

MINUTES

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Minutes of the special meeting of the State Board of Education held May 29, 2007, at the Utah State Office of Education, Salt Lake City, Utah. Meeting commenced at 10:05 a.m.

Chairman Kim R. Burningham presided.

Members present were:

Chairman Kim R. Burningham
Vice Chairman Janet A. Cannon
Member Dixie L. Allen
Member Laurel O. Brown
Member Mark Cluff
Member Bill Colbert
Member Thomas Gregory
Member Greg W. Haws
Member Michael G. Jensen
Member Randall Mackey
Member Denis R. Morrill
Member Richard E. Moss
Member Josh M. Reid
Member Debra G. Roberts
Member Teresa L. Theurer

Members Cyndee Miya, Richard Sadler and Marlon O. Snow were excused.

Also present were:

Superintendent Patti Harrington
Associate Superintendent Patrick Ogden
Associate Superintendent Larry Shumway
Executive Director, USOR, Don Uchida
Public Affairs Director Mark Peterson
Board Secretary Twila B. Affleck

Members of the Press:

Rod Decker, KUTV-2
Tiffany Erickson, Deseret Morning News
Richard Piatt, KSL
Julie Rose, KCPW
Nicole Stricker, Salt Lake Tribune
Amy Stewart, Standard Examiner
Brock Vergiaisis, AP
Carmen Snow, Utah PTA
Cheryl Phipps, Utah PTA
Lisa Johnson, Citizen
Gary Jones, Citizen
Marilyn Kofford, Utah PTA
Kathleen Leonard, Our Lady of Lords School
Karen McCreary, ACLU of Utah

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Mariha Baginsky Love, ACLU of Utah
Carol Moss, Utah House of Representatives
Bob Palais, Citizen
Karina Dareja, Self
Roz McGee, Utah House of Representatives
Antoinette Uwanyiugura, Citizen
Michael McCoy, Utah Education Association
Brinton Burbidge, Utah School Boards Association
Holly Langton, Citizen
Vik Arnold, Utah Education Association
Jeanetta Williams, NAACP
Kim Campbell, Utah PTA
Dr. Galey Colosimo, Juan Diego Catholic High School
Sheryl Allen, Utah House of Representatives
Douglas Meredith, Citizen
Laura Johnson, Citizen
Angela Green, Citizen
Sarah Meier, Utah School Boards Association
Ralph Becker, Utah House of Representatives
Debbie Swenson, Citizen
Alan Smith, Citizen
Mark Shurtleff, Attorney General
William Evans, Education Division Chief Attorney General's Office
Ray Hintze, Chief Civil Deputy, Attorney General's Office
Kristina Kindle, Assistant Attorney General, Attorney General's Office

Chairman Burningham called the meeting to order and expressed appreciation to the audience including the press, legislators, PTA members and representatives from the Attorney General's Office. He excused Board Members Cyndee Miya, Richard Sadler and Marlon Snow.

Chairman Burningham noted that in the *Salt Lake Tribune* yesterday the Governor was quoted as saying: "The voters deserve a clear pathway forward on Utah's voucher policy." He agrees with that statement. Our purpose today is to provide greater clarity.

Chairman Burningham stated that the task is to reach a decision, which could, lead to: (a) the establishment of rule for the implementation of H.B. 174, (b) refuse to implement the rules for implementation of H.B. 174 and respond to the petition issued by Representative Sheryl Allen; or (c) decline to either implement or refuse to implement and continue investigation. Chairman Burningham reported that certain materials had been distributed to all Board Members including the Attorney General's Informal Opinion No. 07-002, the Attorney General's Response to Questions dated May 23, 2007 and delivered under the title of Privileged Attorney Client Communication, a Request for Agency Action by Representative Sheryl Allen, Letter from the

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Office of Legislative Research and General Counsel on the Ballot title for Citizens' State Referendum Number 1, a letter from John Reidhead, CPA, Director, Division of Finance regarding questions asked of the division and his response, and a statement from the Governor, President of the Senate and Speaker of the House of Representatives dated May 14, 2007. All were made available as supporting material and Board Members have had them to examine over the weekend.

Chairman Burningham identified the agenda as follows: 1) A presentation from the Attorney General on why he believes the Board should implement H.B. 174; 2) A question and answer exchange between the Board the Attorney General Shurtleff; 3) Presentation of a Petition Request for Agency Action from Representative Sheryl Allen and her attorney, Alan Smith, followed by a question and answer exchange; 4) Public Comment, allowing anyone to make a comment, for 30 minutes; 5)deliberation by the Board which may include an executive session in keeping with the Utah Open Meetings law; (6) continued deliberation in open meeting with possible action.

