

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS

SUPERIOR COURT

No. 219-2011-CV-000349

DAVID K. TAYLOR

v.

THE OYSTER RIVER COOPERATIVE SCHOOL BOARD

and

HENRY BRACKETT, Chairman

DAVID K. TAYLOR'S REQUEST FOR FINDINGS OF FACT AND RULINGS OF LAW

NOW COMES David K. Taylor, ("Taylor"), Petitioner in the above captioned matter, and submits the within Request for Findings of Fact and Rulings of Law.

FINDINGS OF FACT

1. On March 24, 2011, Board members Brackett, Butts, Kach, Lane, O'Quinn, Turnbull and Wright convened in person at the SAU #5 office. At this meeting the Board received training on the NH Right-to-Know law RSA 91-A. Board members Brackett, Butts, O'Quinn, and Wright also received training on RSA 91-A a year earlier on March 24, 2010.
2. On April 13, 2011 at about 6:00 p.m., Board members Brackett, Butts, Kach, Lane, O'Quinn, Turnbull and Wright convened in person at ORHS for a Special Board Meeting that was noticed with no subject for the content of this meeting. At the April 13, 2011 meeting the Board entered nonpublic session under RSA 91-A:3 II (c) where they discussed how to edit a public statement even though, immediately prior to entering nonpublic session, Superintendent Howard Colter told the Board that attorney Diane Gorrow advised them not

to enter nonpublic session to discuss how to edit a public statement. The minutes do not record any subject discussed in nonpublic session.

3. On or around April 19, 2011, Brackett sequentially communicated with a quorum of the Board by phone or otherwise outside a meeting about changing the contract for Superintendent Howard Colter and retaining an attorney for this purpose as noted in his calendar as "What are your thoughts about separation?". Following this sequential communication, Brackett decided to proceed with a separation agreement and arranged a meeting of the Board with attorneys Daniel Hoefle and Kim Memmesheimer.
4. On May 20, 2011 Board members Brackett, Butts, Kach, Lane, O'Quinn, Turnbull and Wright convened in person with attorney Kim Memmesheimer at her office for a non-meeting. At this meeting or another private meeting, just the Board without the attorney deliberated and decided to delegate to Turnbull and O'Quinn to work on public relations. At this meeting or another private meeting, just the Board without the attorney deliberated and decided to delegate to Brackett to begin the search for an interim superintendent. Subsequently, at this meeting, at another private meeting or outside of a meeting, Brackett appointed Turnbull and Kach to work with him on the search for an interim superintendent. All parts of this meeting, including the deliberations and decisions, were closed to the public and there was no notice or minutes.
5. On May 22, 2011, Board members Brackett, O'Quinn, and Turnbull along with Arthur "Skip" Hanson of the New England Secondary School Consortium and Duke Albanese of the Great Schools Partnership convened by conference call where none of the participants were at the same physical location to discuss issues related to public relations, including general public relations not related to the separation agreement. This meeting was closed to the public and there was no notice or minutes.

6. On May 23, 2011, Board members Brackett, O'Quinn, and Turnbull convened in person with attorney Kim Memmesheimer at her office to interview Raymond Mitchell of Trident Communications Group, as a candidate public relations firm. All parts of this meeting, including the interview, were closed to the public and there was no notice or minutes.
7. Immediately following the interview meeting with Mitchell, Board members Brackett, Butts, Kach, Lane, O'Quinn, and Turnbull convened in person with attorney Kim Memmesheimer at her office where just the Board without the attorney deliberated and decided to not select Raymond Mitchell for public relations. All parts of this meeting, including the deliberation and decision, were closed to the public and there was no notice or minutes.
8. On May 27, 2011, Board members Brackett, O'Quinn, and Turnbull along with Rhoades Alderson of the New Harbor Group in Providence, Rhode Island convened by conference call where none of the participants were at the same physical location to discuss issues related to public relations and where the Board members decided to work with Rhoades Alderson for public relations. This meeting was closed to the public and there was no notice or minutes.
9. At this May 27, 2011 meeting or another private meeting or outside of a meeting, at least Board members O'Quinn and Turnbull deliberated and decided that O'Quinn would draft a response to a letter from the ORHS Senior Student Senate and that Rhoades Alderson would review that draft. Responding to the letter from the ORHS Senior Student Senate is not related to the terms or conditions of the separation agreement with Superintendent Colter and is not subject to the confidentiality provision of that separation agreement.
10. On June 6, 2011, Board members Brackett, Kach and Turnbull convened in person at the Durham Police Station with Arthur "Skip" Hanson. At this meeting or another private

meeting or outside of a meeting, these members interviewed Arthur "Skip" Hanson for interim superintendent, received information from Arthur "Skip" Hanson about the interim superintendent search process as well as about other potential candidates for interim superintendent. This meeting was closed to the public and there was no notice or minutes.

