment would save about \$850,000. She stated her understanding that the \$850,000 cost reduction was for test development and implementation costs. She is unsure whether this represents an annual savings of \$850,000 for the duration of the contract or is a one-time cost saving. She is also unsure whether the development costs have already been accrued. She does not know the status of the contract negotiations with DRC and whether or not Mr. Rush has been successful in re-negotiating the terms. There has been e-mail discussion among SBOE members to have a special meeting to develop a "9<sup>th</sup> grade policy testing waiver."

**Board Member Richard Westerberg** – Telephone interview, 12/17/07

Mr. Westerberg is a recent appointment to SBOE (April 2007) and is still learning about SBOE activities. He serves on the Audit and BAHF (auditing, financial, building, personnel and university matters) Committees. He believes matters related to ISAT testing would be dealt with in the ERSA Committee. He first became aware of the OSBE budget shortfall at the 9/12 meeting. He does not recall whether there was discussion in the executive session of that meeting related to the budget shortfall and a renegotiation of the DRC contract. The OSBE Executive Director is supervised by the Executive Committee; the SBOE president supervises day-to-day activities of OSBE and the Executive Director.

His recollection of the 9/12/07 meeting was that SBOE could not fund ISAT testing for grades 2 and 9 and that the contract with DRC needed to be "adjusted" to address the budget shortfall. He stated that he understood there was not enough money in the budget to pay for grade 2 and 9 testing. He believed the 9/12 discussion was to re-negotiate the contract to drop grade 2 testing, but that 9<sup>th</sup> grade testing would continue. He was unaware of the additional budget deficit until the 12/6/07 meeting (executive session). Mike Rush informed SBOE of the ongoing deficit and the need to re-negotiate the DRC contract to get the "budget in order." There was also a mention of an emergency supplemental request for funding. He is unaware whether or not SBOE is in arrears with DRC. He thinks a supplemental appropriation would fix the budget problems for 2007. He indicated that there have been many problems with OSBE staff submitting timely and

thorough budgets to the SBOE, noting that Dwight Johnson submitted the 2007 budget quite late. The standard procedure is for staff to submit a proposed budget in August for the following fiscal year. (i.e. August 2007 submission for 2008-09 budget). This has evidently not been happening due to the many staff vacancies at OSBE, including the Chief Fiscal Officer.

He does not have an explanation for why the deletion of grade 9 testing was handled differently than the deletion of grade 2 testing in September. He stated that Mr. Rush provided a "menu of options" for how to address the deficit in the 12/6 executive session. He indicated the discussion was brief, and there was no specific direction to Mr. Rush as to how to address the deficit, nor was there any formal action by SBOE members. He does not know how the decision was made to delete 9<sup>th</sup> grade testing, stating he thought the action was taken by the President and that this was "within his purview." Mr. Westerberg did not receive any advance notice that 9<sup>th</sup> grade testing was being dropped, stating he was "surprised by the press release." He indicated that if the Executive Committee took the action, he was unaware of that.

Mr. Westerberg believes there was no formal action by SBOE on 12/6 to drop 9<sup>th</sup> grade testing. He believes that on 9/12, SBOE approved and authorized Mr. Rush to renegotiate the DRC contract. He does not know what the current status is of the contract negotiations with DRC, however, he stated that "one of the deliverables (9<sup>th</sup> grade testing) has changed." He does not know whether DRC has agreed to drop 9<sup>th</sup> grade testing from the contract. He does believe the \$850,000 shortfall has been fixed; he received a "courtesy call" from Milford Terrell after the board meeting (12/6) indicating that the \$850,000 shortfall had been resolved. He also stated that SBOE has created a new committee to oversee internal audits of OSBE and OSBE budget preparation and budget delivery to SBOE. Mr. Terrell asked him to be on that committee. This committee will supervise OSBE staff.

Mr. Westerberg confirmed that Deputy AG Jeff Schrader was present during the executive session. He noted that sometimes Mr. Schrader gives advice to SBOE members regarding whether discussions and topics are appropriate for executive sessions.