Attorney General Mark Shurtleff expressed appreciation for the opportunity to discuss a number of issues. He reminded the Board that under Article 7, Section 16, as the Attorney General he is the legal adviser of all state officers and considers himself the attorney for the Board and the Office of Education. He recommended that the Board change the procedure that has been prescribed. As the Board's attorney, there are issues that need to be discussed in a closed session. There are questions about going forward that can only be done in an attorney/client privilege manner. This would be a full discussion with him and the attorneys in his office regarding liabilities, risks of proposed actions, the law relating to those things, the benefits, all of which should take place in a closed session. He recommended that the Board receive the Petition from the Petitioner.

Member Greg Haws commented that he appreciated the fact that board leadership has set the agenda, however, he agrees with the Attorney General in changing the order identified by the Attorney General.

Motion was made by Member Greg W. Haws and seconded by Member Bill Colbert that the agenda be changed to hear from the Petitioner, Representative Allen, followed by an Executive Session for the purpose of discussing potential or pending litigation and/or personnel

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issues. Chairman Burningham suggested that the motion be split in order that the Board could be polled for the executive session.

Member Teresa Theurer voiced concern that it seemed there were many people in the audience for public comment and would like to hear from them prior to the executive session.

Motion was adjusted to include the public comment prior to the executive session.

Motion to adjust the agenda as previously outlined. Motion carried with Members Allen, Brown, Cannon, Cluff, Colbert, Gregory, Haws, Jensen, Mackey, Morrill, Roberts and Theurer voting in favor; Member Moss absent.

The Board was polled and the motion to move into an executive session failed with Members Brown, Burningham, Colbert, Cluff, Haws, Mackey and Morrill voting in favor; Members Allen, Cannon, Gregory, Jensen, Roberts and Theurer opposed; Member Moss absent.

Petition to Request Agency Action

Petitioners' attorney, Alan Smith, representing Sheryl Allen, the original petitioner in the matter, noted that over the weekend several others have requested to be joined as petitioners and by email this morning an adjoining petition was filed naming them. They are: Steven Mascaro, Kory M. Holdaway, Vic Arnold, Cheryl Phipps, and Marilyn Simister. Mr. Smith reported that he had distributed to the Board an outline that distills the position which is elaborated at greater length in the Request for Agency Action which was filed last week. Also, he had distributed a form of a Proposed Order that the Board may want to use if they determine to grant the relief requested. Mr. Smith indicated that the request is in hopes of getting a solution to the dilemma of the confusion as to whether H.B. 174 can stand alone. He indicated that if the Board would grant the petition it will answer the primary question about the relationship between these two bills and provide for a speedy judicial review, together with the other petitions now pending in the Utah Appellate Courts and hopefully in the near future we can have a judicial answer to this question.

Mr. Smith summarized the arguments in the Petition.

Board Members asked clarifying questions relative to the petition and the compelling reasons for entering into such an order today. Also noted was the fact that several legislators who opposed H.B. 148 voted for H.B. 174 because it made it better and if they had understood that H.B. 174 was replacing H.B. 148 they would have voted differently. It was further noted that the legislation does not say they are repealing H.B. 148.

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Member Denis Morrill requested that the Board hear comments from Attorney General Mark Shurtleff, without waiving any privileges, relative to the discussion of the petition.

Motion was made by Member Denis R. Morrill and seconded by Member Teresa Theurer to turn to the Attorney General for comments. Motion carried with Members Allen, Brown, Cannon, Colbert, Haws, Jensen, Mackey, Morrill, Roberts, and Theurer voting in favor; Member Moss absent.

Attorney General Mark Shurtleff introduced Assistant Attorney General Kristina Kindle, who was responsible for preparation of the responses to the 25 questions submitted by the Board. He cautioned that he was concerned with issues relating to the power of the Board to be considering this petition. It was clarified that this would just be responding to what has been said thus far in the meeting. If anything is privileged, he should so indicate.

Mr. Shurtleff further stated that attorney/client privilege is a privilege that belongs to the client, [the Board] and if they decide to make public and require them to make legal arguments with regard to the meaning and effect of H.B. 174 in public, then the Board is waiving that attorney/client privilege.

Member Greg Haws objected to waiving attorney/client privilege. Member Denis Morrill indicated that attorney's argue before courts all the time and their arguments do not waive any attorney/client privilege.

Mr. Shurtleff responded that this is unique and the Board is not a court and this would not apply. He indicated that most of this has already been made public by the Board sharing the 25 question responses, which he initially requested be an attorney/client privilege.

