

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal # 29929

SD CITIZENS FOR LIBERTY, INC.,
TONI E. WEAVER, MARCY M.
MORRISON, BRIAN T. LARSON,
AND SAMANTHA C. McCULLY,

Appellants,

v.

RAPID CITY AREA SCHOOL
DISTRICT 51-4,

Appellee.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL DISTRICT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE CRAIG A. PFEIFLE, JUDGE

APPELLANTS' BRIEF

Kenneth E. Jasper
Jasper Law Office
201 Main Street, Suite 107
P.O. Box 2093
Rapid City, SD 57709-2093

Kelsey B. Parker
Bangs, McCullen, Butler, Foye &
Simmons, L.L.P.
333 West Blvd. Ste. 400
PO Box 2670
Rapid City, SD 57709-2670

NOTICE OF APPEAL FILED: MARCH 3, 2022

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Appeal # 29929

**RAPID CITY AREA SCHOOL
DISTRICT 51-4,**

Appellee.

PRELIMINARY STATEMENT

Throughout this Brief, Appellants (Plaintiffs), will be referred to collectively as Citizens, unless a specific Appellant (Plaintiff) is referred to. In that case their name: South Dakota Citizens For Liberty, Inc. (hereinafter CFL); Weaver; Morrison; Larson; or McCully will be used. The Appellee (Defendant) Rapid City Area School District 51-4 will be referred to as District or Board. References to the Record will be to the Alphabetical Index page number(s) as (AI-#).

JURISDICTIONAL STATEMENT

Citizens Appeal Circuit Judge Craig A. Pfeifle's Order granting District's Motion for Summary Judgment and denying Citizens' Motion for Summary Judgment, (**Appendix A**), dated January 28th, 2022 (AI-348) in accordance with SDCL 15-26A-3 (2) and (4). Notice of Appeal, Docketing Statement, and Notice of Deposit of Cash Bond,

and Certificate of Service, were filed with the Seventh Judicial Clerk, March 3, 2022 (AI-352-353, 354-356, and 357) and served on the District's counsel on March 3, 2022 (AI-358).

LEGAL ISSUES

1. WHAT IS THE PROCEDURE FOR DECIDING SUMMARY JUDGMENT MOTIONS SUBMITTED SIMULTANEOUSLY, AND WHAT IS THE STANDARD FOR SUMMARY JUDGMENT?

The trial court did not specifically address these issues; it orally declined to rule on two of their issues and orally ruled against the Citizens on one of their issues, and granted the District's Motion that essentially dismissed the case.

Relevant cases: *Gantvoort v. Ranschau*, 2022 S.D. 22, ¶ 17, ___ N.W.2d ___, ___.
Godbe, v. City of Rapid City, 2022 S.D. 1, ¶ 20, 969 N.W.2d 208, 213.
Niemitalo v. Seidel, 2022 S.D. 13, ¶ 12, 972 N.W.2d 115, 119.

Relevant statutes: SDCL 1-25-1
SDCL 1-25-2
SDCL 15-6-56(c)

2. IRRESPECTIVE OF THE PROVISIONS OF SDCL CHAPTER 1-25, IS THE DISTRICT REQUIRED TO FOLLOW ITS OWN POLICIES IF THEY REQUIRE MORE OPPORTUNITY FOR PUBLIC COMMENT?

The trial court did not rule on this issue.

Relevant cases: *Barnes v. Spearfish School District No. 40-2*, 2006 S.D. 108, ¶6, 725 N.W.2d 226, 228-229
Hicks v. Gayville--Volin, 2003 SD 92, ¶10, 668 NW2d 69, 77.

Relevant statutes: SDCL 1-25-1
SDCL 1-25-1.1

3. DID THE DISTRICT TAKE OFFICIAL ACTION IN VIOLATION OF SDCL 1-25-2 BY ISSUING LETTERS TO THE UNSUCCESSFUL CANDIDATES IMMEDIATELY AFTER THEIR EXECUTIVE SESSION, BUT NOT PLACING THAT ACTION ON THE RECORD UNTIL A MEETING FOUR DAYS LATER?

The trial court declined to rule on this issue.

Most relevant cases: *Cass v. Olson*, 349 N.W.2d 435, 436 (S.D. 1984),
In re Discipline of Russell, 2011 S.D. 17, ¶ 41, 797 N.W.2d
77, 87.

Relevant Statutes: SDCL 1-25-2
SDCL 1-25-6

4. WHAT IS THE STANDARD OF REVIEW WHEN ONLY THE INTERPRETATION OF A STATUTE IS AT ISSUE?

The trial court issued its decision without stating what standard was used.

Most relevant cases: *Fluth v. Schoenfelder Construction, Inc.*, 2018 S.D. 65, ¶
12, 917 N.W.2d 542,528.
*Jans v. State of South Dakota, Department of Public
Safety*, 2021 S.D. 51, ¶ 18, 946 N.W.2d 749, 755.
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Relevant statutes: 1-25-1
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1-25-1.5
1-25-1.6
2-14-1
13-8-10

STATEMENT OF THE CASE

A portion of this case requires interpretation of “regularly scheduled” official meeting(s) in SDCL 1-25-1 after § 1-25-1 was wholesale rewritten, revised, amended, and “clarified”—according to the Associations that proposed SB 91, (**Appendix B**), to the 2019 Legislative Session. After members of the public complained to them, and Citizens observed the District’s substantial change by denying, and not providing for, public comment during their meetings, Citizens filed and served their Complaint for Declaratory Judgment (AI-2) on the District on June 28, 2022. District filed their Answer

on July 26th, 2022. District, upon request of Citizens, signed the Consent to Amend the Complaint (AI-29) to include McCully as a Plaintiff. An Amended Complaint (AI-23) was filed and Served on the District on August 30th, 2021. District filed and Served Amended Answer (AI-30) on September 13th, 2021.

Counsel for both parties agreed to submit simultaneous Motions for Summary Judgment. Motions, Statements of Undisputed Facts, and Briefs were filed December 1st, 2021 (AI-44, AI-46, AI-142, and AI-161, AI-179, AI-163). Both parties filed Responses to the other party's Statement of Material facts (AI-313, AI-272), and additional Briefs (AI-319, AI-329 and AI-261, AI-339). (**Appendix L, M, N, and O**). The Motions Hearing was held telephonically on January 27th, 2022 at which time Judge Pfeifle entered his oral decision into the record (AI-359) (**Appendix C**). The court entered the Order granting District's motion for Summary Judgment and Denying Citizens' motion for Summary Judgment (AI-349) (**Appendix A**).

This appeal follows that Hearing.

STATEMENT OF FACTS

A. The significant legislative history of open meeting laws:

South Dakota's statutory provisions for open meetings began in 1953 with SL 193, ch 307, § 1, requiring detailed minutes of all regular and special meetings. [See **Appendix D**, (Citizens' Condensed History Of South Dakota's Law Providing For Open Meetings, Notice, and Public Participation), attached to CFL's Brief in support of Summary Judgment (AI-142)]. This Condensed History includes all subsequent changes relevant to the issues in this case continuing through the 2019 legislative session. (The

following additional legislative enactments will refer to and be contained in **Appendix D** unless otherwise specified.)

SL 1965, ch 269, included official meetings and required that they be open to the public except as provided by law and required that any official action be made in an open official meeting, whether regular or special.

SL 1980, ch 24, allowed for executive or closed meetings only when required by the federal or state constitution, or federal or state law.

SL 1987 ch 22, provided for prior public notice for all meetings and included that requirement for special or rescheduled meetings.

SL 1989, ch 15, §1, permitted meetings by telephone and added the requirement for notice of telephone meetings to provide a place so the public could listen to and participate in the proceeding. That applied to all meetings except for executive sessions. § 2, declared an emergency so the provision had immediate effect. SDCL 1-25-1 was still one lengthy statute with these changes.

SL 1990, ch 18, §1, changed “telephone” to “teleconference” and further required two or more places at which the public may listen to and participate in the proceeding. § 2 added the definition of “teleconference”. SDCL is still one long statute.

SL 1990, ch 19, required at least twenty-four hour prior notice to any meeting and additionally required that notice for special and rescheduled meetings meet the notice requirements to the extent that circumstances permit.

SL 2010, ch 9, amended SDCL 1-25-1 by dividing one paragraph into four separate paragraphs and retained the wording that all official meetings are open to the public except those closed by a specific law (executive sessions) and retained the

requirement that the public may listen to and participate in teleconference meetings. Up until now all meetings and teleconference meetings apparently had this same requirement.

SL 2012, ch 5, and SL 2012, ch 6, clarified, but reiterated, notice requirements, and that meetings be open to the public, except for executive sessions. Of note is in the fourth paragraph, both provisions applying to telephonic meetings, in one place it provides for the public to listen and participate and further below only for the public to listen. SDCL is still one long statute with all the foregoing provisions.

SL 2013, ch 8, and ch 9, SL 2015, ch 11, and SL 2016, ch 9, §1, and § 2, SL 2016, ch 10, §1, and § 2, added more notice requirements but kept all the foregoing provisions.

SL 2017, ch 7, §1, only added notice requirements.

SL 2018, ch 14, §1, amended SDCL 1-25-1 by adding a fifth paragraph stating:

“The chair of the public body shall reserve at every official meeting by the public body a period for public comment, limited at the chair’s discretion, but not so limited as to provide for no public comment.”

SDCL 1-25-1 was still one lengthy statute with all the above provisions.

SL 2019 ch 2, §1, amended SDCL 1-25-2 by adding a sixth provision for allowing executive sessions and referred to SDCL 1-27-1.5 (8) and (17). (**Appendix B** is the entire Session Law).

SL 2019, ch 3, made many changes by rewriting, revising the order, and adding new sections to SDCL Chapter 1-25, that according to the representations made to the State Senate Affairs Committee and House State Affairs Committee, “look complicated but aren’t”, were to “clarify many changes over the years of difficult to understand provisions that led to confusion”, that were the “result of lots of work by lots of people to

bring you a bill that does nothing”, that “were not to make significant changes”, but moved lots of stuff around. [See **Appendix E** (Transcript of the Senate Committee Hearing and **Appendix F** (Transcript of the House Committee Hearing all attached to Weaver’s Affidavit, AI-61].

B. Facts specific to this case:

SDCL 13-8-10 (**Appendix P**) states in relevant part:

“The annual meeting shall be held on the second Monday of July unless otherwise designated by the board at the prior regular meeting. Regular meetings shall be on the second Monday of each month unless otherwise designated by the board at the annual meeting.”

The District has for several years scheduled twice-a-month business meetings, as characterized by Member Kate Thomas, and as stated by the Superintendent they were scheduled in July at their annual meeting. [See (**Appendix G** Transcript of District Study Session held June 2, 2021), attached to Weaver’s Affidavit, (AI-61), page 4. lines 8- 10, and page 5 lines 15-19.]

Board member Kate Thomas had been a Member for six years on June 2, 2021 (**Appendix G**, page 6, lines 23-24) and was elected President on July 26, 2021. (**Appendix H**, Compilation of agendas and meetings of the District prepared by Weaver [Exhibit I-1 of Weaver’s Second Affidavit {AI-311}], page 4, line 37, and page 5, line 5.)

Between July 9, 2018 and approximately June 29, 2020, the District held their normal every twice-a-month business meetings, scheduled in the previous July, in addition to numerous Study Sessions, Retreats, one Special Session on April 24, 2019 on a contested election, and one Special Session on October 28, 2019 on a bond issue, and another Special Session on Zoom on June 22, 2020. Most, if not all, of these additional meetings were scheduled on weeks other than the normal twice-a-month business

meetings. The public was only excluded from some of these additional meetings, specifically the Retreats, or Executive Sessions and one Study Session on April 13, 2020, and permitted and allowed public comment at all others. (AI-311, Exhibit I-1 of Weaver's Second Affidavit, pages 1 through 3 inclusive.) (Exhibit I-1, [**Appendix H**], added additional information on page 7 of Exhibit I, attached to Weaver's {First} Affidavit, AI-61.)

On July 27, 2020 a new member was elected President, **Appendix H**, page 3, line 30, and thereafter the public was not allowed comment at Study Sessions, Retreats, Special Sessions, and Hybrid Sessions, (Hybrid—Sessions labeled for two purposes), with rare exceptions. Prior to November 12, 2020 (AI-61, page 4 of Exhibit I-1) there had not been any Hybrid Sessions and after that they became numerous. (**Appendix H**, AI-61, Exhibit I-1, pages 4-5).

During the Study Session held June 2, 2021 on Zoom, Board Member Thomas made a Motion to allow public comment, pointed out that in her opinion all these additional meetings were regularly scheduled as she had to attend a meeting of the District every week, irrespective of when they were scheduled. **Appendix G**, AI-61, Exhibit G, page 4, lines 6-25 inclusive, and page 6 lines 18-25).

During this June 2, 2021 meeting the Superintendent informed the District's Board that their attorney was of the opinion that only those twice-a-month meetings scheduled in July were regularly scheduled and only during those meetings was public comment to be required. (**Appendix G**, AI-61, Exhibit G, page 5, lines 3-20). Only after a vote on member Thomas' Motion was public comment then allowed. Thereafter, the policy

espoused by the Superintendent, attributed to the District's attorney, continued by prohibiting public comment during most of these additional meetings.

Numerous members of the public, in addition to the Plaintiff/Appellant Citizens, voiced their concerns to CFL, and others, and thereafter CFL, Weaver, Morrison, and Larson joined forces to initiate this lawsuit. After the lawsuit was Served and the District Answered, McCully requested to become a party Plaintiff/Appellant, and the District consented. AI-29.

On November 12, 2020 the District's Board held a Study/Executive (Hybrid) meeting. (**Appendix H**, AI-61, page 4, line 8 {Exhibit I-1}). During the meeting they went into executive session to discuss replacing a Board Member that was resigning. (AI-61, [Exhibit M]). The next day, November 13, 2020 the District sent letters to the unsuccessful candidates identifying the chosen candidate; the Board President and the Superintendent signed this letter. (AI-61, {Exhibit L}). On November 16, 2020 the District took official action to place the selected person on the Board. (AI-61, Exhibit M). Weaver Filed a Complaint with the Pennington County State's Attorney, receipt acknowledged by him, and the result of his investigation. (AI-61, [Exhibits J, K, L, M, and N]). (**Appendix I** contains all these Exhibits.) Irrespective of what appears to be a clear violation of SDCL 1-25-2, i.e. taking official action in Executive Session, the state's attorney did not find a violation.

District Code (Policy) BEDH (**Appendix J**) first paragraph reads:

“All regular and special meetings of the board will be open to the public. At meetings a specific time period will be designated as “Open Forum” a time limit may be set both for Individual speakers and for the length of the Open Forum time period.”

(AI-61, [Exhibit D]). District Code BEDH-P (**Appendix K**) first sentence reads:

“The board of education encourages the public and district staff to share their suggestions and concerns and welcomes questions about district policy during Open Forum.”

(AI-61, Exhibit E). AI-61.

Exhibit I-1 of Weaver’s Second Affidavit (AI-311) clearly shows more than “regular” and “special” meetings, i.e. Retreats, Study Sessions, and Hybrids, were being held and that not all meetings, not including Executive Sessions or parts of meeting with Executive Sessions that properly excluded the public, allowed public attendance or public comment. A review of Exhibit I-1 of Weaver’s Second Affidavit (AI-311) will readily demonstrate an equal or more than the 24 meetings scheduled in July are held almost each year. At 24 or more of these additional meetings were held in a year and these are all “regularly scheduled” as Kate Thomas stated. The Amended Complaint, AI-23, ¶ 33 makes that allegation and that is borne out by Weaver’s Second Affidavit AI-311, Exhibit I-1, **Appendix H**.

The Amended Complaint, AI-23, ¶ 31 alleges “regularly scheduled official meeting(s)” are not defined by South Dakota statutes or case law and the Amended Answer, AI-30, ¶ 31. Admits that allegation. Citizens contend a controversy exists, AI-23, ¶ 40 and the District Admits the same, AI-30, ¶ 40. Therefore these issues were ripe for adjudication by a Declaratory Judgment.

Citizens’ (Appellants’/Plaintiffs’) Statement of Undisputed Material Facts are attached as **Appendix L**; District’s Statement of Undisputed Material Facts are attached as **Appendix M**; Citizens’ Disagreement with District’s Statement of Facts are attached as **Appendix N**; and District’s Response to Citizens’ Statement of Facts are attached as **Appendix O**. Not all facts given or contested are relevant to the issues before this court.

ARGUMENT AND AUTHORITIES

This case required the trial court to decide competing Motions for Summary Judgment, SDCL 15-6-56(c), and interpretation of at least one Session Law that changed and modified one statute into several statutes. Citizens requested a judgment that Declaratory Judgment was a proper request for relief, and that the District: failed to follow its own Policies; violated SDCL 1-25-2 by taking official action during an Executive Session; that “regularly scheduled” in SDCL 1-25-1 was ambiguous; and that legislative history was needed to determine the legislature’s intent as the plain meaning was not clear and unambiguous. The District requested only Judgment that there was no genuine issue of material fact as they complied with South Dakota’s Open Meetings Laws, specifically SDCL 1-25-1 (**Appendix V**).

The trial court reasoned:

“I will indicate to the parties that it’s always challenging when there is a request to have the court direct another governmental body to handle meetings in a certain fashion, particularly when the hallmark of that local governmental agency is local control over those particular actions.” (Court’s statement in Motions Hearing, **Appendix C**, page 18, lines 14-19),

and declined to find a violation of the Open Meetings law (**Appendix C**, page 19, lines 22-25). It did find and determined that the Declaratory Judgment was an appropriate remedy in this matter (**Appendix C**, page 20, lines 18-21)—the District has not filed a Notice of Review and therefore that is not before this court.

In addressing the competing Motions for Summary Judgment, the court stated:

“...I believe that the statute is unambiguous. I think SDCL 13-8-10 allows the Board to set those regularly scheduled official meetings; that those regularly scheduled official meetings are those at which public comment is required.” (**Appendix C**, page 20, lines 24-25, page 21, Lines 1-4).

The court continued:

“The Rapid City Area School District offers public comment at those regularly scheduled official meetings. And other meetings, while they may be official and require the ability for the public to have that meeting available to them for purposes of review, are not meetings at which the Board is required to offer public comment based on my reading of the statutes. So I’m going to grant the District’s Motion for Summary Judgment on that particular issue.” (**Appendix C**, Page 21, lines 4-12).

The court did not address whether or not the District’s Policy, BEDH, (**Appendix J**, which states:

“All regular and special meetings of the board will be open to the public. At meetings a specific time period will be designated as “Open Forum” a time limit may be set both for Individual speakers and for the length of the Open Forum time period.”

was violated by the District.

Citizens address these issues seriatim.

1. THE TRIAL COURT DECIDED THE ISSUES ONE AT A TIME WHEN THE PARTIES SUBMITTED SIMULTANEOUS MOTIONS FOR SUMMARY JUDGMENT.

Summary judgment is appropriate if the pleadings and admissions, together with the Affidavits, show that there is no genuine issue as to the material facts and that the moving party is entitled to judgment as a matter of law. A disputed fact is not material unless it would affect the outcome of the suit in accordance with the governing substantive law, if a reasonable jury could return a verdict for the non-moving party. The moving party has the burden of clearly demonstrating an absence of genuine issues of material fact and that they are entitled to judgment as a matter of law. *Gantvoort v.*

Ranschau, 2022 S.D. 22, ¶ 17, ___ N.W.2d ___, ___, citing SDCL 15-6-56(c) and other cases.

Summary Judgments are reviewed de novo. *Niemitalo v. Seidel*, 2022 S.D. 13, ¶ 12, 972 N.W.2d 115, 119. There must be no genuine issue on the inferences to be drawn from the facts as summary judgment is not a substitute for trial and a belief that the non-moving party will not prevail at trial is not an appropriate basis for granting the motion on issues not shown to be a sham, frivolous or unsubstantiated, as this court views all reasonable inferences drawn from the facts in the light most favorable to the non-moving party. The party challenging summary judgment must substantiate their allegations with sufficient probative evidence that would permit a finding on more than mere speculation, conjecture, or fantasy. Mere speculation and general assertions, without concrete proof, are not enough to avoid summary judgment. *Godbe, v. City of Rapid City*, 2022 S.D. 1, ¶ 20, 969 N.W.2d 208, 213. While the trial court did not specifically say how it arrived at its decisions, it appears to have done so one at a time as presented by the parties or did not address them at all.

Citizens assert that they have conclusively provided by clear and convincing evidence that the District does not follow its own Policies; violated the open meetings law by taking an official action in Executive Session; that “regularly scheduled” as used and applied in SDCL 1-25-1 was ambiguous; and that legislative history was necessary, appropriate, and helpful in the interpretation of those words.

2. IRRESPECTIVE OF THE PROVISIONS OF SDCL CHAPTER 1-25, THE DISTRICT IS REQUIRED TO FOLLOW ITS OWN POLICIES AS THOSE POLICIES HAVE THE FORCE AND EFFECT OF LAW.

Citizens contend that they have unequivocally demonstrated with Weaver's Exhibit I-1, the compilation of District meetings from July 9, 2018 through January 11, 2022 (**Appendix H**), that the District violated its own Policies, BEDH (**Appendix J**) and BEDH-P (**Appendix K**) by not allowing Open Forum, i.e. public comment at all regular and special meetings, that were not Executive Session and therefore closed to the public, as provided for in BEDH and further they by denying such Open Forum did not "encourage the public...to share their suggestions and concerns and welcomed questions" during Open Forum as specified in BEDH-P.

This court stated that their review of a school board's decision is well established and that:

"School boards are creatures of the [Legislature] and the judiciary may not interfere with their decisions unless the decision is made contrary to law. Therefore, "[a]s long as the school board is legitimately and legally exercising its administrative powers, the courts may not interfere with nor supplant the school board's decision making process." Only the legality of the decision, not the propriety of the decision, may be reviewed by the courts. The legality of a school board's decision is determined by a two-prong review. First, the procedural regularity of the decision is reviewed. This review includes whether the school board was vested with the authority to act and whether all procedural requirements required by law were followed. Second, the school board's decision is reviewed to determine whether the decision was arbitrary, capricious or an abuse of discretion." *Barnes v. Spearfish School District No. 40-2*, 2006 S.D. 108, ¶6, 725 N.W.2d 226, 228-229.

This court went on to state: "[S]chool board policies have the force and effect of law and must be complied with." *Hicks v. Gayville--Volin*, 2003 SD 92, ¶10, 668 NW2d 69, 73.", *Barnes* at ¶ 6, 229.

The District has policies, separate and apart from SDCL 1-25-1, requiring Open Forum, a time for the public to share their suggestions and concerns and ask questions, and to do so at all regular and special meetings. While the District began having Retreats, Study Sessions, or Hybrid meetings on at least August 20, 2018, and continued to do so

through January 11, 2022, (well after this lawsuit was commenced), and documented with **Appendix H**, neither SDCL 1-25-1 nor Policy BEDH, contemplates meetings other than regular or special. The District characterizes all these addition meetings as “special” even though they are regularly scheduled essentially every other week, opposite the weeks when regular business meetings are held. One has only to peruse **Appendix H** to determine they are scheduled with the regularity of clockwork and properly noticed i/a/w SDCL 1-25-1.1, (**Appendix Q**), as **all** meetings are required to be noticed. Whether they are regularly scheduled as special meetings, or rescheduled meetings, all are required to allow for Open Forum and allow public comment if their policies BEDH and BEDH-P are to have meaning. It is relevant that SDCL 1-25-1.1 ends by stating:

“For any special or rescheduled meeting, each political subdivision shall also comply with the public notice provisions of this section for a regular meeting to the extend that circumstances permit. A violation of this section as a Class 2 misdemeanor.”

Citizens are not requesting that the Board or its members be charged with a crime, they just want the District to have the court admonish them for being in violation of the law, and require the District to take corrective action to allow public comment as contemplated by their Policies.

3. THE DISTRICT TOOK OFFICIAL ACTION BY ISSUING LETTERS TO THE UNSUCCESSFUL CANDIDATES IMMEDIATELY AFTER THEIR EXECUTIVE SESSION, BEFORE PLACING THAT ACTION ON THE RECORD UNTIL A LATER MEETING, AND IN SO DOING THEY VIOLATED SDCL 1-25-2.

SDCL 1-25-2 (**Appendix R**) starts by stating that Executive or closed meetings may be held for the sole purposes itemized into six categories. Following those categories it provides: “However, any official action concerning such matter shall be made at an

open official meeting.”

Without considering the appropriateness of discussing the merits of which of several applicants is to be selected to fill a vacant Board position in Executive Session, making the decision as to which person is being selected is clearly taking official action by the Board. The letter Exhibit J, in **Appendix I**, signed by the Board President and the Superintendent, provides proof of having made that selection during this closed meeting. It is beyond dispute that the Board went into Executive Session on November 12, 2020 as that is shown on Exhibit M of **Appendix I**. The letter, Exhibit L is dated November 13, 2020. It was not announced to the public until the next Special Session on November 16, 2020, as shown by the official minutes published in the Rapid City Journal as shown on Exhibit M.

The Board's action in this case, is quite the opposite of the action in *Cass v. Olson*, 349 N.W.2d 435, 436 (S.D. 1984), where that Board went into Executive Session to discuss issues and after leaving the Session and reassembling publicly, a motion was made, and even though the public was not given an opportunity for comment, was voted on, and became final. In *Cass, supra*, the issue was not one of being deprived of public comment but rather the appropriateness of the action taken. What is relevant is to show the proper way to take official action after, and not during, Executive Sessions.

This is apparently the “local control” the trial judge had some trepidation about in directing another governmental body to handle meetings in a certain fashion.

Nonetheless, even though the State’s Attorney called the Board’s action in Executive Session a “straw poll” on Exhibit N of **Appendix I**, official action was taken as shown by the letter sent to the unsuccessful applicants, signed by the Board President and the

Superintendent. Citizens realize that prosecutors have discretion, and that such discretion should be directed to obtaining justice, and not merely convictions. Whether or not the state's attorney complied with SDCL 1-25-6 (**Appendix T**) is not the issue. As this court quoted the Minnesota Supreme Court in addressing the role of the prosecutor:

“We have repeatedly stated that a “prosecutor is a minister of justice whose obligation is to guard the rights of the accused as well as to enforce the rights of the public””. *In re Discipline of Russell*, 2011 S.D. 17, ¶ 41. 797 N.W.2d 77, 87.

Citizens are not interested in proceeding with a criminal proceeding but rather, seek justice so that the right's to provide public comment are maintained. The purpose of open meetings is to keep public bodies doing the public's business in the open and not behind closed doors. A statement by this court that the proper procedure was not followed should serve as a warning to this Board as well as other public entities and is warranted in this case.

4. THE STANDARD OF REVIEW WHEN ONLY THE INTERPRETATION OF A STATUTE IS AT ISSUE HAS SEVERAL STEPS.

A. ARE THE WORDS “REGULARLY SCHEDULED OFFICIAL MEETING(S)” AS USED IN SDCL 1-25-1 AMBIGUOUS?

Citizens contend the words “regularly scheduled”, when used in conjunction with official meeting(s), in SDCL 1-25-1 are ambiguous. “”In conducting statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole.”” *Reck v. South Dakota Board of Pardons and paroles*, 2019 S.D. 42, ¶ 11. 932 N.W.2d 135, 139, citing other cases. However, the court in *Reck, supra* at ¶ 15, 140, further states, “...an ambiguity exists “where the literal meaning of a statute leads to an absurd or unreasonable conclusion...or when a statute is capable of being understood by reasonably well-informed persons in either of two or more senses.”” (Emphasis added.)

In this case, Kate Thomas, a member of the Board for six years on June 2, 2021, and elected as Board President on July 26, 2021 as shown by **Appendix H** and her statements before the Board on June 2, 2021, that she considered almost all the additional scheduled meetings, those not scheduled in July, as regularly scheduled in that she had to come to a meeting every Monday. She also stated Special meetings were held for special events such as bond issues and emergencies. **Appendix G**, page 3, lines 17-25. She went on to say Study Sessions aren't special as they are regularly scheduled, every month, one if not two,

“...[S]o I would almost define that as regular. You have your regular business meeting where you have, ya know, money at hand, etc., claims, all of those type of things, but you also have informational items that can be something that you end up discussing at a study session, which is again, I would argue, a regular meeting,” **Appendix G**, page 4, lines 7- 13.

Further on, during the same meeting Ms. Thomas reiterates:

“And I would respectfully disagree, because they are regularly scheduled. They are not special meetings. They would have a special meeting attached to it and we clearly have an example of what a special meeting is. I have never thought of them as special meetings. I have thought of them for the last six years as merely every Monday I'm going to have to come down to have a meeting. So I would respectfully argue the opposite.” **Appendix G**, page 6, lines 18-25, page 7, line 1.

Ms. Thomas appears to be a rational, well-informed person, and as a member of the board for Board six years or more, and now President of the Board, appears to know what meetings are regularly scheduled and differentiates between them and actual special meetings. She appears to agree with Citizens, having made these statements well before this lawsuit was begun—consequently it appears that reasonable people can disagree on the meaning of regularly scheduled official meetings, especially as applied to the District. The District asserts that only Meetings scheduled in accordance with SDCL 13-8-10 are

regularly scheduled. Ms. Thomas has shown other meetings are regularly and routinely scheduled with various labels.

Citizens contend regularly scheduled means meetings scheduled in accordance with SDCL 1-25-1.1 unless exigent circumstances make that impractical or impossible. This is another meaning that the person in the street can relate to, as that is generally how they become aware of scheduled meetings and not differentiate between regular and special when not specifically denominated as special.

**B. HAVING DETERMINED THAT THE WORDS ARE AMBIGUOUS
THE NEXT STEP IS TO READ THE STATUTES AS A WHOLE.**

“Words used are to be understood in their ordinary sense...” SDCL 2-14-1 (Appendix U) and *Reck, supra* ¶ 11, 139, as cited above, states words are to be given their plain meaning and effect and the statutes are to be read as a whole. To do that requires looking beyond SDCL 1-25-1 and into the legislative history, specifically Senate Bill 91 of the 2019 Legislative Assembly, as passage of that Bill resulted in what had been SDCL 1-25-1, being divided into new sections and rewording of SDCL 1-25-1. That brings into play additional words previously used in the statute and retained in the additional sections.

1. What kinds of meetings are contemplated by Chapter 1-25?

SDCL 1-25-1, fourth paragraph contains regularly scheduled official meeting(s) and regular meetings. The fifth paragraph contains regularly scheduled meeting.

SDCL 1-25-1.1 refers to a special or rescheduled meeting twice and regular meeting once. It requires for these special or rescheduled meeting that the notice provision for regular meetings be complied to the extent that circumstances permit. This suggests that regular meetings that are rescheduled and special meetings may have

difficulty providing timely notice. This suggests to a reasonable person that an emergency exists, therefore a special meeting is required to deal with the immediacy of the situation. This appears to be in keeping with Ms. Thomas statement that special meeting are for special things and not routinely scheduled—as the District does with Retreats, Study Sessions, and Hybrid meetings.