**Interim Executive Director Mike Rush** – (In-office) Interview 12/19/07

Mr. Rush continues to be Director of Professional Technical Education (PTE) and has been the Interim Executive Director of OSBE since his appointment at the September 12, 2007 SBOE meeting. He reports to SBOE in both capacities. Mr. Rush explained that PTE conducts programmatic functions and OSBE generally oversees policy functions. In the last several years since OSBE has taken on more functions from the Department of Education, it has assumed more programmatic functions, such as ISAT testing. It did not and does not have the staff to adequately develop and administer programs. Additionally, OSBE has also lost, for various reasons, a number of seasoned experienced staff in the last year. Those positions have not been filled due to the budget constraints. Importantly, there has been no experienced financial officer at OSBE since Jeff Shinn's

departure last spring. Mr. Rush speculated that this accounts for both the budget shortfall and the lateness in the discovery of the shortfall.

Most of Mr. Rush's SBOE contact is with Mr. Terrell, although he does communicate regularly with SBOE members via e-mail and telephone. A week or so prior to SBOE meetings, Mr. Rush meets with Mr. Terrell and Deputy AG Jeff Schrader to discuss agenda items and set the executive session agenda. Determinations are made at that time regarding the propriety of discussion topics for executive sessions. Prior to the 12/6 meeting Mr. Rush discussed proposed executive session items with Mr. Terrell and Mr. Schrader. Generally, the executive sessions contain personnel matters from the institutions. Board members may also propose items for the agenda.

The justification for discussing dropping 9<sup>th</sup> grade testing was related to an agenda item for hiring staff at OSBE and the ongoing critical need for key personnel, such as a chief financial officer, academic officer, etc. Mr. Rush also wanted to discuss salaries and bonuses for OSBE staff, some of whom did not get CEC increases this year. This discussion also implicated the ongoing OSBE budget deficit for the current fiscal year and the DRC contract. Mr. Rush has not hired staff to fill vacancies due to the budget deficit – he has effectively implemented a hiring freeze in order to balance the OSBE budget.

The SBOE authorized him to renegotiate the DRC contract in September because OSBE was over \$2 million short in its budget. The re-negotiation items authorized at the 9/12 SBOE meeting included dropping 2<sup>nd</sup> grade testing and deferring payments for the costs of 9<sup>th</sup> grade testing in the current fiscal year over the course of three subsequent years (2008-2010). In consultation with DFM staff and DRC staff in September, Mr. Rush believed that these amendments to the contract would balance the OSBE budget. There was a strong feeling on the part of Mr. Luna and Mr. Terrell to try to keep 9<sup>th</sup> grade testing in the contract. Mr. Rush was informed by DRC at that time that dropping the 9<sup>th</sup> grade component from the contract would only result in a savings of approximately \$250,000.

Mr. Rush has been working with the OSBE financial technician to balance the OSBE budget since his September appointment. Other PTE staff members have been providing OSBE with additional assistance to ameliorate the effect of the OSBE vacancies. With the contract amendment items negotiated in September with DRC, the OSBE budget was still approximately \$1.1 million short. Mr. Rush continued to explore ways to balance the OSBE budget and comply with his duty as a Director not to spend monies beyond the agency appropriation. During this time it was also determined and confirmed by LSO staff that the schedule of deferred payments for the 9<sup>th</sup> grade testing component of the DRC contract did not comply with Idaho law (i.e. obligating the agency to exceed its appropriation). Mr. Rush advised Mr. Terrell in approximately early November of these matters. They also discussed that the effect of leaving the four key OSBE positions vacant through the end of the fiscal year would result in approximately \$400,000 savings. The OSBE budget continued to be approximately \$800,000 over budget at this time.