Chairman Burningham indicated that he would hope that the Attorney General would try to sort out things that he deems more privileged.

Member Denis Morrill commented that he did not want to impose something on members of the board that they were uncomfortable with and if this is the case he would like to see it done differently.

Member Randall Mackey indicated that he felt there were a lot of things the Attorney General could say publically in response to what the Board has heard from Mr. Smith and Representative Allen that would not constitute any confidential information.

Mr. Shurtleff indicated that they would stick with the 25 questions and response and the opinion released to the Governor.

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Mr. Shurtleff stated that the emergency order was brought pursuant to Title 63-46b-20 [Emergency adjudicative proceedings] of the Utah Code asking the Board to do an emergency order. There was nothing presented this morning that would indicate why this is an emergency. The requirement that first has to be met is whether the Board has the authority to make this decision. The language in 63-46b-20 reads: “the facts known by the agency or presented to the agency show that an immediate and significant danger to the public health, safety, or welfare exists. . . .” There are very few times this has been used. The Board needs to first make the determination that there is an immediate danger to the public health, safety or welfare. He indicated that they did not feel that the desire to have people have clarity on the issue come November meets this test. The second thing the Board is doing by calling themselves into this quasi judicial proceeding is that it is ordering itself basically not to follow, if it does believe their opinion, that H.B. 174 is the law and it openly makes a determination, using the emergency situation to tell themselves not to follow the law. He recommended against such action.

Kristina Kindle, Assistant Attorney General presented a summary of the Opinion to the Governor followed by a summary of the answers to the 25 questions posed to the Attorney General by the Board.

Attorney General Shurtleff clarified that he does not have a position nor has he stated a position on vouchers. His job is to enforce and defend the law. By state law when the Governor, State Legislature, or county officials request an official opinion of the Attorney General’s office he will give that opinion. He uses assistant attorney general’s who are merit protected to avoid any concern that they are politically motivated, they do their jobs. This is an opinion that the client can accept or not. There is always protection in following the advice of counsel, particularly in a position of public trust because reliance on counsel can protect you if you are sued. The first opinion was to the Governor, it was not to the Board because they did not request it – it is an opinion. When the Board decided, under its statutes, to request an opinion via response to 25 questions of law. The statute that governs the Board [53a-1-303, U.C.A.] then comes into play. There was some question as to whether or not this was a request for an opinion, but pursuant to the Superintendent’s letter to him dated May 10, which she was instructed by the Board to request the opinion, specifically says in keeping with these responsibilities and pursuant to Section 53a-1-303 U.C.A. which reads: “Upon request by the state superintendent the Attorney General shall issue written opinions on questions of law.” The statute is in effect once the letter

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was sent. Subsection 4 reads: "Opinions issued under this section shall be considered to be correct and final unless set aside by a court of competent jurisdiction or by subsequent legislation." With regard to the opinion letter in response to the 25 questions which repeats the opinion that H.B. 174 can stand on its own and gives the Board guidance and instruction on how it can implement H.B. 174, is correct and final and it is the duty of the Board to follow that opinion.

Mr. Shurtleff indicated that this situation is a mess and we all understand that it is and we all want clarity. He believes the court needs to decide this, but you can't create the desire to get it there quicker, and you can't create an authority to go through this emergency order as the route to get it there. Mr. Shurtleff then explained the process should a lawsuit be filed challenging a piece of legislation.

Member Josh Reid, a practicing attorney, commented that the memo on the 25 questions was a persuasive memo and questioned why it did not show both sides of the law. Mr. Shurtleff responded that his result was in the prior opinion to the Governor, that H.B. 174 can stand on its own. It may not have been intended to do so, and it is incomplete, and his duty to his client is to tell them to obey the law.

Member Teresa Theurer commented on her frustration with regard to legislative intent which is very important in rule writing by the Board. Further, she indicated that it seems on this issue and this legislation we don't have to go with intent, but on other rules we need to follow intent.

Member Denis Morrill shared the same concerns as Member Theurer that when it seems they want us to do something we have broad power, if you don't want us to do something we don't have power. If we have the power to accept legislative intent, why can't we say we believe the legislature did not intend us to implement these two bills separately.

Mr. Shurtleff responded that each elected body has separately defined duties. The legislature makes the law and the Board was elected to implement policy and to write policy to implement the laws the legislature passes.

Member Tom Gregory commented that he objected to the characterization that the Board is an executive body because it is not defined in the Constitution that way - it is defined outside of the legislative, executive, or judicial branches. He suggested that the Board has very broad general control and supervision.

