

BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY
OFFICE OF OPEN GOVERNMENT



July 15, 2016

VIA ELECTRONIC MAIL

Ms. Hanseul Kang
Superintendent
Office of the State Superintendent of Education
810 First Street, NE
Ninth Floor
Washington, DC 20002
hanseul.kang@dc.gov

RE: #OOG-0006_6.28.16 Notice of Violation and Demand

Dear Superintendent Kang:

On June 28, 2016, the Office of Open Government (OOG) electronically transmitted to your attention the complaint it received from Mr. Fritz Mulhauser, alleging the Office of the State Superintendent of Education (OSSE) convened a meeting of a working group or task force to review the uniform per-pupil school funding formula in violation of the Open Meetings Act (OMA) (D.C. Official Code §§ 2-571 *et seq.* (2016)).

The purpose of this letter is to: (1) apprise OSSE of the OOG's investigatory findings regarding the complaint allegations; (2) issue an advisory opinion as directed by the OMA; and (3) demand that OSSE provide the requested records by close of business on July 19, 2016.

Background

The purpose of the OMA is to provide the public with full and complete information regarding the affairs of government and any official actions taken by government officials.¹ Therefore, the OOG reviews complaints with the aim of supporting the policy of the OMA, and will strictly construe the application of exceptions to the Act.

The Council of the District of Columbia provided the OOG with the authority to investigate and seek legal redress where a Public Body has violated the OMA, as in the instant case. The regulations promulgated pursuant to D.C. Official Code § 2-593(a)(4)(2016) are found at 3 DCMR § 10400 *et seq.* (2016), and provide the OOG with exclusive jurisdiction to investigate

¹ D.C. Official Code § 2-572.

alleged violations of the OMA by a Public Body. Where such violations constitute a willful or reckless disregard of the provisions of the OMA or the requirements of 3 DCMR § 10400, the OOG may enforce compliance with the Act by filing suit in the Superior Court of the District of Columbia against the Public Body per D.C. Official Code § 2-579 and 3 DCMR § 10406.4.

At issue is whether the Uniform Per Pupil Student Funding Formula Working Group (UPSFF) is a Public Body bound by the requirements of the OMA. The complaint alleged: (1) OSSE set a meeting of the UPSFF without proper timely notice in violation of the §§ 2-576(1) and 2-576(2)(B) of the OMA; (2) OSSE failed to publish a draft agenda of the UPSFF meeting in violation of §§ 2-576(1) and 2-576(2)(B) of the OMA; and (3) OSSE failed to list the UPSFF meeting on its website in violation of § 2-576(2)(B) of the OMA. The complaint was prospective as it was received on June 28, 2016 for the meeting that occurred on June 29, 2016.

The complaint alleged: (1) OSSE set a meeting of the working group/task force without proper timely notice in violation of the §§ 2-576(1) and 2-576(2)(B) of the OMA; (2) OSSE failed to publish a draft agenda in violation of §§ 2-576(1) and 2-576(2)(B) of the OMA; and (3) OSSE failed to list the meeting on its website in violation of § 2-576(2)(B) of the OMA. As filed, the complaint was prospective as the meeting occurred on June 29, 2016.

On June 28, 2016, OOG Director, Traci Hughes, contacted via telephone and email, Ms. Shana Young, OSSE Chief of Staff, to inform OSSE of the complaint. Ms. Young confirmed the Uniform Per Pupil Student Funding Formula Working Group (UPSFF) was scheduled to hold its first meeting on June 29, 2016, 12:00 PM to 1:00 PM at OSSE offices, 810 First Street, NE, 9th Floor. Future meetings were to be determined.² Ms. Hughes advised that until such time that a proper finding may be made concerning whether the UPSFF is a Public Body as contemplated by the OMA, the UPSFF should cancel the June 29, 2016 meeting, and reschedule for July 1, 2016 to meet the minimum 48-hour or two-business day notice requirement under D.C. Official Code § 2-576(1). By way of email to Director Hughes, Ms. Young acknowledged that failure to notice the meeting as required by the OMA was an oversight, and that the meeting would not be postponed.³

Findings

The grant of investigative authority also empowers the OOG to “issue an Advisory Opinion addressing the complaint that a Public Body violated the Open Meetings Act.” 3 DCMR § 10406.1. OSSE’s lack of cooperation in meeting the information request and its failure to timely respond to the complaint leaves the OOG no statutory recourse, but to issue this binding advisory opinion “based on the information available from the complaint and any other relevant sources.”⁴

To conduct a full investigation to resolve the complaint, the OOG requested:

² June 28, 2016 email from S. Young to T. Hughes.

³ *Id.*

⁴ 3 DCMR § 10405.2.