In mid-November DRC informed Mr. Rush that the contract amendments agreed to in September did not bring about the savings anticipated and discussed in the 9/12 SBOE meeting. DRC informed Mr. Rush that dropping the 9<sup>th</sup> grade testing would result in a savings of approximately \$823,000. Mr. Rush believed that he had been authorized by SBOE in September to renegotiate the DRC contract and he believed that he was under a duty to balance the agency budget and not violate state expenditure laws. He therefore ordered DRC to stop further work on developing the 9<sup>th</sup> grade test as a means of balancing the OSBE budget and not exceeding the spending authority for the agency.

The fall portion of the 9<sup>th</sup> grade test was designed to provide preliminary information that would assist DRC in developing the spring assessment. This process also required input from teachers and superintendents throughout the state to determine the final test items for the spring assessment. Mr. Rush felt it was important for SBOE to make an ultimate decision about 9<sup>th</sup> grade testing before Idaho school districts incurred the expenses of sending teachers and administrators to a state meeting (probably in January) to assess the analysis of the fall testing and determine the final outcomes for the spring test.

Mr. Rush informed Mr. Terrell of these matters, including the fact that he had ordered DRC to cease all further work on the development of the 9<sup>th</sup> grade test. Mr. Rush was aware that Mr. Luna continued to be interested in offering 9<sup>th</sup> grade testing and that it was his intention to seek a supplemental appropriation from JFAC. Mr. Terrell supported Mr. Luna in this regard. Mr. Luna scheduled a meeting with JFAC members for late December to discuss a supplemental appropriation to keep 9<sup>th</sup> grade testing in the contract. Mr. Rush felt that he had no choice in mid-November but to order DRC to stop further work on the 9<sup>th</sup> grade test development. He was concerned that if he waited until Mr. Luna met with JFAC members in late December that further significant costs would be incurred. The December SBOE meeting was scheduled for 12/6 and, as per the usual procedure, Mr. Rush and Mr. Terrell met with Deputy AG Jeff Schrader to discuss agenda items. Personnel issues at OSBE and the budget constraints preventing filling vacancies was one of the agenda items for the executive session. Mr. Rush and Mr. Terrell advised SBOE members of the \$850,000 savings that could be realized by dropping 9<sup>th</sup> grade testing, which would balance the OSBE budget and allow Mr. Rush to fill some of the OSBE vacancies before the end of the fiscal year. This discussion took approximately 3 minutes.

Mr. Luna and Mr. Rush met with JFAC members on 12/7 (re-scheduled meeting) to discuss a supplemental appropriation to maintain 9<sup>th</sup> grade testing in the DRC contract. JFAC members declined to meet the funding request. Mr. Rush informed JFAC members at that time that all work on 9<sup>th</sup> grade testing by the vendor had ceased. Mr. Rush and Mr. Terrell agreed to inform (by press release) school districts statewide that 9<sup>th</sup> grade testing would not occur in the spring. According to Mr. Rush, it was an unintentional error to have stated in the 12/10 press release that the board had eliminated the 9<sup>th</sup> grade test. Mr. Rush is clear that he made a unilateral decision to halt the vendor from further work on the 9<sup>th</sup> grade test in order to balance the OSBE budget and not further obligate OSBE to additional expenses. He also feels that he had SBOE authority to do this based on the 9/12 SBOE meeting authorizing him to renegotiate the DRC

contract. Furthermore, he believes it an agency director's duty not to violate state purchasing and spending laws. Mr. Rush indicated he is accustomed to managing state agencies within certain parameters and does not feel he can obligate an agency to exceed its budget appropriation.

An SBOE meeting is scheduled for 12/20 to take formal action on 9<sup>th</sup> grade testing including: 1) waiving the SBOE rule requiring 9<sup>th</sup> grade testing; and 2) authorizing OSBE staff to renegotiate the DRC contract to eliminate 9<sup>th</sup> grade testing (and the September amendments related to deferred payments for 9<sup>th</sup> grade testing). Mr. Rush indicated that DRC is amenable to these new terms, and the revised contract will be reviewed by the Dept. of Administration/Purchasing Division.