SDCL 1-25-1.5 permits any official meeting to be held telephonically and makes no distinction between regular and special meetings being held by telephone.

SDCL 1-25-1.6 (**Appendix S**) in the first sentence requires that for any official teleconference meeting there shall be provided one or more places at which the public may listen to and participate in the meeting. Further on it states that if less than a quorum is present at the location of the meeting, arrangements shall be made for the public to listen to the meeting via telephone or internet.

No one disputes that all meetings, however named, have to provide notice as required by SDCL 1-25-1.1—sometimes, in what provides for emergencies, circumstances may limit the notice because of exigent circumstances.

Since the statutes and Board Policy (BEDH) both list only regular and special as identified types of meetings, the other names for meetings held by the District should be one of those types. Special implies for a special purpose, as Ms. Thomas stated and the fact that exigent circumstances may exist excusing full compliance with the notice requirements supports that implication. When numerous other meetings are scheduled on a regular basis, but called by an undefined name, they really are regular meetings. With the degree of regularity the District schedules these other meetings, they can only be

regularly scheduled official meetings and not Special unless specified for that purpose in the notice and then, as Ms. Thomas stated public Comment is limited to that issue.

It is incongruous to suggest, as does the District, that meetings at which public comment is not required would require public comment were that meeting held by teleconference or just rescheduled.

2. Is public participation synonymous with public comment?

Participation involves more than just being a mute observer. Only listening may be described as mute activity. If participation is to have any significance, sharing suggestions and concerns, and welcoming questions is how the public can interact with the Board as contemplated by Policy BEDH-P and thereby participate.

It is reasonable to conclude that it is illogical for a meeting that is not required to allow public participation suddenly is required to allow that just because the meeting is held by teleconference as required by SDCL 1-25-1.6 (**Appendix S**). If public participation is to have any realistic meaning it has to encompass public comment. Reading 1-25-1 and 1-25-1.6 as a whole should lead to the conclusion that the words are synonymous.

Dictionary.com defines participate as “to take or have a part or share, as with others; partake; share (usually followed by *in*): *to participate in profits; to participate in a play*. This court has resorted to dictionary definitions to determine the plain and ordinary meaning of undefined words in a contract. *Western National Mutual Insurance Company v. TSP, Inc.*, 2017 S.D. 72, ¶ 14, 904 N.W.2d 52, 57.

Wuest v. Winner School Dist. 59-2, 2000 S.D. 42, ¶ 25, 607 N.W.2d 912, 918, involved a teacher not being allowed to participate in a meeting was alleging denial of

her due process. The court held she was not denied due process by not being allowed to participate as nothing regarding her was discussed in the meeting. In *People in Interest of M.D.*, 2018 S.D. 79, ¶ 16, 920 N.W.2d 496, 501, the lack of response by someone whose participation was solicited by DSS was at issue. There the court found the failure to respond to the solicitation is what prevented the person from providing input in a planning meeting. In that case participation would have involved a response to the invitation to either do so or decline—failing to respond was considered a declination to participate. *National Bank of Dakota v. Taylor*, 5 S.D. 99, 109, 58 N.W. 297, 300 involved a person that had been elected to a position, did not attend or participate in any meeting thereafter, and therefore was not liable. All these cases indicate a degree of activity more than just being present and listening would constitute participation. Likewise, those parties had the opportunity to make comment but did not do so. While not have been described as public comment in those cases, in the case a bar participation indicates the public is to be provided the opportunity to do more than just listen—they should be allowed to be actively involved by making public comment.

3. Does legislative history indicate participation and public comment are applicable to meetings other than regularly scheduled official meetings?

The legislative history having the most impact on what these words mean, and the intent of the legislature, while lengthy, really boil down to what is the purpose of having open meetings. Notice was one of the points repeatedly addressed with more specifics in the notice required. Without notice, or other avenue for the public being informed, the reality is the public won't be able to keep themselves informed and won't participate.

While the genesis was in 1953, it wasn't until 1965 that meetings were required to be open to the public and that official action could only occur in open meetings (not in

executive sessions). 1989 added a requirement for a place for the public to listen and participate. 1990 provided for teleconferences to have two places for the public to listen and participate. 2010 continued the provision for Listening and participating. 2012 also held onto that wording. It was 2018 when the words public comment were first used and a requirement for a specific time be set aside to accomplish that. All the statutes have this in common—do official acts in the open and allow the public to have an opportunity to addressed their concerns to the public body, in the open, before the body.

2019 is when the words “regularly scheduled” were inserted, with no reference being made in the proposed legislation or in the testimony before the committees to SDCL 13-8-10. Had they wanted to add that reference they could have. Otherwise, the law was essentially unchanged, just rearranged, and clarified, and some definitions added. See **Appendix E** and **Appendix F**.

There is and was not any reference to restricting the public’s right to provide comment.

As all the changes, except for definitions, were in SDCL 1-25-1 before SB 91 was passed, by consent of both houses, based on the Committee’s recommendations, all the changes need to be construed together as they all apply to the same subject.

“Generally, when multiple statutes may apply to the same subject matter, “a court should construe [the] statutes...in such a way as to give effect to all of the statutes if possible.” *Abata v. Pennington Cnty. Bd. of Commissioners*, 2019 S.D. 39, ¶19, 931 N.W.2d 714, 721. However, “[s]tatutes of specific application take precedence over statutes of general application.” *Id.* “When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute.” *Martinmaas v. Engelmann*, 2000 S.D.85, ¶ 49, 612 N.W.2d 600, 611.” As cited by *Jans v. State of South Dakota, the Department of Public Safety*, 2021 S.D. 51, ¶ 18, 946 N.W. 2d 749, 755.

Statutory interpretation is a question of law, and in discerning the intent of the Legislature the court examines the language used by attempting to give words their plain

meaning and effect and in construing an ambiguous statute, the court may examine: “the legislative history, title, and the total content of the legislation.” *Fluth v. Schoenfelder Construction, Inc.*, 2018 S.D. 65, ¶ 12, 917 N.W.2d 524, 528. That court continued stating first an ambiguity was observed, as exists in this case, and then defined ambiguity as when a statute is reasonably capable of being understood in more than one sense, or more than one reasonable interpretation. *Id.*, ¶ 16, 529. Further, when called upon to construe ambiguous statutes, courts: “..may look to “the legislative history, title, and the total content of the legislation.””. *Id.*, ¶ 17, 529.

Looking at the legislative history invariably should lead to the conclusion that the legislature was convinced that there was no intent to change the law significantly. The intent was to clarify the way things work, to make the law to be more easily read, and to bring a Bill that “doesn’t do anything”—the representation made to both the Senate and the House committees. There was no intent to limit the right of the public to comment—the intent was to take the decision away from the chair and place it with the body. “The decision by the Legislature to add language to the statute[s] does not change [the] reading of the statute as it existed prior to the amendment.” *Reck, supra* ¶ 14, 140. Likewise, in this case, adding regularly scheduled should not change the right of the public to provide public comment as that was not the intent of the Legislature.

CONCLUSION AND RELIEF SOUGHT

Citizens have demonstrated that Policy BEDH requires public comment at all official meetings of the District, regular or special or otherwise titled, except for Executive Sessions or portions of meetings containing Executive Session. They have also proven that the Board violated SDCL 1-25-2 by taking official action during an Executive

Session. Citizens are convinced that regularly scheduled should be interpreted to mean all meetings scheduled in accordance with SDCL 1-25-1.1 as it relates to this District and believes it should be applicable in all cases.

Citizens respectfully request a decision stating that:

1. The District shall provide Open Forum during all regular and special meetings, except during Executive Sessions.
2. The District took official action in Executive Session by selecting the candidate announced four days later in an open meeting, as demonstrated by the letters to the unsuccessful candidates.
3. That regularly scheduled as used in SDCL 1-25-1 means all meetings noticed in accordance with SDCL 1-25-1.1.

REQUEST FOR ORAL ARGUMENT

Citizens respectfully request Oral Argument as the same may provide additional information and can answer questions this court may have that are not answered by the Briefs of the respective parties.

Dated this 4th day of May, 2022.

JASPER LAW OFFICE

/s/ Kenneth E. Jasper
Kenneth E. Jasper
Attorney for Appellants/Citizens
201 Main Street, Suite # 107
PO Box 2093
Rapid City, SD 57709-2093
Phone:(605) 342-6565
Fax: (605) 348-3299
jasperlaw@rushmore.com

CERTIFICATE OF SERVICE

Kenneth E. Jasper, the undersigned attorney, hereby certifies that on the 4th day of March, 2015, he provided a true and correct complete copy of Appellants' Brief , for the Citizens For Liberty, Inc., et al., to the persons hereinafter next designated by emailing the same to the following persons at the following email addresses which are the last known email addresses of such parties, to-wit:

Shirley Jameson-Fergel, Clerk
South Dakota Supreme Court
SCClerkBriefs@ujs.state.sd.us

Kelsey B. Parker
Attorney for Appellees/District
kparker@bangsmccullen.com

Dated this 4th day of May, 2022.

JASPER LAW OFFICE

/s/ Kenneth E. Jasper
Kenneth E. Jasper
Attorney for Appellants/Citizens
201 Main Street, Suite # 107
PO Box 2093
Rapid City, SD 57709-2093
Phone:(605) 342-6565
Fax: (605) 348-3299
jasperlaw@rushmore.com

CERTIFICATE OF ADDITIONAL SERVICE

Kenneth E. Jasper, the undersigned attorney, hereby certifies that on the 4th day of May, 2022, he provided the Original and two (2) true and correct hardcopies of Appellant's Brief to the person hereinafter next designated by placing the same in a securely sealed envelope, with

sufficient first-class postage prepaid thereon, and placing the same in the United States Mail.

Said envelope was addressed as follows, to-wit:

Shirley Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated this 4th day of May, 2022.

JASPER LAW OFFICE

/s/ Kenneth E. Jasper
Kenneth E. Jasper
Attorney for Appellants
201 Main Street, Suite # 107
P. O. Box 2093
Rapid City, SD 57709-2093
Phone:(605) 342-6565
Fax: (605) 348-3299
jasperl@rushmore.com

CERTIFICATE OF COMPLIANCE

Kenneth E. Jasper, the undersigned attorney, hereby certifies that the foregoing Appellant's Brief of Appellant, Citizens was prepared using Times New Roman font size 12; that it contains 6,638 words, and 40,916 characters, and 23 pages, as counted by his Microsoft Office Premium 2000 word processing program, which excludes in these limitations: the table of contents; table of cases; jurisdictional statement; statement of legal issues; any addendum (Appendices) materials; or any certificates of counsel, and is in compliance with the rules and requirements set forth regarding a Brief submitted under SDCL 15-26A-66(b).

Dated this 4th day of May, 2022.

JASPER LAW OFFICE

/s/ Kenneth E. Jasper
Attorney for Appellants
201 Main Street, Suite #107
P. O. Box 2093
Rapid City, SD 57709-2093
Phone: (605) 342-6565
Fax: (605) 348-3299
jasperlaw@rushmore.com

APPENDIX

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STATE OF SOUTH DAKOTA)
PENNINGTON COUNTY)ss)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

SD CITIZENS FOR LIBERTY, INC.,
TONI E. WEAVER, MARCY M.
MORRISON, BRIAN T. LARSON, AND
SAMANTHA MCCULLY

51Civ21-000749
Hon. Craig Pfeifle

Plaintiffs,

Order

vs.

RAPID CITY AREA SCHOOL
DISTRICT 51-4,

Defendant.

This matter came before the Court on the parties' cross Motions for Summary Judgment on January 27, 2022. Plaintiffs appearing through their counsel of record, Kenneth E. Jasper, and Defendant appearing by its counsel, Kelsey B. Parker. The Court, having reviewed the arguments and materials submitted, now, therefore, it is hereby

ORDERED that the Defendant's Motion for Summary Judgment is granted and that the Plaintiff's Motion for Summary Judgment is denied for the reasons stated in the Court's oral ruling at the hearing.

Dated this 28th day of January, 2022.

BY THE COURT:



CRAIG A. PFEIFLE
CIRCUIT COURT JUDGE

ATTEST:
CLERK OF COURTS



Pennington County, SD
FILED
IN CIRCUIT COURT

JAN 28 2022

Ranee Truman, Clerk of Courts
Deputy

State of South Dakota

NINETY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 2019

318B0146

SENATE BILL NO. 91

Introduced by: Senators Soholt, Heinert, and Novstrup and Representatives Reed, Anderson,
and Ring

1 FOR AN ACT ENTITLED. An Act to revise certain provisions regarding open meeting
2 requirements.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That chapter 1-25 be amended by adding a NEW SECTION to read:

5 Terms used in this chapter mean:

- 6 (1) "Political subdivision," any association, authority, board, commission, committee,
7 council, task force, school district, county, city, town, township, or other local
8 government entity that is created or appointed by statute, ordinance, or resolution and
9 is vested with the authority to exercise any sovereign power derived from state law;
- 10 (2) "Public body," any political subdivision and the state;
- 11 (3) "Official meeting," any meeting of a quorum of a public body at which official
12 business or public policy of that public body is discussed or decided by the public
13 body, whether in person or by means of teleconference;
- 14 (4) "Teleconference," information exchanged by any audio, video, or electronic medium,
15 including the internet;



1 (5) "State," each board, commission, department, or agency of the State of South Dakota.

2 Section 2. That § 1-25-1 be amended to read:

3 1-25-1. The official meetings of the state; and its political subdivisions; ~~and any public body~~
4 ~~of the state or its political subdivisions~~ are open to the public unless a specific law is cited by
5 the state; or the political subdivision; ~~or the public body~~ to close the official meeting to the
6 public. For the purposes of this section, a political subdivision or a public body of a political
7 subdivision means any association, authority, board, commission, committee, council, task
8 force, school district, county, city, town, township, or other agency of the state that is created
9 or appointed by statute, ordinance, or resolution and is vested with the authority to exercise any
10 sovereign power derived from state law. For the purposes of this section, an official meeting is
11 any meeting of a quorum of a public body at which official business of that public body is
12 discussed or decided, or public policy is formulated, whether in person or by means of
13 teleconference.

14 It is not an official meeting of one political subdivision ~~or public body~~ if its members
15 provide information or attend the official meeting of another political subdivision ~~or public body~~
16 for which the notice requirements of § 1-25-1.1 have been met or press conferences called by
17 a representative of a public subdivision.

18 For any event hosted by a nongovernmental entity to which a quorum of the public body is
19 invited and public policy may be discussed, but the public body does not control the agenda, the
20 political subdivision may post a public notice of a quorum, in lieu of an agenda. The notice of
21 a quorum shall meet the posting requirements of § 1-25-1.1.

22 ~~Any official meeting may be conducted by teleconference as defined in § 1-25-1.2. A~~
23 ~~teleconference may be used to conduct a hearing or take final disposition regarding an~~
24 ~~administrative rule pursuant to § 1-26-4. A member is deemed present if the member answers~~

1 ~~present to the roll call conducted by teleconference for the purpose of determining a quorum.~~

2 ~~Each vote at an official meeting held by teleconference shall be taken by roll call.~~

3 ~~If the state, a political subdivision, or a public body conducts an official meeting by~~

4 ~~teleconference, the state, the political subdivision, or public body shall provide one or more~~

5 ~~places at which the public may listen to and participate in the teleconference meeting. For any~~

6 ~~official meeting held by teleconference, which has less than a quorum of the members of the~~

7 ~~public body participating in the meeting who are present at the location open to the public,~~

8 ~~arrangements shall be provided for the public to listen to the meeting via telephone or internet.~~

9 ~~The requirement to provide one or more places for the public to listen to the teleconference does~~

10 ~~not apply to an executive or closed meeting.~~

11 The chair of the public body shall reserve at every regularly scheduled official meeting by

12 the public body a period for public comment, limited at the chair's public body's discretion, but

13 not so limited as to provide for no public comment. Public comment is only required at regularly

14 scheduled official meetings which are designated as regular meetings by statute, rule, or

15 ordinance.

16 Public comment is not required at official meetings held solely for the purpose of an

17 inauguration, swearing in of newly elected officials, or presentation of an annual report to the

18 governing body regardless of whether or not such activity takes place at the time and place

19 usually reserved for a regularly scheduled meeting.

20 If a quorum of township supervisors, road district trustees, or trustees for a municipality of

21 the third class meet solely for purposes of implementing previously publicly-adopted policy,

22 carrying out ministerial functions of that township, district, or municipality, or undertaking a

23 factual investigation of conditions related to public safety, the meeting is not subject to the

24 provisions of this chapter.

1 A violation of this section is a Class 2 misdemeanor.

2 Section 3. That chapter 1-25 be amended by adding a NEW SECTION to read:

3 Any official meeting may be conducted by teleconference. A teleconference may be used
4 to conduct a hearing or take final disposition regarding an administrative rule pursuant to § 1-
5 26-4. A member is deemed present if the member answers present to the roll call conducted by
6 teleconference for the purpose of determining a quorum. Each vote at an official meeting held
7 by teleconference shall be taken by roll call.

8 Section 4. That chapter 1-25 be amended by adding a NEW SECTION to read:

9 At any official meeting conducted by teleconference, there shall be provided one or more
10 places at which the public may listen to and participate in the teleconference meeting. For any
11 official meeting held by teleconference, that has less than a quorum of the members of the
12 public body participating in the meeting who are present at the location open to the public,
13 arrangements shall be provided for the public to listen to the meeting via telephone or internet.
14 The requirement to provide one or more places for the public to listen to the teleconference does
15 not apply to official meetings closed to the public pursuant to specific law.

16 Section 5. That § 1-25-1.1 be amended to read:

17 1-25-1.1. ~~All public bodies, except the state and each state board, commission, or~~
18 ~~department as provided in § 1-25-1.3; Each political subdivision~~ shall provide public notice,
19 with proposed agenda, that is visible, readable, and accessible for at least an entire, continuous
20 twenty-four hours immediately preceding any official meeting, by posting a copy of the notice,
21 visible to the public, at the principal office of the ~~public body~~ political subdivision holding the
22 meeting. The proposed agenda shall include the date, time, and location of the meeting. The
23 notice shall also be posted on the ~~public body's~~ political subdivision's website upon
24 dissemination of the notice, if ~~such~~ a website exists. For any special or rescheduled meeting, the

1 information in the notice shall be delivered in person, by mail, by email, or by telephone, to
2 members of the local news media who have requested notice. For any special or rescheduled
3 meeting, each ~~public body~~ political subdivision shall also comply with the public notice
4 provisions of this section for a regular meeting to the extent that circumstances permit. A
5 violation of this section is a Class 2 misdemeanor.

6 Section 6. That § 1-25-1.2 be repealed.

7 ~~1-25-1.2. For the purposes of this chapter, a teleconference is information exchanged by any~~
8 ~~audio, video, or electronic medium, including the internet.~~

9 Section 7. That § 1-25-1.3 be amended to read:

10 1-25-1.3. The state ~~and each state board, commission, or department~~ shall provide public
11 notice of a meeting by posting a copy of the proposed agenda at the principal office of the board,
12 commission, or department holding the meeting. The proposed agenda shall include the date,
13 time, and location of the meeting, and be visible, readable, and accessible to the public. The
14 agenda shall be posted at least seventy-two hours before the meeting is scheduled to start
15 according to the agenda. The seventy-two hours does not include the day the agenda is posted
16 nor Saturday, Sunday, or legal holidays. The notice shall also be posted on a state website,
17 designated by the commissioner of the Bureau of Finance and Management. For any special or
18 rescheduled meeting, the information in the notice shall be delivered in person, by mail, by
19 email, or by telephone, to members of the local news media who have requested notice. For any
20 special or rescheduled meeting, ~~each~~ the ~~state board, commission, or department~~ shall also
21 comply with the public notice provisions of this section for a regular meeting to the extent that
22 circumstances permit. A violation of this section is a Class 2 misdemeanor.

23 Section 8. That § 1-25-3 be amended to read:

24 1-25-3. ~~Any board or commission of the various departments of the State of South Dakota~~

1 The state shall keep detailed minutes of the proceedings of all regular or special meetings. The
2 minutes required in this section shall report how each individual member voted on any motion
3 on which a roll call vote is taken. The minutes shall be available for inspection by the public at
4 all times at the principal place of business of the board or commission. A violation of this
5 section is a Class 2 misdemeanor.

6 Section 9. That § 1-25-11 be amended to read:

7 1-25-11. No ~~state, political subdivision, or~~ public body may prevent a person from
8 recording, through audio or video technology, ~~a public~~ an official meeting ~~that is open to the~~
9 ~~public~~ as long as the recording is reasonable, obvious, and not disruptive. This section does not
10 apply to meetings closed to the public pursuant to specific law.

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

SD CITIZENS FOR LIBERTY, INC.,) FILE NO. 51CIV21-749
TONI E. WEAVER, MARCY M.)
MORRISON, BRIAN T. LARSON and)
SAMANTHA MCCULLY,)

* * * * *

DATE: January 27, 2022

PLACE: Pennington County Courthouse
Rapid City, South Dakota

BEFORE: THE HONORABLE CRAIG A. PFEIFLE
Circuit Court Judge
Rapid City, South Dakota

FOR THE PLAINTIFFS: MR. KENNETH E. "CHUCK" JASPER
(Telephonically) Attorney at Law
201 Main Street, #107
Rapid City, South Dakota

FOR THE DEFENDANT: MS. KELSEY B. PARKER
(Telephonically) Attorney at Law
333 West Blvd., #400
Rapid City, South Dakota

Also Present: Toni Weaver, Marcy Morrison, Samantha McCully
Beth Ann Halvorson - Paralegal

1 **THE COURT:** Good afternoon, everyone. This is
2 Judge Pfeifle.

3 Mr. Jasper, do I have you on the line?

4 **MR. JASPER:** Yes, you do. Good afternoon, Judge.

5 **THE COURT:** And who do you have with you?

6 **MR. JASPER:** I have Tonchi Weaver here, Marcy Morrison,
7 and Samantha McCully.

8 **THE COURT:** Thank you.

9 **MR. JASPER:** They can hear.

10 **THE COURT:** Thank you.

11 And do I have Ms. Parker on the line?

12 **MS. PARKER:** Yes.

13 **THE COURT:** And, Ms. Parker, who do you have with you?

14 **MS. PARKER:** My paralegal Beth Ann.

15 **THE COURT:** Thank you.

16 This is the time set for competing motions in
17 Civil File 21-749 and regarding South Dakota Citizens For
18 Liberty, et al., vs. the Rapid City Area School District.

19 We are holding this via a telephonic hearing. A
20 couple of rules or guidelines for purposes of our
21 telephonic hearing process. First, I'd ask you only
22 speak when directed to by the Court. This is going into
23 the courtroom. Our court reporter is transcribing this
24 for purposes of a record here today, and that seems to
25 help us keep the record clear if you only speak when I

1 address you. I will make sure everyone gets a chance to
2 address the issues that they believe pertinent.

3 The other thing that I am going to ask you to do is
4 that when you do speak and make your argument, that you
5 use your handset versus the speaker function on your
6 phone. We tend to get a little feedback or an echo
7 chamber type effect when you use your speaker, and that
8 will also help clarify and allow us to keep the record as
9 clear as possible.

10 I will let the parties know that in preparation for
11 today's hearing I have read the materials that have been
12 submitted. I appreciate those.

13 Mr. Jasper, since your clients are the plaintiffs, I
14 will let you address your motion, and if you would at the
15 same time address your opposition to the defendant's
16 motion. And you can go first, sir.

17 **MR. JASPER:** Thank you, Judge.

18 I guess from my standpoint on our motion, I think
19 we've met all the requirements for Declaratory Judgment
20 and I think my brief indicates that a Declaratory
21 Judgment is appropriate and that the statute, I think
22 it's 1-46-something is not a -- the sole remedy. I'm
23 sorry. It's 13-46-1. I don't believe it is an exclusive
24 remedy and that's why I believe a Declaratory Judgment is
25 appropriate.

1 Under the facts of the case, we believe the statute
2 1-25-1 and the following ones, all of them were changed
3 by Senate Bill 91 and, therefore, they all need to be
4 read simultaneously. And so the problem pops up because
5 the words "regularly scheduled" were added into the
6 statute which are nowhere defined in South Dakota Code
7 or, for that matter, in South Dakota Case Law as far as I
8 can determine.

9 But when you read "regularly scheduled" and you read
10 the next statute which is 1-25-1.1, it talks about how
11 hearings are -- I'm sorry -- meetings are to be
12 scheduled, and our argument is that is the regular way in
13 which meetings are scheduled.

14 Now, it says "official meetings." And one of the
15 things that the statute did and that is under 1-25-12(3)
16 is finally defined what an "official meeting" was.
17 "Official meeting" had been used in the prior statute but
18 had not been defined. And in this case the Senate Bill
19 91 and the final resolutions defined what an "official
20 meeting" is.

21 And what an "official meeting" is, is whenever a
22 quorum meets and either conducts business or discusses
23 business that results in official action or even if it
24 doesn't result in official action, as long as it's
25 discussed it's an official meeting, whether you call it

1 regularly scheduled, special meeting, a retreat or some
2 other definition or name, and the school uses various
3 different names as you can see from Tonchi Weaver's
4 Affidavit listing all the different titles they've given
5 to various meetings.

6 So our understanding of the statute is when you read
7 it in its entirety, all the meetings are going to be
8 official meetings. The only one from which public
9 comment and/or public participation is prohibited is an
10 executive session or closed meeting.

11 And if you look at the statute, "executive session"
12 doesn't necessarily -- isn't necessarily defined as
13 always a closed meeting, but my argument is a "closed
14 meeting" under the law is, by definition, an executive
15 session and so those two terms are synonymous.

16 Then when we start talking about the word "statute,"
17 you know, the defendant wants to argue that public
18 comments are only permitted in those meetings that are
19 scheduled in July, of which there are 24 scheduled, twice
20 a month for the following year. When I say "the
21 following year," I mean the fiscal year for the School
22 Board, whereas our argument is that's two.

23 But in addition to that, there are more meetings,
24 and as Ms. Weaver's Affidavit points out, generally
25 there's more of these additional meetings every year than

1 the 24 that are scheduled in July, and those are all
2 official meetings if there is a quorum present. And
3 whether -- and if there's -- if it's an executive
4 session, we have no argument. There's no public
5 participation or public comment allowed.

6 And Ms. Parker indicates in her final brief that
7 that's our position, and I say no, that's not our
8 position at all. Our position is 1-25-1 specifically
9 talks about public comment. And if we look in the later
10 statutes, there's the words "listen to" and "listen" and
11 "participate in." And if participation in a meeting
12 doesn't imply public comment, then what does it mean?
13 Because "public comment" really isn't defined anywhere in
14 the statutes, nor is "participation" defined in the
15 statutes, but the common definition of "public comment"
16 and "participation" I argue are synonymous.

17 So that basically sums up our position so that
18 Declaratory Judgment is appropriate.

19 Now, any comment related to the Pennington County
20 State's Attorney, he in his letter decision, if that's
21 what you want to call it, calls it a straw vote and said,
22 *Well, I don't consider it a violation.* But the reality
23 is, a straw vote was taken. It was an executive session.
24 There was action taken based on that straw vote and the
25 action was, in fact, letters sent to each of the other

1 parties that had applied for the open position. And
2 consequently, that's the basis of proof, if you will,
3 that official action was taken at an executive session,
4 which is prohibited because any official action has to
5 take place at an open meeting.

6 Now, our understanding of Senate Bill 91 was not to
7 exclude public participation but to further define when
8 and how public participation could occur. And if you
9 read the statute in its entirety, there's nothing
10 prohibiting public comment except during executive
11 sessions or closed meetings.

12 Otherwise, if you look at 1-25-1 there's a provision
13 you don't -- it doesn't require public comment or the
14 option for public comment at what I will call celebratory
15 meetings where they are inaugurating someone who has been
16 in office or I think the statute talks about annual
17 report and those kinds of things, but it's not
18 prohibited.

19 You know, from my standpoint it might be a good idea
20 to allow the public to participate but it's not required
21 by statute, but it can be allowed by the School Board if
22 they want. I think that would be a good political, if
23 you will, decision because it invites public
24 participation which is what the whole provision, if you
25 will, that SDCL 1-25-1 et seq. talks about, is to allow

1 participation --

2 **THE COURT:** Mr. Jasper?

3 **MR. JASPER:** Yes.

4 **THE COURT:** I'm going to have you slow down just a little
5 bit.

6 **MR. JASPER:** Oh, I'm sorry.

7 **THE COURT:** You speeded up and you're creating a little
8 bit of difficulty for our reporter.

9 **MR. JASPER:** Okay.

10 **THE COURT:** If you wouldn't mind slowing down a little
11 bit. And then once you complete your presentation, let
12 me know. I've got a couple questions.

13 **MR. JASPER:** Very good.

14 **THE COURT REPORTER:** Have him start with "SDCL 1-25-1."

15 **MR. JASPER:** SDCL 1-25-1 et seq., following in other
16 words. I think I was arguing that it does not prohibit
17 public participation, but that it could be allowed, and
18 that I was thinking it would be a good move in order to
19 meet the spirit of the entire session -- or the entire
20 statute that is 1-25-1, which basically is to allow for
21 participation.

22 And I think I was at the point where I was saying
23 the legislature, if you look at the legislative history,
24 they said, *What we're trying to do is clarify what's in*
25 *the statute rather than try to prohibit anything.* They

1 were just merely adding to the statute so that public
2 participation could be allowed.

3 Now, additional argument, I believe that certainly
4 the words of the statute are ambiguous and, consequently,
5 you need to read the statutes as a whole and not just
6 take 1-25-1 and read it by itself. You have to look at
7 the additional statutes which talk about public
8 participation and read them altogether.

9 And I think, Your Honor, that sums up my thoughts.
10 But if I could take a look at my notes here a moment.

11 **THE COURT:** You may.

12 **MR. JASPER:** I...

13 Okay. Two other minor points I will make. We do
14 not rely on 1-25-1 previous version as Ms. Parker
15 suggests when it says -- as it relates to "public
16 comment." You know, and official meetings are always the
17 same, and even meetings that are not scheduled in
18 accordance with 13-8-10, they're still official meetings
19 if a quorum is in attendance.

20 And "in attendance" by definition under the statute,
21 it doesn't matter whether it's in person or
22 telephonically, as long as you have at least a quorum
23 it's still an official meeting if business is discussed
24 and policy -- or policy is discussed.

25 And the other thing I would point out is, I think

1 we've indicated and Ms. Weaver's Affidavit shows the
2 Board is not following their own policy. They say all of
3 these other meetings are open to the public, but yet
4 they're not. And her Affidavit and I believe it's
5 Exhibit I is the one that shows how all the different
6 meetings were titled and whether they were open to the
7 public or not.