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Vice Chairman Janet Cannon commented that there is some question around the letter written by Superintendent Harrington on behalf of the Board as to what type of opinion was requested of the Attorney General.

Superintendent Harrington responded that in no place in her letter asked for the Attorney General's opinion. Dr. Harrington reviewed the context of her letter to the Attorney General. Dr. Harrington commented that in a meeting with the Attorney General, Ray Hintze and other staff she had asked about informal and formal opinions relative to the opinion they had provided the Governor on this issue. They reiterated that it was just an opinion and nothing more. They did indicate they numbered their opinions so they have an understanding that it is something that has come from their office, whether it is a formal or informal opinion. The response to the 25 questions, on Attorney General letterhead, is not numbered and not called an informal or formal opinion. They have referred to the 25 questions and not an opinion.

Mr. Shurtleff explained that there are different statutes that govern opinions of the Attorney General's office. The Board's statute indicates that the Board or State Office can request written opinions. He then quoted the particular statute relative to this request and indicated that the Board had submitted 25 questions of law for their opinion.

Public Comment

The Board heard comments from the following [listing those in favor of the Board implementing H.B. 174 and those against implementation of H.B.174.

In favor of the Board implementing H.B. 174:

Karinaina Parija
Antoinette Uwanyiugra
Kathleen Leonard
Dr. Galey Colosimo
Laura Johnson
Angela Green

Against the Board implementing H.B. 174:

Representative Roz McGee .
Michael McCoy
Brinton Burbidget
Holly Langton
Cheryl Phipps
Vic Arnold
Marilyn Kofford
Lisa Johnson

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Jeanetta Williams
Kim Campbell
Bob Palais
Representative Sheryl Allen
Representative Carol S. Moss
Douglas Meredith
Sarah Meier
Representative Ralph Becker
Debbie Swenson

Chairman Burningham expressed appreciation to everyone who offered public comment.

Executive Session

Motion was made by Member Thomas Gregory and seconded by Vice Chairman Janet A. Cannon that following a five minute recess the Board move into an executive session to discuss potential litigation and possible personnel issues. The Board was polled and by unanimous consent of those present the Board moved into an executive session at 12:25 p.m.

Motion was made by Member Teresa L. Theurer and seconded by Member Dixie L. Allen that the Board reconvene into open meeting. The Board reconvened at 3:15 p.m.

Member Denis Morrill commented that it is his firm belief that we can't grow the branch without the tree. Motion was made by Member Denis R. Morrill and seconded by Vice Chairman Janet A. Cannon that the Board grant the petition before the Board and to issue an order, not exactly like the one presented to us, but one that can be discussed which gets the Board to the point, but takes out some of the things that have concerned others about the use of the word invalid.

A revised order was presented to the Board for its consideration. Member Randall Mackey explained the changes from the original order distributed.

Member Teresa Theurer suggested that the word "considered" remain in Paragraph 1 following the new language. It was agreed that the word "considered" be left in the document.

Member Tom Gregory offered an amendment to the Order to delete the sentence on the second page, first clause, second sentence reading: "For all of the reasons articulated in the Request," because he did not believe in all of the reasons identified in the request, although there are enough conclusions in it that might lead him to the same outcome. Motion to amend was seconded by Member Dixie L. Allen.

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Member Greg Haws voiced concern with the issue of legislative intent which he thought was spelled out in the request and if you take it out you are taking out reference to that, therefore we need to say something about legislative intent. Member Haws and Morrill suggested that the wording be changed to “for some of the reasons” or “for reasons.”

Member Denis Morrill commented that we need to state our reasoning. We could draft a much longer order and insert those reasons that we could all agree on. We need to have reasons and this was a simple way of doing it. As pointed out by Member Haws, one of the biggest reasons is the discussion on legislative intent.

Motion to amend the amendment was made by Member Denis R. Morrill and seconded by Vice Chairman Janet A. Cannon that the sentence read: “For reasons articulated in the Request, . . .” Motion carried with Members Allen, Brown, Cannon, Haws, Jensen, Mackey, Morrill, Roberts and Theurer voting in favor; Members Cluff, Colbert, Gregory and Moss opposed.

Motion on the amendment carried with Members Allen, Brown, Cannon, Haws, Jensen, Mackey, Morrill, Roberts and Theurer voting in favor; Members Cluff, Colbert, Gregory and Moss opposed.