**Board President Milford Terrell** – Telephone interview, 12/20/07

Mr. Terrell meets with Mr. Schrader and Mr. Rush prior to each board meeting to discuss agenda items, including items for executive sessions. Mr. Schrader gives advice about "where the line is" regarding what can be discussed in executive or public sessions. Prior to the 12/6 meeting, Mr. Rush and Mr. Terrell indicated that they needed to have some discussion in the executive session regarding the ongoing urgency of filling staff vacancies at OSBE and the need to balance the SBOE budget.

Mr. Rush informed Mr. Terrell in November that the deferred payment schedule for grade 9 testing, which had been approved in the 9/12/07 SBOE meeting, had been declared to be impermissible by LSO staff. When it became clear that the deferred payment schedule was not a viable cost saving option, Mr. Terrell and Mr. Rush became concerned over the reduced options to balance the budget. Mr. Terrell believed with Mr. Rush that the only option available to balance the SBOE budget was to eliminate 9<sup>th</sup> grade testing. He was aware that Mr. Rush had ordered DRC in mid to late November to cease further work on the development of 9<sup>th</sup> grade testing in order not to incur additional costs.

As background, Mr. Terrell explained that he has only been the SBOE President since last March. He did not sign the DRC contract and had not been involved in any of the negotiations when the contract was developed. He indicated that there had been longstanding problems with information from OSBE and that the current budget deficit began in 2006 with previous Executive Director, Dwight Johnson. During the 2006-07 budget cycle, SBOE was over \$300,000 behind on payments to DRC. SBOE members have been attempting to resolve the compounding budget problems since that time, and the primary means of doing so have been to amend the \$22 million DRC contract and to try to realize cost savings through the personnel budget. However, leaving high level staff positions vacant (such as the Chief Financial Officer) impacts the quality of the information SBOE members rely on to make decisions, which further compounds the ongoing budget problem. Additionally, staffers in the Governor's Office have made representations that the Governor would support supplemental appropriations and/or that JFAC members would be supportive of supplemental appropriations; SBOE members

have also been told that there would be monies available to fund ISAT testing from a Department of Education program to fund special needs education. Mr. Terrell indicated that, during his time as a member of SBOE, he has learned hard lessons about the prudence of making decisions based on such unreliable representations.

He indicated that as soon as Mr. Rush became the Interim Director, he began to struggle with the budget matter and look for ways to balance the OSBE budget and fill important staff vacancies. Referring to the deferred payment schedule, when Mr. Rush informed him that SBOE would "have to pay for this year's bills with this year's money" the budget balancing options were significantly reduced. In discussions with the Governor and Mr. Hammond this fall, it became increasingly clear to Mr. Terrell that SBOE could not pay for 9<sup>th</sup> grade testing.

Mr. Terrell described the discussion during the executive session on 12/6/07 as being a discussion about the ongoing personnel issues at OSBE, impacted by the ongoing deficit due to the DRC contract and which lasted about four minutes. He indicated to SBOE members that they would probably have to eliminate 9<sup>th</sup> grade testing. Mr. Terrell indicated that no formal action was taken by the SBOE at this point. Mr. Luna also had a meeting scheduled the following day with JFAC members as a last effort to try to secure supplemental funding to maintain 9<sup>th</sup> grade testing. When JFAC members indicated on 12/7/07 that they did not support this supplemental, he knew that there were few remaining options. Mr. Rush and Mark Browning believed that a press release should be issued. Mr. Terrell stated he disagreed with them and wanted to wait until the SBOE made a decision before making an announcement. He reviewed the press release before it went out, but did not appreciate the statement that SBOE had "eliminated" 9<sup>th</sup> grade testing at that point. He believes that Mr. Rush acted within his authority to halt development of 9<sup>th</sup> grade testing. He also indicated SBOE is holding a public meeting this afternoon and will hear Mr. Rush's recommendation to eliminate 9<sup>th</sup> grade testing and that SBOE members will vote on that proposal. He also stated that if the "board does not take Mr. Rush's recommendation, DRC would fire up 9<sup>th</sup> grade testing again."

Mr. Terrell does not believe he violated the Open Meeting Law and indicated that the wording of the press release should have been more precise. He also indicated that he would seek training for all board members on the open meeting law.