11. On June 10, 2011 and on June 13, 2011, Board members Brackett, Kach and Turnbull convened in person at the Durham Police Station with unnamed candidates for interim superintendent. At each of these meetings, these members interviewed an unnamed candidate for interim superintendent and/or received information about the interim superintendent search process. These meetings were closed to the public and there were no notices or minutes.

12. On June 13, 2011, Board members Brackett, Kach, Lane, O'Quinn, Turnbull and Wright convened in person with attorney Kim Memmesheimer at her office. At this meeting or another private meeting, just the Board without the attorney deliberated and decided to hold finalist interviews for interim superintendent in nonpublic session. At this meeting or another private meeting, just the Board without the attorney deliberated and decided whether to write public relations documents like a list of frequently asked questions (FAQs) or other statements. At this meeting or another private meeting, just the Board without the attorney deliberated and decided how to announce the separation agreement. At this meeting or another private meeting, just the Board without the attorney deliberated and decided how to announce the interim superintendent search such as the timing of this announcement. All parts of this meeting, including the deliberations and decisions, were closed to the public and there was no notice or minutes.

13. On June 14, 2011, Board members Brackett and Turnbull convened in person at the Durham Police Station. Kach was informed about this meeting but could not attend. They met with

Lyonel Tracy. At this meeting or outside of a meeting they received information from Lyonel Tracy about the interim superintendent search process and about potential candidates for interim superintendent. This meeting was closed to the public and there was no notice or minutes.

14. On June 15, 2011, Board members Brackett, Butts, Kach, Lane, O'Quinn, Turnbull and Wright convened in person at a Regular Board Meeting at ORHS where the Board deliberated and decided without a formal vote to delegate to Butts and O'Quinn to talk with the press about the separation agreement and the interim superintendent search as noted in the minutes as "The Board discussed talking to the press on this situation and how the process will be moving forward." The minutes of this meeting do not record the motion to enter nonpublic session. The initial minutes of the nonpublic session did not accurately record the motion of the Board approving the separation agreement since the motion did not include the dollar amount. On June 22, 2011 the initial minutes were replaced by minutes with the dollar amount.

15. On June 21, 2011, Board members Butts, O'Quinn, and Turnbull along with Rhoades Alderson of the New Harbor Group in Providence, Rhode Island convened by conference call where none of the participants were at the same physical location to discuss issues related to public relations and press interviews and where the Board members decided how to be interviewed by the press. This meeting was closed to the public and there was no notice or minutes.

16. On September 12, 2011 Board members Brackett, Butts, Kach, Lane, O'Quinn, Turnbull and Wright convened in person with attorney Dennis Ducharme where just the Board without the attorney deliberated and decided not to settle the present case out of court. All parts of

this meeting, including the deliberation and decision, were closed to the public and there was no notice or minutes.

17. As early as June 22, 2011, except for Brackett, the other Board members had made documents available for legal review in response to the June 20, 2011 Right-to-Know request. The June 22, 2011 date is evident from the dates when these documents were forwarded. But, these documents were not released to Taylor until July 7, 2011 which is 17 days after June 20, 2011.
18. In spite of repeated reminders and legal advice, Brackett did not release any documents until 55 days after June 20, 2011 on August 12, 2011, including time when he went on vacation. August 12, 2011 is 8 days after the petition was filed in this case.
19. Taylor received new documents responding to the June 20, 2011 request from Brackett around August 22, 2011 and from Turnbull on October 7, 2011 at their depositions. Based on the dates when these documents were forwarded for legal review, all documents pertaining to the public relations meetings and most documents related to the interim superintendent search meetings were only released at these depositions.