8 And I think I would rest with my comments at that
9 point, Your Honor.

10 **THE COURT:** Let me ask a couple of questions, Mr. Jasper.

11 First, have there been actions taken by your clients
12 to request public forum opportunity for comment at
13 meetings other than the biweekly meetings of the Rapid
14 City Area School Board?

15 **MR. JASPER:** Yes, there has been. At times it's been
16 permitted. At times it has not been permitted. But at
17 one specific meeting where it was permitted, I can't give
18 you the exact date -- hold on a second. June 2nd of last
19 year I believe was the meeting. No, she said June 10th.
20 At which case -- yeah, the one that we have the
21 transcript of and the transcript I believe is G. The
22 transcript where there was some discussion as to whether
23 or not there was going to be public comment permitted,
24 and that's when the Board discussed and the
25 superintendent said, *Well, this is what our attorney has*

1 *advised for us.*

2 Ultimately the Board went ahead and voted and
3 allowed public comment at that meeting. Otherwise, it
4 was going to be denied. That's just one specific
5 example.

6 **THE COURT:** All right. The point is that I'm asking this
7 for a purpose, Mr. Jasper, is that you're asking me to
8 require the Board to do certain activities when at least
9 in one opportunity that you can reference your clients
10 had been given that opportunity for the Board to make
11 that determination at meetings beyond those that are the
12 scheduled biweekly Monday meetings. That is correct?

13 **MR. JASPER:** Correct.

14 **THE COURT:** All right.

15 **MR. JASPER:** Now, if I can help to clarify.

16 **THE COURT:** No, that answers my question. Thank you.

17 **MR. JASPER:** All right.

18 **THE COURT:** And have there been proposals made by your
19 clients to the Rapid City School Board to suggest a
20 modification of their policies to require public comment
21 at any and every meeting?

22 **MR. JASPER:** I don't believe there was ever any what I'll
23 say formal requests. By that I mean, nothing was done
24 under I think it's Policy KL where you file a public
25 complaint. Nothing like that has occurred. But requests

1 have been made at meetings. That's the only request that
2 I'm aware of, Your Honor.

3 **THE COURT:** And have there been situations in which the
4 Rapid City Area School Board has limited your clients'
5 ability to communicate positions to the Board in ways
6 other than open comment at a meeting? In other words,
7 have they proscribed their ability to write to the Board,
8 to post on social media or any other fashion in which
9 they would like to communicate their views? Has there
10 been any indication from your clients that that has
11 occurred?

12 **MR. JASPER:** Specifically, yes. Brian Larson in fact was
13 served with a "do not contact" order on two occasions
14 that I'm aware of and I believe he addressed those in his
15 Affidavit. There have been others, but those are the
16 most formal ones I can think of to where, yes, he was
17 prohibited from further comment by the School Board's
18 attorney.

19 **THE COURT:** The last word you used, was that "attorney"?

20 **MR. JASPER:** Was the School Board's attorney, yes.

21 **THE COURT:** Thank you.

22 All right. Ms. Parker, your comments, please?

23 **MS. PARKER:** Thank you, Your Honor. Can you hear me
24 okay?

25 **THE COURT:** Yes. And I'm going to ask you to slow down

1 as well when you address the Court so our court reporter
2 doesn't come over the bench at me here.

3 (Laughter)

4 **MS. PARKER:** Sounds good. Feel free to yell at me, too.

5 Your Honor, the plaintiffs brought this Declaratory
6 Judgment action, asking the Court to essentially misread
7 or modify the plain, unambiguous language of SDCL 1-25-1.
8 And we're simply asking the Court to read the terms as
9 they're stated in that statute, which provides that the
10 District only has an obligation to allow for public
11 comment during regularly scheduled official meetings.

12 Although there are additional facts that were
13 provided by plaintiffs, I think the only two real
14 important facts to this Court's consideration is the fact
15 that the Rapid City Area School District always allows
16 for public comment at regularly scheduled official
17 meetings and that the District doesn't always allow for
18 public comment at special meetings that are sometimes
19 designated as Board retreats or study sessions, and those
20 are stated and agreed upon I think in both the
21 plaintiffs' and defendant's Statement of Undisputed
22 Material Facts.

23 Although Mr. Jasper is indicating that "regularly
24 scheduled" meeting is not defined anywhere in the
25 statutes, I disagree with that for a couple reasons. If

1 you read 1-25-1, it indicates in that statute that
2 "...public comment shall be allowed at regularly
3 scheduled official meetings which are designated as
4 regular meetings by statute, rule, or ordinance."

5 And there is a statute, SDCL 13-8-10 that identifies
6 what "regular meetings" are and what "special meetings"
7 are for purposes of School Board matters.

8 Regular meetings are those that occur on the second
9 Monday of each month unless otherwise designated by the
10 Board at the annual meeting. Our Board currently has
11 regular scheduled meetings on the second and fourth
12 Tuesday of every month, and they're designated as such on
13 the school calendar and on the appropriate agenda.

14 SDCL 13-8-10 also details that special meetings are
15 those which are called upon by the Board president or, in
16 the president's absence, by the vice president or a
17 majority of the Board members.

18 If you look at the Rapid City Area School District
19 calendar, you will see that there are regular meetings
20 and special meetings.

21 The State legislature in multiple chapters
22 throughout the Code differentiates between special
23 meetings and regular meetings. I think there is some
24 confusion about what "official meeting" means, and I went
25 through that in my brief, but "official meetings" include

1 of course regular meetings, special meetings, and closed
2 meetings.

3 If the legislature didn't want to limit public
4 comment to regularly scheduled meetings, it knew that it
5 didn't have to require it or limit it to only regularly
6 scheduled meetings.

7 Although I don't believe there is any ambiguity in
8 the words "regularly scheduled official meetings," simply
9 because the plaintiffs disagree with the reading of that
10 statute, their reliance on the legislative history,
11 Your Honor, supports the defendant's reading of that
12 statute.

13 The legislature, if they didn't intend to make it a
14 minimum requirement, they wouldn't have done so. They
15 wouldn't have changed the statute as it reads today.

16 So respectfully, Your Honor, I would just ask that
17 the Court declare the meaning of the statute as it's
18 written and find that there is no ambiguity.

19 Finally, more of a confusing issue as it relates to
20 this matter is whether or not plaintiffs followed the
21 proper procedure in filing this Declaratory Judgment
22 action. Plaintiffs allege that the reason they didn't
23 utilize the appeal process required by SDCL 13-46-1 is
24 because the Board didn't take any sort of official
25 action. And that's just not accurate. The Board at

1 every meeting makes a motion to approve the agenda which
2 would or would not include public comment.

3 So the plaintiffs had any opportunity at any special
4 meeting to appeal that decision. I think the real issue
5 is that they lack standing because none of the plaintiffs
6 can establish that they're actually aggrieved persons
7 under that statute.

8 As indicated in the Affidavit provided by Jim
9 Hansen, you can see that these plaintiffs have regular
10 and consistent communication with some Board members.
11 They have never been prohibited from contacting Board
12 members.

13 Mr. Brian Larson harassed employees of the School
14 District regularly and consistently and was asked
15 repeatedly to stop engaging in harassing conduct and
16 refused. He sent numerous e-mails to numerous employees
17 and engaged in what I would consider a harassing manner
18 towards employees. So the only limitation on any
19 plaintiff was that I asked him to not engage with
20 employees of the District.

21 The case of Cuka says that essentially if the
22 plaintiffs don't have standing to appeal pursuant to that
23 statute, that they should file for an injunction, and the
24 plaintiffs didn't make any attempt to do that. As
25 indicated by their customs, they also made no attempt to

1 follow Board policy and simply file a complaint alleging
2 that the District wasn't following its own policy so that
3 we could solve any problem that they allege to be a
4 problem.

5 I think what's really important here, though, is the
6 fact that plaintiffs have still not alleged a date in
7 which the School Board has done something wrong. And
8 that statute SDCL 13-46-1 has a statute of limitations
9 timeline; that you have 90 days to appeal the decision.

10 The Court in *Murray vs. Sioux Falls Board of*
11 *Education* says that essentially even if you file an
12 injunction, you can't use that as a substitute to extend
13 the 90-day time limitation, statute of limitation.

14 If you read Plaintiff Tonchi Weaver's Affidavit, her
15 paragraph number 23 indicates that after April 13th of
16 2020, three of 17 study sessions allowed public comment.
17 So plaintiffs have known since April 13th of 2020 that we
18 were allegedly not complying with SDCL 1-25-1 and they
19 took no action until June 28th of 2021. Over a year
20 later and over -- well over a year past the 90-day
21 timeline.

22 I think if you read the District Policy BED-8, that
23 policy allows the School District, just as SDCL 1-25-1
24 does, to limit public comment. And in that policy, I
25 believe the District has the authority to limit it so

1 much to not include it at special meetings, especially
2 when you read it alongside 1-25-1.

3 Finally, Your Honor, as it relates to the use of the
4 word "participation," participation doesn't equal public
5 comment. Again, if that's what the legislature intended,
6 they would have said that. Just as we're all sitting on
7 this phone conference right now, my paralegal is sitting
8 next to me, she's participating in a hearing but she's
9 not necessarily going to provide comment.

10 For those reasons, Your Honor, I would ask that the
11 Court simply read the statute and declare its meaning.

12 **THE COURT:** All right. This matter comes before the
13 Court on plaintiffs' request for Declaratory Judgment.

14 I will indicate to the parties that it's always
15 challenging when there is a request to have the Court
16 direct another governmental body to handle meetings in a
17 certain fashion, particularly when the hallmark of that
18 local governmental agency is local control over those
19 particular actions.

20 I have some pause about the fact that we have at
21 least some evidence or some presentation as part of the
22 materials that have been provided to the Court as facts
23 upon which there is no dispute that there have been
24 circumstances in which there have been requests for
25 public comment that have been granted and other requests

1 for which there have been not, but in those circumstances
2 have there not been available public comment at the
3 meetings which are scheduled biweekly on Mondays by the
4 Rapid City School District.

5 So my first concern surrounds the fact that this
6 issue in my mind is best served by being directed to the
7 agency in which the conduct is alleged to have been
8 happening, as that local control issue is always
9 paramount. But be that as it may, I'm asked to weigh in
10 on some of these issues.

11 Let me first comment on that specter that has been
12 raised surrounding an allegation that there has been
13 perhaps in the past and then declaration moving forward
14 concerning surrounding open meetings violations. First,
15 I don't think that the Declaratory Judgment statutes are
16 the appropriate remedy for purposes of allegations of
17 directions concerning open meetings. I mean, the
18 statutes are clear. There are certain meetings that are
19 required to be open and there are certain reports -- or
20 references that need to be made, I should say, as it
21 relates to those open meetings.

22 In this particular case, to the extent that the
23 plaintiffs are requesting that the Court declare a
24 violation of South Dakota's Open Meetings Law, I'm going
25 to decline to do that. The statutory procedure is clear

1 that needs to proceed through the office of the State's
2 Attorney and then through the South Dakota Open Meetings
3 Commission. It is not appropriate nor do I have the
4 capability sitting as this Court to make those findings
5 at this particular point in time. So to the extent that
6 that is being requested, that request for declaration
7 will be denied.

8 The next issue that comes before the Court is the
9 position that's taken by the defendant in this particular
10 case that the appropriate procedural path for this
11 particular case is an appeal through South Dakota
12 Codified Law Chapter 13-46. I think that the argument of
13 the School District, while having some allure to it,
14 doesn't preclude the plaintiffs in this particular case
15 from requesting a Declaratory Judgment as to the meaning
16 of statutes as they are applicable to governmental
17 agencies.

18 So, as such, I'm going to find and make a
19 determination that the matter is appropriately before the
20 Court under the South Dakota Declaratory Judgment
21 statute.

22 Then the determination comes before the Court as to
23 the competing Motions For Summary Judgment. In this
24 particular case, I think it is incumbent upon the Court
25 to advise the parties I believe that the statute is

1 unambiguous. I think SDCL 13-8-10 allows the Board to
2 set those regularly scheduled official meetings; that
3 those regularly scheduled official meetings are those at
4 which public comment is required. The Rapid City Area
5 School District offers public comment at those regularly
6 scheduled official meetings. And other meetings, while
7 they may be official and require the ability for the
8 public to have that meeting available to them for
9 purposes of review, are not meetings at which the Board
10 is required to offer public comment based upon my reading
11 of the statutes. So I'm going to grant the District's
12 Motion For Summary Judgment on that particular issue.

13 I think that addresses the questions that were ripe
14 for today. I think that gives each of you the
15 opportunity to have a record available to you should you
16 believe that further interpretation on these questions is
17 warranted.

18 Is there anything else that we need to address from
19 your clients' perspective, Mr. Jasper?

20 **MR. JASPER:** I would ask, are you intending to enter a
21 written decision and order in this case as to what you've
22 found so far?

23 **THE COURT:** The judgment will be the summary judgment as
24 requested by the District. I don't believe that written
25 findings are required in those particular cases. I think

1 the Court's rationale will be part of the transcript,
2 Mr. Jasper, so you have that information.

3 To the extent that you need it for purposes of
4 appeal, quite frankly I don't know that you do based upon
5 the fact that both parties have filed competing Motions
6 For Summary Judgment and both parties thus believe that
7 there are no genuine issues of material fact, that it
8 really is a competing legal question or statutory
9 interpretation question that the Court needs to address.

10 MR. JASPER: Okay. That answers my question, Your Honor.

11 THE COURT: Anything else from your perspective,
12 Ms. Parker? If you could send me the order granting your
13 motion.

14 MS. PARKER: Yes, Your Honor.

15 THE COURT: All right. Thank you both.

16 MS. PARKER: Thank you.

17 THE COURT: Bye now.

18 MR. JASPER: Thank you. Good-bye.

19 (Hearing adjourned.)
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25

1 STATE OF SOUTH DAKOTA)
2 COUNTY OF PENNINGTON) SS. CERTIFICATE

3
4 I, Teresa L. Fink, RMR, CRR, Official Court Reporter
5 of the Seventh Judicial Circuit and Notary Public
6 within and for the State of South Dakota, do hereby
7 certify that I reported in stenotype the proceedings of
8 the above-entitled action; that I thereafter
9 transcribed said stenotype notes into typewriting; and
10 that the foregoing pages 1-23, inclusive, are a true,
11 full, and correct transcript of my stenotype notes.

12 IN TESTIMONY WHEREOF, I hereto set my hand this
13 3rd day of March, 2022.

14
15
16 /s/ Teresa L. Fink

17
18 _____
19 Teresa L. Fink, RMR, CRR
20 Official Court Reporter
21 Notary Public
22 My Commission Expires: 4/29/2022

CONDENSED HISTORY OF SOUTH DAKOTA'S LAW PROVIDING FOR OPEN
MEETINGS, NOTICE, AND PUBLIC PARTICIPATION

THE UNDERLINED PORTIONS ARE FOR EMPHASIS

SL 1953, ch 307, §1—Requiring State Boards to keep and file minutes

Provides it shall be the duty of all boards and commissions of the various departments of the state of South Dakota to keep detailed minutes of the proceedings of all regular or special meetings...unless said board or commission, its officers or employees is required by law to keep secret facts and information obtained in the discharge of their duties...

SL 1965, ch 269—Providing Public Meetings of State and Political Subdivisions Open to Public

Provided that except as otherwise provided by law, the official meetings of the state and political subdivisions thereof, including all related boards, commissions and other agencies, and the official meetings of boards, commissions and agencies created by statute of which are non-tax paying and derive a source of revenue directly from public funds, shall be open to the public, except as herein provided. Executive or closed meetings may be held for the sole purpose of considering...matters, however any official action concerning such matters shall be made at an open official meeting...

SL 1966, ch 165, §16—Amendment

Amended SDC 1960 Supp. 55.2917 but not change the above language but reworded other portions of the previously enacted laws

SL 1980, ch 24, § 9—Amendment

Amended § 1-25-1 by changing the words “herein provided” to “provided in this chapter”, and added a violation of this section is a Class 2 misdemeanor. No other changes from above.

§ 10—Amendment

Amended § 1-25-2 by adding a violation of this section is a Class 2 misdemeanor. No other changes from above.

§ 11—Amendment

Amended § 1-25-3 by adding a violation of this section is a Class 2 misdemeanor. No other changes from above.

§ 12—Repealed § 1-25-5.

SL 1987, ch 22, § 1—Amendment

Amended § 1-25-2 by changing “purpose” to “purposes” and deleted “considering student, employee and personnel matters; however” and added five specific subsections for which an executive or closed meeting may be held.

§ 2—Amendment

Amended chapter 1-25 by adding a new section requiring public bodies to provide public notice, with a proposed agenda, prior to any meeting, by posting a copy of the notice, visible to the public for special or rescheduled meetings.

SL 1989, ch 15, § 1A—Amendment

Amended § 1-25-1 by adding provisions for meetings, including executive or closed meetings to be conducted by telephone and required a place to be provided at which the public could listen to and participate in the proceeding except for executive and closed meetings.

§ 2—Amendment

Declared an emergency so this provision would have immediate effect.

SL 1990, ch 18, § 1—Amendment

Amended § 1-25-1 by changing “telephone” to “teleconference” and provided for all votes to be by roll call and further required two or more places at which the public may listen to and participate in the proceeding. It also provides that teleconference meetings are subject of the notice requirements of chapter 1-25.

§ 2—Amendment

Amended § chapter 1-25 by adding a new section defining teleconference as information exchange by audio or video medium.

SL 1990, ch 19—Amendment

Amended § 1-25-1.1 by requiring at least twenty-four hours notice prior to any meeting and further added the requirement that for special and rescheduled meetings all public bodies comply with the notice requirements of this section for regular meetings to the extent that circumstances permit.

SL 1990, ch 30, § 1—Amendment

Amended 1-25-1 by replacing “telephone conference” with “teleconference” and added that violation of this section is a Class 2 misdemeanor.

§ 2—Amendment

Amended § 1-25-1.1 by adding a violation of this section is a Class 2 misdemeanor.

SL 1993, ch 17—Amendment

Amended 1-25-1 as it affects the Rural Development Communications Network.

SL 1996, ch 9, § 1—Amendment

Amended 1-25-3 by changing “It shall be the duty of all boards and commissions” to “Any board or commission” and then deleted the requirement of sending minutes to the auditor general.

§ 2—Amendment

Repealed § 1-25-4.

SL 2005, ch 16, § 1—Amendment

Amended 1-25-1 by replacing “Rural Development Telecommunications” with “Digital Dakota”.

SL 2005, ch 13, § 1—Amendment

Amended 1-25-1 by replacing “Rural Development Telecommunications” with “Digital Dakota”.

SL 2008, ch 13, § 1—Amendment

Amended 1-25-1 by adding; “It does not constitute an official meeting if members of a political subdivision of this state are attending a meeting of the state or one of its political subdivisions, a board, a commission, an association, an agency, or any other public entity for which public notice is provided pursuant to § 1-25-1.1 for the purpose of providing information or observing, and the notice requirements in § 1-25-1.1 do not apply”.

SL 2010, ch 9, § 2—Amendment

Amended 1-25-1 by replacing the first paragraph with four paragraphs but retained the wording that all official meetings are open to the public unless a specific law is cited to close the official meeting to the public and the public may listen to and participate in teleconference meetings and that one or more places for the public to listen does not apply to an executive or closed meeting.

SL 2012, ch 5, § 1—Amendment

Amended the fourth paragraph of 1-25-1 by including: “For any official meeting held by teleconference, which has less than a quorum of the members of the public body participating in the meeting who are present at the location open to the public, arrangements shall be provided for the public to listen to the meeting via telephone or internet.”

SL 2012, ch 6, § 1—Amendment

Amended 1-25-1 by replacing “at least twenty-four hours prior to” with “that is visible, readable, and accessible for a least an entire twenty-four hours before” and required the notice to be posted on the public body’s website upon dissemination of the notice –if such a website exists. It further required for special or rescheduled meetings the information also be delivered by email to members of the local news media who have requested notice.

SL 2013, ch 8, § 1—Amendment

Amended 1-25-1 by adding a fifth paragraph that applies to only certain public entities and does not apply to school boards and removes meeting from the provisions of chapter 1-25.

SL 2013, ch 9, § 1—Amendment

Amended 1-25-1.1 by adding that the proposed agenda shall include the date, time, and location of the meeting.

SL 2014, ch 90, § 2—Amendment

Amended only 1-25-2 (2) by adding a provision related to eligibility of a student as a basis for executive or closed meetings.

SL 2015, ch 11, § 1—Amendment

Amended 1-25-1.1 by adding “continuous” to the twenty-four requirement and replaced “before” with “immediately preceding” to the notice requirements.

SL 2015, ch 12, § 1—Amendment

Amended 1-25-3 to require a roll call vote to be recorded on all votes taken by a state board or commission—this does not affect school boards..

SL 2016, ch 9, § 1—Amendment

Amended the first paragraph of 1-25-1 by adding at the end: “For the purposes of this section, an official meeting is any meeting of a quorum of a public body at which official business of that public body is discussed or decided, or public policy is formulated, whether in person or by means of teleconference.”

§ 2—Amendment

Amended 1-25-1.2 to define teleconference as an information exchanged by any audio, video, or electronic medium, including the internet.

SL 2016, ch 10, § 1—Amendment

Amended 1-25-1.1 to exempt certain public bodies specified by section 2 of this act from the notice requirements and added some few additional requirements for those not exempt. School boards are not covered by the exemption.

§ 2—Amendment

Amended 1-25-2 by adding a new section providing notice requirement for only state boards, commissions, and departments—this does not affect school boards.

SL 2017, ch 7, § 1—Amendment

Amended 1-25-1.3 by changing the notice requirements for state boards, commissions, and departments—this does not affect school boards.

SL 2017, ch 8, § 1—Amendment

Amended 1-25-1.3 by changing the notice requirements for state boards, commissions, and departments—this does not affect school boards.

§ 2—Amendment

Added a new section related to the state boards, commissions, and departments—this does not affect school boards.

SL 2018, ch 14, § 1—Amendment

Amended 1-25-1 by adding a new fifth paragraph that states: “The chair of the public body shall reserve at every official meeting by the public body a period for public

comment, limited at the chair's discretion, but not so limited as to provide for no public comment."

SL 2019, ch 2, § 1—Amendment

Amended 1-25-2 by adding a sixth provision, for information listed in 1-27-1.5(8) and 1-27-1.5(17), to be addressed in executive or closed meetings.

SL 2019, ch 3, § 1—Amendment (Revised the order and previous provisions of portions of chapter 1-25 without making significant substantive changes—see testimony before the State Senate and State House of Representatives Committees—this is essentially how the present statutes read. This is when “regularly scheduled official meeting” came into existence.)

Amended chapter 1-25 by adding a new section with five subsections defining the terms “Political subdivision”, “Public body”, “Official meeting”, “Teleconference”, and “State”.

§ 2—Amendment

Amended 1-25-1 by rewriting this section and set out meetings at which a quorum of a public body attends that are not official meetings—meetings of other public bodies and press conferences over which they do not control the agenda. It also specifically provides that public comment is not required only for inauguration, swearing in new members, or presentation of an annual report whether or not such activity takes place at a regularly scheduled meeting—it does not prohibit public comment though.

§ 3—Amendment

Amended chapter 1-25 by adding a new section that only restates prior provisions of chapter 1-25.

§ 4—Amendment

Amended chapter 1-25 by adding a new section that only restates prior provisions of chapter 1-25.

§ 5—Amendment

Amended 1-25-1.1 by removing the exclusion for state boards, commissions, and departments as provided in 1-25-1.3 and made the notice requirements applicable to each political subdivision.

§ 6—Amendment

Repealed 1-25-1.

§ 7—Amendment

Amended 1-25-1.3 by changing to prior provisions without substantial substantive changes.

§ 8—Amendment

Amended 1-25-3 by changing to prior provisions without substantial substantive changes.

§ 9—Amendment

Amended 1-25-11 by changing to prior provisions without substantial substantive changes.

SL 2021, ch 9, § 1—Amendment

Amended 1-25-1.5 by changing the manner of recording votes held by teleconference from “shall” to “may” for roll call voting unless a member votes in the negative—then roll call vote is required.

1 SENATE STATE OF AFFAIRS COMMITTEE HEARING
2 ON SB91
3

4 February 6, 2019
5

6 Committee Chair: Senator Bob Ewing

7 Prime Sponsor: Senator Deb Soholt
8

9 Proponents: Yvonne Taylor, South Dakota Municipal League

10 Eric Erickson, South Dakota Association of County

11 Commissioners

12 Wade Pogany, Associated School Boards of South Dakota

13 (ASBSD)
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1 BOB EWING: Okay. The next bill before us here
2 this morning, we'll go back to the top of our schedule.
3 I don't know that we'll get through the entire list here
4 today, but we're gonna give it a try. The next bill
5 before us is Senate Bill 91. The title is to revise
6 certain provision regarding open meeting requirements.
7 And at this time we will take proponent testimony on
8 Senate Bill 91. Good morning Senator Soholt. I'm sorry
9 we kept you waiting.

10 SENATOR SOHOLT: Not a problem. Good morning Mr.
11 Chair and members of the committee. I bring before you
12 Senate Bill 91, and I'm gonna just hold for a moment,
13 because there's a pretty significant amendment and a new
14 marked-up bill that's being passed out. And the
15 Amendment is 91JA and would certainly be open to dealing
16 with that amendment before we get into discussion of the
17 Bill, if that's the wish of the committee.

18 CHAIRMAN EWING: Okay. And let's just kind of
19 pause for a short period here until we can have the
20 opportunity to look the document over, and once we get
21 it looked over, I would entertain a Motion to add that
22 to your bill.

23 SENATOR SOHOLT: We can certainly hold, as well,
24 Mr. Chair if that's the discretion of the committee,
25 whatever is your wish.

1 CHAIRMAN EWING: Okay, as the committee members
2 have probably already seen, the prime sponsor did offer
3 us another Bill with all of the corrections made in it,
4 which to me makes it a lot easier to understand what
5 we're doing. Would the committee like to act on this or
6 continue to look at it a little further here?

7 SENATOR GREENFIELD: Mr. Chair, I'll move
8 Amendment 91JA.

9 SENATOR BOLIN: Second.

10 CHAIRMAN EWING: Okay. We have a Motion to Move
11 Amendment 91JA, Motion made by Senator Greenfield and
12 seconded by Senator Bolin. All those in favor of the
13 Motion will say aye.

14 (Vote taken.)

15 CHAIRMAN EWING: Opposed? Okay. Senator Soholt
16 you can continue on with Amended Senate Bill 91.

17 SENATOR SOHOLT: Thank you Mr. Chair and to the
18 members of the committee, all of those amendments came
19 from further discussion which really strengthened the
20 Bill that we brought before you today. This is
21 regarding our open meeting requirements and something
22 that the municipalities are really interested in having
23 clarified. The Bill looks complicated, but it really is
24 not. Our the government entities are happy to have open
25 meetings and to allow public input, but in order to

40.

1 follow our laws, we really need to be able to read and
2 understand them.

3 Over the years many changes have been really put
4 into the Chapter 1-25-1 making it very difficult to
5 understand and leading to much confusion. What this
6 Bill does is, it separates it into different sections,
7 creating a section with definitions, and just basically
8 clarifies the way things work. So it's not confusing
9 for people that are trying to follow our open meeting
10 laws. Changes in the Bill in general move current
11 language, new sections allowing the laws to be more
12 easily read. There is a specific change with
13 municipalities are going to explain in a moment, but
14 it's important to note that this entire chapter of law
15 is about minimums. Any entity can publish more, allow
16 more, post more and many do that. These laws would be
17 the minimum requirements. I would appreciate your
18 support of Senate Bill 91 as amended and will stand by
19 for any further questions.

20 CHAIRMAN EWING: Thank you. Further proponent
21 testimony, Amended Senate Bill 91. Good morning Miss
22 Taylor. You have the floor.

23 YVONNE TAYLOR: Good morning Mr. Chairman and
24 members of the committee, Yvonne Taylor with the South
25 Dakota Municipal League. Thank you for considering the

1 amendment and considering the Bill in front of you. As
2 kind of was explained by Senator Soholt, this Bill is
3 the product of a lot of work by a lot of people to bring
4 you a Bill that doesn't do anything. We really worked
5 hard to not make significant changes. We're happy with
6 our open meeting laws; we're happy to have open
7 meetings, but if it's okay with you Mr. Chairman, if I
8 would address the Bill and the amendment, I can take you
9 through the sections and kind of explain what we're
10 doing. It looks like we're moving a lot of stuff around
11 and we are.

12 Section 1 of the Bill establishes the new section
13 where we list the definitions. Mostly these were picked
14 up from mostly out of 1-25-1 and moved up into
15 definitions. We did create a couple of things.
16 Sometimes the State has to do things; sometimes locals
17 have to do things and sometimes everybody has to do
18 things. So we created three definitions that refer to
19 those things differently. So we have the State, we have
20 political subdivisions and then we have public body and
21 that refers to both.

22 Section 2 is clean-up language. It removes the
23 definitions that will now be up in Section 1. It adds
24 press conferences to things that are not official
25 meetings. And it adds the language on page 2 line 17 to

1 20 that clarify when a quorum attends a meeting.

2 Technically right now if a quorum attends a meeting,
3 even if it's not their own meeting, they would need to
4 post an agenda if public policy is going to be
5 discussed. We really can't do that because there isn't
6 one. So we're saying when you attend an outside event
7 with the quorum and there's going to be public policy,
8 you can publish the fact of a quorum and then the
9 amendment clarifies what that contains, which is the
10 time, place and location of the event that they'll be
11 attending.

12 The Amendment also makes the provisions in line 14
13 to 21 applied to all entities, State and local. And it
14 says that a notice of a quorum at a minimum includes
15 that date, time and location and event where the quorum
16 is gonna be present and public policy will be discussed.
17 Think of that -- it's kind of hard to explain why we're
18 even talking about that -- but think of that as if the
19 say the city council is invited to attend the monthly
20 Chamber luncheon. Well, because of the nature of the
21 Chamber of Commerce, public policy is going to be
22 discussed, what's good for the businesses in our town.
23 The quorum, we'll be attending that because they go to
24 the Chamber luncheon. And so that's the kind of
25 situation that we're talking about with that. The City

1 could simply say we're gonna have a quorum, public
2 policy is going to be discussed, here's where.

3 Section 2 also removes all of the provision for
4 tele-conferencing because we picked them up and moved
5 them. And I think that language is identical, they're
6 just in separate sections.

7 And then the last change in Section 2 on the
8 Amendment, on page three of the Bill clarifies that the
9 minimum standards for meetings at which public comment
10 is required, and that is at regularly-schedule meetings,
11 and it takes out the ceremonial types of meetings.

