

**OPEN RECORDS AND MEETINGS OPINION  
2007-O-05**

DATE ISSUED: March 29, 2007

ISSUED TO: Southern School District #8

**CITIZEN'S REQUEST FOR OPINION**

On February 12, 2007, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Nancy and Gary Rader asking whether the board of the Southern School District #8 (District) violated N.D.C.C. § 44-04-20 by failing to properly notice a special meeting and violated N.D.C.C. § 44-04-19 by refusing to allow their daughter to attend the special meeting.

**FACTS PRESENTED**

The District's school board held a special meeting on Monday, January 22, 2007, at 3:30 p.m. in the Cando school boardroom. The day before the meeting, Superintendent Lindahl asked Mr. and Mrs. Rader and another parent to attend the meeting. According to Superintendent Lindahl, these parents were asked to attend because, throughout the girls' basketball season, they had been openly critical of the program and coaches. According to the superintendent, the ongoing criticism began to affect the Cando and Bisbee-Egeland schools and communities negatively. At the meeting, the board president read a prepared statement informing the parents that their behavior toward the coaches would no longer be tolerated. The meeting was attended by the five members of the District's board, two Bisbee school board members, the District superintendent, the principal, two of the three basketball coaches, other school staff, and the three parents who were asked to attend.

According to the Raders, on the day of the meeting, notice was not posted at the location of the meeting and was not filed with the county auditor. They also allege that the District failed to notify the District's official newspaper. According to the District, the notice was posted on the door of the Cando school main office and on the window in the school lobby; the notice was not filed with the county auditor nor was it provided to the Towner County Record Herald, the school's official newspaper.

The Raders further allege that when their daughter attempted to attend the meeting, she was refused admittance. According to the District, when the school board was assembled in the meeting room and the meeting was about to begin, Mrs. Rader asked if her daughter, who was outside in the school office, could attend. According to the District, the school board president stated that she preferred that Mrs. Rader's daughter not attend the meeting but she did not prohibit her from attending.

By law, any opinion issued under N.D.C.C. § 44-04-21.1 must be based on the facts given by the public entity.<sup>1</sup>

### ISSUES

1. Whether the District violated N.D.C.C. § 44-04-20 by failing to properly post notice of the special meeting.
2. Whether the District violated N.D.C.C. § 44-04-19 by prohibiting a member of the public from attending the special meeting.

### ANALYSES

#### Issue One

Unless otherwise provided by law, written public notice must be given in advance of all meetings of a public entity.<sup>2</sup> The notice must be posted at the public entity's main office, if any; filed, in the case of a school district, with the county auditor; and given to anyone requesting this information.<sup>3</sup> On the day of the meeting, the notice must be posted at the location of the meeting.<sup>4</sup> For emergency or special meetings, the District must notify the official newspaper of the county in which the entity's principal office or mailing address is located, as well as any representatives of the news media who have requested notice.<sup>5</sup> In this case, the District failed to notify the District's official newspaper and failed to file the notice with the county auditor.

The District stated that it did not notify the newspaper because the meeting was to take place on Monday and the paper is published on Fridays. Apparently, the District thought that because any notice the paper might provide would take place after the meeting, it would not have been a meaningful way to notify the public in advance of the meeting. There is no requirement, however, to publish notices of meetings in the newspaper.<sup>6</sup> Notifying the official newspaper about emergency or special meetings, which are often called on short notice, compensates for the possibility that the public

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<sup>1</sup> N.D.C.C. § 44-04-21.1.

<sup>2</sup> N.D.C.C. § 44-04-20(1).

<sup>3</sup> N.D.C.C. § 44-04-20(4)(5).

<sup>4</sup> N.D.C.C. § 44-04-20(4).

<sup>5</sup> N.D.C.C. § 44-04-20(6).