- Any and all records pertaining to the UPSFF and its formation from January 1, 2016, to present.
- All UPSFF meeting minutes, agendas, recordings.
- A final list of UPSFF Working Group members and their respective agencies or professional affiliations.⁵

As a result of this complaint, the OOG has conducted a preliminary review of the working group. It appears from the legislative record that the requirement for the OSSEE to convene a working task group, which now meets, took effect on February 22, 2014, with the enactment of D.C. Law 20-0087. An online search reveals that the District of Columbia Public Education Finance Reform Commission (Commission) under OSSE convened a series of meetings in which it made public its agendas and called for public input.⁶ The only communication indicated meeting schedules and locations were to be made available to the public.⁷ One of the Commission's recommendations established by D.C. Official Code § 38-2914 was to re-establish the UPSFF task force whose members were to be chosen by the State Superintendent of Education.

Analysis

D.C. Official Code § 38-2911(b)(1-5) (2016) sets out the charge of the UPSFF to study the actual costs of education in consultation with District of Columbia Public Schools (DCPS) and the Public Charter schools by:

- Address the relationship of funding levels to student outcomes.
- Promote continuity of effective practices.
- Improve techniques for determining levels of funding needed to provide adequate special education services.
- Review the costs associated with identifying and servicing at risk students.

UPSFF members are required to determine funding levels for more than 50,000 DCPS⁸ and 39,000 Public Charter School⁹ students. The recommendations of the UPSFF are to be forwarded to the Mayor of the District of Columbia to be included in a report issued biennially to the Council of the District of Columbia, starting January 30, 2016.

⁵ *Id.* A list of UPSFF Working Group Members was provided to OOG. The email lists UPSFF members as “invited, pending final confirmation.”

⁶ November 14, 2011 letter from the Commission addressed to “DC Families and Community Partners” acknowledged “a number of individuals and groups expressing their interest in the work of the Commission and a concern about a lack of ‘parent advocate and community’ representatives.

⁷ OOG finds records on Facebook of Commission meetings occurring on September 27, 2011; December 1, 2011; December 12, 2011; December 14, 2011; December 21, 2011; January 5, 2012; January 17, 2012; and January 25, 2012. The public was invited to attend the meetings. See <https://www.facebook.com/DC-Public-Education-Finance-Reform-Commission-152771484816066/>. The Facebook postings specifically indicate meeting minutes were published on the Internet, along with audio recordings of the meetings. The URL on which the meeting minutes and audio records were posted is no longer online. The OOG notes posting is required at minimum in hard copy and on the government agency or Public Body website. Publication on social media is considered supplemental, and does not meet the baseline notice requirement of D.C. Official Code § 2-576(1).

⁸ <http://dcps.dc.gov/page/dcps-glance-enrollment>

⁹ <http://www.dcpsb.org/>

The scope of the UPSFF and the importance of its recommendations are critical considerations in the OOG's analysis of whether the UPSFF may be considered a Public Body as contemplated by the OMA. This is not a matter of first impression by the OOG. In fact, the importance of the work of the task force and its broad impact is not unlike the Cross-Sector Collaboration Task Force (OOG-002_8.31.15).¹⁰ There, the OOG determined that although the body was labeled a task force, "its potential far-reaching impact on education policy," dictates that it must also be considered a Public Body as contemplated under the OMA.¹¹ The OOG finds the opinion applicable to the UPSFF, as the task force has the equivalent impact on the public and educational agencies, as its intended outcomes in the form of recommendations are forwarded to the Executive Office of the Mayor.

Conclusion

The OOG finds OSSE in violation of 2 DCMR § 10405.4, as it has failed to address the complaint upon notification from the Director. Further, based on all records currently accessible online by the OOG, and the acknowledgement of Ms. Young that OSSE intended to properly notice the UPSFF meeting in accordance with the OMA, the OOG finds that the UPSFF is a Public Body bound by the requirements of D.C. Official Code § 2-571 *et seq.* (2016). Should OSSE provide the requested records by July 19, 2016, for review, the OOG will issue a supplemental opinion on this matter.

Should OSSE fail to comply, the OOG reserves its authority to bring a lawsuit in the Superior Court of the District of Columbia for injunction or declaratory relief pursuant to D.C. Official Code § 2-579.

Sincerely



TRACI L. HUGHES, ESQ.
Director, Office of Open Government
Board of Ethics and Government Accountability

cc: Ms. Shana Young, Chief of Staff

¹⁰ http://www.open-dc.gov/sites/default/files/DME%20Cross-Sector%20Collaboration%20Task%20Force_OOG%20OPINION%20%2810.7.15%29%28OOG-0002_%28Niles%29.pdf

¹¹ On June 28, 2016, Director Hughes emailed to Ms. Young a copy of the Cross-Sector Collaboration Task Force Opinion, recommending OSSE rely on the opinion in postponing the June 29, 2016 meeting to comply with the OMA.