12 Only other thing I need to notice, up in the
13 definitions, under the definition of State, the
14 Amendment makes it clear that none of this applies to
15 the legislature, which is status quo. They're covered
16 under your own stuff.

17 Section 3 is a new section that addresses those
18 tele-conference meetings, and that's where we move that
19 language from 1-25-1 and that's the same with Section 4,
20 we just broke the tele-conference stuff out into two
21 separate sections. Section 5 cleans up the public
22 posting requirements for non-state entities.

23 Section 6 deletes language that is now contained
24 up in the definitions. Section 7 cleans up public
25 notice posting requirements for State entities. Section

1 8 makes the section consistent for definitions with
2 State agencies. And Section 9 clarifies that recording
3 provisions don't apply to executive sessions, which is
4 also status quo, we just cleaned up the language.

5 Mr. Chairman, we would be happy to stand by for
6 questions and urge your support of the Bill and the
7 Amendment. Thank you.

8 CHAIRMAN EWING: Okay. Thank you for explaining
9 your nothing Bill. Further proponent testimony?
10 Further proponent testimony on Amended Senate Bill 91?
11 Good morning, sir. You have the floor.

12 ERIC ERICKSON: Good morning Mr. Chairmen, members
13 of the committee, Eric Erickson with the South Dakota
14 Association of County Commissioners. We also support
15 nothing. We appreciate the senator bringing this Bill.
16 I believe Miss Taylor provided an excellent description
17 of what's going on and just support this opportunity
18 where it's an easier process for our local governments
19 to read and understand and comply with the open meetings
20 laws. Thank you.

21 CHAIRMAN EWING: Thank you. Further proponent
22 testimony Amended Senate Bill 91. Good morning, sir.
23 Once you're seated, you have the floor.

24 WADE POGANY: Good morning Mr. Chairman and
25 members of the committee. I guess you don't get much

1 more transparent than a Bill that does nothing. So I
2 would like to just offer our support from the Associated
3 School Boards. I appreciate everything the Municipal to
4 League has done and also what Senator Soholt has offered
5 help sponsor this, too. Our input into this was really
6 on page 3, and we know that school boards have set
7 policies already, and procedures for open forums. We
8 have no qualms to open forums, we welcome them, but we
9 wanted to change that from the Chair's discretion to the
10 public body. The body itself decides what kind of a
11 forum procedure you'll have and so that changes that
12 just a bit. But I think there are other things in here
13 that also will help school boards with some clarity, and
14 I think it's a very good bill. Thank you, Mr. Chairman.

15 CHAIRMAN EWING: Okay. Thank you. Further
16 proponent testimony Amended Senate Bill 91. Further
17 proponent testimony. Seeing none we will offer for
18 opponent testimony. Opponent testimony, Amended Senate
19 Bill 91. Seeing none we will waive rebuttal and close
20 the testimony from the floor and offer to the committee
21 for questions, discussion or action.

22 (Unable to hear.)

23 CHAIRMAN EWING: Okay. We have a due pass Motion
24 made by Senator Greenfield and seconded by Senator
25 Klumb. Discussion on the Motion?

1 SENATOR GREENFIELD: Mr. Chair, you know I first
2 said, well, what are we trying to do here. I think the
3 testimony has borne out that there really isn't an
4 intention of providing a sea change in the statute, just
5 to clarify some things, and I would endorse the changes
6 that are represented in the Bill so I encourage your
7 support. Thank you.

8 CHAIRMAN EWING: Okay. Further discussion on the
9 Motion. Seeing none, we do have a due pass Motion made
10 by Senator Greenfield and seconded by Senator Clumb for
11 due pass on Amended Senate Bill 91. All those in favor
12 of the Motion will say aye, those opposed will say nay.
13 Madam Secretary, please call the role.

14 MADAM SECRETARY: Senator Bolin.

15 SENATOR BOLIN: Aye.

16 MADAM SECRETARY: Greenfield.

17 SENATOR GREENFIELD: Aye.

18 MADAM SECRETARY: Heinert.

19 SENATOR HEINERT: Aye.

20 MADAM SECRETARY: Kennedy.

21 SENATOR KENNEDY: Aye.

22 MADAM SECRETARY: Langer.

23 SENATOR LANGER: Aye.

24 MADAM SECRETARY: Novstrup.

25 SENATOR NOVSTRUP: Aye.

1 MADAM SECRETARY: Youngberg.

2 SENATOR YOUNGBERG: Aye.

3 MADAM SECRETARY: Klumb.

4 SENATOR KLUMB: Aye.

5 MADAM SECRETARY: Ewing.

6 SENATOR EWING: Aye.

7 MADAM SECRETARY: Nine.

8 CHAIRMAN EWING: Okay. We do have a unanimous due
9 pass motion for Amended Senate Bill 91 to go on down to
10 the floor.

11 (Inaudible conversation.)

12 CHAIRMAN EWING: Okay. We have a Motion made by
13 Senator Klumb and seconded by Senator Greenfield to add
14 to the consent calendar. All those in favor of the
15 Motion will say aye.

16 (Verbally voted on.)

17 CHAIRMAN EWING: Opposed. Motion carried.
18 Amended Senate Bill 91 will be placed on the consent
19 calendar.

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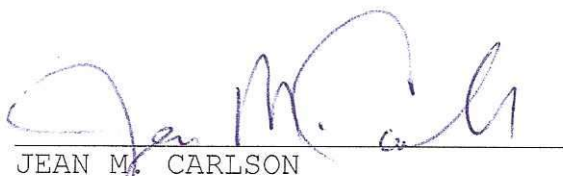
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1 STATE OF SOUTH DAKOTA)
2) SS. CERTIFICATE
3 COUNTY OF PENNINGTON)

4 I, JEAN M. CARLSON, Certified Court Reporter and
5 transcriptionist in and for the State of South Dakota, do
6 hereby certify that the excerpt of the foregoing 11 pages,
7 is a true and correct transcript of my stenotype notes, as
8 taken by me from the official recordings of the hearings
9 from the South Dakota Legislature website in machine
10 shorthand and thereafter transcribed.

11 Dated at Rapid City, South Dakota, this 8th day of
12 September, 2021.

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18 JEAN M. CARLSON
19 Court Reporter/transcriptionist
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House State Affairs Committee Hearing on
SB91 in 2019

March 4, 2019

Committee Chair: Lee Qualm

Prime Sponsor: Tim Reed

Proponents: Yvonne Taylor, South Dakota Municipal League
Gary Kaufman, Associated School Boards of South Dakota
(ASBSD)

David Bordewyk, South Dakota Newspaper Association
Eric Erickson, South Dakota Association of County
Commissioners

Passed the House unanimously on consent calendar



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1 CHAIRMAN QUALM: Okay. With that we will move on
2 to SB91, Revised Certain Provision Regarding Open
3 Meeting Requirements. Do we have any proponent
4 testimony? Good morning.

5 REPRESENTATIVE REED: Good morning, Mr. Chair,
6 committee members, Tim Reed, District 7. Today I bring
7 to you Senate Bill 91 and this is to revise certain
8 provisions regarding open meeting requirements. I spent
9 13 years in local government and I know firsthand that
10 these statutes needed to be clarified and rewritten, and
11 I'm glad that it's being accomplished this year. I know
12 the Bill looks complicated, but it really is not.
13 During my time in local government, we needed to have
14 the open meetings, we wanted to follow the open meeting
15 laws and usually even to go a step further than what the
16 actual laws were when it came to open meetings. But
17 they were very hard to understand, and there was some
18 requirements that we really had a tough time
19 understanding and so this clears it up.

20 You know, like any statute, there's many changes
21 over the past several years and it led to confusion for
22 local governments. So what this bill does is separates,
23 in this section, in several different sections, and then
24 also creates a section with definitions and just
25 basically clarifies the way things work. Changes in the

1 Bill in a general move, the current language to new
2 sections, allowing the law to be more easily read. And
3 I knew they were very hard to follow during my time in
4 local government.

5 If there are any substantial changes, one of them
6 is in Section 2, lines 21 through 24 and this has to do
7 with, if you're gonna have a quorum at another meeting
8 or if you're gonna have a quorum at a press conference,
9 and this section just clarifies that if it's not, if
10 it's not the agenda of the body that has the quorum
11 there, all they have to do is post they're gonna be at
12 the meeting. They don't have to post any agenda. And
13 we had problems with that also, because we'd be going to
14 a meeting where the agenda was not in our control as the
15 local government body, so this will help clarify that
16 all you have to do is post that there will be a quorum
17 of electe4d officials there.

18 There's also another change that may be seen as
19 substantive and that is Page 3, line 17 through 19. And
20 this clarifies, this amendment clarifies that at a
21 minimum, public comment is required at regularly
22 schedule meetings, and there's a few more information
23 below there. The Municipal League is gonna come up and
24 do a little bit more, section-by-section explanation of
25 it as they worked on it and I would ask for your

1 favorable support and I will stand by for questions.

2 Thank you.

3 CHAIRMAN QUALM: Okay. Thank you. Do we have
4 any more proponent testimony? Good morning.

5 YVONNE TAYLOR: Good morning, Mr. Chairman and
6 members of the committee, Yvonne Taylor with the South
7 Dakota Municipal League. It has taken a lot of effort
8 and time by a lot of people to bring you a Bill that
9 doesn't do anything. We are just trying to make this
10 something that we can read and easily follow. We're
11 completely at peace with our open meeting laws. We're
12 happy to follow them, but we would like to be able to
13 understand them better. So if I may, Mr. Chairman, just
14 take you through the sections, it might be easier to
15 read if we tell you what we're up to.

16 Section 1 establishes a new section where we
17 provide for a list of definitions of terms that are used
18 in this chapter. Most are just moved from other parts
19 of the chapter, but we did separate out political
20 subdivision, which is all of the locals, the public
21 body, which is all of the locals and the State and the
22 State. The Amendment that was added in the Senate made
23 it clear that the legislature is not covered by this
24 Chapter, because you folks have your own rules, so that
25 is status quo.

53,

1 Section 2 is clean-up language. It removes the
2 definitions that will now be in Section 1. It adds
3 press conferences to things that are not official
4 meetings and adds the language on page 2, lines 21 to
5 24, clarifying that when a quorum attends a meeting
6 where public policy may be discussed, but the public
7 body does not control the agenda, the public body can
8 post a Notice of a Quorum rather than the agenda. The
9 provisions apply to all entities, the State and the
10 locals, and it says that if notice of a quorum will at a
11 minimum include the date, time and location of event
12 where a quorum may be present and public policy will be
13 discussed.

14 A good example of this is since the city council
15 is invited to the monthly Chamber of Commerce luncheon.
16 They might all go there, but it's not their meeting, if
17 the Chamber wants what's good for the City, chances are
18 public policy is going to be discussed, but it's not the
19 City's meeting and so they could just say we're going to
20 have a quorum there. Section 2 also removes provisions
21 for teleconferencing, which were moved to separate
22 sections and the definitions.

23 And the last change in Section 2 says that the
24 Amendment, the last change in Section 2 on Page 3 of the
25 Bill clarifies the minimum standards for meetings at

1 which the public comment is required, which are
2 regularly scheduled meetings and it takes out the
3 ceremonial types of meetings.

4 Section 3 is the new section to address
5 teleconferencing meetings and that language was moved
6 from 1.25.1. Section 4 of the new section to address
7 teleconference meetings and that language was moved from
8 Section 1.25.1. Section 5 cleans up public notice
9 posting requirements for non-state entities. Section 6
10 deletes language that is now contained in the
11 definitions. Section 7 cleans up public posting
12 requirements for State entities. Section 8 makes the
13 section consistent with definitions for State entities.
14 And Section 9 clarifies that the recording provisions
15 don't apply to executive session. That is also status
16 quo, but we just made it clearer.

17 With that, Mr. Chairman, we would urge your
18 support of Bill and I would stand by for questions.
19 Thank you.

20 LEE QUALM: Thank you, very much. Any more
21 proponent testimony? Good morning.

22 GARY KAUFMAN: Good morning, Mr. Chair. Good
23 morning, Mr. Chair, members of the committee. My name
24 is Gary Kaufman and I'm director of policy and legal
25 services for Associated School Boards of South Dakota

1 ASBSD definitely supports SB91 and requests your support
2 and approval of it. There's one other thing -- and we
3 appreciate, ASBSD appreciates the Municipal League's
4 opportunity provided to us to be involved in this
5 revision. One of the things though, we also suggested
6 and you'll find it on Page 3, I believe it's lines 15
7 and 16, references, goes back to last year's Bill, House
8 Bill 1172 when this was most recently changed, and in
9 that piece of legislation, now currently law, is a
10 provision that says it is the Chair that determines when
11 there will be public comments made during the meeting
12 and under the discretion of the Chair. And the language
13 on Page 3, lines 15 and 16, changes that so it is the
14 governing board. Like in the school boards, it would be
15 by school board policy that they would determine when
16 there's going to be public participation meeting,
17 counties and municipalities that would be under ordinance or
18 policy and other entities would also probably policies.

19 The idea is to put the control in the realm of the
20 governing board to determine when that's going to be,
21 when identified during the portion of their meeting and
22 determine, like the time limits and the sign-up
23 opportunities, etc., for participation, similar to what
24 the legislative committee has when we do the sign-in and
25 there's time limits. And it changes the current law

1 from the Chair making that determination, so it is the
2 entire governing board that is making those kind of
3 policy decisions.

4 Other than that, again, the other changes we're
5 totally fine with and we support and we would ask that
6 you also support Senate Bill 91. And I will stand by
7 for questions. Thank you.

8 CHAIRMAN QUALM: Thank you. Any further proponent
9 testimony? Good morning.

10 DAVID BORDEWYK: Good morning, Mr. Chair, members
11 of the committee, David Bordewyk, registered lobbyist
12 South Dakota Newspaper Association. Probably the
13 exception as opposed to the norm when the Newspaper
14 Association gets up on the same side of the fence as
15 those representing local governments on open government
16 issues, but this is the exception today. And a lot of
17 it is due, I want to extend my appreciation to Yvonne
18 and the Municipal League for sharing with us, drafts of
19 this legislation as it's being worked on. Because it
20 did go through a lot of work and I appreciate them
21 bringing that and being transparent with us as they were
22 doing that, because that helped us get confident with
23 the Bill.

24 So, we are supportive of -- we think not only for
25 local governments, is it a good Bill to help them

1 understand how the open meeting law works, but also for
2 the public, as well. I think the public will be well
3 served by this and with that we'd appreciate your
4 support. Thank you.

5 Chairman QUALM: Thank you. Any further proponent
6 testimony? Good morning.

7 ERIC ERICKSON: Good morning, Mr. Chairman,
8 members of the committee, Eric Erickson with the South
9 Dakota Association of County Commissioners. We also
10 rise in support of Senate Bill 91 and urge your
11 favorable consideration. Thank you.

12 CHAIRMAN QUALM: Thank you. Any further proponent
13 testimony? Any further proponent testimony? Seeing
14 none I will open it up to opponent testimony. Do we
15 have any opponent testimony? Okay. Seeing none,
16 there's no need for rebuttal, I will open it up for
17 committee questions. Do we have any committee
18 questions? Seeing none, I will close it and open it up
19 to comments and/or action.

20 REPRESENTATIVE ANDERSON: Mr. Chair.

21 CHAIRMAN QUALM: Representative Anderson.

22 REPRESENTATIVE ANDERSON: I move to pass.

23 REPRESENTATIVE BEAL: Second.

24 CHAIRMAN QUALM: Seconded by Beal. Any comments?
25 Okay. Seeing none, the secretary will call the role;

1 all in favor say aye, opposed, nay.

2 MADAM SECRETARY: Representative Anderson.

3 REPRESENTATIVE ANDERSON: Aye.

4 MADAM SECRETARY: Dennert excused; Deidrich.

5 REPRESENTATIVE DEIDRICH: Aye.

6 MADAM SECRETARY: Goodwin.

7 REPRESENTATIVE GOODWIN: Aye.

8 MADAM SECRETARY: Gosch.

9 REPRESENTATIVE GOSCH: Aye.

10 MADAM SECRETARY: Hansen excused. Haugaard.

11 REPRESENTATIVE HAUGAARD: Aye.

12 MADAM SECRETARY: Jensen.

13 REPRESENTATIVE JENSEN: Aye.

14 MADAM SECRETARY: McCleary excused. Peterson
15 excused. Smith excused. Beal.

16 REPRESENTATIVE BEAL: Aye.

17 MADAM SECRETARY: Qualm.

18 CHAIRMAN QUALM: Aye.

19 MADAM SECRETARY: Eight with 5 excused.

20 CHAIRMAN QUALM: Senate Bill 91 moves to the floor
21 on 8 to 0.

22 REPRESENTATIVE ANDERSON: Mr. Chair.

23 CHAIRMAN QUALM: Mr. Anderson.

24 REPRESENTATIVE ANDERSON: Move consent.

25 MR. BEAL: Second.

1 CHAIRMAN QUALM: Move consent by Anderson,
2 seconded by Beal. All in favor say aye; opposed nay.

3 (Voted).

4 CHAIRMAN QUALM: It is moved consent.
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1 STATE OF SOUTH DAKOTA.)

2) SS.

CERTIFICATE

3 COUNTY OF PENNINGTON)

4 I, JEAN M. CARLSON, Certified Court Reporter and
5 transcriptionist in and for the State of South Dakota, do
6 hereby certify that the excerpt of the foregoing 11 pages,
7 is a true and correct transcript of my stenotype notes, as
8 taken by me from the official recordings of the hearings
9 from the South Dakota Legislature website in machine
10 shorthand and thereafter transcribed.

11 Dated at Rapid City, South Dakota, this 14th day
12 of September, 2021.

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18 JEAN M. CARLSON
19 Court Reporter
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1 Board of Education Study Session

2 June 2, 2021

3 5:00

4 _____

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6 PRESIDENT POCHARDT: Matt do you have anything
7 further?

8 MATT STEPHENS: I think Kate disagreed with me
9 that it would be appropriate tonight because it is, it's
10 not a one of our regular biweekly meetings, it's a
11 special study session so it is, we can limit it to scope
12 to just this topic.

13 KATE THOMAS: If I may.

14 PRESIDENT POCHARDT: Well, let's take the hands in
15 order. Jim is next.

16 JIM HANSEN: Thank you, President Pochardt. All I
17 was gonna suggest is when this gets resolved I would
18 then bring back the agenda to include that and just vote
19 in an agenda just including this public speaking.
20 That's all I was going to say.

21 PRESIDENT POCHARDT: Thank you. Next is Amy.

22 AMY POLICKY: Yes, can you read, or Shirley, since
23 we're not together, can you read what our form says
24 about public comments at a school board meeting. And
25 Kate, can you please find the policy that you're quoting

62.

1 and give me what number it is?

2 SHIRLEY FLETCHER: My apologies. I had to step
3 away. What do you want read?

4 AMY POLICKY: It's what the sheet says the
5 guidance is on public comment during an open forum.

6 SHIRLEY FLETCHER: Board of Education encourages
7 the public and district staff to share their suggestions
8 and concerns and welcomes questions about district
9 policy during open forum to foster civility and promote
10 constructive dialogue speakers in the audience are asked
11 to recognize the following procedures and guidelines.
12 That board will defer items in need of action, research,
13 and/or recommendations to the superintendent.

14 The procedures is just pretty much, they must sign
15 up a sheet; they're limited to 5 minutes; each speaker
16 may present more than once but only after everyone else
17 has had an opportunity to speak. Speakers wishing to
18 speak on any topic on the agenda are requested to speak
19 during open forum.

20 Groups should designate one spokesperson to
21 represent them during open forum. They should also
22 provide a name and phone number to the board to
23 follow-up questions and information. Open forum will be
24 limited to 30 minutes, but may be extended for a
25 specific period of time by a vote by the Board of

63,

1 Education. Guidelines issues that effect an individual
2 or particular school should be addressed at the building
3 level so staff has the opportunity to address issues
4 that effect them directly. Speaker should focus on
5 their main point and not be repetitive. Personnel
6 matters or complaints that directly or indirectly
7 identifies an employee should not be discussed, to
8 maintain a civil dialogue threats and intimidation will
9 not be allowed. The chairman of the board has the
10 option to stop any speaker and to edit anything that's
11 intimidating or offensive or deals with a personnel
12 matter.

13 AMY POLICKY: So in that policy it indicates the
14 comments need to address agenda items or possibly
15 policy. Kate, where are you reading from that says the
16 items don't have to address the agenda items?

17 KATE THOMAS: I'm sorry, I can't find it now. I
18 just remember it referring to special meetings such as
19 our bond, when we had that from a year and a half ago,
20 it refers to special meetings such as a bond etc., that
21 need to be, because that's a special meeting, or an
22 emergency -- not an emergency. Those are the ones that
23 you don't have to have public comment on, but special
24 meetings such as bond, you would only let public comment
25 in that situation refer to the subject at hand. I can't

64

1 find it now.

2 I would argue, though, in this is discussion about
3 public comment, that study sessions aren't special. Ya
4 know, they're -- they are, I mean this was, this was
5 last week, as much time as we give for the regular
6 meetings, it is regularly scheduled. Every month we
7 have a study session, if not two, so I would almost
8 define that as regular. You have a regular business
9 meeting where you have, ya know, money at hand, etc.,
10 claims, all of those type of things, but you also have
11 informational items that can be something that you end
12 up discussing at a study session, which is again, I
13 would argue, a regular meeting. So this one isn't
14 special as in a bond issue alone. That's all I would
15 say.

16 PRESIDENT POCHARDT: Matt, go ahead.

17 MATT STEPHENS: Thank you. I would just point out
18 the relevant statute on this point is SDCL 1-25-1 and it
19 says right in there that it encourages participation of
20 the public, but also says that the board or the state
21 agency can limit that to whatever extent it deems
22 appropriate, or some language like that. We can limit
23 the participation, so long as it isn't such that we're
24 effectively nullifying any opportunity for
25 participation, we have free reign to limit that.

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1 PRESIDENT POCHARDT: Dr. Simon, you have your hand
2 up.

3 DR. SIMON: Yes. I just want you to know that I
4 did ask our legal counsel to weigh in on this topic in
5 general, and our legal counsel is looking at statute and
6 is disagreeing with the conclusion that state law
7 requires the board to provide for public comment during
8 either special meetings or study sessions. Matt just
9 talked about the codified law, and it's 1-25-1 in which
10 it says, a public body shall reserve at every regularly
11 scheduled, official meeting, a period of time for public
12 comment. And then goes on to say, as Matt said, limited
13 at the public body's discretion, but not so limited as
14 to provide for no public comment, etc.

15 And so, I think our legal counsel is defining
16 regularly scheduled official meetings as those official
17 board meetings that are scheduled, essentially a year in
18 advance on currently what is the 2nd and 4th Tuesdays of
19 each month. So, just wanted to add that for a little
20 bit more context. I won't belabor the point and the
21 rest of the information legal counsel.

22 PRESIDENT POCHARDT: The Motion on the floor is
23 Kate's motion to add public comment, the amendment by
24 Matt Stephens to allow it pertinent to the subject
25 matter of this meeting only, the ten-point grading scale

66.

1 and to hold it after the presentation from the staff.
2 Further discussion? Amy, go ahead.

3 AMY POLICKY: I did find our policy, it's BEDH,
4 Public Participation at Board Meetings. And it says
5 public comments in questions at open forum may deal with
6 any topic related to public education. Public comments
7 on agenda items will be encouraged by the board
8 president. Comments at special meetings must be related
9 to the subject of the meeting. And I guess I understand
10 that bond election meetings would be considered special
11 meetings, but I always considered study session special
12 meetings also because they differed from our official
13 business meetings. So I would agree with Matt that
14 public comment at our meeting should occur, but that at
15 special meetings, it should only be allowed on the topic
16 of the agenda.

17 PRESIDENT POCHARDT: Kate, go ahead.

18 KATE THOMAS: And I would respectfully disagree,
19 because they are regularly scheduled. They are not
20 special meetings. They would have special meeting
21 attached to it and we clearly have an example of what a
22 special meeting is. I have never thought of them as
23 special meetings. I have thought of them for the last
24 six years as merely every Monday I'm going to have to
25 come down to have a meeting. So, I just would

67,

1 respectfully argue the opposite.

2 (Matt Stephen's motion to amend Kate Thomas'
3 motion to limit public comment to the subject of the
4 presentation and put it at the end of the meeting died
5 on a 3-3 tie with one abstention. Kate's original
6 motion to amend the agenda to add public comment to the
7 beginning of the agenda carried 5-1.)
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68.

1 STATE OF SOUTH DAKOTA)
2) SS. CERTIFICATE
3 COUNTY OF PENNINGTON)

4 I, JEAN M. CARLSON, Certified Court Reporter, in
5 and for the State of South Dakota, do hereby certify that
6 the foregoing 7 pages, is a true and correct transcript of
7 proceedings that took place on June 2, 2021 and were taken
8 from the audio from said meeting and thereafter transcribed
9 to the best of my ability.

10 Dated at Rapid City, South Dakota, this 14th day
11 of October, 2021.

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16 _____
17 JEAN M. CARLSON
18 Court Reporter/Transcriptionist
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69.

Date	Topic/Location	Meeting Type	Public comment allowed	number of speakers
07/09/18			yes	1
07/23/18		Annual Meeting	yes; Ron Riherd elected President	1
08/13/18			yes	0
08/20/18		Study Session	yes	0
08/27/18			yes	1
09/10/18			yes	1
09/13/18	Custer State Park	Retreat	no	
09/14/18	Custer State Park	Retreat	no	
09/17/18		Western Dakota Tech	yes	18
09/18/18		Executive Session	no	
09/27/18		Executive Session	yes	0
10/09/18		Executive Session	no	
10/15/18			yes	6
10/22/18			yes	6
10/29/18		Study Session	yes	0
11/05/18		Western Dakota Tech	yes	4
11/12/18			yes	6
11/19/18		Study Session	yes	2
11/26/18			yes	2
12/03/18		Study Session	yes	3
12/10/18			yes	3
12/17/18			yes	7
01/07/19		Western Dakota Tech	yes	3
01/11/19	WDT	Retreat	no	
01/14/19			yes	3
01/22/19		Study Session	yes	2
01/28/19			yes	2
02/11/19			yes	1
02/19/19		Study Session	yes	0
02/25/19			yes	1
03/11/19			yes	0
03/18/19		Western Dakota Tech	yes	2
03/19/19		Study Session	yes	1
03/21/19	Outdoor Campus	Retreat	no	
03/25/19			yes	3
04/01/19		Study Session	yes	2

04/08/19			yes	1
04/22/19			yes	1
04/24/19	Janis vs. Janak	Special	yes	16; 4 yielded time
05/07/19		Western Dakota Tech	yes on agenda; no notation in minutes. No video	
05/08/19		Study Session	yes	3
05/13/19			yes	4
05/15/19		Study Session	yes	4
05/20/19		Study Session	yes on agenda; no notation in minutes. No video	
05/23/19		Study Session	yes	3
05/28/19			yes	8
05/29/19		Study Session	yes on agenda; no notation in minutes. No video	
06/03/19		Study Session	yes	10
06/06/19		Executive Session	no	
06/10/19			yes	
06/17/19		Study Session	yes	1
06/18/19		Executive Session	yes	1
06/24/19			yes	1
07/11/19		Annual Meeting	yes; Mike Roesler elected President	3
07/29/19			yes	3
08/05/19			yes	1
08/12/19		Executive Session	no	0
08/13/19	Outdoor Campus	Retreat	no	
08/19/19			yes	1
08/26/19		Study Session	yes	3
09/03/19			yes	2
09/09/19		Western Dakota Tech	yes	1
09/13/19	The Lodge, Ddwd	Retreat	no	
09/16/19			yes	2
10/07/19			yes	8
10/09/19		Executive Session	no	
10/21/19			yes	4
10/24/19		Study Session	yes	4
10/28/19	Gen. Ob. Bond	Special	yes	11
11/04/19			yes	9
11/12/19		Western Dakota Tech	yes	1
11/18/19			yes	10
11/25/19		Study Session	yes	8

16

06/10/21	Study Session	yes	7
06/14/21		yes	6
06/28/21		yes	5
07/12/21		yes	9
07/26/21	Annual Meeting	yes; Kate Thomas elected President	24
08/06/21 RCEC	Retreat	no	18
08/09/21		yes	43
08/23/21		yes	63
09/07/21		yes	
09/14/21	Special/Study Session	no	14
09/21/21		yes	
10/04/21 RCEC	Retreat	no	11
10/05/21		yes	
10/12/21	Special/Study Session	no	7
10/19/21 Council chambers		yes	20
11/02/21 Council chambers		yes	
11/09/21 RCEC	Special/Study Session	no; legislative issues; 10-pt grading scale	8
11/16/21 Council chambers		yes	
11/29/21 RCEC - no video	Special	no; executive session only	
11/30/21 RCEC - no video	Special	no; resolution to replace board member	
12/02/21 RCEC - no video	Special	no; \$2.5M stipend vote, state report card	
12/07/21 Council chambers		yes	8
12/14/21 RCEC - no video	Special/Executive Session	no; MOU, calendar, Canyon Lk boiler recommend	
12/16/21 RCEC - Zoom	Special	yes; \$1.4M HVAC system for Canyon Lk.	1
01/04/22 Council chambers		yes	7
01/11/22 RCEC - no video	Study Session	no; TeamMates Mentoring program	



OFFICE OF THE PENNINGTON COUNTY STATE'S ATTORNEY

Mark A. Vargo—State's Attorney

130 Kansas City Street, Suite 300

Rapid City, SD 57701

Phone: (605) 394-2191

Fax: (605) 394-6093

November 18, 2020

Tonchi Weaver
1306 38th St.
Rapid City SD 57702

Re: RCAS Board of Education

Dear Ms. Weaver,

I received your email and petition regarding your concern of a possible action taken in executive session by the Rapid City Area Schools Board of Education. Please keep in mind that I do not have the authority to instruct other elected public officials how to conduct their business. The authority the law grants me is clearly laid out in statute. I have the authority to receive complaints, investigate and either prosecute offenders or refer cases to the South Dakota Open Meetings Commission.

My authority is outlined in SDCL 1-25-6, which then also refers to SDCL 23A-2-1 describing what a "complaint" is and how it is completed under state law. You are certainly welcome to present your to the Board of Education itself, in order to give them a chance to address your concerns. If you do not want to follow that protocol or if they decline to make any changes in procedure, you can file a formal complaint pursuant to SDCL 1-25-6 and my office will take it from there.

A formal complaint is a written statement of the essential facts constituting an offense charged. All essential facts upon which the complaint relies should be included, including names of witnesses. It would have to be signed under oath before a person authorized to administer oaths in the State of South Dakota.

