

**Prepared Remarks of  
Attorney General Lawrence Wasden  
News Conference RE: SBOE Open Meeting  
Complaint  
9:00 AM  
February 22, 2008**

Good morning, thank you for coming. We are here today to announce the conclusion of my office's investigation into a complaint alleging that the state board of education violated the Open Meeting Law. We have copies of our full investigation and findings for each of you and will post them on our website. The full investigative report contains a large amount of detail and analysis of the board's actions, as well as supporting documentation we relied on in the course of our investigation. I would like to summarize our investigation and findings, and try to answer your questions at the end.

On December 12, 2007, Betsy Russell, a reporter with The Spokesman-Review, filed a complaint with our office, alleging a violation of the Idaho Open

Meeting Law by the Idaho State Board of Education. Essentially, the complaint alleged that the Board violated the Open Meeting Law by:

(First) discussing, during an executive session on December 6, 2007, budgetary issues AND the elimination of ISAT testing for the 9<sup>th</sup> grade;

(Second) 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;

(Third) failing to specifically delineate in its agenda for the December 6 meeting the reasons it planned to go into executive session; and

(Fourth) failing to specifically delineate in the minutes of its October 11, 2007 meeting the reasons for going into executive session.

The Idaho Allied Dailies submitted a companion complaint on December 19, 2007, incorporating Betsy Russell's complaint by reference.

A quick summary of the facts as shown by our investigation is as follows:

On December 6, 2007, the Board held a regular meeting at Idaho State University in Pocatello, commencing at 9:00 AM. This meeting was properly noticed, and the intent to enter into an executive session was placed on the agenda. Board member Blake Hall immediately moved to go into executive session, and the Board properly voted to do so. Present at the beginning of the executive session were Board members Mr. Hall, Paul Agidius, Sue Thilo, Laird Stone, Richard Westerberg, and President of the Board Milford Terrell. Mike Rush, the Interim Executive Director of the Board of Education, and Jeff Schrader, the Deputy Attorney General

assigned to represent the Board, were also present. Board members Rod Lewis and Superintendent Tom Luna arrived approximately 15-30 minutes into the executive session, and neither was present during the discussion which was the subject of our review. Board communications officer, Mark Browning was not in attendance.

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 Executive Director position while simultaneously holding the position of Director of the Office of Professional Technical Education. These staff vacancies have not been filled due to budget constraints dating back to the 2006 budget cycle. 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.

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, because dropping 9<sup>th</sup> grade testing from the contract would save approximately \$850,000. 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. 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.

During the executive session on December 6, 2007, the State Board of Education did NOT make any decision regarding the issues discussed and did NOT vote on these issues. It is worth noting, that if a decision had been made within the executive session, that would have most certainly been a violation of the open meeting law, but again, no decision was made.

In his interview, Mike Rush, the Interim Executive Director, said that HE unilaterally made the decision to direct the contractor to stop work on the testing and that he believed he had the authority to make that decision. The Executive Director and the Board's communications officer decided to issue the press release announcing that the 9<sup>th</sup> grade testing had been eliminated.

The Board subsequently scheduled a meeting with proper notice and agenda. The Board properly conducted a special public meeting on December 20, 2007 and eliminated 9<sup>th</sup> grade testing.

Following this office's investigation of the matter, which included, among other things, 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:

The Board's actions **may** have constituted a **non-knowing** violation of the Open Meeting Law.

By way of further explanation, although the statutory language regarding permissible topics for discussion in executive session seems to contemplate the hiring of a single person rather than a host of persons, we cannot say with certainty that a court would find that the Board committed a knowing violation of the Open Meeting Law by discussing these vacancies in its executive session. In the future, we would

recommend and counsel our clients to observe this more cautious interpretation of that language.

Even if a violation did occur, it does not give rise to the penalties (nullification and a fine) provided for under the law, for the following reasons:

First: No decision was made in the December 6 executive session;

Second: Without exception, the evidence shows that the Board members believed the executive session was held in compliance with the Open Meeting Law;

Third: 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;

Fourth: Since no decision was made during the executive session, the remedy under the Law to void a Board action is inappropriate;

Fifth: In light of the “good faith exception” created by the case of State v. Yzaquirre, a knowing violation of the law cannot be proven;

Sixth: Absent a knowing violation, no fine can be imposed under the Law;

We additionally concluded that:

The December 10th press release, announcing that the Board had decided to eliminate 9th grade ISAT testing, was inaccurate;

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;

The Board's agenda for the December 6 executive session was appropriate; and that

The Board would benefit from receiving training on the Open Meeting Law.

As a point of information, the Board has scheduled such training in the near future.

In summary, my office was presented with three general questions:

First, did the State Board of Education violate the Open Meeting Law? Second, if the State Board of Education violated the Open Meeting Law, was it a knowing violation? Finally, did the State Board of

Education make a decision that must be nullified due to a violation of the Open Meeting Law?

In answer to the first question -- “Did the State Board of Education violate the Open Meeting Law?” -- The answer is maybe.

The statute is ambiguous as to its proper application, and there is no case law on point or legislative history discussing its proper interpretation. In other words, there is room for reasonable minds to disagree, but my office recommends a more cautious narrow interpretation.

In answer to the second -- “If the State Board of Education violated the Open Meeting Law, was it a knowing violation?” -- Based upon the ambiguities in the statute, as well as the statements of the Board Members, it would be impossible to prove a knowing violation of the law based on the evidence the investigation gathered.

Finally, in answer to the third -- “Did the State Board of Education make a decision that must be nullified due to a violation of the Open Meeting Law?” -- No decision was made during the executive session. Therefore, there is no decision to nullify.

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

I am happy to answer any questions you have.