Interview Notes

**Karin Jones – Interviewer**

**Board Member Paul Agidius** – Telephone Interview, 12/17/07

The executive session of the 12/6/07 meeting began at 9 AM and lasted until about 1 PM. They held an open session in the afternoon. All board members were present at the executive session, though Rod Lewis and Tom Luna showed up late. Jeff Schrader and Mike Rush were also present.

During the investigation, the Board heard presentations from the institutions (the U of I, BSU, and he believes ISU). He doesn't recall all the issues presented by the institutions, but one involved a contract negotiation with an employee. He felt that everything fell within the bounds of an executive session.

Milford Terrell commented that they would likely have to eliminate 9<sup>th</sup> grade ISAT testing because their budget was over by \$800,000. Mr. Agidius does not recall responding to the comment. It was a very brief discussion, with Mr. Terrell commenting that the 9<sup>th</sup> grade tests would probably have to be cut, based upon the outcome of Mr. Terrell's meeting w/ the joint chairs of JFAC the following day. Mr. Agidius doesn't recall anyone else commenting on the issue. Mr. Terrell said that they would have to have a telephone conference or meeting to take official action. This discussion tied into a discussion regarding staffing for the Board. There are vacancies, including the positions of Chief Fiscal Officer and Academic Director. Their current Executive Director (Mike Rush) is also temporary. These budget/staffing issues tied into the \$800,000 shortfall and cutting the 9<sup>th</sup> grade tests.

With respect to cutting the 2<sup>nd</sup> grade ISAT testing back in September, the Board took action to authorize renegotiation with the contractor (DRC). Mr. Agidius commented that there was a misunderstanding that the funds for the 9<sup>th</sup> grade testing were included in the contract price and that after cutting the 2<sup>nd</sup> grade testing, they would be back in line. They found out that the 9<sup>th</sup> grade testing wasn't included, and the Board can't be over budget by that much.

Mr. Agidius doesn't know how the decision to cut the 9<sup>th</sup> grade testing was made. He wasn't part of the decision. He has since heard – though not directly from Mike Rush – that Mr. Rush believed he had the authority to cut the testing.

**Board Member Blake Hall** – Telephone Interview, 12/17/07

The executive session on 12/6/07 began at 9 AM and took most of the morning. Mr. Hall was the one to move to go into the executive session. This motion was made during an initial open session before going into executive session.

The general topics discussed during the executive session included institutions reporting regarding activities that he believed were appropriate for executive session. BSU, the U of I, and ISU all made reports about matters, including real estate acquisitions and matters related to litigation.

There was an update made by Milford Terrell regarding personnel issues related to a large number of vacancies among the Board staff. Mr. Terrell commented that he was trying to get a supplemental appropriation for proper funding for the 9<sup>th</sup> grade ISAT testing, but he was dubious that it was going to happen. Mr. Terrell had talked earlier with the governor, and the governor was not willing to support supplemental funding unless JFAC agreed. Mr. Terrell was going to meet the next day with the co-chairs of JFAC to try to get them to commit to funding the 9<sup>th</sup> grade ISATs, and Mr. Terrell commented that he would let the Board know how it went and that the Board would have to decide what to do. Mr. Terrell also commented that if they could not get funding, then the Board would have to make a decision. As Mr. Hall commented during this interview, it was pretty obvious what the decision would have to be if the Board was called upon to make it (if there was no funding). The discussion regarding funding was pretty minor. Mr. Hall returned from a restroom break just as the discussion had gotten underway, and he believed it was just an update from Mr. Terrell on prior issues raised during meetings Mr. Hall had missed. (Mr. Hall was absent from board meetings in the preceding months, as he was going through a divorce, and thus he has not been quite as involved with the Board recently.)

Mr. Hall does not recall being present during the prior meeting when the Board discussed cutting 2<sup>nd</sup> grade ISAT testing (again, because of his divorce). He has no knowledge of what occurred regarding the funding issues.