Respectfully,

Mark A. Vargo
State's Attorney



Complaint submitted to Pennington Co. State's Atty.
12/05/2020

I believe that the RCAS Board of Education has violated §1-25-2. Official action was taken by the Board to select the winner from 11 candidates to fill the vacant Area 3 seat during Executive Session on Thursday, November 12, 2020. The statute clearly states what can and cannot be done in executive or closed meetings and cautions that "...any official action concerning such matters shall be made at an open official meeting". The Board's next official meeting was not scheduled until Monday, November 16, 2020, at which time the Board should have held a public vote on the candidates in consideration and discussed any possible conflicts of interest regarding the contenders. That did not happen.

Instead, the Board President and Superintendent, who was also present in the executive session, sent out rejection letters to the unsuccessful contenders on Friday, November 13, 2020. The letter informed them that they were not chosen for the position, gave the name of the Board's official choice for the position and thanked them for their interest in serving on the RCAS Board of Education.

On Monday, November 16, 2020, the Board had only one consent item on their agenda: "Resolution to Appoint Candidate to Board of Education Area 3 Position". A single name was on the list. The vote was 5-2, signaling that there was dissent on the candidate, the process, or both. No public comment was allowed at this meeting. Earlier in the day I circulated a petition with my signature and 22 other taxpayers in the school district, including two of the candidates for the Area 3 position. It was addressed to Mark Vargo, Pennington County States Attorney, requesting some action to stop the Board from proceeding to appoint the illegally chosen candidate at their meeting that night.

Time was short and I did not hear from Mr. Vargo prior to the meeting, so I and other interested parties took copies of the petition to the Rapid City Education Center (RCEC) to try to bring the violation to the attention of the board before they could compound the situation. When we got there, we were informed that the Board meeting was only on ZOOM and there was no Public Comment on the agenda. We stood outside in the cold and dark and watched the meeting proceed on our phones.

Mr. Vargo followed up with me and advised me of the complaint process. He also pointed out that I could ask the Board to try to remedy their action, which I did. I contacted the Board members and spoke at length with their attorney, Mike Hickey. I forwarded to the emails between me and Mr. Vargo with a redacted copy of the rejection letter attached and copies of the published minutes as evidence of my claim. Although the violation occurred, I made what I believe was a fair and reasonable suggestion as a remedy. It would require the Board to notify all contenders that the process of selection they followed was improper. They would reconsider the appointment and schedule a public vote including discussion of any possible conflicts of interest a candidate may have regarding a position on or relationship with the Board of Education, for the next regular meeting.

At the Board's November 30, 2020 regular meeting (3:30 on the video), agenda items #4 (motion to reconsider) and #5 (resolution to appoint) were tabled. At 5:15 on the video, Area 6 Board member Amy



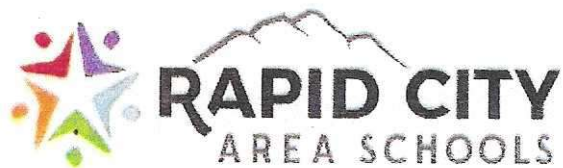
Policky seems very annoyed that the Board cannot seat the Area 3 representative as planned. She tries to force the Board to move forward with a motion to seat the candidate. She states publicly that they "had an executive session where they discussed all the candidates according to the statute. We made a decision on the candidate and brought and brought that name forward to the November 16 meeting where we already voted for her to become the representative from Area 3..." The Board is under the impression that a complaint has already been filed and is already in the hands of the Open Meeting Commission. She reiterates at 7:18 that they "...selected a replacement in our executive session..." Her motion was not approved.

Later in the meeting while discussing an unrelated item that they scheduled for a Special Meeting on Wednesday, December 2, 2020, the Board - at the suggestion of Superintendent Lori Simon, agreed among themselves (56:43 on the video) to add items #4 and #5 that had been tabled, to the Special Meeting agenda. The Board DID NOT VOTE TO TAKE THE ITEMS FROM THE TABLE.

At the Special Meeting the following Wednesday (12/2/2020), under Public Comment, I informed the Board that they could not act on those items that night because they were still on the table. They were advised by their attorney after a hasty phone call that they indeed could proceed with those items. At 1:10:40 on the video, Area 1 Board member Matt Stephens commented that the Board has never properly removed items from the table in order to consider them and that the Board adopted Roberts Rules of Order as a "guideline that is loosely followed" and he contended that the Board has been clear that they are not rigidly bound by them.

What ensued was a parliamentary process that proved his point.

The Board ultimately voted on two names - only because one board member nominated one of the other candidates for the position. The candidate chosen behind closed doors, who has a discoverable possible conflict of interest in serving on the BOE was ultimately voted in 5-2, whether or not the process was proper.



Office of the Superintendent

625 – 9th Street, Suite 208

Rapid City, SD 57701

P(605) 716-0327

November 13, 2020

Janette McIntyre
3515 Park Drive
Rapid City, SD 57702

Dear Janette,

We would like to thank you for your interest in the Rapid City Area School Board of Education Area 3 vacancy. We appreciate you taking time to interview last evening with our current board.

The Board of Education has chosen Kara Flynn to serve as Area 3 representative. The board unanimously agree that there was a truly impressive group of applicants.

We ask for your continued interest and support of the Rapid City Area Schools.

Enjoy your weekend and stay safe.

Sincerely,

Dr. Lori J. Simon
Superintendent

Curt Pochardt
Board of Education President

sf



November 20 L21096
**RAPID CITY AREA SCHOOL
DISTRICT 51-4
BOARD OF EDUCATION
MEETING**

The Rapid City Area School Board of Education held a Special Board of Education Meeting - Study Session and Executive Session on Thursday, November 12, 2020. Information for the meeting was listed at: <https://bit.ly/3lkt4H4> President Curt Pochardt called the session to order at 5:00 PM with the following board members in attendance: Clay Colombe, Jim Hansen, Amy Policky, and Kate Thomas. Matt Stephens and Brian Johnson joined via Zoom. Dr. Lori Simon, Mark Gabrylczyk, Nicole Swigart, and Kim Morsching were also present.

APPROVAL OF AGENDA
POLICKY moved and COLOMBE seconded to approve the establishment of the agenda as presented and recommended. MOTION CARRIED 7-0 with a ROLL CALL VOTE.

ITEMS FOR BOARD DISCUSSION
Nicole Swigart and Kim Morsching presented information on Attendance and Truacy.

EXECUTIVE SESSION
• SDCL 1-25-2.1 - Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. The term "employee" does not include any independent contractor.

HANSEN moved and POLICKY seconded to go into Executive Session at 6:15 PM to discuss personnel.

Executive Session concluded at 9:25 PM.

ADJOURNMENT
JOHNSON moved and POLICKY seconded to adjourn the November 12, 2020 Special Board of Education Meeting - Study Session and Executive Session at 9:25 PM. MOTION CARRIED 7-0 with a ROLL CALL VOTE.

Respectfully submitted,

Dr. Lori J. Simon, Superintendent

ATTEST:
Shirley Fletcher,
Executive Assistant

Curt Pochardt, President
Rapid City Board of Education

(Published once at the total approximate cost of \$43.98)

RCJ Nov 20, 2020 Pg B8

Minutes

November 21 L21105
**RAPID CITY AREA SCHOOL
DISTRICT 51-4
BOARD OF EDUCATION
MEETING**

The Rapid City Area School Board of Education held a Special Board of Education Meeting on Monday, November 16, 2020. Information for the meeting was listed at: <https://bit.ly/2lycuik> President Curt Pochardt called the Virtual Meeting to order at 5:30 PM with the following board members in attendance: Clay Colombe, Jim Hansen, Amy Policky, Matt Stephens, Brian Johnson, and Kate Thomas. Dr. Lori Simon, Mark Gabrylczyk, and Coy Sasse were also present.

APPROVAL OF CONSENT AGENDA

HANSEN moved and STEPHENS seconded to approve the consent agenda as presented and recommended and to name Kara Flynn as Area 3 Representative. MOTION CARRIED 5-2 with a ROLL CALL VOTE and JOHNSON and THOMAS VOTING NAY.

President Pochardt asked Kara to share a few words.

ADJOURNMENT
HANSEN moved and POLICKY seconded to adjourn the November 16, 2020 Special Board of Education Meeting at 5:40 PM. MOTION CARRIED 7-0 with a ROLL CALL VOTE.

Respectfully submitted,

Dr. Lori J. Simon, Superintendent

ATTEST:
Shirley Fletcher,
Executive Assistant

Curt Pochardt, President
Rapid City Board of Education

(Published once at the total approximate cost of \$31.98)

RCJ Nov 21, 2020 Pg B4

EXHIBIT

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OFFICE OF THE PENNINGTON COUNTY STATE'S ATTORNEY

Mark A. Vargo—State's Attorney

130 Kansas City Street, Suite 300

Rapid City, SD 57701

Phone: (605) 394-2191

Fax: (605) 394-6093

February 10, 2021

Tonchi Weaver
1306 38th St
Rapid City, SD 57702

Re: Open Meetings Complaint

Dear Ms. Weaver,

After reviewing the complaint you filed with my office in October, I assigned the State's Attorney's Office investigator to investigate the allegations. He reviewed your complaint along with all accompanying documents, interviewed school board members, and reported back to me on his findings.

Based on the totality of the circumstances, I have determined there was no open meetings violation by the Rapid City Area School Board during the executive session they held on November 12, 2020. The allegation was the Board held a vote and made an official decision on what candidate to appoint to the school board while in executive session. Witness interviews lead me to conclude no official action was taken in executive session, despite the fact that a letter was sent to the candidates that were ultimately not selected. While the members of the Board may have understood who was considered the top candidate, and would most likely ultimately be voted in, this is not a violation of open meetings laws. Any "vote" that was taken would be better described as a "straw poll" or informal vote.

It appears the letters sent to the other candidates were seen as a "courtesy" so the rest of the candidates would know whose name was being brought forward at the meeting. The sending of the letter is not an "official action" as the ultimate vote had not occurred and the outcome could still change.

The official action of the board was scheduled to take place at the Board's special meeting on November 16, 2020. In legal terms an "official action" is a final decision by a governmental body which is within the official jurisdiction of that body. As you noted in your complaint, a vote on the resolution to appoint the board member took place and the resolution was passed 5-2. The manner in which the meeting was held did not constitute an open meetings violation given Governor Noem's Executive Order suspending the rule for a body to have a physical place for the public to meet due to COVID.

Upon being interviewed, all board members indicated they felt free to change their mind between November 12 and November 16 because no official or final decision had been made in the executive session. This includes the dissenting board members, although at least one did not

80.



like the way the issue was handled in executive session, this person does not describe an open meetings violation.

Following the November 16, 2020 meeting you voiced your concerns with the school board and their attorney about what you felt was a lack of transparency in how the meeting was held and in not allowing public comment. As a result, there was a motion to reconsider before the Board at their next meeting on November 30, 2020. This motion was tabled for a later meeting. I would note that any perceived violations of Roberts Rules of Order fall outside the purview of the open meetings statutes and has no bearing on my decision.

Ultimately, the Board voted in an open meeting on December 2, 2020, on the resolution to appoint a board member. At that meeting there were two candidates nominated and ultimately one candidate received more votes. Potential conflicts of interest of any candidate and lack of notice to any candidate are not open meetings issues within the jurisdiction of this office.

Sincerely,

Mark A. Vargo

(Read but not signed to expedite mailing)

Mark A. Vargo
Pennington County State's Attorney

MAV/jdf

PUBLIC PARTICIPATION AT BOARD MEETINGS

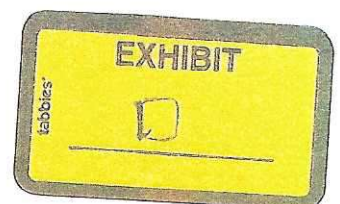
All regular and special meetings of the board will be open to the public. At meetings a specific time period will be designated as "Open Forum." A time limit may be set both for individual speakers and for the length of the Open Forum time period.

Personnel matters or complaints that directly or indirectly identify an employee shall not be discussed. Such complaints shall be filed in accordance with district policy.

Public comments and questions at Open Forum may deal with any topic related to public education.. Public comments on agenda items will be encouraged by the board president. Comments at special meetings must be related to the subject of the meeting.

The board president will be responsible for recognizing all speakers, for maintaining proper order and for adhering to any time limits set. Board members may participate in the discussion. All speakers will properly identify themselves. The board will refer to the superintendent items requiring action, research and/or recommendation(s) which shall be answered in a timely manner.

Adopted	11/24/81
Reviewed	05/24/88
Reviewed	11/23/93
Revised	01/13/98
Reviewed	09/08/98
Revised	04/25/16



PUBLIC PARTICIPATION AT BOARD MEETINGS

The board of education encourages the public and district staff to share their suggestions and concerns and welcomes questions about district policy during Open Forum. To foster civility and promote constructive dialogue, speakers and the audience are asked to recognize the following procedures and guidelines. The board will refer items in need of action, research and/or recommendation(s) to the superintendent. These concerns will be addressed in a timely manner.

PROCEDURES

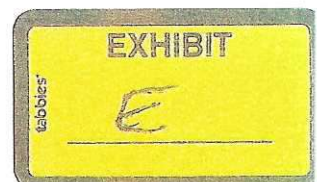
1. Each Open Forum participant must list on a sign-up sheet his/her name, address, phone number and topic on which he/she wishes to speak.
2. Speaker's remarks are limited to five minutes.
3. Each speaker may present more than once, but only after everyone else has had an opportunity to speak.
4. Groups should designate one spokesperson to represent them during Open Forum.
5. Open Forum is limited to 30 minutes but may be extended for a specific period of time by a vote of the board of education.

GUIDELINES

1. Issues that affect an individual or particular school should first be addressed at the building level so staff has the opportunity to address issues that affect them directly.
2. Speakers should focus on their main points and not be repetitive.
3. Personnel matters or complaints that directly or indirectly identify an employee shall not be discussed. Such complaints shall be filed in accordance with District Code: KL—Public Complaints.
4. To maintain a civil dialogue, threats and intimidation are not allowed.
5. The chairman of the board has the option to stop any speaker and to edit anything that is intimidating or offensive or that deals with a personnel matter.

Adopted 01/13/98
Reviewed 09/08/98
Revised 12/11/01
Revised 02/02/06
Reviewed 02/22/16

Rapid City Area School District No. 51-4, Rapid City, South Dakota



STATE OF SOUTH DAKOTA)
)SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL DISTRICT
51CIV21-000749

SD CITIZENS FOR LIBERTY, INC.,)
TONI E. WEAVER, MARCY M.)
MORRISON, BRIAN T. LARSON,)
AND SAMANTHA C. McCULLY,)

Plaintiffs,)

v.)

RAPID CITY AREA SCHOOL)
DISTRICT 51-4,)

Defendant.)

**PLAINTIFFS' STATEMENT OF
UNDISPUTED MATERIAL FACTS**

COMES NOW THE PLAINTIFFS and provide the following Statement Of
Undisputed Material Facts.

1. SD CITIZENS FOR LIBERTY, INC. (hereinafter CFL) was formed and filed as a Perpetual Corporation and issued a Certificate of Incorporation by the SD Secretary of State on July 27, 2010, with Toni E. Weaver one of the incorporators. Affidavit of Mike Mueller, President of CFL, (hereinafter Mueller) ¶ 2, ¶ 3, and Affidavit of Toni E. Weaver (hereinafter Weaver) ¶ 13.

2. CFL is a Non-Profit Domestic Corporation in Good Standing in SD, has filed their 2021 Annual Report, and has their address as P.O. Box 7611, Rapid City, SD 57709. Mueller Affidavit ¶ 4, ¶ 5 and **Exhibits A** and **Exhibit B** attached thereto.

3. CFL was formed as a public interest Corporation with some of its purposes: "To facilitate research, education, public awareness, and policy about the means and opportunities for improving the political process, fairness, democracy, and open, accountable government in South Dakota..." Mueller Affidavit ¶ 6, Weaver Affidavit ¶ 13.

4. That Toni E. Weaver, is also known as Tonchi Weaver (hereinafter Weaver), and is a lobbyist registered with the State of South Dakota to act on behalf of CFL at all levels of

government and specifically with the Rapid City Area School District (hereinafter RCASD). Mueller Affidavit ¶ 7, ¶ 8, ¶ 9, and Weaver Affidavit ¶ 2, ¶ 12, ¶ 14, ¶ 15 and **Exhibit A**, **Exhibit B**, and **Exhibit C** attached thereto.

5. The membership of CFL is interested in and concerned about RCASD School activities and the quality of the education of children attending RCASD Schools and has directed and authorized Weaver to provide public comment consisting of suggestions and concerns of the membership of CFL at all open meetings of the RCASD School Board meetings in accordance with SDCL 1-25-1 et seq. Mueller Affidavit ¶ 10, and Weaver Affidavit ¶ 19.

6. Mueller, Weaver, and Marcy M. Morrison state the superintendent of the RCASD School has stated at an open meeting that the RCASD's attorney has advised them that the words in SDCL 1-25-1 "regularly scheduled official meetings" are only those meetings scheduled a year in advance on the 2nd and 4th Tuesday of each month, and therefore are the only times when a public comment period is required to be provided. Mueller Affidavit ¶ 11 ¶ 12, Weaver Affidavit ¶ 20A, **Exhibit G** attached thereto, page 5, lines 15-19, Affidavit of Marcy M. Morrison (hereinafter Morrison) ¶ 12 ¶ 13.

7. Mueller, Weaver, and Morrison believe the correct interpretation of the words "regularly scheduled official meetings" are all meetings of the RCASD School Board that are not closed by statute. Mueller Affidavit ¶ 13, Weaver Affidavit ¶ 20, ¶ 20B, ¶ 20C, and ¶ 20D and Morrison Affidavit ¶ 13.

8. CFL's interest in this matter is in keeping with their purposes of facilitating public awareness for open and accountable government and providing their membership and all citizens an opportunity for public comment at all meetings not closed by statute. Mueller Affidavit ¶ 14.

9. Weaver is a resident and taxpayer of Rapid City and the RCASD and has been at all times material hereto. Weaver Affidavit ¶ 3.

10. Weaver has three (3) grandchildren that live in and attend RCASD Schools and she has attended RCASD School Board meetings as a grandparent interested and concerned about her grandchildren's School activities and the quality of their education and her desires to be able to make public comments at all open meetings of the RCASD School Board. Weaver Affidavit ¶ 9, ¶ 10, ¶ 11, Defendant **Admits** in ¶ 5 of Answer to Amended Complaint,

(hereinafter all admissions or partial or partial **Admissions** will only refer to the paragraph (¶) in which the Admission is located. **Admit** in part ¶ 6, **Admit** in part ¶ 8, **Admit** in part ¶ 10.

11. Weaver indicates when making public comment whether she is doing so as a lobbyist for CFL or for herself as a grandparent. Weaver Affidavit ¶ 16.

12. Weaver believes her lobbying efforts have been useful at the state level because some of her efforts were directed to: education funding; student privacy; student safety (school sentinel program); standardized tests; state education standards; conflicts of interest; and open meetings laws (Weaver did not testify in 2019 when SDCL 1-25-1 was last Amended—all the testimony then is attached as **Exhibit P** and **Exhibit Q** in a following ¶). Weaver Affidavit ¶ 17.

13. Weaver believes her lobbying efforts have been useful to the RCASD inasmuch as RCASD has implemented part of her suggestions in: Changes in Student Handbook Acknowledgement Form; Requirement for prior written parental consent for non-emergency Medical exams in schools; Ending live-streaming RCASD School Board meetings on Facebook; and Relocating RCASD Board meetings to larger venues to accommodate more public attendance. Weaver Affidavit ¶ 18.

14. Morrison is presently a resident and taxpayer of Meade County and lives outside of the RCASD but previously lived in and was a taxpayer in Rapid City and her children attended RCASD Schools in the past. Morrison Affidavit ¶ 2, ¶ 3, **Admit** in part ¶ 12, **Admit** in part ¶ 13, **Admit** in part ¶ 14 **Admit** in part ¶ 15.

15. After moving out of the RCASD in 2020, Morrison applied for Open Enrollment with RCASD, because she wanted her children to continue their education with RCASD Schools, and her application had not been acted upon at the time of commencement of this suit (June 28, 2021—Certificate of Service by County Constable), and the application was thereafter approved on August 23, 2021. Morrison Affidavit ¶ 4, ¶ 5, ¶ 6, **Exhibits A** and **Exhibit B** attached thereto. **Admit** in part ¶ 13.

16. Morrison at all times material hereto has attended some RCASD School Board meetings and as a parent is interested and concerned about her children's School activities and the quality of their education and she desires to be able to make public comments at all open meetings of the School Board. Morrison Affidavit ¶ 9, ¶ 10, ¶ 11, **Admit** in part ¶ 14.

17. Samantha C. McCully (hereinafter McCully) is a resident and taxpayer of Rapid City and the RCASD and has been at all times material hereto. McCully Affidavit ¶ 2, **Admit** in part ¶ 19, **Admit** in part ¶ 20.

18. McCully has three (3) children that live in and attend RCASD Schools and she attended School Board meetings as a parent interested and concerned about her children's School activities and the quality of their education and she desires to be able to make public comments at all open meetings of the School Board. McCully Affidavit ¶ 6, ¶ 7, ¶ 8 **Admit** in part ¶ 20, **Admit** in part ¶ 21.

19. Brian T. Larson (hereinafter Larson) is presently a resident and taxpayer of Meade County and lives outside of the RCASD but at all times material hereto his children have been Open Enrolled in the RCASD (since the fall of 2014). Larson Affidavit ¶ 2, ¶ 3, **Admit** in part ¶ 15, **Admit** in part ¶ 16, **Admit** in part ¶ 17.

20. Larson has attended RCASD School Board meetings and at all times material hereto and as a parent is and was interested and concerned about his children's School Activities and the quality of their education and desires to be able to make public comment at all open meetings of the School Board. Larson Affidavit ¶ 6, ¶ 7, ¶ 8, **Admit** in part ¶ 17.

21. Both Morrison and Larson have directly contacted Board members and employees of the RCASD multiple times to obtain answers to their questions with limited success or no response in obtaining answers; Larson even contacted the State Athletic Director and State Board of Education who referred him back to the RCASD School Board. Morrison Affidavit ¶ 14, ¶ 17, ¶ 18, ¶ 19, Larson Affidavit ¶ 10, ¶ 11.

22. Larson was issued two (2) "No Contact" letters from RCASD's attorney for his efforts to obtain responses from RCASD employees. Larson Affidavit ¶ 10.

23. Both Morrison and Larson are frustrated because they are unable to obtain answers from: Individual Board members; or a response from the Board; or superintendent when they ask questions at meetings, during scheduled "Open Forum" when public comment was scheduled and permitted. Morrison Affidavit ¶ 15, ¶ 20, Larson Affidavit ¶ 11, ¶ 12, McCully Affidavit ¶ 11.

24. Board Policy, District Code BEHD-E requires everyone wanting to provide public comment to complete this form by providing their name, address, phone number, topic on which

they desire to speak, their signature and date so that "These concerns will be addressed in a timely manner[]" and they have never received a response from questions during public comment. Morrison Affidavit ¶ 16, ¶ 17, Larson Affidavit ¶ 9, and McCully Affidavit ¶ 9, ¶ 10.

25. RCASD has Policies and Procedures relevant to this matter as follows:

A. District Code: BEDH, **Exhibit D** attached hereto and incorporated herein by this reference, provides:

"All regular and special meetings of the board will be open to the public. At meetings a specific time period will be designated as "Open Forum."" in the first paragraph.

Admit in part ¶ 28,

B. District Code: BEHD-P, **Exhibit E** attached hereto and incorporated herein by this reference provides:

"The board of education encourages the public and district staff to share their suggestions and concerns and welcomes questions about district policy during Open Forum[...]. The board will refer items in need of action, research and/or recommendation(s) to the superintendent[]"

in the first paragraph.

And under PROCEDURES,

"1. Each open forum participant must list on a sign-up sheet his/her name, address, phone number and topic on which he/she wishes to speak."

C. District Code: BEDH-E, **Exhibit F** attached hereto and incorporated herein by this reference, the Open Forum Request Form, repeats the wording of subparagraph B. above.

D. District Code: BCA, **Exhibit H** attached hereto and incorporated herein by this reference, the School Board Member Ethics statement provides in relevant part:

"D. Encourage the free expression of opinion by all board members and seek systemic communications between the board and students, staff and all elements of the community."

And,

“F. Communicate to other board members and the superintendent expressions of public reaction to board policies and school programs.”

26. RCASD has held fast to the policy, since April 13, 2020, with limited exceptions, that only the meetings held on the second (2nd) and fourth (4th) Tuesday of the month are required to provide for public comment, as shown by **Exhibit I** attached hereto and incorporated herein by this reference, which **Exhibit** identifies the date of the meeting, the location if other than the RCEC, the meeting type, whether or not public comment was allowed, and the number of speakers that spoke. Weaver Affidavit ¶ 20 A, ¶ 20 last paragraph, ¶ 21, ¶ 21 ¶ 22, ¶ 23, ¶ 24 with ¶ 21 C. and Exhibit G and ¶ 23 indicating one specific exception. **Admit** in part ¶ 32, **Admit** in part ¶ 33, **Admit** in part ¶ 37.

27. RCASD schedules meetings of different types, not just regular or special as indicated in **Exhibit D**, District Code: BEDH in the first sentence, as follows: Annual meeting; Study Session; Retreat; Executive Session; Special; Study/Executive Session; Special/Study Session; Special/Executive Session; WDT (no longer applicable as Western Dakota Tech is no longer managed by RCASD); Special/Study/Executive; Special Study Session; Special Executive Session, and Special Retreat. Weaver Affidavit ¶ 21, ¶ 22, **Admits** in part ¶ 25

28. No Retreat held between July 9 2018 and October 12, 2021 posted an agenda allowing for public comment. Weaver Affidavit ¶ 24, **Admit** in part ¶ 33.

29. Holding Retreats or meetings out-of-the RCASD boundaries adds additional expense for members of the public wishing to attend or attend and make public comment. Weaver Affidavit ¶26.

30. Holding open meetings in the RCEC adds the additional burden to the public of having to go through the YMCA's "gatekeepers". Weaver Affidavit ¶ 25.

31. The School Board violated SDCL 1-25-2 in principal, if not in fact, by apparently choosing (voting for) Kara Flynn in executive session, to fill the vacancy in Area 3, as shown by the letter sent to the candidates not chosen. Weaver Affidavit ¶ 27. **Exhibit J, Exhibit K, Exhibit L, Exhibit M, Exhibit N.**

32. The School Board either violated their Policy for Board Meeting Procedures, District Code: BED, **Exhibit O** attached hereto and incorporated herein by this reference, on page 2, Parliamentary Procedure, the first sentence that states:

“ The Board of Education shall utilize Robert’s Rules of Order for Parliamentary Procedure for conducting official meetings held by the Board of Education (School Board).”

or Matt Stevens, a Board member, was mistaken in his statement on page two (2), third paragraph, third sentence, of the attachment to Weaver’s Formal Complaint to the State’s Attorney (**Exhibit K**) when Matt Stevens noted on December 2, 2020, that Robert’s Rules of Order are a “guideline that is loosely followed”. Weaver Affidavit ¶ 27 vi.

33. Everyone that testified before the Senate State [Of] Affairs Committee Hearing, **Exhibit P** attached hereto and incorporated herein by this reference, and before the House State Affairs Committee Hearing, **Exhibit Q** attached hereto and incorporated herein by this reference, indicated no intent to change the intent of having all official meetings open to the public unless a specific law is cited to close the official meeting, by using the words “regularly scheduled official meeting”. Quite the contrary was stated—they supported public comment at all open meetings and that “no change” in the law was contemplated. Weaver Affidavit ¶28, ¶ 29.

34. “Regularly scheduled official meeting” is not defined in South Dakota Statutes or in South Dakota Supreme Court decisions. **Admit ¶ 31.**

35. RCASD’s interpretation of the changes to SDCL 1-25-1 et seq. as espoused by their superintendent, and attributed to their attorney, are not in keeping with the intent of providing:

“At a minimum, public comment shall be allowed at regularly scheduled official meetings which are designated as regular meetings by statute, rule, or ordinance.”

in accordance with SDCL 1-25-1 the fourth paragraph, second sentence, as demonstrated by Weaver’s review of the meeting Notices and Minutes. Weaver Affidavit ¶ 21, **Exhibit I**, ¶ 22, ¶ 23, ¶ 24, ¶ 25, ¶ 30, **Admit** in part ¶ 30.

36. RCASD is a political subdivision of the State of South Dakota organized under SDCL Chapter 13-5 and consists of all of Rapid City, South Dakota, and portions of the surrounding area in Pennington and Meade Counties, with its principal place of business at 625 9th Street, Rapid City, SD 57701. **Admits ¶ 23.**

37. An actual controversy has arisen and now exists between Plaintiffs and Defendant concerning the definition of “regularly scheduled official meetings” of the Board. **Admit ¶ 40.**

Respectfully submitted this ____ day of October, 2021.

JASPER LAW OFFICE

s/s Kenneth E. Jasper
Kenneth E. Jasper
Attorney for Plaintiffs
201 Main Street, Suite # 107
PO Box 2093
Rapid City, SD 57709-2093
Phone:(605) 342-6565
Fax: (605) 348-3288
jasperl@rushmore.com

STATE OF SOUTH DAKOTA)
)ss
PENNINGTON COUNTY)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

**SD CITIZENS FOR LIBERTY, INC.,
TONI E. WEAVER, MARCY M.
MORRISON, BRIAN T. LARSON AND
SAMANTHA MCCULLY,**

51Civ21-000749
Hon. Craig Pfeifle

Plaintiffs,

**Defendant's Statement of
Undisputed Material Facts**

vs.

**RAPID CITY AREA SCHOOL
DISTRICT 51-4,**

Defendant.

Defendant, Rapid City Area School District ("District"), through counsel, and pursuant to SDCL §15-6-56(c)(1), respectfully offers this *Defendant's Statement of Undisputed Material Facts* in support of its *Motion for Summary Judgment*.

1. The Rapid City Area School District, 51-4 ("District") is a school corporation, pursuant to SDCL § 13-5-15, that provides K-12 education services to the Rapid City area. Affidavit of Jim Hansen, ¶3.

2. The District serves approximately 13,000 children and employs more than 1,800 employees. *Id.* at ¶4.

3. The District operates under the authority and management of the Board of Education ("Board"). *Id.* at ¶3.

4. Every year, the Board, at its annual meeting, designates the time and place for its regularly scheduled meetings, as required under South Dakota law. Exhibit A.¹

5. During its regularly scheduled meetings, the Board allows Open Forum, where the public can come in and address the Board with issues, concerns, recommendations, and/or general comment. Affidavit of Jim Hansen, ¶8; Exhibit D.

6. As elected officials, the Board takes great interest in learning and appreciating views of the public. The Board regularly communicates with the community in person, through social media, through phone calls, and in email. Affidavit of Jim Hansen, ¶9.