RULINGS OF LAW

1. "'Public body" means any of the following: ... (d) Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto." RSA 91-A:1-a VI.
2. Board members Turnbull and O'Quinn at least, if not also Brackett, meet the statutory definition of a public body as a committee, subcommittee, or subordinate body of the Oyster

River School Board with a charge to work on public relations. They are charged by the Board and subordinate to the authority of the Board with consistent membership and convened repeatedly with a consistent purpose of public relations, including general public relations beyond the scope of the separation agreement. They interviewed PR firms and through the use of a PR firm obligated the ORCSD to pay money. Hence all meetings of these members dealing with public relations are subject to the requirements of RSA 91-A, and since these meetings did not meet these requirements all of these meetings are in violation of RSA 91-A and documents arranging these meetings are within the scope of the June 20, 2011 Right-to-Know request.

3. Board members Brackett, Kach and Turnbull meet the statutory definition of a public body as a committee, subcommittee, or subordinate body of the Oyster River School Board with a charge to search for an interim superintendent. They are charged by the Board and chair and subordinate to the authority of the Board with consistent membership and convened repeatedly with a consistent purpose of searching for an interim superintendent, including gathering information about the search process and interviewing candidates. Hence all meetings of these members dealing with the interim superintendent search are subject to the requirements of RSA 91-A, and since these meetings did not meet these requirements all of these meetings are in violation of RSA 91-A and documents arranging these meetings are within the scope of the June 20, 2011 Right-to-Know request.
4. "For the purpose of this chapter, a "meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to

communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. "Meeting" shall also not include: ... (b) Consultation with legal counsel;" RSA 91-A:2 I.

5. Since only Board members have legal authority to participate in decisions by the Board, as advised in the Attorney General's Memorandum on New Hampshire's Right-to-Know Law, RSA Chapter 91-A, July 15, 2009, section IV. B. 3., the definition of consultation with legal counsel shall not include deliberations and decisions by the Board. Hence, all portions of meetings with legal counsel where the Board deliberated and decided or otherwise were not actively receiving legal advice are subject to the requirements of RSA 91-A, and those meetings of the Board with legal counsel that did not meet these requirements are in violation of RSA 91-A and documents arranging these meetings are within the scope of the June 20, 2011 Right-to-Know request.
6. "Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. ... Minutes of all such meetings, including names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions, shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2

appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. ... If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter.” RSA 91-A:2 II

7. ORCSD Policy BBAA provides “It is understood that the members of the board have authority only when acting as a board legally in session. ... [A]n individual board member, including the chairperson, has power only when the board by vote has delegated authority to him or her. No legal action can be taken except at a duly posted meeting of the board and by a quorum acting as a unit.” Policy BBAA meets the statutory definition of guidelines or rules of order of the Board, requires a broader public access to official meetings and records than described in chapter RSA 91-A and hence takes precedence over the requirements of chapter RSA 91-A. It is a violation of RSA 91-A for the Board to violate those provisions of Policy BBAA.

8. ORCSD Policy BDG provides “The board may, at its discretion, appoint an attorney to perform desired legal services. ... Consequently, it [the Board] shall retain an attorney or law firm....” Policy BDG meets the statutory definition of guidelines or rules of the Board, and requires that the Board, not the chair, has authority to retain an attorney. Retaining an attorney is an action of the Board that, in conjunction with Policy BBAA, may only take place at a duly posted meeting. Thereby Policy BDG requires a broader public access to official meetings and records than described in chapter RSA 91-A and hence takes precedence over the requirements of chapter RSA 91-A. It is a violation of RSA 91-A for the Board to violate those provisions of Policy BDG.

9. ORCSD Policy BE provides “A special meeting of the Board is a meeting that is held to address important matters that arise between regular meetings and/or require Board action before the time set for the next regular meeting, or to consider a single subject in one session. ... The Superintendent shall provide notice of a special meeting to Board members and the media at least 72 hours in advance of the meeting. The notice or agenda [for special meetings] shall indicate the subject(s) of the meeting and action to be taken. No business other than that stated in the notice of the [special] meeting shall be transacted.” Policy BE meets the statutory definition of guidelines or rules of the Board, requires a broader public access to official meetings and records than described in chapter RSA 91-A and hence takes precedence over the requirements of chapter RSA 91-A. It is a violation of RSA 91-A for the Board to violate those provisions of Policy BE.