<sup>6</sup> N.D.A.G. 2007-O-02.

may not otherwise learn about the meeting.<sup>7</sup> Notifying the newspaper gives it an opportunity to follow up on an emergency or special meeting or to have a reporter attend and cover the meeting should it desire.<sup>8</sup>

The District also failed to file the notice with the county auditor. The purpose of requiring the notice to be filed with the auditor is to have a central location for people to find out about public meetings of the District.<sup>9</sup> It is my opinion the District violated N.D.C.C. § 44-04-20 by failing to notify the official newspaper and failing to file the notice with the county auditor.

### Issue Two

Unless otherwise provided by law, all meetings of a public entity must be open to the public.<sup>10</sup> The law is violated if a person is denied access to a meeting unless the denial is due to a lack of physical space.<sup>11</sup> Denial can be explicit or constructive.<sup>12</sup> In this case, the school board president told Mrs. Rader that she “preferred” that her daughter not attend the meeting. The District asserts that Mrs. Rader could have insisted her daughter be allowed to attend, but that the Raders voluntarily decided not to pursue her attendance.

In Florida, a state with open meeting laws similar to North Dakota’s, a court determined that a public entity violated the state’s open meetings law when it asked competing bidders to voluntarily excuse themselves from the committee meeting during presentations by competitors.<sup>13</sup> The court found that the actions of the public entity “amounted to a *de facto* exclusion of the competitors, especially since the ‘request’ was made by an official directly involved with the procurement process.”<sup>14</sup> The Florida Attorney General determined that requiring a member of the public to provide identification as a condition of attending a meeting would have a “chilling effect on the public’s willingness to attend” meetings.<sup>15</sup> In Tennessee, the Attorney General opined

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<sup>7</sup> N.D.A.G. 2005-O-20.

<sup>8</sup> Cf. N.D.A.G. 2007-O-02 (giving notice to a newspaper after a meeting makes it aware that a meeting took place and could follow up if it so chose).

<sup>9</sup> N.D.A.G. 2005-O-07.

<sup>10</sup> N.D.C.C. § 44-04-19.

<sup>11</sup> N.D.C.C. § 44-04-19.

<sup>12</sup> N.D.A.G. 98-O-16.

<sup>13</sup> Port Everglades Authority v. International Longshoremen’s Ass’n, Local 1922-1, 652 So.2d 1169, 1170 (Fla. 1995).

<sup>14</sup> Id.

<sup>15</sup> Fla. AGO 2005-13.

that a request to leave can be a powerful tool for coercing a person to waive the person's right to attend a meeting because the person may understand that by remaining, it may antagonize board members and influence their decision. "In such a context, [requesting a person to leave] . . . would have a chilling effect upon the exercise of the individual's right to be present during deliberations of public governing bodies, contrary to the whole design of the open meetings law."<sup>16</sup>

In this case, the board president's statement that she preferred Mrs. Rader's daughter not attend the meeting was made before the full school board and several school officials. This statement certainly had a chilling effect on Mrs. Rader's willingness to assert her daughter's right to attend the meeting, especially as she was one of only three parents in attendance. Therefore, it is my opinion that the District violated N.D.C.C. § 44-04-19 by, in effect, constructively denying Mrs. Rader's daughter access to the meeting.

#### CONCLUSIONS

1. The District violated N.D.C.C. § 44-04-20 by failing to notify the District's official newspaper and failing to file the notice with the county auditor.
2. The District violated N.D.C.C. § 44-04-19 by, in effect, constructively denying the Raders' daughter access to the meeting.

#### STEPS NEEDED TO REMEDY VIOLATION

The District shall provide copies of the notice of the meeting to the county auditor and the District's official newspaper. Nancy and Gary Rader attended the meeting and have copies of the minutes and attachments. They indicated they would inform their daughter about the meeting. Therefore, no additional remedy is required with regard to the District's de facto exclusion of the Raders' daughter from the meeting.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.<sup>17</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>18</sup>

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<sup>16</sup> Tenn. Op. Atty. Gen. No. 80-504.

<sup>17</sup> N.D.C.C. § 44-04-21.1(2).

<sup>18</sup> Id.

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