All of the Board members were present during at least parts of the executive sessions, as were Mike Rush and Jeff Schrader. He recalls Rod Lewis and Tom Luna being the last to arrive, but he thinks they arrived prior to the above commentary by Mr. Terrell.

Mr. Hall noted during this interview that he represents public entities on a regular basis and has, in previous Board meetings, raised the issue of whether the Board should be discussing something in executive session. The Board will then rely on Jeff Schrader's advice on how to proceed. Mr. Hall did not, however, raise that issue during the 12/6 executive session. Mr. Hall just thought it was an update from Mr. Terrell on prior issues discussed in meetings Mr. Hall had missed. Mr. Hall doesn't recall Mike Rush or Jeff Schrader commenting on Mr. Terrell's discussion of the 9<sup>th</sup> grade testing, but Mr. Hall noted that he isn't sure of that fact.

There was no vote of the Board taken during the executive session and no decision was made by the Board. Mr. Hall has never cast a vote regarding the 9<sup>th</sup> grade testing (as of the date of the interview). He has no idea who made the decision to cut the testing or who issued the announcement on 12/10/07. He hasn't talked to any Board members about any issues since the Board meeting on 12/6/07 (as of the date of the interview).

**Board Member Laird Stone** – Telephone Interview, 12/18/07

The Board went into executive session at about 9 AM on 12/6/07. Mr. Stone believes that Blake Hall was the one who made the motion to do so. Typically when Mr. Hall makes such a motion, he refers to the subsection in the Open Meeting Act under which the Board is going into executive session.

Not all members of the Board were present initially. Rod Lewis and Tom Luna arrived late. Mr. Luna was on his way from the airport, and Mr. Stone believes that he arrived a little bit before Mr. Lewis. Mike Rush and Jeff Schrader were present at the executive session.

On the agenda for the executive session that day were legal issues regarding the acquisition of property through condemnation actions. ISU brought to the Board a review on a personnel contract regarding a coach's termination of employment. Mr. Lewis noted that potential litigation was associated with that issue. Kent Nelson from the U of I went through pending lawsuits regarding personnel claims against the University and talked about acquiring property in the Sandpoint area.

The contract with DRC (as it pertained to obligations of the Board and DRC) was the first item about which they spoke during the executive session. Milford Terrell brought up the issue of the DRC contract, commenting that there were potential problems and issues regarding financial aspects of the contract (what DRC thought they were going to do vs. what the Board thought DRC was going to do) that could affect the ability to fill staff vacancies at the Board of Education. The CFO, Chief Academic Officer, and Executive Director positions are currently vacant. The issue was whether the Board could hire for those positions at this point in time.

Mr. Stone knew there were issues with the DRC contract. The budget was handled by JFAC. He knew there would be shortages and that there were ongoing negotiations with DRC, which Mr. Terrell had taken over.

Mr. Terrell stated that it didn't appear that the Board could require another contract for DRC to go forward w/ 9<sup>th</sup> grade ISAT testing and that they needed to do something about their finances. There were some other comments regarding the financial impact of cutting the 9<sup>th</sup> grade tests and where that would put the Board financially. Board members had questions and comments.

There was no vote or decision made during the meeting. Either Mr. Terrell, Mr. Schrader, or Mr. Rush said that a decision would have to be made in the very near future. Mr. Stone took that to mean that a decision would need to be made within the next few days or week. It was not clear how that decision was going to be made. Mr. Stone somewhat assumed that the decision would be made by Mr. Rush, as Acting Executive Director, and ratified by the Board, but no one actually said that.

The issue of cutting 9<sup>th</sup> grade testing was not on the agenda for the open session of the meeting, and Mr. Stone does not remember discussing it during the open session. Mr. Stone does not think he discussed the 9<sup>th</sup> grade testing with anyone after the 12/6/07 meeting (as of the date of the interview). There was no vote or decision made by the Board following the meeting.

Word later went out that Mr. Rush had pulled the 9<sup>th</sup> grade testing. Mr. Stone has full confidence in Mr. Rush and assumes Mr. Rush is doing his job.