Member Bill Colbert spoke in opposition to the motion indicating that with his background in municipal government his history is that when the legislature passes a law you obey the law, even if it is difficult. He felt the Board did not have the option of ignoring the law. This legislation was passed by two-thirds vote of the legislature and signed by the Governor. He recognizes the difficulties in implementing it, but it is the Boards responsibility to try to do that to the best of our ability. If we need help, especially with the funding issue, we should go to the legislature and ask for a special session to find the money to implement the law.

Member Mark Cluff spoke in opposition to the motion commenting that after reading a considerable amount of information over the past weeks from both sides, he needs to go with the Office of Legislative Research and General Counsel stated in the referendum ballot that we will consider provisions enacted by H.B. 174 which are now law. He knows the intent when H.B. 174 was originally passed was it was to work with H.B. 148 because a referendum was not in sight. Once the referendum happened on H.B. 148 and because H.B. 174 enacted five sections in total it then has the power to stand alone. Based on the recommendations and advice from the Attorney General and others he felt we are on slippery ground in taking this action. Further, he

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did not feel we have an emergency situation and therefore we are acting inappropriately. He feels the Board has the authority to go forward and enact what is needed with H.B. 174. He reported that his constituents have indicated to him that the Board needs to enact this law.

Member Thomas Gregory spoke against the motion although he would concur in part with the final decision of the Board, he cannot agree with the wording described. His reasons for doing so are based on an argument of the authority of the Board as well as a disagreement with significant portions of the complaint. Further, under the law this is not an emergency, there is no immediate danger. He did not believe that the opportunity to be heard by all parties of interest has not been satisfied.

Member Teresa Theurer spoke in favor of the motion commenting that the Board has a responsibility to listen to the public and there were enough signatures have been received relative to the referendum and it should go to a vote of the people. Writing a rule and implementing H.B. 174 would negate the need for a vote.

Member Denis Morrill spoke in favor of the motion commenting that the problem is what can we do and what can't we do. You can follow a tortured line of reasoning, but if you look at the two statues and are honest and ask what did the legislature intend, you can't come to any other decision. For the Board, as a rule making body, to try to take what logic would tell us and what someone else is telling us and mesh it all together – you can't do it. This is a way to get it before a court and get it heard and have someone who can make a decision and we then can move forward. Everyone ought to be cheering that wants this to be decided once and for all because this will help it get decided.

Vice Chairman Janet Cannon spoke in favor of the motion commenting that she believes there is a danger to the public welfare and that danger includes the educational needs of parents and their children. We have been asked to implement an amendment to a law that has been questioned. We have looked at putting \$12 million plus dollars of taxpayer money on the line, and we need court clarification. There needs to be a legal remedy around the questions raised by H.B. 174 standing alone. This get us there in the best interest of the public who hopefully will have an opportunity to vote up or down on the voucher issue.

Member Laurel Brown spoke in favor of the motion. She did not see this as being a rash action by the Board. This is something that is contemplative. Our duty is to examine all of

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the issues carefully. By this action we will be able to get clarification from the court and then we can move on with this.

Member Randall Mackey commented that he had taken an oath to uphold the Constitution of Utah, and he takes very seriously his role in being faithful to that. He has read a great deal of material on both sides and as he looks at these issues from the standpoint of a lawyer, he concludes that there is a great deal of uncertainty in this area. He has always felt that the courts are the arbiters of final decisions. If it were clear that we could be implementing regulations on a piece of legislation he would be the first one to want to go forward and do that. This puts the Board in a very awkward position when you are asked to implement regulations where there is a great deal of uncertainty and validity of the intent. It is safer to get this to the courts as quickly as possible.

Motion to grant the petition and issue the order as amended carried with Members Allen, Brown, Cannon, Haws, Jensen, Mackey, Morrill, Roberts and Theurer voting in favor; Members Cluff, Colbert, Gregory and Moss opposed.

(For complete details of all of the materials presented see General Exhibit No. 10254.)

Member Randall Mackey requested that the Board keep open the idea of filing a Declaratory Judgment. This may be an issue to be considered at our board meeting in June.

Chairman Burningham commented that earlier in the meeting he had quoted Governor Huntsman who said that it was his desire to establish a clear pathway on the voucher action. Unfortunately, he is not convinced that there is an absolutely clear pathway in existence. In his opinion, what we have sought to do by the action taken is to establish a more clear pathway as directly and expeditiously as we can. The Board looks forward to the courts decision to make a clear answer to the question as to whether or not H.B. 174 the voucher amendments are implementable as a voucher law. He commended the Board for its diligence and action taken.

Motion to adjourn was made by Member Denis R. Morrill and seconded by Member Dixie L. Allen to adjourn. Meeting adjourned at 3:45 p.m.