7. In addition to its regularly scheduled official meetings, the Board schedules Special Meetings that include Study Sessions and Board Retreats. Study Sessions relate to specialized topics which require additional consulting, research, and information for the Board. *Id.* at ¶10.

8. Study Sessions are meetings where the Board takes an in-depth review of a particular subject matter which requires more time and discussion before any formal action is taken. *Id.* at ¶11; Exhibit B.

9. Similarly, Board Retreats are an opportunity for the Board to meet to discuss the Board's current and future work at the District – including planning what matters will be coming before the Board, what presentations are necessary for the Board's consideration and the public's interest, and to

¹ Exhibits referenced are to those exhibits attached to the *Affidavit of Jim Hansen in Support of Motion for Summary Judgment* also filed herewith.

communicate with Administration about updates, questions, and concerns. Affidavit of Jim Hansen, ¶12; Exhibit C.

10. It would be impractical to have these in-depth conversations (Study Sessions and Board Retreats) during our regularly scheduled meetings given the amount of business we conduct at our regularly scheduled meetings. Oftentimes, our regular meetings can be lengthy due to the amount of business we have to accomplish each month. Affidavit of Jim Hansen, ¶13.

11. Like regularly scheduled meetings, notice of the time and place, and the agenda for, Study Sessions and Board Retreats are posted on the District website: www.rcas.org/our-district/board-of-education/. *Id.* at ¶14.

12. All Special Meetings (Study Sessions and Board Retreats) and regularly scheduled meetings are open to the public. *Id.* at ¶15.

13. No formal Board action is taken at Board Retreats or at Study Sessions. *Id.* at ¶16.

14. The Board does not include Open Forum on the agenda for Special Meetings (Board Retreats or Study Sessions). *Id.* at ¶17.

15. Before formal action is taken by the Board on any matter discussed in Study Sessions or Board Retreats, the public gets an opportunity to comment at Open Forum during a regularly scheduled meeting. *Id.* at ¶18.

16. The only time a meeting is closed to the public is during Executive Session. *Id.* at ¶19.

17. The Board is permitted to close Executive Session for the limited purposes described in SDCL § 1-25-2. Discussions in Executive Session largely relate to confidential employee issues, student discipline issues, and matters that require legal advice. No formal action is taken during Executive Session. *Id.* at ¶17.

18. Plaintiffs named in this action have appeared (some regularly appear) at Open Forum to address matters with the Board at its regularly scheduled meetings. *Id.* at ¶21; Exhibit D.

19. Plaintiffs named in this action have emailed the Board to address concerns, issues and/or to provide general comment to the Board. Affidavit of Jim Hansen, ¶22; Exhibit E.

20. Before taking any Board action, the Board thoroughly reviews the matter and considers the public's input, including Plaintiffs' input. Affidavit of Jim Hansen, ¶23.

21. Plaintiffs, neither individually nor cumulatively, filed an appeal to Circuit Court pursuant to SDCL § 13-46-1 and, instead, filed a Declaratory Judgment Action against the District. *Id.* at ¶24.

Dated this 1st day of December, 2021.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: /s/ Kelsey B. Parker
KELSEY B. PARKER
333 West Boulevard, Ste. 400
P.O. Box 2670
Rapid City, SD 57709-2670
Telephone: (605) 343-1040
Facsimile: (605) 343-1503
kparker@bangsmccullen.com
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned certifies that on December 1, 2021, she caused true and correct copies of the above to be served upon each of the persons identified below as follows:

<input type="checkbox"/>	First Class Mail	<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Hand Delivery	<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Electronic Mail	<input checked="" type="checkbox"/>	Odyssey / ECF System

Kenneth E. Jasper
JASPER LAW OFFICE
201 Main St., Ste. 107; PO Box 2093
Rapid City, SD 57709-2093
ATTORNEYS FOR PLAINTIFFS

/s/ Kelsey B. Parker
KELSEY B. PARKER

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL DISTRICT

51CIV21-000749

SD CITIZENS FOR LIBERTY, INC.,)
TONI E. WEAVER, MARCY M.)
MORRISON, BRIAN T. LARSON,)
AND SAMANTHA C. McCULLY,)

Plaintiffs,)

v.)

RAPID CITY AREA SCHOOL)
DISTRICT 51-4,)

Defendant.)

**Plaintiffs' Disagreement with
Defendant's Statement of
Undisputed Material Facts**

Plaintiffs Disagree with Defendant's Statement of Undisputed Material facts on the grounds and for the reasons as follows:

1. Plaintiffs do not intend to impugn the integrity of Jim Hansen because of what appear to be inaccuracies in his Affidavit of November 19, 2021 as he may not have been requested to thoroughly review the Agendas and Minutes of the RCASD Board meetings from 07/09/2018 thru 10/12/2021 for the details that are displayed in Exhibit I of Tonchi Weaver's First Affidavit provide, and for the further reason that he was not a member of the RCASD Board between July of 2017 and July of 2020.

2. Defendant's #7 is incomplete. The Board has other named types of meetings than included in this statement. Affidavit of Weaver ¶ 21, ¶30, and Exhibit I of that Affidavit. In addition, there are other items at "Study Sessions" other than consulting, research, and information for the Board and at times motions and votes are taken of items usually of public interest without public comment being permitted. First Affidavit of Weaver ¶ 21 A, ¶ 22.

3. Defendant's # 10 is misleading. By claiming it is impractical to have in-depth conversations at the normal twice-a-month meetings, viewed as business meetings by at least two Board members, because they are quite frequently lengthy, supports permitting public comment during Study Sessions and Board Retreats when they are not now normally permitted. Exhibit G

of Weaver's First Affidavit, page 4, lines 8-13 comment by Member Kate Thomas; page 6, lines 12-13, comment by Member Amy Policky.

4. Defendant's # 11 does not comply with all the requirements of SDCL 1-25-1.1 as they do not in addition to the website post a copy of the proposed Agenda, visible to the public at the principal office of the RCASD. The public has to go through YMCA personnel to access the RCASD principal office. Weaver's First Affidavit ¶ 25.

5. Defendant's # 12 is untrue. A specific example of one such occurrence was on December 2, 2021 "Study Session" when one of the items discussed and voted on was the Stipend for school employees in an amount up to Two Point Two-Five Million Dollars \$2,250,000.00, if all of the approximately One Thousand Eight Hundred employees receive the proposed One Thousand Two Hundred Fifty Dollars \$1,250.00 Stipend and the State Report Card was not voted on that day. This meeting was listed as a "Zoom meeting" and the doors were locked but the media was in attendance. Weaver gained initial access through a media representative and then her access was blocked by Shirley Fletcher, an administrative assistant to the Superintendent, stating the public was not permitted to attend. Weaver inquired of Shirley if the Board was present. Shirley affirmed that they were and for this reason Weaver believed she should also be permitted to physically attend. Then Shirley later relented and allowed Weaver to attend. Another member of the public, Florence Thompson, also then attended but Weaver and Thompson were only allowed to observe. This Stipend was of much interest to Weaver and Thompson as well as was the State Report Card, that indicates Student Achievement Scores for the District, and they each wished to provide public comment on these issues. Second Affidavit of Weaver ¶ 5.

6. Defendant's #13 is not true. Exhibit I of Weaver's First Affidavit indicates a resolution was made on 11/16/2020 at a meeting titled a Special Meeting; the Board voted on two action items on 01/05/2021 at a meeting titled a special Meeting; and the Board voted on one action item on 03/01/2021 at a meeting titled a Special/Study Session. In addition another specific example is provided in Paragraph No. 5 above. Second Affidavit of Weaver ¶ 5. The Update of Exhibit I Attached hereto as Exhibit I-1 only adds to the last page of Exhibit I.

7. Defendant's # 15 is untrue and misleading. A specific example is in Paragraph No. 5 above. Further it is misleading because if all discussion occurs during Study Sessions or

Board Retreats, and public comment is prohibited while matters are being discussed and information is being provided to the Board by the administration, and public input is not allowed, until brief comments at the normal twice a month Business Meetings, when it is impractical to allow lengthy comment, amounts to a "right" to be provided public comment is being denied because it is severely limited in time. Second Affidavit of Weaver ¶ 8,. Affidavit of Jim Hansen ¶ 13 stating it is impractical. This way the Board only gets to hear only what the administration chooses to provide them.

In addition, Exhibit I of Weaver's First Affidavit indicates meetings were held in Custer State Park, The Outdoor Campus, and The Lodge in Deadwood raising the question of public access. Whether a Zoom meeting, of which there were many, is open to the public is also subject to dispute. Normally, during the Covid concerns, Zoom meetings were conducted with Board members usually at separate remote locations. Second Affidavit of Weaver ¶ 8, ¶ 9.

Another Study Session discussing an item of public interest, the Ten Point Grading Scale, was held on November 9, 2021 by Zoom, without public participation, and later Passed on January 4, 2022. Another Special meeting on the Canyon Lake Boiler System, without public attendance was held. Weaver's Second Affidavit ¶ 7.

8. Defendant's # 16 is misleading. Weaver's First Affidavit ¶ 25 and Exhibit I of that Affidavit show when meetings were held outside of the District, which essentially allows the inference that they are closed to the public.

9. Defendant's # 17 is untrue. First Affidavit of Weaver ¶ 27. Formal action was taken by a vote that Weaver filed a Complaint about to the Pennington County State's Attorney that was deemed a "straw vote" and therefore inconsequential and not prosecuted. A reasonable inference is that a vote occurred and a person had been decided upon at that Executive session by sending letters to the ones rejected. Exhibits J, K, L M, and N. of Weaver's First Affidavit.

10. Defendant's # 18 is misleading. Public Comment is limited to the meeting purpose in accordance with District Code: BEDH, Exhibit D of Weaver's First Affidavit.

11. Defendant's # 20 is misleading. Public Comment is normally only allowed at the twice a month Business Meetings and not normally allowed at Study Sessions and Retreat Meetings. At the business meetings there is limited time for public comment as it would be

“impractical” as stated by Defendant’s # 10. Exhibit I of Weaver’s First Affidavit and ¶ 21 C, and ¶ 23 and Affidavit of Jim Hansen ¶ 13 stating it is impractical.

12. Defendant’s #21 is true but misleading. Plaintiffs did not file an appeal, as there was no Board action to appeal from. Denial of public comment at other than their normal business meeting, which they term the only “regularly scheduled official meetings”, is based on their attorney’s representation of the meaning of SDCL 1-25-1. First Affidavit of Weaver ¶ 20 A, ¶ 21 C, and Exhibit G of that Affidavit. Also, Second Affidavit of Weaver ¶ 9.

Respectfully submitted this 13th day of January, 2022.

JASPER LAW OFFICE

s/s Kenneth E. Jasper
Kenneth E. Jasper
Attorney for Plaintiffs
201 Main Street, Suite # 107
PO Box 2093
Rapid City, SD 57709-2093
Phone:(605) 342-6565
Fax: (605) 348-3288
jasperl@rushmore.com

STATE OF SOUTH DAKOTA)
)ss
PENNINGTON COUNTY)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

**SD CITIZENS FOR LIBERTY, INC.,
TONI E. WEAVER, MARCY M.
MORRISON, BRIAN T. LARSON AND
SAMANTHA MCCULLY,**

51Civ21-000749
Hon. Craig Pfeifle

Plaintiffs,

vs.

**RAPID CITY AREA SCHOOL
DISTRICT 51-4,**

Defendant.

**Defendant's Response to
Plaintiffs' Statement of
Undisputed Material Facts**

Defendant, Rapid City Area School District ("District"), through counsel, respectfully submit this *Response to Plaintiffs' Statement of Undisputed Material Facts*.

SUMF No. 1. SD CITIZENS FOR LIBERTY, INC. (hereinafter CFL) was formed and filed as a Perpetual Corporation and issued a Certificate of Incorporation by the SD Secretary of State on July 27, 2010, with Toni E. Weaver one of the incorporators. Affidavit of Mike Mueller, President of CFL, (hereinafter Mueller) ¶ 2, ¶ 3, and Affidavit of Toni E. Weaver (hereinafter Weaver) ¶ 13.

Response: District does not dispute that the SD Citizens for Liberty, Inc. is a South Dakota Corporation.

SUMF No. 2. CFL is a Non-Profit Domestic Corporation in Good Standing in SD, has filed their 2021 Annual Report, and has their address as

P.O. Box 7611, Rapid City, SD 57709. Mueller Affidavit ¶ 4, ¶ 5 and Exhibits A and Exhibit B attached thereto.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute the substance of this paragraph.

SUMF No. 3. CFL was formed as a public interest Corporation with some of its purposes: “To facilitate research, education, public awareness, and policy about the means and opportunities for improving the political process, fairness, democracy, and open, accountable government in South Dakota...” Mueller Affidavit ¶ 6, Weaver Affidavit ¶ 13.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute the substance of this paragraph.

SUMF No. 4. That Toni E. Weaver, is also known as Tonchi Weaver (hereinafter Weaver), and is a lobbyist registered with the State of South Dakota to act on behalf of CFL at all levels of government and specifically with the Rapid City Area School District (hereinafter RCASD). Mueller Affidavit ¶ 7, ¶ 8, ¶ 9, and Weaver Affidavit ¶ 2, ¶ 12, ¶ 14, ¶ 15 and Exhibit A, Exhibit B, and Exhibit C attached thereto.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute the substance of this paragraph.

SUMF No. 5. The membership of CFL is interested in and concerned about RCASD School activities and the quality of the education of children attending RCASD Schools and has directed and authorized Weaver to provide public comment consisting of suggestions and concerns of the membership of CFL at all open meetings of the RCASD School Board meetings in accordance with SDCL 1-25-1 et seq. Mueller Affidavit ¶ 10, and Weaver Affidavit ¶ 19.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute the substance of this paragraph.

SUMF No. 6. Mueller, Weaver, and Marcy M. Morrison state the superintendent of the RCASD School has stated at an open meeting that the RCASD’s attorney has advised them that the words in SDCL 1-25-1 “regularly scheduled official meetings” are only those meetings scheduled a year in advance on the 2nd and 4th Tuesday of each month, and therefore are the only times when a public comment period is required to be provided. Mueller Affidavit, ¶ 11 ¶ 12, Weaver Affidavit ¶ 20A, Exhibit G attached thereto, page 5, lines 15-19, Affidavit of Marcy M. Morrison (hereinafter Morrison) ¶ 12 ¶ 13.

Response: Undisputed.

SUMF No. 7. Mueller, Weaver, and Morrison believe the correct interpretation of the words “regularly scheduled official meetings” are all meetings of the RCASD School Board that are not closed by statute. Mueller Affidavit ¶ 13, Weaver Affidavit ¶ 20, ¶ 20B, ¶ 20C, and ¶ 120D and Morrison Affidavit ¶ 13.

Response: Undisputed that Mueller, Weaver, and Morrison "believe" that "regularly scheduled official meetings" means "all official meetings." District disputes that the law supports this belief. See SDCL §§ 1-25-1; 13-8-10.

SUMF No. 8. CFL's interest in this matter is in keeping with their purposes of facilitating public awareness for open and accountable government and providing their membership and all citizens an opportunity for public comment at all meetings not closed by statute. Mueller Affidavit ¶ 14.

Response: Objection. The facts as stated in this paragraph are not "material" as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute the substance of this paragraph.

SUMF No. 9. Weaver is a resident and taxpayer of Rapid City and the RCASD and has been at all times material hereto. Weaver Affidavit ¶ 3.

Response: Undisputed.

SUMF No. 10. Weaver has three (3) grandchildren that live in and attend RCASD Schools and she has attended RCASD School Board meetings as a grandparent interested and concerned about her grandchildren's School activities and the quality of their education and her desires to be able to make public comments at all open meetings of the RCASD School Board. Weaver Affidavit ¶ 9, ¶ 10, ¶ 11, Defendant Admits in ¶ 5 of Answer to Amended Complaint, (hereinafter all admissions or partial or partial Admissions will only refer to the paragraph (¶) in which the Admission is located. Admit in part ¶ 6, Admit in part ¶ 8, Admit in part ¶ 10.

Response: Undisputed.

SUMF No. 11. Weaver indicates when making public comment whether she is doing so as a lobbyist for CFL or for herself as a grandparent. Weaver Affidavit ¶ 16.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute the substance of this paragraph.

SUMF No. 12. Weaver believes her lobbying efforts have been useful at the state level because some of her efforts were directed to: education funding; student privacy; student safety (school sentinel program); standardized tests; state education standards; conflicts of interest; and open meetings laws (Weaver did not testify in 2019 when SDCL 1-25-1 was Last Amended – all the testimony then is attached as Exhibit P and Exhibit Q in a following ¶). Weaver Affidavit ¶ 17.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute what Weaver believes. District disputes that her beliefs, as stated above, are all factual.

SUMF No. 13. Weaver believes her lobbying efforts have been useful to the RCASD inasmuch as RCASD has implemented part of her suggestions in: Changes in Student Handbook Acknowledgement Form; Requirement for prior written parental consent for non-emergency Medical exams in schools; Ending live-streaming RCASD School Board meetings on Facebook; and Relocating RCASD Board meetings to larger venues to accommodate more public attendance. Weaver Affidavit ¶18.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute what Weavers believes. District disputes that her beliefs, as stated above, are all factual.

SUMF No. 14. Morrison is presently a resident and taxpayer of Meade County and lives outside of the RCASD but previously lived in and was a taxpayer in Rapid City and her children attended RCASD Schools in the past. Morrison Affidavit ¶ 2, ¶ 3, Admit in part ¶ 12, Admit in part ¶ 13, Admit in part ¶ 14 Admit in part ¶ 15.

Response: Undisputed.

SUMF No. 15. After moving out of the RCASD in 2020, Morrison applied for Open Enrollment with RCASD, because she wanted her children to continue their education with RCASD Schools, and her application had not been acted upon at the time of commencement of this suit (June 28, 2021 – Certificate of Service by County Constable), and the application was thereafter approved on August 23, 2021. Morrison Affidavit ¶ 4, ¶ 5, ¶ 6, Exhibits A and Exhibit B attached thereto. Admit in part ¶ 13.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute the substance of this paragraph.

SUMF No. 16. Morrison at all times material hereto has attended some RCASD School Board meetings and as a parent is interested and concerned about her children’s School activities and the quality of their education and

she desires to be able to make public comments at all open meetings of the School Board. Morrison Affidavit ¶ 9, ¶ 10, ¶ 11, Admit in part ¶ 14.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute Morrison’s participation at meetings or her “desires”.

SUMF No. 17. Samantha C. McCully (hereinafter McCully) is a resident and taxpayer of Rapid City and the RCASD and has been at all times material hereto. McCully Affidavit ¶ 2, Admit in part ¶ 19, Admit in part ¶ 20.

Response: Undisputed.

SUMF No. 18. McCully has three (3) children that live in and attend RCASD Schools and she attended School Board meetings as a parent interested and concerned about her children’s School activities and the quality of their education and she desires to be able to make public comments at all open meetings of the School Board. McCully Affidavit ¶ 6, ¶ 7, ¶ 8 Admit in part ¶ 20, Admit in part ¶ 21.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute McCully’s participation at meetings or her “desires”.

SUMF No. 19. Brian T. Larson (hereinafter Larson) is presently a resident and taxpayer of Meade County and lives outside of the RCASD but at all times material hereto his children have been Open Enrolled in the RCASD

(since the fall of 2014). Larson Affidavit ¶ 2, ¶ 3, Admit in part ¶ 15, Admit in part ¶ 16, Admit in part, ¶ 17.

Response: **Undisputed.**

SUMF No. 20. Larson has attended RCASD School Board meetings and at all times material hereto and as a parent is and was interested and concerned about his children's School Activities and the quality of their education and desires to be able to make public comment at all open meetings of the School Board. Larson Affidavit ¶ 6, ¶ 7, ¶ 8, Admit in part ¶ 17.

Response: **Objection. The facts as stated in this paragraph are not "material" as they have no impact on the outcome of this case under the governing substantive law.**

Notwithstanding this objection, District does not dispute Larson's participation at meetings or his "desires".

SUMF No. 21. Both Morrison and Larson have directly contacted Board members and employees of the RCASD multiple times to obtain answers to their questions with limited success or no response in obtaining answers; Larson even contacted the State Athletic Director and State Board of Education who referred him back to the RCASD School Board. Morrison Affidavit ¶ 14, ¶ 17, ¶ 18, ¶ 19, Larson Affidavit ¶ 10, ¶ 11.

Response: **Objection. The facts as stated in this paragraph are not "material" as they have no impact on the outcome of this case under the governing substantive law.**

Notwithstanding this objection, District does not dispute Morrison and Larson have participated in Open Forum and sent emails directly to Board members. See Exhibits D and E, attached to the Affidavit of Jim Hansen filed on December 1, 2021.

Dispute that Morrison or Larson are entitled to information regarding confidential matters.

SUMF No. 22. Larson was issued two (2) "No Contact" letters from RCASD's attorney for his efforts to obtain responses from RCASD employees. Larson Affidavit ¶ 10.

Response: Objection. The facts as stated in this paragraph are not "material" as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute that it had to send Mr. Larson cease and desist letters due to his harassing conduct towards employees of the District.

SUMF No. 23. Both Morrison and Larson are frustrated because they are unable to obtain answers from: Individual Board members; or a response from the Board; or superintendent when they ask questions at meetings, during scheduled "Open Forum" when public comment was scheduled and permitted. Morrison Affidavit ¶ 15, ¶ 20, Larson Affidavit ¶ 11, ¶ 12, McCully Affidavit ¶ 11.

Response: Objection. The facts as stated in this paragraph are not "material" as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute how Larson or Morrison feel.

District disputes and denies that Morrison and/or Larson are owed explanations regarding confidential matters or that Open Forum is an opportunity for the District to answer questions. *See* Board Policy BEDH (Exhibit J to the Affidavit of Kelsey Parker).

SUMF No. 24. Board Policy, District Code BEHD-E requires everyone wanting to provide public comment to complete this form by providing their

name, address, phone number, topic on which they desire to speak, their signature and date so that "These concerns will be addressed in a timely manner[]" and they have never received a response from questions during public comment. Morrison Affidavit ¶ 16, ¶ 17, Larson Affidavit ¶ 9, and McCully Affidavit ¶ 9, ¶ 10.

Response: Objection. The facts as stated in this paragraph are not "material" as they have no impact on the outcome of this case under the governing substantive law.

District disputes and denies that Morrison, McCully, and/or Larson are owed explanations regarding confidential matters or that Open Forum is an opportunity for the District to answer questions. *See* Board Policy BEDH (Exhibit J to the Affidavit of Kelsey Parker).

SUMF No. 25. RCASD has Policies and Procedures relevant to this matter as follows:

A. District Code: BEDH, Exhibit D attached hereto and incorporated herein by this reference, provides:

"All regular and special meetings of the board will be open to the public. At meetings a specific time period will be designated as "Open Forum."" in the first paragraph.

Admit in part ¶ 28,

B. District Code: BEHD-P, Exhibit E attached hereto and incorporated herein by this reference provides:

"The board of education encourages the public and district staff to share their suggestions and concerns and welcomes questions about district policy during Open Forum[] ... The board will refer items in need of action, research and/or recommendation(s) to the superintendent[]"

in the first paragraph.

And under PROCEDURES,

"1. Each open forum participant must list on a sign-up sheet his/her name, address, phone number and topic on which he/she wishes to speak."

C. District Code: BEDH-E, Exhibit F attached hereto and incorporated herein by this reference, the Open Forum Request Form, repeats the wording of subparagraph B. above.

D. District Code: BCA, Exhibit H attached hereto and incorporated herein by this reference, the School Board Member Ethics statement provides in relevant part:

"D. Encourage the free expression of opinion by all board members and seek systemic communications between the board and students, staff and all elements of the community."

And,

"F. Communicate to other board members and the superintendent expressions of public reaction to board policies and school programs."

Response: Undisputed that District Policies BEDH (and its attachments) and BCA speak for themselves.

SUMF No. 26. RCASD has held fast to the policy, since April 13, 2020, with limited exceptions, that only the meetings held on the second (2nd) and fourth (4th) Tuesday of the month are required to provide for public comment, as shown by Exhibit I attached hereto and incorporated herein by this reference, which Exhibit identifies the date of the meeting, the location if other than the RCEC, the meeting type, whether or not public comment was allowed, and the number of speakers that spoke. Weaver Affidavit ¶ 20A, ¶ 20 last paragraph, ¶ 21, ¶ 21 ¶ 22, ¶ 23, ¶ 24 with ¶ 21 C. and Exhibit G and

¶ 23 indicating one specific exception. Admit in part ¶ 32, Admit in part ¶ 33, Admit in part ¶ 37.

Response: Undisputed that District has complied with SDCL § 1-25-1, and only *required* public comment at regularly scheduled official meetings.

SUMF No. 27. RCASD schedules meetings of different types, not just regular or special as indicated in Exhibit D, District Code: BEDH in the first sentence, as follows: Annual meeting; Study Session; Retreat; Executive Session; Special; Study/Executive Session; Special Study Session; Special/Executive Session; WDT (no longer applicable as Western Dakota Tech is no longer managed by RCASD); Special/Study/Executive; Special Study Session; Special Executive Session, and Special Retreat. Weaver Affidavit ¶ 21, ¶ 22, Admits in part ¶ 25

Response: Undisputed that the District schedules regularly scheduled official meetings (meetings scheduled at the annual meeting) and special meetings (meetings scheduled throughout the year to include: Study Sessions, Board Retreats, etc.).

SUMF No. 28. No Retreat held between July 9 2018 and October 12, 2021 posted an agenda allowing for public comment. Weaver Affidavit ¶ 24, Admit in part ¶ 33.

Response: Objection. The facts as stated in this paragraph are not "material" as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District does not dispute the substance of this paragraph.

SUMF No. 29. Holding Retreats or meetings out-of-the RCASD boundaries adds additional expense for members of the public wishing

to attend or attend and make public comment. Weaver Affidavit ¶ 26.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

SUMF No. 30. Holding open meetings in the RCEC adds the additional burden to the public of having to go through the YMCA’s “gatekeepers”. Weaver Affidavit ¶ 25.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District complies with all safety precautions taken at the RCEC building as the YMCA needs to monitor who is entering or leaving the building with children. District disputes that it is a burden to the public to have to inform the front desk person as to the reason a person enters the building. This is especially true when weighed against the interest YMCA has in keeping kids safe in its daycare programs.

SUMF No. 31. The School Board violated SDCL 1-25-2 in principal, if not in fact, by apparently choosing (voting for) Kara Flynn in executive session, to fill the vacancy in Area 3, as shown by the letter sent to the candidates not chosen. Weaver Affidavit ¶ 27. Exhibit J, Exhibit K, Exhibit L, Exhibit M, Exhibit N.

Response: Objection. The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Dispute that the District violated SDCL § 1-25-2 as evidenced by the Pennington County State’s Attorney’s decision, concluding that the District did not violate open meeting laws. See Exhibit N, attached to the Affidavit of Weaver, filed on December 1, 2021.

SUMF No. 32. The School Board either violated their Policy for Board Meeting Procedures, District Code: BED, Exhibit O attached hereto and incorporated herein by this reference, on page 2, Parliamentary Procedure, the first sentence that states:

“The Board of Education shall utilize Robert’s Rules of Order for Parliamentary Procedure for conducting official meetings held by the Board of Education (School Board).”

or Matt Stevens, a Board member, was mistaken in his statement on page two (2), third paragraph, third sentence, of the attachment to Weaver’s Formal Complaint to the State’s Attorney (Exhibit K) when Matt Stevens noted on December 2, 2020, that Robert’s Rules of Order are a “guideline that is loosely followed”. Weaver Affidavit, ¶ 27 vi.

Response: **Objection.** The facts as stated in this paragraph are not “material” as they have no impact on the outcome of this case under the governing substantive law.

Notwithstanding this objection, District disputes there has been any Policy violation, nor has any Plaintiff filed a formal complaint with the District, alleging any policy violation. *See* District Policy KL (Exhibit H to the Affidavit of Kelsey Parker).

SUMF No. 33. Everyone that testified before the Senate State [Of] Affairs Committee Hearing, Exhibit P attached hereto and incorporated herein by this reference, and before the House State Affairs Committee Hearing, Exhibit Q attached hereto and incorporated herein by this reference, indicated no intent to change the intent of having all official meetings open to the public unless a specific law is cited to close the official meeting, by using the words “regularly scheduled official meeting”. Quite the contrary was stated – they supported public comment at all open meetings and that ‘no change’ in the law was contemplated. Weaver Affidavit ¶28, ¶ 29.

Response: Disputed. The transcripts speak for themselves. "And then the last change in Section 2 on the Amendment, on page three of the Bill clarifies that the *minimum standards* for meetings at which public comment is required, and that is regularly-scheduled meetings, and it takes out the ceremonial types of meetings." Senate State of Affairs Committee Hearing, dated February 6, 2019 (Exhibit P, pg. 7, to the Affidavit of Weaver filed on December 1, 2021) (emphasis added). "And this clarifies, this amendment clarifies that at a *minimum*, public comment is required at regularly schedule[d] meetings" House State Affairs Committee Hearing on SB91, dated March 4, 2019 (Exhibit Q, pg.3, to the Affidavit of Weaver filed on December 1, 2021) (emphasis added). The best evidence of what the Legislature intended is the words used in the statute. SDCL § 1-25-1.

SUMF No. 34. "Regularly scheduled official meeting" is not defined in South Dakota Statutes or in South Dakota Supreme Court decisions. Admit ¶ 31.

Response: Undisputed.

SUMF No. 35. RCASD's interpretation of the changes to SDCL 1-25-1 et seq. as espoused by their superintendent, and attributed to their attorney, are not in keeping with the intent of providing;

"At a minimum, public comment shall be allowed at regularly scheduled official meetings which are designated as regular meetings by statute, rule, or ordinance."

in accordance with SDCL 1-25-1 the fourth paragraph, second sentence, as demonstrated by Weaver's review of the meeting Notices and Minutes, Weaver Affidavit ¶ 21, Exhibit I, ¶ 22, ¶ 23, ¶ 24; ¶ 25, ¶ 30, Admit in part ¶ 30.

Response: Objection. This paragraph is not a material fact, but a statement of Plaintiffs' position on the law.

SUMF No. 36. RCASD is a political subdivision of the State of South Dakota organized under SDCL Chapter 13-5 and consists of all of Rapid City, South Dakota, and portions of the surrounding area in Pennington and Meade Counties, with its principal place of business at 625 9th Street, Rapid City, SD 57701. Admits ¶ 23.

Response: **Undisputed.**

SUMF No. 37. An actual controversy has arisen and now exists between Plaintiffs and Defendant concerning the definition of “regularly scheduled official meetings” of the Board. Admit ¶ 40.

Response: Undisputed that the parties disagree over the meaning of the words found in SDCL §§ 1-25-1 and 13-8-10, but the same is not a justiciable controversy.