Mr. Stone does not think that the 9<sup>th</sup> grade testing was treated differently from the 2<sup>nd</sup> grade testing. Everyone was aware that the 9<sup>th</sup> grade testing was in danger because the DRC contract didn't include the 9<sup>th</sup> grade. The hope was that cutting the 2<sup>nd</sup> grade testing would take care of it if the Board could get a supplemental appropriation for the 9<sup>th</sup> grade. There was additional research done into supplemental appropriation, but then the Board found itself in December with no time left. Mr. Stone himself was not part of the supplemental appropriation discussions (he believes Mr. Rush, Mr. Terrell, and temporary CFO Scott Christie were involved with that).

Mr. Stone feels very comfortable that the Board was completely within the Open Meetings Act. Mr. Schrader always reminds the Board when they're close to boundaries, and he didn't do so in this case. Mr. Stone thinks Mr. Schrader does an excellent job of reminding the Board of boundaries for executive sessions.

#### **Board Member Rod Lewis** – Telephone Interview, 12/21/07

Mr. Lewis arrived at the 12/6/07 meeting about 10-15 minutes after 9 AM. When he walked in, he asked what had happened so far, and they told him they had discussed 9<sup>th</sup> grade testing. The issue did not come up again in the meeting.

There was no vote or decision made by the Board regarding the 9<sup>th</sup> grade testing while Mr. Lewis was present. If there had been any actual decision made before his arrival at the 12/6 meeting, Mr. Lewis is sure they would have told him about it. It would, however, have been contrary to how the Board does business to make such a decision in an executive session, as they are aware that decisions need to be made in public.

It was a fairly busy agenda for the executive session. The universities made presentations, etc. The executive session ran until about 1 PM, as Mr. Lewis recalls having lunch during the meeting.

Milford Terrell updated Mr. Lewis either later that day or the next day on the financial situation. Mr. Terrell did not phrase the situation in the manner of a decision having been made about cutting 9<sup>th</sup> grade testing, but there was a sense of inevitability, as it would be difficult to make things work financially without cutting the 9<sup>th</sup> grade testing.

Mr. Lewis knew Tom Luna was on the other side of the issue, as Superintendent Luna was trying to maintain the 9<sup>th</sup> grade testing. Mr. Lewis knew that Mr. Terrell and Superintendent Luna had a meeting with legislators after the 12/6 Board meeting, so there was some hope of funding for the testing. Mr. Lewis talked to Mr. Terrell after the meeting, though, and the JFAC leadership had made it clear that they were unlikely to fund the testing.

Mr. Lewis was surprised by the 12/10 press release.

The Board met on 12/20/07 at a special meeting and engaged in a full discussion of the issue of 9<sup>th</sup> grade testing during a public session. Mike Rush started the discussion by commenting that, knowing the Board didn't have funding, he thought he had the authority to make the decision to notify DRC to move down the path of cutting 9<sup>th</sup> grade testing. There were two matters on the table at the 12/20 meeting: (1) Amending the DRC contract to remove 9<sup>th</sup> grade testing; and (2) a motion to waive the Board rules to allow for not testing 9<sup>th</sup> graders in the spring and fall of 2008. Superintendent Luna advocated keeping the 9<sup>th</sup> grade testing in the contract, and there was a fair amount of debate, including a discussion of whether the contract amendment would be for only one year or for the full term of the contract. Mr. Terrell talked about the financial status of the Board. The Board voted on the issue and approved amending the contract 5-1 (with Superintendent Luna voting against it).