10. ORCSD Policy BDB provides “The chair shall nominate and the board shall elect all committee appointments.” Policy BDB meets the statutory definition of guidelines or rules of the Board and requires that the Board, following a nomination by the chair, has authority to elect all committee appointments. Electing committee appointments is an action of the Board that, in conjunction with Policy BBAA, may only take place at a duly posted meeting. Policy BDB thereby requires a broader public access to official meetings and records than described in chapter RSA 91-A and hence takes precedence over the requirements of chapter RSA 91-A. It is a violation of RSA 91-A for the Board to violate those provisions of Policy BDB.

11. However, RSA 91-A is silent on the level of formality required for a subgroup to be considered a committee, subcommittee or subordinate body, with subordinate body being a very broad term. In contrast, RSA 91-A requires formal votes for other actions like entering nonpublic session. Requiring a nomination by the chair and a vote by the Board to consider

a group as a public body, as does Policy BDB, actually requires a *narrower* public access than chapter RSA 91-A. With no such rule, any subgroup of the Board that acts as a unit based on a charge from the Board would be required to follow RSA 91-A. Since Policy BDB does *not* require a broader public access than RSA 91-A, it therefore does *not* take precedence over the requirements of RSA 91-A when determining whether a subgroup is a public body. Therefore, in spite of the fact that there was no vote at a posted meeting to delegate the public relations or interim superintendent search work for example, these subgroups are still public bodies under RSA 91-A:1-a VI (d).

12. "A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.

(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.

(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting.

(c) ... Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.

(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote."

RSA 91-A:2 III

13. "I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of

RSA 91-A:2, II or III. II. Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.” RSA 91-A:2-a

14. The sequential communication on or around April 19, 2011 by Brackett with a quorum of the Board that lead to a decision to meet with an attorney for a separation agreement with Superintendent Colter constitutes communications outside a meeting that circumvents the spirit and purpose of RSA 91-A.
15. “(a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded. ...
 - (b) Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present.
 - (c) All discussions held and decisions made during nonpublic session shall be confined to the matters set out in the motion.”

RSA 91-A:3 I

16. “Only the following matters shall be considered or acted upon in nonpublic session: ... (c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting.” RSA 910A:3 II
17. The April 13, 2011 Special Board Meeting violated RSA 91-A by discussing editing a public statement in nonpublic session called under RSA 91-A:3 II (c), a subject not confined by RSA 91-A:3 II (c) and not covered by any provision of RSA 91-A:3 II.

18. "Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release. If a public body or agency is unable to make a governmental record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency." RSA 91-A:4 IV

19. "I. If any public body or agency or employee or member thereof, in violation of the provisions of this chapter, refuses to provide a governmental record or refuses access to a governmental proceeding to a person who reasonably requests the same, such public body, public agency, or person shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter provided that the court finds that such lawsuit was necessary in order to make the information available or the proceeding open to the public. Fees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was a violation of this chapter or where the parties, by agreement, provide that no such fees shall be paid. In any case where fees are awarded under this chapter, upon a finding that an officer, employee, or other official of a public body or agency has acted in bad faith in refusing to allow access to a governmental proceeding or to provide a governmental record, the court may award such fees personally against such officer, employee, or other official. ... III. In addition to any other relief awarded

pursuant to this chapter, the court may issue an order to enjoin future violations of this chapter.” RSA 91-A:8

WHEREFORE, Taylor requests that this Court:

- A. Compel the Board and Brackett to comply with Chapter 91-A and produce the requested information within forthwith;
- B. Enjoin future violations of Chapter 91-A by the Board and Brackett in accordance with RSA 91-A:8 III, by issuing an order compelling the Board to comply with RSA 91-A request by Taylor within the mandates of that law;
- C. Award Taylor his costs and attorneys’ fees made necessary by the bringing of this action as allowed by RSA 91-A:8 I;
- D. Declare such other relief as may be just and equitable.

Respectfully submitted,

David K. Taylor, *pro se*

Date: November 28, 2011

By: _____
David K. Taylor, *pro se*
16 Surrey Lane
Durham, NH 03824
Tel: (603) 659-0976

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request for Findings of Fact and Rulings of Law has been forwarded this 28th day of November, 2011 to Dennis Ducharme, Esquire.

David K. Taylor, *pro se*