Dated this 13th day of January, 2022.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: /s/ Kelsey B. Parker

KELSEY B. PARKER

333 West Boulevard, Ste. 400

P.O. Box 2670

Rapid City, SD 57709-2670

Telephone: (605) 343-1040

Facsimile: (605) 343-1503

kparker@bangsmccullen.com

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned certifies that on January 13, 2022, she caused true and correct copies of the above to be served upon each of the persons identified below as follows:

<input type="checkbox"/>	First Class Mail	<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Hand Delivery	<input type="checkbox"/>	Facsimile
<input type="checkbox"/>	Electronic Mail	<input checked="" type="checkbox"/>	Odyssey / ECF System

Kenneth E. Jasper
JASPER LAW OFFICE
201 Main St., Ste. 107; PO Box 2093
Rapid City, SD 57709-2093
ATTORNEYS FOR PLAINTIFFS

/s/ Kelsey B. Parker
KELSEY B. PARKER

**13-8-10. Meetings of board--Election of officers--Designation of depository and newspaper--
Quorum.**

The annual meeting shall be held on the second Monday of July unless otherwise designated by the board at the prior regular meeting. Regular meetings shall be on the second Monday of each month unless otherwise designated by the board at the annual meeting. At the annual meeting the school board shall organize by the election of a president and a vice president from its membership, and such officers shall serve until the next annual meeting. The board shall designate the depository or depositories as provided in § 13-16-15, and the custodians of all accounts; and designate the legal newspaper to be used for publishing all official notices and proceedings. A majority of the members of the school board constitutes a quorum for the purpose of conducting business. Any board action may be taken if it is approved by the majority of the members voting.

Special meetings may be held upon call of the president or in the president's absence by the vice-president, or a majority of the board members. Notice of such meeting shall be given by the business manager to the board members either orally or in writing in sufficient time to permit their presence.

§ 2-3-1. Notice of meeting of political subdivision--Agenda--Violation as misdemeanor.

Each political subdivision shall provide public notice, with proposed agenda, that is visible, readable, and accessible for at least an entire, continuous twenty-four hours immediately preceding any official meeting, by posting a copy of the notice, visible to the public, at the principal office of the political subdivision holding the meeting. The proposed agenda shall include the date, time, and location of the meeting. The notice shall also be posted on the political subdivision's website upon dissemination of the notice, if a website exists. For any special or rescheduled meeting, the information in the notice shall be delivered in person, by mail, by email, or by telephone, to members of the local news media who have requested notice. For any special or rescheduled meeting, each political subdivision shall also comply with the public notice provisions of this section for a regular meeting to the extent that circumstances permit. A violation of this section is a Class 2 misdemeanor.

§ 2. Executive or closed meetings--Purposes--Authorization--Violation as misdemeanor.

Executive or closed meetings may be held for the sole purposes of:

- (1) Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. The term, employee, does not include any independent contractor;
- (2) Discussing the expulsion, suspension, discipline, assignment of or the educational program of a student or the eligibility of a student to participate in interscholastic activities provided by the South Dakota High School Activities Association;
- (3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;
- (4) Preparing for contract negotiations or negotiating with employees or employee representatives;
- (5) Discussing marketing or pricing strategies by a board or commission of a business owned by the state or any of its political subdivisions, when public discussion may be harmful to the competitive position of the business; or
- (6) Discussing information listed in subdivisions 1-27-1.5(8) and 1-27-1.5(17).

However, any official action concerning such matters shall be made at an open official meeting. An executive or closed meeting shall be held only upon a majority vote of the members of the public body present and voting, and discussion during the closed meeting is restricted to the purpose specified in the closure motion. Nothing in § 1-25-1 or this section prevents an executive or closed meeting if the federal or state Constitution or the federal or state statutes require or permit it. A violation of this section is a Class 2 misdemeanor.

§ 16. Public participation in teleconference meeting.

At any official meeting conducted by teleconference, there shall be provided one or more places at which the public may listen to and participate in the teleconference meeting. For any official meeting held by teleconference, that has less than a quorum of the members of the public body participating in the meeting who are present at the location open to the public, arrangements shall be provided for the public to listen to the meeting via telephone or internet. The requirement to provide one or more places for the public to listen to the teleconference does not apply to official meetings closed to the public pursuant to specific law.

§ 2-2-2. Duty of state's attorney on receipt of complaint alleging chapter violation.

If a complaint alleging a violation of this chapter is made pursuant to § 2-2-1, the state's attorney shall take one of the following actions:

- (1) Prosecute the case pursuant to Title 23A;
- (2) Determine that there is no merit to prosecuting the case. Upon doing so, the state's attorney shall send a copy of the complaint and any investigation file to the attorney general. The attorney general shall use the information for statistical purposes and may publish abstracts of such information, including the name of the government body involved for purposes of public education; or
- (3) Send the complaint and any investigation file to the South Dakota Open Meetings Commission for further action.

§ 2-1-1. Words used in ordinary sense.

Words used are to be understood in their ordinary sense except also that words defined or explained in § 2-1-4 are to be understood as thus defined or explained.

1-23-1. Official meetings open to public--Exceptions--Public comment--Violation as misdemeanor.

The official meetings of the state and its political subdivisions are open to the public unless a specific law is cited by the state or the political subdivision to close the official meeting to the public.

It is not an official meeting of one public body if its members provide information or attend the official meeting of another public body for which the notice requirements of § 1-25-1.1 or 1-25-1.3 have been met. It is not an official meeting of a public body if its members attend a press conference called by a representative of the public body.

For any event hosted by a nongovernmental entity to which a quorum of the public body is invited and public policy may be discussed, but the public body does not control the agenda, the political subdivision may post a public notice of a quorum, in lieu of an agenda. The notice of a quorum shall meet the posting requirements of § 1-25-1.1 or 1-25-1.3 and shall contain, at a minimum, the date, time, and location of the event.

The public body shall reserve at every regularly scheduled official meeting a period for public comment, limited at the public body's discretion, but not so limited as to provide for no public comment. At a minimum, public comment shall be allowed at regularly scheduled official meetings which are designated as regular meetings by statute, rule, or ordinance.

Public comment is not required at official meetings held solely for the purpose of an inauguration, swearing in of newly elected officials, or presentation of an annual report to the governing body regardless of whether or not such activity takes place at the time and place usually reserved for a regularly scheduled meeting.

If a quorum of township supervisors, road district trustees, or trustees for a municipality of the third class meet solely for purposes of implementing previously publicly-adopted policy, carrying out ministerial functions of that township, district, or municipality, or undertaking a factual investigation of conditions related to public safety, the meeting is not subject to the provisions of this chapter.

A violation of this section is a Class 2 misdemeanor.

124,

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

SD CITIZENS FOR LIBERTY, INC.,
TONI E. WEAVER, MARCY M.
MORRISON, BRIAN T. LARSON AND
SAMANTHA McCULLY,

Appeal No. 29929

Plaintiffs/Appellants,

vs.

RAPID CITY AREA SCHOOL
DISTRICT 51-4,

Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Craig A. Pfeifle
Circuit Court Judge

Notice of Appeal filed on March 3, 2022

APPELLEE'S BRIEF

Kenneth E. Jasper
JASPER LAW OFFICE
201 Main Street, Ste. 107
Rapid City, SD 57701
Attorneys for Appellants

Kelsey B. Parker
Emily M. Smoragiewicz
BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, LLP
333 West Blvd., Ste. 400
Rapid City, SD 57701
Attorneys for Appellee

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Preliminary Statement

In this Brief, references to the Settled Record are cited as “SR” followed by the appropriate page number. References to Appellants’ Appendix are cited as “App.” followed by the appropriate page number.

Appellants, SD Citizens for Liberty, Inc., Toni E. Weaver, Marcy M. Morrison, Brian T. Larson, and Samantha McCully are collectively referred to as “Appellants” or by their individual names, and Appellee, Rapid City Area School District #51-4 is referenced as “District.”

Jurisdictional Statement

At the conclusion of a hearing on cross Motions for Summary Judgment held on January 27, 2022, Judge Pfeifle granted District’s *Motion for Summary Judgment*. The Order was filed on January 28, 2022. SR 348. Notice of Entry of the Order was filed and served on February 1, 2022. SR 349. Appellants filed and served their *Notice of Appeal* and *Docketing Statement* on March 3, 2022. SR 352, 354.

Statement of the Issues

I. Whether SDCL § 1-25-1 is plain, clear, and unambiguous?

SDCL § 1-25-1 is plain, clear, and unambiguous. The Circuit Court correctly concluded that SDCL § 1-25-1 is unambiguous – it simply requires that public bodies allow public comment, at a minimum, at regularly scheduled official meetings.

Most Relevant Authorities:

SDCL § 1-25-1
SDCL § 13-8-10

State v. Rus, 2021 SD 14, 956 N.W.2d 455.
State v. Thoman, 2021 SD 10, 955 N.W.2d 759.

II. Whether the words “regularly scheduled official meetings” as found in SDCL 1-25-1 are ambiguous?

Although resorting to legislative history is unnecessary because there is no ambiguity in SDCL § 1-25-1, the legislative history is further evidence that the Legislature intended to limit public comment to regularly scheduled official meetings. Based on the Legislature’s use of “official meeting,” “special meeting,” and “regularly scheduled official meeting” throughout the Code, it is clear that the Legislature knew what it was doing when it wrote SDCL § 1-25-1.

Most Relevant Authorities:

SDCL § 1-25-1
SDCL § 13-8-10

Expungement of Oliver, 2012 SD 9, 810 N.W.2d 350.
In re Est. of Flaws, 2016 SD 61, 885 N.W.2d 580.

III. Whether Appellants' failure to request a declaration from the Circuit Court was error?

Appellants' single request to the Circuit Court was a declaration that "regularly scheduled official meetings" as used in SDCL § 1-25-1 means "all official meetings." The Circuit Court declined to re-write SDCL § 1-25-1. Appellants did not seek a declaration on the meaning or interpretation of any District policy. Even when asked by the Circuit Court if there were any outstanding matters, attorney for Appellants did not seek clarification or request a specific ruling. Appellants did not submit proposed findings of fact, conclusions of law, or object to the Order signed by the Circuit Court. It is not the job of the Circuit Court to do Appellants' work.

Most Relevant Authorities:

SDCL § 21-24-3
SDCL § 1-25-1

IV. Whether Appellants unnecessarily sought Court intervention, in contradiction to SDCL § 13-46-1, when an informal resolution process was readily available?

Appellants have unnecessarily burdened the court system when they could have simply followed District's grievance policy (Public

Complaint policy), designed to remedy alleged violations of District policy. Instead, Appellants sought to meet the District in Court and act as champions of the community and frame this matter as a general taxpayer suit, in direct contradiction of SDCL § 13-46-1. Knowing that no Appellant could meet the “person aggrieved” standard found in SDCL § 13-46-1 and knowing that the time limitation prescribed therein had long-since lapsed, Appellants sought to circumvent the appeal process through a Declaratory Judgment action. This Court should deny Appellants’ invitation to broaden the scope, purpose, and intent of SDCL § 13-46-1.

Most Relevant Authorities:

SDCL § 13-46-1

Anderson v. Kennedy, 264 N.W.2d 714 (S.D. 1978).

Murray v. Sioux Falls Bd. of Ed., 225 N.W.2d 589 (S.D. 1975).

Cuka v. Sch. Bd. of Bon Homme Sch. Dist. No. 4-2 of Bon Homme County, 264 N.W.2d 924 (S.D. 1978).

V. Whether the Circuit Court correctly granted District’s Motion for Summary Judgment and Denied Plaintiffs’ Motion for Summary Judgment Simultaneously?

The Circuit Court did not err by deciding the cross motion for summary judgment simultaneously, rather than one issue at a time. Appellants failed to cite to any legal authority which dictates what order a Circuit Court must address issues raised in a declaratory

judgment action. Failure to cite to such authority constitutes waiver of that issue.

Most Relevant Authorities:

SDCL § 15-26A-60

Hart v. Miller, 2000 SD 53, 609 N.W.2d 138.

VI. Whether the Circuit Court correctly declined to declare that the District violated any open meeting law, contrary to the findings of State's Attorney Mark Vargo?

State's Attorney Mark Vargo investigated Appellant Toni Weaver's complaint that District had violated Open Meeting laws on November 18, 2020. State's Attorney Mark Vargo investigated the matter and concluded that no Open Meeting law violation had occurred. The Circuit Court correctly declined to overturn the decision of State's Attorney Mark Vargo, who is charged with the responsibility of investigating complaints of Open Meeting law violations.

Most Relevant Authorities:

SDCL § 1-25-1

SDCL § 1-25-6

Statement of the Case

This is an appeal from the Seventh Judicial Circuit, Pennington County, Judge Craig A. Pfeifle, presiding. Appellants filed a *Declaratory Judgment* action asking the Circuit Court to re-write SDCL § 1-25-1 and declare that “regularly scheduled official meetings” means “official meetings.” SR 23–28; *see* SDCL § 1-25-12(3). Judge Pfeifle correctly rejected Appellants’ invitation and instead, declared that the plain, clear, and unambiguous language of SDCL § 1-25-1 only mandates that public bodies, like school boards, hold public comment at regularly scheduled official meetings. This Court should affirm the Circuit Court’s grant of *Summary Judgment* in favor of District and reject Appellants’ invitation to re-write and/or misread SDCL § 1-25-1.

Now, Appellants argue that the Circuit Court erred by failing to interpret District Policy – despite failing to seek such a remedy in its *Amended Complaint*.¹ *Id.* Similarly, missing from Appellants’ *Amended Complaint* is a request that the Circuit Court declare that the

¹ Appellants did not seek a declaration from the Circuit Court that there was a violation of District Policy. SR 23–28. Indeed, the only reference to District Policy is, “RCASD Policy BHED-P states that the Board encourages the public to share their suggestions and concerns and welcomes questions during “Open Forum”; “Open Forum” being the time designated for public comment.” SR 26 at ¶28.

District violated Open Meeting laws on November 20, 2020. *Id.* The Circuit Court did what it was asked to do – declare the meaning of SDCL § 1-25-1.

Statement of the Facts

1. The District’s Regularly Scheduled Meetings.

District is a school corporation, pursuant to SDCL § 13-5-15, that provides K-12 education services to the Rapid City area. SR 184 at ¶3. The District serves approximately 13,000 children and employs more than 1,800 employees. SR 184-85, ¶¶3–4. The District operates under the authority and management of the Board of Education (“Board”). SR 184. During the school year, the Board holds both regular meetings and special meetings (Board Retreats, Study Sessions). SR 186 at ¶10. Regular meetings are those meetings which are scheduled at the annual meeting each year,² and which occur on a consistent schedule

² As required under SDCL § 13-8-10, the Board designates the time and place for its regularly scheduled meetings at its annual meeting. This is reflected in the Board minutes, made available to the public on the District website. SR 185 at ¶5. For example, the minutes detail,

DESIGNATION OF TIME AND PLACE FOR REGULAR BOARD OF EDUCATION MEETINGS.

The Board will consider establishing a time, day(s) and place for the regular Board of Education meetings.

each month. SR 185, ¶5; SR 190–207; *see also* SDCL §§ 1-25-1, 13-8-10. Regularly scheduled official meetings of the Board are designated as “regular meetings” and are scheduled on the District’s calendar throughout the year. SR 190–207. During its regularly scheduled meetings, the Board conducts its regular business and allows for public comment (Open Forum), where the public can come in and speak. SR 186 at ¶8; SR 220–242.

2. District’s Special Meetings.

In addition to its regularly scheduled meetings, the Board schedules Special Meetings throughout the year that include Study Sessions and

SDCL 13-8-10. – Meetings of Board . . . Regular meetings shall be held on the second and fourth Monday of each month unless otherwise designated by the Board at the annual meeting ...

ADMINISTRATION’S RECOMMENDATION.

It is recommended that the Board of Education approve to designate 5:30 p.m. as the time, second and fourth Mondays of each month as the day(s), and the Rapid City Administration Center is designated as the place for the regular Board of Education Meetings. ...

SR 192.

It continues, “HANSEN moved and JOHNSON seconded to approve ... Designation of Time and Place for Regular Board of Education Meetings”. SR 191.

Board Retreats. SR 186 at ¶10. Study Sessions relate to specialized topics which require additional consulting, research, and information for the Board. *Id.* at ¶11. For example, Study Session topics have included: reviewing/considering a 10 Point Grading Scale, Title VI – Office of Indian Education, RCAS Consulting Agreement with AGI, and RCAS Academic and Pathways. *Id.*; SR 208–215. These meetings are currently video recorded and made available to the public online.³ The public can attend the meetings, but the Board does not regularly reserve time on the Agenda for public comment. SR 187 at ¶¶15, 17.

Similarly, Board Retreats include topics like Board Governance. SR 186 at ¶12; SR 216–219. Board Retreats are an opportunity for the Board to meet and discuss the Board’s current and future work at the District – including planning what matters will be coming before the Board at regular meetings, what presentations are necessary for the Board’s consideration and the public’s interest, and to communicate with District Administration about updates, questions, and concerns. SR 186 at ¶12; SR 216–219. Board Retreats are open to the public, but the Board does not schedule public comment. SR 187 at ¶¶15, 17.

³ [Board of Education 20-21 Agendas, Briefs, Minutes and Videos – Rapid City Area Schools \(rcas.org\)](https://rcas.org)

Before formal action is taken by the Board on any matter discussed during special meetings, the public gets an opportunity to comment at Open Forum during a regularly scheduled meeting. SR 187 at ¶18.

3. Appellants' Communication with the Board.

Appellants have appeared (some consistently) at regularly scheduled Board meetings and speak during public comment. SR 220–242. In addition, Appellants communicate their comments, concerns, and opinions to the Board *via* email. SR 243–260. Appellants Marcy Morrison and Brian Larson have children who attend school at the District, although they live in the Meade County School District. SR 34. Appellant Toni Weaver is a registered lobbyist for Citizens for Liberty⁴ but has no children that currently attend the District.⁵ SR 24 at ¶ 6. Appellant Samantha McCully (Toni Weaver's daughter) is the

⁴ Citizens for Liberty, Inc., holds itself out to be a public interest corporation, which hopes to improve “the political process, fairness, democracy, and open, accountable government in South Dakota.” SR 46 at ¶3.

⁵ Appellant Toni Weaver has grandchildren that attend the District.

only Appellant who has a child attending the District, and lives within the boundaries of the District.⁶ SR 35–36.

4. District Policy.

District Policy permits public comment to be limited in time and scope at regular and special meetings, consistent with SDCL § 1-25-1.⁷ SR 308–310. If members of the public desire to have public comment at special meetings, they can request that public comment be added to an agenda.⁸ SR 305–307

Appellants (and the public) can file a grievance (*Public Complaint*) if they believe that a District policy (including policies on public comment) have been violated. SR 298–304. This internal grievance procedure is intended to informally resolve issues and prevent

⁶ Appellants amended their *Complaint* to add Appellant Samantha McCully, presumably because she is the only Appellant that has a child in the District, and lives within the boundaries of the District.

⁷ Board Policy BEDH provides, “All regular and special meetings of the board will be open to the public. At meetings a specific time period will be designated as ‘Open Forum.’ A time limit may be set both for individual speakers and for the length of the Open Forum time period.” SR 308.

⁸ “[C]itizen[s], groups of citizens, or organization[s]” can request that a “matter[] affecting the school system” be placed on the agenda. The board, upon majority vote, may add items to the agenda during the meeting. SR 305.

unnecessary court intervention. *Id.* Appellants never filed a *Public Complaint* alleging that the District violated its policies on public comment. SR 369–370.

5. The Decision to file a Declaratory Judgment Action.

Instead of filing a *Public Complaint* pursuant to District policy or filing an appeal pursuant to SDCL § 13-46-1,⁹ Appellants sought to act as champions of the community and file a *Declaratory Judgment* action, asking this Court to ignore the plain, clear, and unambiguous language of SDCL § 1-25-1, and declare that “regularly scheduled official meetings” means “official meetings.” SR 27–28.

⁹ SDCL § 13-46-1 provides,

From a decision made by any school board, or by a special committee created under any provision of the school law relative to a school or school district matter or in respect to any act or proceeding in which such officer, board, or committee purports or assumes to act, an appeal may be taken to the circuit court by any person aggrieved, or by any party to the proceedings, or by any school district interested, within ninety days after the rendering of such decision. Provided, however, that all legal actions relative to bond issues must be started within ten days.

6. The Circuit Court's Decision.

In granting District's *Motion for Summary Judgment*, the Circuit Court, in its oral ruling:

1. Declined to declare that District violated Open Meeting laws and concluded that alleged violations of Open Meeting Laws should be brought to the State's Attorney, then through the South Dakota Open Meetings Commission;
2. Determined that Citizens for Liberty was not precluded from bringing a Declaratory Judgment Action in lieu of an appeal, pursuant to SDCL Ch. 13-46;
3. Declared that SDCL § 1-25-1 and SDCL § 13-8-10 are unambiguous; and,
4. Concluded that the District complies with the requirements of SDCL § 1-25-1 and SDCL § 13-8-10 by offering public comment at regularly scheduled official meetings.

SR 376–380.

Standard of Review

This Court reviews the granting of Summary Judgment under the de novo standard of review. *Geidel v. De Smet Farm Mut. Ins. Co. of S. Dakota*, 2019 SD 20, ¶7, 926 N.W.2d 478, 481. This Court should affirm the Circuit Court's grant of summary judgment "when no issues of material fact exist, and the legal questions have been correctly decided." *Harvieux v. Progressive N. Ins. Co.*, 2018 SD 52, ¶9, 915 N.W.2d 697, 700. Issues of statutory interpretation are also reviewed

under the de novo standard. *State v. Erwin*, 2013 SD 35, ¶8, 831 N.W.2d 65, 67. But, “[w]hen the language in the statute is clear, certain and unambiguous, there is no reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed.” *Id.*

Argument

The issues presented to the Circuit Court and at issue on appeal boil down to one simple question: whether (or not) SDCL § 1-25-1 clearly and unambiguously requires public comment *only* at “regularly scheduled official meetings” and not at all official meetings. This singular question was the only declaration Appellants sought from the Circuit Court. SR 27–28. SDCL § 1-25-1 speaks for itself: “The public body shall reserve at every *regularly scheduled official meeting* a period for public comment . . . *At a minimum*, public comment shall be allowed at regularly scheduled official meetings.” SDCL § 1-25-1 (emphasis added).

The Circuit Court correctly concluded that SDCL § 1-25-1 was unambiguous, and that District complied with that statute by holding public comment at its regularly scheduled official meetings.

To reverse the decision of the Circuit Court, this Court would have to disregard its well-settled rules of statutory construction and either add words to (“special meetings and regularly scheduled official meetings”), or remove words (“~~regularly scheduled~~ official meetings”) from, SDCL § 1-25-1. This Court should reject Appellants’ invitation to ignore basic rules of statutory interpretation, and simply declare the meaning of the statute as it reads.

A. The Circuit Court correctly declared that SDCL § 1-25-1 is clear, plain, and unambiguous.

This Court’s well-settled rules dictate that the starting point for statutory interpretation must be the language used in the statute. *State v. Rus*, 2021 SD 14, ¶13, 956 N.W.2d 455, 458. “In conducting statutory interpretation, we give words their plain meaning and effect, and read the statutes as a whole.” *State v. Thoman*, 2021 SD 10, ¶17, 955 N.W.2d 759, 767. If the words in a statute have “plain meaning and effect, we should simply declare their meaning and not resort to statutory construction.” *Id.*; *Zoss v. Schaefers*, 1999 SD 105, ¶6, 598 N.W.2d 550, 552. This Court “must attempt to give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject.” *Gloe v. Union Ins. Co.*, 2005 SD 30, ¶ 8, 694 N.W.2d 252, 256.

SDCL § 1-25-1 is plain, clear, and unambiguous – public comment is only required at “regularly scheduled official meetings.” The relevant portion of SDCL § 1-25-1 provides,

The public body shall reserve at every *regularly scheduled official meeting* a period for public comment, limited at the public body’s discretion, but not so limited as to provide for no public comment. *At a minimum, public comment shall be allowed at regularly scheduled official meetings which are designated as regular meetings by statute, rule, or ordinance.*

SDCL § 1-25-1 (emphasis added).¹⁰ A school board’s regular meetings are designated by statute in Chapter 13-8 (School Boards and School

¹⁰ The entirety of SDCL § 1-25-1 provides,

The official meetings of the state and its political subdivisions are open to the public unless a specific law is cited by the state or the political subdivision to close the official meeting to the public.

It is not an official meeting of one public body if its members provide information or attend the official meeting of another public body for which the notice requirements of § 1-25-1.1 or 1-25-1.3 have been met. It is not an official meeting of a public body if its members attend a press conference called by a representative of the public body.

For any event hosted by a nongovernmental entity to which a quorum of the public body is invited and public policy may be discussed, but the public body does not control the agenda, the political subdivision may post a public notice of a quorum, in lieu of an agenda. The notice of a quorum shall meet the posting requirements of § 1-25-1.1 or 1-25-1.3 and shall contain, at a minimum, the date, time, and location of the event.

The public body shall reserve at every regularly scheduled official meeting a period for public comment, limited at the public body’s discretion, but not so limited as to provide for no public comment. At a minimum, public comment shall be allowed at regularly scheduled

District Officers). SDCL § 13-8-10. Regularly scheduled official meetings are scheduled by the school board at the annual meeting pursuant to SDCL § 13-8-10, which provides,

Regular meetings shall be on the second Monday of each month unless otherwise designated by the board at the annual meeting.

. . . .

Special meetings may be held upon call of the president or in the president's absence by the vice-president, or a majority of the board members. Notice of such meeting shall be given by the business manager to the board members either orally or in writing in sufficient time to permit their presence.

SDCL § 13-8-10¹¹ (emphasis added). SDCL § 13-8-10 makes a distinction between “regular meetings” and “special meetings.” This is

official meetings which are designated as regular meetings by statute, rule, or ordinance.

Public comment is not required at official meetings held solely for the purpose of an inauguration, swearing in of newly elected officials, or presentation of an annual report to the governing body regardless of whether or not such activity takes place at the time and place usually reserved for a regularly scheduled meeting.

If a quorum of township supervisors, road district trustees, or trustees for a municipality of the third class meet solely for purposes of implementing previously publicly-adopted policy, carrying out ministerial functions of that township, district, or municipality, or undertaking a factual investigation of conditions related to public safety, the meeting is not subject to the provisions of this chapter.

A violation of this section is a Class 2 misdemeanor.

¹¹ The entirety of SDCL § 13-8-10 provides,

not the only place in the Code the Legislature has made the distinction between regular and special meetings.¹²

Although “regularly scheduled official meeting” is not specifically defined in Chapter 1-25, the ordinary meaning of the terms “regular”

The annual meeting shall be held on the second Monday of July unless otherwise designated by the board at the prior regular meeting. Regular meetings shall be on the second Monday of each month unless otherwise designated by the board at the annual meeting. At the annual meeting the school board shall organize by the election of a president and a vice president from its membership, and such officers shall serve until the next annual meeting. The board shall designate the depository or depositories as provided in § 13-16-15, and the custodians of all accounts; and designate the legal newspaper to be used for publishing all official notices and proceedings. A majority of the members of the school board constitutes a quorum for the purpose of conducting business. Any board action may be taken if it is approved by the majority of the members voting.

Special meetings may be held upon call of the president or in the president's absence by the vice-president, or a majority of the board members. Notice of such meeting shall be given by the business manager to the board members either orally or in writing in sufficient time to permit their presence.

¹² See SDCL § 34-11A-29 (“A *regular meeting* of the registered voters who are residing within the boundaries of a district shall be held in the first quarter of each calendar year and *special meetings* may be called by the board of directors at any time.”); SDCL § 9-10-8 (“The governing body of any first or second class municipality employing a manager shall hold its *regular meetings* on the first Monday of each month at such hour as may be fixed by it. It may prescribe by ordinance the manner in which *special meetings* may be called ...”); SDCL § 46A-4-45 (“The board of directors shall hold *regular meetings* in its office each month on a day specified in the bylaws of the district at such time as the president shall designate and shall hold such *special meetings* as may be required for proper transaction of business. . . .”).

and “special” clearly indicates that the District is complying with SDCL § 1-25-1. When the statutes in question do not define a term, the Court may use statutes and dictionary definitions to determine the plain and ordinary meaning of the undefined words. *Jackson v. Canyon Place Homeowner’s Ass’n, Inc.*, 2007 S.D. 37, ¶11, 731 N.W.2d 210, 213.

“Regular” means “recurring, attending, or functioning at fixed, uniform, normal intervals” or “constituted, conducted, scheduled, or done in conformity with established or prescribed usages, rules or discipline”.

<https://www.merriam-webster.com/dictionary/regular>

(November 19, 2021). Conversely, “special” means “being other than the usual” or “designed for a particular purpose or occasion.”

<https://www.merriam-webster.com/dictionary/special>

(November 19, 2021). The ordinary meaning of “regular” and “special” is consistent with the descriptions of each in SDCL § 13-8-10.

Indeed, “regular” meetings are those scheduled at the Board’s annual meeting, which occur throughout the year at a set time and place. SDCL § 13-8-10. Conversely, “special” meetings are those meetings scheduled by the Board President throughout the year as needed, which serve a particular purpose. *Id.* They are, indeed, special.

The statutes are clear – public comment is only required at regularly scheduled official meetings. This is a “minimum” burden placed on public bodies. SDCL § 1-25-1. There is no prohibition that prevents public bodies from allowing public comment during other meetings (special meetings), but it is not required. *Id.* Given the Legislature’s chosen language, it is clear that it intended to require public comment *only* at regularly scheduled meetings. Had the Legislature intended to require public comment at all official meetings, it would have said so.

The Circuit Court correctly declared, and this Court should, too, that SDCL §§ 1-25-1 and 13-8-10 are clear, plain, an unambiguous:

Then the determination comes before the Court as to the competing Motions for Summary Judgment. In this particular case, I think it is incumbent upon the Court to advise the parties I believe that the statute is unambiguous. I think SDCL 13-8-10 allows the Board to set those regularly scheduled meetings; that those regularly scheduled meetings are those at which public comment is required.

SR 378–379.

1. Appellants’ requested reading of SDCL § 1-25-1 would require this Court to re-write or misread the same.

Appellants ask this Court to read “regularly scheduled official meetings” as used SDCL § 1-25-1 to mean “official meeting,” a term specifically defined in Chapter 1-25. *Appellants’ Brief*, Pg. 28. In other

words, Appellants want this Court to remove the words “regularly scheduled” from SDCL § 1-25-1. Appellants argue that the words “regularly scheduled” are superfluous – and should be ignored. However, a statute must “be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Kolda v. City of Yankton*, 2014 SD 425, ¶18, 852 N.W.2d 425, 431. This Court must assume that statutes “mean what they say and that legislators have said what they meant.” *Gloe*, 2005 SD at ¶25, 694 N.W.2d at 260.