#### **State Superintendent Tom Luna** – Telephone Interview, 1/11/08

Superintendent Luna was present for the executive session on 12/6/07, but he arrived approximately half an hour late, as he had flown over with Rod Lewis. He also had to leave at noon to give a speech at the Pocatello Chamber of Commerce. When he returned to the meeting, the Board had finished its executive session and was preparing to go into the afternoon public session. During the portion of the executive session where Superintendent Luna was present, the Board did not discuss 9<sup>th</sup> grade ISAT testing at all. He was present for reports given by colleges and universities, but was not present for any budgetary/ISAT testing discussion. No decision or vote was undertaken regarding the ISAT testing at the portion of the executive session when he was present, nor did anyone say anything to him about such a decision having been made when he was absent. After he returned to the afternoon public session, Superintendent Luna found out that the Board had talked about the College of Western Idaho after he left the executive session; however, he was not told of any discussion regarding 9<sup>th</sup> grade ISAT testing.

Superintendent Luna provided this interviewer with some background regarding the Board's budgetary issues insofar as they affected 9<sup>th</sup> grade ISAT testing. The Board changed vendors (to DRC), signing a contract that obligated the Board to pay quite a bit more for ISAT testing than it had under the previous contract. There was not enough money in the budget to pay the extra costs. The Board eliminated 2<sup>nd</sup> grade ISAT testing back in September. They also eliminated winter testing and gave up some of the tools that teachers were originally to receive after the tests were given. The Board also

negotiated a reduction in the contract price with DRC. In taking all these measures, the Board was hoping that it would not have to eliminate 9<sup>th</sup> grade testing. It was hoped that supplemental funding could be obtained. Superintendent Luna was involved in negotiations with DRC and in discussions with Milford Terrell, Rod Lewis, and Mike Rush regarding ways in which they could try to balance the budget.

Superintendent Luna met with the JFAC co-chairs in Burley on December 7, along with Mike Rush. They discussed Superintendent Luna's budget that he would be presenting in 2008. They also discussed the possibility of restoring funding for the 9<sup>th</sup> grade ISAT testing.

Superintendent Luna was not part of the drafting of the 12/10/07 press release. He received an e-mail on his blackberry regarding the release, but he's not sure he even read the press release itself. Superintendent Luna assumed that Mr. Rush issued the press release because he needed to let DRC know to stop working on the 9<sup>th</sup> grade test development (and thus to stop incurring further costs). He assumed that Mr. Rush would have to take those kinds of steps if JFAC did not approve the funding.

On 12/20/07, Superintendent Luna was present at a public meeting of the Board, in which the Board discussed the potential elimination of 9<sup>th</sup> grade ISAT testing. The Board voted to eliminate the testing, with Superintendent Luna as the only one voting against it. Superintendent Luna clarified that he understood why the testing was being cut, but, as State Superintendent, he felt 9<sup>th</sup> grade testing was important. The fact is, however, that the money for the testing simply isn't there. The Board then voted to remove 9<sup>th</sup> grade testing from the Board rules. Superintendent Luna voted for that removal, since the Board had already voted to eliminate the testing.

Superintendent Luna commented that Board attorney Jeff Schrader does a good job of making sure that the Board stays within the parameters of the Open Meetings Act. Superintendent Luna assumes that Mr. Schrader was doing so during the entirety of the executive session on 12/6.

## **APPENDIX “D”**

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**December 10, 2007**

### **STATE BOARD ELIMINATES 9th GRADE PORTION OF THE ISAT**

BOISE— The Idaho State Board of Education announced today that they have eliminated the 9th grade test as part of the Idaho Standard Achievement Tests (ISAT) in both the spring and fall testing windows, effective immediately.

"It's unfortunate but we must balance our budget," said Board President Milford Terrell "Accountability is key, and that includes fiscal accountability."

The change is due to unforeseen contractual costs associated with the test. As a result of today's action, the Board estimates they will eliminate approximately \$826,320 in projected costs in this current fiscal year (FY08).

The spring and fall ISAT for grades 3-8 and 10 remains in place. A high school student in Idaho must pass the 10th grade ISAT in order to graduate. State accountability testing is mandated by the federal No Child Left Behind Act (NCLB) of 2002. The ISAT is Idaho's mechanism that satisfies the NCLB requirement. To learn more about the Idaho State Board of Education or ISAT assessment, please visit [www.boardofed.idaho.gov](http://www.boardofed.idaho.gov).

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