The statutory maxim expression *unius est exclusion alterius*, meaning “the expression of one thing is the exclusion of another” is applicable here. *In re Est. of Flaws*, 2012 SD 3, ¶19, 811 N.W.2d 749, 753. The fact that the Legislature intentionally and expressly included the words “regularly scheduled” indicates the Legislature’s intention that it did not intend to require public comment at other official meetings. Indeed, the Legislature knows how to include and exclude specific terms in its statutes. *Sanford v. Sanford*, 2005 SD 34, ¶19, 694 N.W.2d 283, 289. Given the Legislature’s inclusion of the words “regularly scheduled”, and its use and differentiation of “official meetings”, “special meetings” and “regularly scheduled meetings”

throughout Chapter 1-25, it is clear the Legislature knew what it was doing when it wrote SDCL § 1-25-1. *See* SDCL § 1-25-12(3)(defining “official meeting”); SDCL § 1-25-1.5 (“Any *official meeting* may be conducted by teleconference...”); SDCL § 1-25-1.6 (“At any *official meeting* conducted by teleconference, there shall be....”); SDCL § 1-25-1.1 (“Each political subdivision shall provide public notice ... preceding any *official meeting*...”); SDCL § 1-25-2 (“*Executive or closed meetings* may be held for the purpose of...”); SDCL § 1-25-3 (“The state shall keep detailed minutes of the proceedings of *all regular or special meetings*...”); SDCL § 1-25-1 (“The public body shall reserve at every *regularly scheduled* official meeting a period for public comment...”).

The Legislature meant what it said: public comment is only required at regular meetings.

B. The words “regularly scheduled official meeting” are not ambiguous, nor does the literal interpretation of the same lead to an absurd or unreasonable result.

Appellants ask this Court to ignore the plain language of SDCL § 1-25-1 and rely on the legislative history of Chapter 1-25. To resort to legislative history, Appellants must first establish that the language used in the statute is ambiguous, or “its literal meaning is absurd or

unreasonable.”¹³ *Expungement of Oliver*, 2012 SD 9, ¶ 6, 810 N.W.2d 350, 352.

1. There is no ambiguity in the words “regularly scheduled official meeting.”

Despite the plain, unambiguous language of the applicable statutes, Appellants argue that the words, “regularly scheduled official meeting” are ambiguous because an individual board member did not understand the legal definition of a regular vs. special meeting.

Appellants’ Brief, Pg. 21–22. A misunderstanding of the applicable statute by an individual board member does not create ambiguity.

Indeed, “[a]n ambiguity exists when a statute is reasonably capable of being understood in more than one sense.” *In re Est. of Flaws*, 2016 SD 61, ¶28, 885 N.W.2d 580, 587 (quotations omitted). However, resorting to legislative history provides further support that the Circuit Court made the correct decision.

¹³ Appellants make no argument that the literal meaning of the words in the statute lead to an absurd or unreasonable result.

2. The Legislative History of Chapter 1-25 contradicts Appellants' position.

First, SDCL § 1-25-1 *previously required* public comment at all official meetings. It provided, “[t]he chair of the public body shall reserve at every official meeting by the public body a period for public comment, limited at the chair’s discretion, but not so limited as to provide for no public comment.” SD LEGIS 14 (2018), 2018 South Dakota Laws Ch. 14 (HB 1172). In 2019, this requirement changed. Senate Bill 91, provided:

The ~~chair of the~~ public body shall reserve at every ~~regularly scheduled~~ official meeting ~~by the public body~~ a period for public comment, limited at the ~~chair’s~~ **public body’s discretion, but not so limited as to provide for no public comment. **At a minimum, public comment shall be allowed at regularly scheduled official meetings which are designated as regular meetings by statute, rule, or ordinance.****

Public comment is not required at official meetings held solely for the purpose of an inauguration, swearing in of newly elected officials, or presentation of an annual report to the governing body regardless of whether or not such activity takes place at the time and place usually reserved for a regularly scheduled meeting.

SD LEGIS 3 (2019), 2019 South Dakota Laws Ch. 3 (SB 91).

Although the language of SDCL § 1-25-1 previously comported with Appellants’ (now erroneous) position, that is not persuasive to the Court’s interpretation of SDCL § 1-25-1 and how it reads today. Indeed,

the Legislature's changes indicate a clear, explicit directive to limit public comment requirements for public bodies.

Appellants offered transcripts from Senate State of Affairs Committee Hearing on SB91 and House State Affairs Committee Hearing on SB91 which, again, support the literal interpretation of the SDCL § 1-25-1. SR 102–125. “And then the last change in Section 2 on the Amendment, on page three of the Bill clarifies that the *minimum standards* for meetings at which public comment is required, and that is regularly-scheduled meetings, and it takes out the ceremonial types of meetings.” SR 108. “And this clarifies, this amendment clarifies that at a *minimum*, public comment is required at regularly schedule[d] meetings” SR 116.

Even if SDCL § 1-25-1 were ambiguous, Appellants' legislative history analysis is not persuasive. Indeed, the legislative history offers further support that public comment at “regularly scheduled official meetings” is the minimum requirement for school boards (and other public bodies).

3. This Court should affirm the Circuit Court’s finding that the District complies with SDCL §§ 1-25-1 and 13-8-10, and only requires public comment at its regularly scheduled meetings.

There is no factual dispute that District only requires public comment at regularly scheduled meetings.¹⁴ SR 186 at ¶8; SR 180 at ¶5.¹⁵ Therefore, the Circuit Court correctly found that the District complies with SDCL § 1-25-1.

The Rapid City Area School District offers public comment at those regularly scheduled official meetings. And the other meetings, while they may be official and require the ability for the public to have that meeting available to them for purposes of review, are not meetings at which the Board is required to offer public comment based upon my reading of the statutes. So I’m going to grant the District’s Motion for Summary Judgment on that particular issue.

SR 379.

The Circuit Court correctly declared that the words of SDCL §§ 1-25-1 and 13-8-10 are unambiguous – public comment is only required at regularly scheduled official meetings – and that the District complies

¹⁴ At times, the District has permitted public comment at special meetings. SR 87–91.

¹⁵ Plaintiffs did not dispute District’s *Statement of Undisputed Facts*, ¶5. See SR 315–318.

with statutory requirement of public comment. This Court need not look any further.

C. Appellants' failure to request a declaration from the Circuit Court regarding District policy.

Appellants argue that the Circuit Court failed to address the issue of whether (or not) District violated its policies, despite making no such request in its *Prayer for Relief*. SR 23–28. Appellants make no reference in their *Amended Complaint* that District violated any of its policies. *Id.* Indeed, the only question before the Circuit Court was the interpretation of a statute (SDCL § 1-25-1). *See* SDCL § 21-24-3. The Circuit Court was not asked to declare the meaning of District policy. SR 23–28. Appellants' failure to seek such a declaration is not an error of the Circuit Court.

When given the opportunity to raise this issue, attorney for Appellants said nothing. The Circuit Court, after making its oral ruling, asked attorney for Appellants if “there was anything else that we need to address from your clients’ perspective,” attorney for Appellants simply inquired about whether or not a written decision would be issued. SR 379–380. Attorney for Appellants never sought a clarification or a specific ruling from the Circuit Court as to the meaning of any District policy. *Id.* Appellants never filed proposed

findings of fact or conclusions of law, and never objected to the *Order*.
See SR 348. It is not the Circuit Court’s job to do the work of
Appellants.

Regardless, consistent with SDCL § 1-25-1, District Policy BEDH provides, “All regular and special meetings of the board will be open to the public. At meetings a specific time period will be designated as ‘Open Forum.’ A time limit may be set both for individual speakers and for the length of the Open Forum time period.” SR 308. As permitted by policy, the District may limit Open Forum, so much as to not allow Open Forum at all during special meetings. SDCL § 1-25-1. This limitation is permissible – especially where members of the community can request that public comment (Open Forum) be added to the Board agenda. *See* SR 305.

The irony of Appellants’ argument is their own failure to follow District policy. Importantly, Appellants made no effort to file a *Public Complaint* – a policy specifically designed to address alleged violations of District policy. SR 298–307. The *Public Complaint* policy is intended to resolve issues – just like the one Appellants allege here. “A ... community member, or group of individuals alleging a violation of a District policy *must file a Public Complaint* and follow the procedures

set forth herein.” SR 298 (emphasis added). Appellants made no effort to informally resolve this matter, and instead, sought Court intervention.

D. Appellants have unnecessarily sought Court intervention when an informal resolution process was readily available.

Although Appellants brought a *Declaratory Judgment* action rather than an appeal pursuant to SDCL § 13-46-1, the scope, purpose and intent of the appeal process cannot be ignored. This Court’s precedent is clear: a taxpayer’s only relief from an action of a school board is by a statutory appeal. SDCL § 13-46-1; *Anderson v. Kennedy*, 264 N.W.2d 714 (S.D. 1978) (A taxpayer’s only relief from an action by a school board is an appeal pursuant to SDCL § 13-46-1.). SDCL § 13-46-1 provides,

From a decision made by any school board, or by a special committee created under any provision of the school law relative to a school or school district matter or in respect to any act or proceeding in which such officer, board, or committee purports or assumes to act, an appeal may be taken to the circuit court by any person aggrieved, or by any party to the proceedings, or by any school district interested, *within ninety days after the rendering of such decision*. Provided, however, that all legal actions relative to bond issues must be started within ten days.

SDCL § 13-46-1 (emphasis added). A plaintiff must be able to show that he/she was a “person aggrieved” by the Board’s decision, which occurred in the last 90 days.

It is no wonder that Appellants sought to circumvent the appeal process where they could not establish that any individual Appellant was a “person aggrieved”, and they missed the statutory 90-day time limitation. Regardless, the purpose of the exclusive remedy under SDCL § 13-46-1 is to prevent taxpayers from dragging school board officials to Court every time they disagree with a decision of the Board, as Appellants have done here. *Blumer v. Sch. Bd. of Beresford Indep. Sch. Dist. No. 68 of Union County*, 250 N.W.2d 282, 284-285 (S.D. 1977). This Court should decline Appellants’ invitation to broaden the appeal procedures laid out in SDCL § 13-46-1.

1. Appellants failed to file a Declaratory Judgment action or an appeal within the 90-day limitation period.

Notably missing from Appellants’ *Amended Complaint* is a date in which they allege *any* Appellant was deprived of the opportunity to speak at public comment, or a date where Appellants requested and were denied an opportunity to have public comment at a special meeting. SR 23–28. Appellants attempt to circumvent the exclusive appeal process in SDCL §13-46-1 by filing a *Declaratory Judgment*

action. However, Appellants cannot substitute a *Declaratory Judgment* action for an appeal pursuant to SDCL § 13-46-1 because they have missed the ninety-day jurisdictional requirement. *See Murray v. Sioux Falls Bd. of Ed.*, 225 N.W.2d 589, 590 (S.D. 1975) (“Nor can injunction be used as a substitute for the appeal provided in SDCL 13-46-1.”). Based on the Affidavit of Appellant Toni Weaver, she knew as of July 18, 2018 (or at the latest of April 13, 2020), that the District was not regularly including public comment at Special Meetings. SR 67 at ¶¶ 23, 24. Appellants did nothing until they filed a *Declaratory Judgment* action on June 28, 2021, long after the 90-day limitation period had lapsed. SR 2–7.

2. Appellants are not “aggrieved persons.”

This Court has repeatedly held that “aggrieved persons” are:

[O]nly such persons as might be able affirmatively to show that they were aggrieved in the sense that by the decision of the board they suffered the denial of some claim of right, either of person or property, or the imposition of some burden or obligation in their personal or individual capacity, *as distinguished from any grievance they might suffer in their capacities as members of the body public.*

Cuka v. Sch. Bd. of Bon Homme Sch. Dist. No. 4-2 of Bon Homme

County, 264 N.W.2d 924, 926 (S.D. 1978) (emphasis added). “Aggrieved persons” must suffer some individual harm. This standard prevents

community members from unnecessarily burdening courts every time they disagree with a decision of the school board.

No private person or number of persons can assume to be the champions of the community, and [on] its behalf challenge the public officers to meet them in the courts of justice to defend their official acts ... Obviously if every taxpayer who disagrees with any act of a school board could appeal to the courts our administrative agencies would be unable to function and our courts would be hopelessly jammed with appeals.

Blumer, 250 N.W.2d at 284–285.

Instead of appealing the Board’s decision pursuant to SDCL § 13-46-1, Appellants are substituting the appeal process for a general taxpayer suit – acting as (alleged) champions of the community. Appellants write in their opening paragraph of their *Amended Complaint* that the harm Appellants have allegedly suffered is suffered by “all members of the public.” SR 23 at ¶1. In *Cuka*, the South Dakota Supreme Court stated,

The repeal of SDCL 13-16-25, when combined with the judicial definition of “person aggrieved,” has left serious questions as to whether general taxpayer suits are allowed in South Dakota and, if so, what the procedural requirements of such suits are. For the reasons given below, we hold that SDCL 13-46-1 denies these taxpayers the standing to appeal the decisions of the school board and the proper remedy would have been to seek an injunction or a writ of prohibition.

Cuka, 264 N.W.2d at 926. Instead of instituting this action and costing the District (and taxpayers) attorney’s fees, Appellants could have simply filed a *Public Complaint* with the District. Unnecessarily burdening the Courts with issues like this is the precise reason the Legislature adopted the “aggrieved person” standard in SDCL § 13-46-1.

This Court should not expand the clear parameters set forth in SDCL § 13-46-1.

E. The Circuit Court correctly granted District’s Motion for Summary Judgment and Denied Plaintiff’s Motion for Summary Judgment simultaneously.

It appears that Appellants are arguing that the Circuit Court erred by deciding issues before the Court one at a time, rather than simultaneously. *Appellants’ Brief*, Pgs. 15–16. For legal support of this argument, Appellants cite to general legal authority on the summary judgment standard. *Id.* Appellants failed to cite to any legal authority which dictates what order a Circuit Court must address issues raised in a declaratory judgment action. Failure to cite to such authority constitutes waiver of that issue. SDCL § 15-26A-60; *Hart v. Miller*, 2000 SD 53, ¶45, 609 N.W.2d 138, 149.

The parties agreed that the issues raised in Appellants' *Amended Complaint* could be addressed most efficiently and appropriately with cross motions for summary judgment. The Circuit Court entered an *Order* on January 28, 2022, which read, "This matter came before the Court on the parties' cross Motions for Summary Judgment ... ORDERED that the Defendant's Motion for Summary Judgment is granted and that the Plaintiff's Motion for Summary Judgment is denied for the reasons stated in the Court's oral ruling at the hearing." SR 348. The Circuit Court made no error in its order of rulings.

F. The Circuit Court correctly denied Appellants' invitation to declare that the District violated any open meeting laws, contrary to the finding of State's Attorney Mark Vargo.

Again, notably missing from Appellants' *Prayer for Relief* is a request from the Circuit Court that it declare that the District violated open meeting laws. SR 23–28. The Circuit Court correctly said,

Let me first comment on that specter that has been raised surrounding an allegation that there has been perhaps in the past and then declaration moving forward concerning surrounding open meeting violations. First, I don't think that the Declaratory Judgment statutes are the appropriate remedy for purposes of allegations of directions concerning open meetings. I mean, the statutes are clear. There are certain meetings that are required to be open and there are certain reports – or references that need to be made, I should say, as it relates to open meetings. In this particular case, to the extent that the plaintiffs are requesting that the Court declare a violation of South

Dakota Open Meeting Law, I'm going to decline to do that. The statutory procedure is clear that needs to proceed through the office of the State's Attorney and then through the South Dakota Open Meetings Commission. It is not appropriate, nor do I have the capability sitting as this Court to make those findings at this particular point in time. So to the extent that is being requested, that request for declaration will be denied.

SR 378–379. As detailed by the Circuit Court, Appellants ignore the plain language and proper procedure found in Chapter 1-25 regarding alleged Open Meeting violations, and instead seek Court intervention. *See* Chapter 1-25. Citizens who believe a public body has violated open meeting laws may file a complaint with the State's Attorney. SDCL § 1-25-6. The State's Attorney may: 1) prosecute the complaint; 2) determine that there is no merit to prosecuting the complaint; or 3) send the complaint to the South Dakota Open Meetings Commission for further action. *Id.*

On November 18, 2020, State's Attorney Mark Vargo, responded to an email from Appellant Toni Weaver regarding an alleged violation of open meeting laws. SR 92. State's Attorney Mark Vargo instructed Appellant Toni Weaver on the correct procedure she should follow if she desired to file a formal complaint. (SDCL § 1-25-6). *Id.* He explained to Appellant Toni Weaver,

Please keep in mind that I do not have the authority to instruct other elected public officials how to conduct their business. The authority the law grants me is clearly laid out in statute. I have the authority to receive complaints, investigate and either prosecute offenders or refer cases to the South Dakota Open Meetings Commission.

Id. Subsequently, Toni Weaver filed a formal complaint, which was investigated by the State’s Attorney’s office. SR 97–98. On February 10, 2021, State’s Attorney Mark Vargo concluded, “*I have determined there was no open meetings violation* by the Rapid City Area School Board during the executive session they held on November 12, 2020.” SR 97–98 (emphasis added). Seemingly displeased with this decision, Appellants sought a declaration from the Circuit Court that was contrary to the State’s Attorney’s decision. The Circuit Court did not err when it declined to replace its opinion with the authorities actually tasked with the investigation/determination. The record is clear: the authority tasked with investigating and making determinations on open meeting violations determined that the District did not violate open meeting laws in November of 2020. SR 97–98.

Conclusion

The Circuit Court correctly found that SDCL § 1-25-1 is unambiguous – that public comment is only required at regularly

scheduled official meetings – and that the District complies with that statute. This Court should affirm the decision of the Circuit Court.

Respectfully submitted this 5th day of July, 2022.

BANGS, MCCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: /s/ Kelsey B. Parker

Kelsey B. Parker

333 West Blvd., Ste. 400

P.O. Box 2670

Rapid City, SD 57709-2670

Phone: (605) 343-1040

kparker@bangsmccullen.com

Attorneys for Defendant/Appellee

Certificate of Compliance

Pursuant to SDCL § 15-26A-66(b)(4), Appellee's counsel states that the foregoing brief is typed in proportionally spaced typeface in Century 13 point. The word processor used to prepare this brief indicated that there are a total of 7,075 words in the body of the brief.

/s/ Kelsey B. Parker

Kelsey B. Parker

Certificate of Service

The undersigned hereby certifies that July 5, 2022, the foregoing *Appellee's Brief* was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501-5070
SCClerkBriefs@ujs.state.sd.us

and a true and correct copy of *Appellee's Brief* was provided by electronic mail and U.S. Mail as follows, to:

Kenneth E. Jasper
JASPER LAW OFFICE
201 Main St., Ste. 107; PO Box 2093
Rapid City, SD 57709-2093
ATTORNEYS FOR PLAINTIFFS

/s/ Kelsey B. Parker
Kelsey B. Parker

APPENDIX

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B	Correspondence on Amount of Association's Refund and Interest Following OHE Decision.....	5-8

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF HUGHES)

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

SOUTH DAKOTA LIFE & HEALTH
INSURANCE GUARANTY ASSOCIATION,

Appellant,

vs.

SOUTH DAKOTA BANKERS BENEFIT
PLAN TRUST,

Appellee.

32CIV21-000065

APPELLANT'S BRIEF

Appellant, South Dakota Life & Health Insurance Guaranty Association (the "Association"), by and through its counsel of record, hereby submits the following Appellant's Brief.

PRELIMINARY STATEMENT

Citations to the administrative record will be designated as "AR.," followed by the page number assigned by the South Dakota Department of Labor, Division of Insurance (the "Division"), in its indices. Citations to the Appendix of this Brief will be denoted as "Appellant-Appx.," followed by the corresponding page number(s). A copy of the parties' Amended Stipulation as to Facts and Record is included in the Appendix of this Brief. For clarity, the parties' factual stipulations will be referred to as "Stipulation," followed by the corresponding paragraph number(s), and the parties' record stipulations will be referred to as "Record," followed by the corresponding record/exhibit letter(s).

Appellant-Appx. 6. The OHE's decision is backward: The Trust was *already liable* (and, according to the Plan of Operation, it "remained liable") for assessments related to the Penn Treaty Liquidation prior the passage of Senate Bill 37, and so Senate Bill 37 could not retroactively terminate that pre-existing (and "remaining") liability.

The OHE's decision is also doubly problematic. The OHE's decision retroactively nullified the Trust's liability for assessments made related to the Penn Treaty Liquidation. At the same time, the OHE effectively and retroactively shifted the Trust's share of the financial burden that arose while it was undeniably a member of the Association onto all of the Association's other members. The OHE's application of Senate Bill 37 in this fashion would alter the pre-enactment legal status and obligations of the Association and all of its members, not just those of the Trust. Such a change would clearly be substantive, rather than merely procedural. *Sopko v. C & R Transfer Co., Inc.*, 2003 S.D. 69, ¶ 15, 665 N.W.2d 94, 98-99 (concluding pre-enactment liabilities cannot be altered by subsequent changes in the law because doing so "would constitute a clear violation of the prohibition against giving statutes which control substantive rights retroactive effect"); *see also* 82 C.J.S. Statutes § 574 ("Thus, a retrospective statute is one which gives to preenactment conduct a different legal effect from what it would have had without the passage of the statute"). Thus, Senate Bill 37 did not, and could not, extinguish the Trust's liability to the Association for assessments related to the Penn Treaty Liquidation, and the OHE erred when it concluded otherwise.

D. The Trust Can Participate as a Member in the Association

Finally, although this point would not abrogate the Trust's liability for the Assessments and to some extent it is tethered to the OHE's discussion of ERISA, *infra*, the OHE also erred when it found the Trust "could not be a member of the Association pursuant to state law" after

Senate Bill 37 took effect. Appellant-Appx. 4. This is so, according to the OHE, because SDCL 58-29C-48(12)—the statute defining “member insurer”—and SDCL 58-29C-46.B(2)(d)(i), a statute defining the protective scope of the Act, suggest an entity like the Trust cannot be a member of the Association. However, those two statutes were both adopted in 2003 and have remained as written aside from immaterial changes, *see* S.D. Sess. Laws 2003 ch. 252, §§ 3, 5, whereas, as noted above, the version of SDCL 58-18-88 which required the Trust to be a member of the Association was adopted in 2005. S.D. Sess. Laws 2005 Ch. 272, § 2. Again, the latter-in-time statute controls, *Peterson*, 2001 S.D. 126, at ¶ 29, and SDCL 58-18-88(6) effectively repealed the earlier, inconsistent provisions in these earlier statutes.

While Senate Bill 37 later repealed the language in SDCL 58-18-88 which required the Trust to be a member of the Association, that did not revive the previously repealed provisions in SDCL 58-29C-48(12) and SDCL 58-29C-46.B(2)(d)(i). Rather, “[w]hensoever any act of the Legislature is repealed, which repealed a former act, such former act shall not thereby be revived unless it shall be expressly so provided.” SDCL 2-14-19. Senate Bill 37 did not expressly revive the provisions of SDCL 58-29C-48(12) and SDCL 58-29C-46.B(2)(d)(i). Accordingly, those provisions were not revived, and the Trust is not prohibited from being a member in the Association.

The Montana Supreme Court addressed a similar situation in *State ex rel. Jenkins v. Carisch Theatres, Inc.*, 564 P.2d 1316, 1320 (Mont. 1977). There, one statutory provision (“section 84-3205”) was implicitly repealed through a subsequent legislative enactment (“Chapter 91, Laws of 1937”). *Id.* at 1319 (“We agree with the conclusion that section 84-3205 was repealed by implication”). This latter enactment was, itself, then repealed. *Id.* at 1318. The question was thus “whether section 84-3205 was revived by the repeal of Chapter 91, Laws of

1937.” *Id.* at 1320. However, Montana had an anti-revival statute like SDCL 2-14-19. *Id.*

Consequently, the Court explained:

The legislature in repealing Chapter 91, Laws of 1937, made no express revival of section 84-3205. Therefore, section 84-3205 was not revived and has no force and effect. Neither does the fact that section 84-3205 was carried forward into the Revised Code of Montana, 1947, revive the statute having once been repealed by implication.

Id.; see also *Sunflower Racing, Inc. v. Bd. of Cty. Comm'rs of Wyandotte Cty.*, 256 Kan. 426, 440, 885 P.2d 1233, 1241 (Kan. 1994) (“Once a law is repealed by implication, a later repeal of the repealer statute does not operate to revive the law repealed by implication”); *Lily Lake Rd. Defs. v. Cty. of McHenry*, 619 N.E.2d 137, 140 (Ill. 1993) (“A statute which is repealed by implication is legally eliminated. Repeal of the repealing statute does not revive the repealed law. The legislature must expressly reenact a statute which has been repealed by implication to render it valid and enforceable again”). The same is true here. Thus, the OHE erred when it concluded the Trust was prohibited from being a member of the Association.

In sum, the OHE erred when it held the Association had no authority to issue the Assessments. As a matter of law, Trust is, and remains, liable for any assessments related to the Penn Treaty Liquidation. Thus, the OHE should be reversed.

II. The OHE Erred when it Held ERISA Precluded the Trust from Paying the Assessments

The Court should also conclude the OHE erred when it held ERISA prohibited the Trust from paying the Assessments. According to the OHE, doing so would violate ERISA’s “exclusive benefit” provision, which the OHE held pre-empts the Act’s assessment mechanisms, at least as applied to the Trust. Appellant-Appx. 7-8.

The OHE erred both in its application of ERISA’s “exclusive benefit” provision, as well as in the breadth it gave ERISA’s pre-emptive scope. The “exclusive benefit” (or “exclusive

Michael L. Snyder

From: Charles D. Gullickson
Sent: Wednesday, April 7, 2021 12:00 PM
To: Randie Thompson; Michael Shaw; Terra Fisher-Larson
Cc: Margaret Withers; Mitch A. Peterson; Michael L. Snyder
Subject: RE: SDLHIGA/Bankers Trust

Just FYI, we initiated this wire this morning. Checking our account online, I see the funds have already left our account. Let me know if the funds don't clear the Trust's account by the end of the day. Thanks.

From: Charles D. Gullickson
Sent: Tuesday, April 6, 2021 4:06 PM
To: 'Randie Thompson'; Michael Shaw; Terra Fisher-Larson
Cc: Margaret Withers; Mitch A. Peterson; Michael L. Snyder
Subject: RE: SDLHIGA/Bankers Trust

Thanks for the e-mails; I received both of them. I'll initiate the wire tomorrow and let you know when that happens.

From: Randie Thompson [mailto:randie@erisalawpractice.com]
Sent: Tuesday, April 6, 2021 3:05 PM
To: Charles D. Gullickson; Michael Shaw; Terra Fisher-Larson
Cc: Margaret Withers; Mitch A. Peterson; Michael L. Snyder
Subject: Re: SDLHIGA/Bankers Trust

Thank you. We understand on the timing and appreciate the additional information. A wire transfer tomorrow is fine.

The wire transfer should be sent to the South Dakota Bankers Benefits Trust account with American Bank and Trust in Huron, SD. The routing number is 091407175. For security purposes, I will send the corresponding bank account number to Mr. Gullickson via separate email.

Thanks again and please let me know should you encounter any difficulty effecting the transfer. Best, Randie

From: "Charles D. Gullickson" <CGullickson@dehs.com>
Date: Tuesday, April 6, 2021 at 8:46 AM
To: Randie Thompson <randie@erisalawpractice.com>, Michael Shaw <mfs@mayadam.net>, Terra Fisher-Larson <terra@mayadam.net>
Cc: Margaret Withers <maw@mayadam.net>, "Mitch A. Peterson" <MPeterson@dehs.com>, "Michael L. Snyder" <MSnyder@dehs.com>
Subject: RE: SDLHIGA/Bankers Trust

Thanks for the update. Once I receive the information I need to prepare the wire transfer request and then physically go to our account relationship manager's Wells Fargo branch to sign the request in his presence, and then of course we're at the mercy of Wells Fargo as to how quickly the transfer gets processed. Their cut-off time for a "soft promise" that it would clear today is 3:00 p.m. but realistically I probably need to receive the information by 2:00-ish to make their cut-off time. If your client is not worried about whether it clears today or tomorrow then of course it's not an issue, and getting the information to me any time today or even in the a.m. tomorrow works.

Although it shouldn't make a difference it might be wise to advise your client that I intend to make the payment by wire transfer and not an ACH transfer. Thanks.

From: Randie Thompson [mailto:randie@erisalawpractice.com]
Sent: Tuesday, April 6, 2021 9:18 AM
To: Charles D. Gullickson; Michael Shaw; Terra Fisher-Larson
Cc: Margaret Withers; Mitch A. Peterson; Michael L. Snyder
Subject: Re: SDLHIGA/Bankers Trust

Good morning and thank you for your email below, Mr. Gullickson. I will have the Trust's bank account information to you by end of the day. The Trust understands that based on the timing of when you receive the account information, the refunded assessment may not post until after hours today or tomorrow. Thank you again and I will be back in touch as soon as possible. Best regards, Randie

From: "Charles D. Gullickson" <CGullickson@dehs.com>
Date: Monday, April 5, 2021 at 1:28 PM
To: Michael Shaw <mfs@mayadam.net>, Randie Thompson <randie@erisalawpractice.com>, Terra Fisher-Larson <terra@mayadam.net>
Cc: Margaret Withers <maw@mayadam.net>, "Mitch A. Peterson" <MPeterson@dehs.com>, "Michael L. Snyder" <MSnyder@dehs.com>
Subject: RE: SDLHIGA/Bankers Trust

I am following up on the earlier emails concerning the pending decision issued by the hearing examiner in the South Dakota Bankers Benefit Plan Trust appeals. The South Dakota Life & Health Insurance Guaranty Association intends to initiate a payment tomorrow to refund the protested assessments. I would appreciate having someone on behalf of the South Dakota Bankers Benefit Plan Trust provide me with the appropriate bank and account information so that we can initiate the payment tomorrow electronically.

As required by SDCL 58-29C-52.1(5), we will also pay to the Trust interest at the rate actually earned by the Association while it has held these funds. At all times while we have held the assessments paid under protest all of the Association's funds have been held exclusively in an interest-bearing checking and/or a savings account at Wells Fargo Bank, N.A. Both accounts have paid and continue to pay an identical rate of interest (w/ the exception of March 2020 when our savings account had a lower rate of interest than our checking account; for these purposes I am using the rate paid that month on our checking account).

Note that we received the 2020 assessment of \$77,943.55 on February 28, 2020, and we received the 2021 assessment in the same amount on January 29, 2021. The rate of interest paid on the Association's checking account at Wells Fargo during the month of March 2020 was 0.04% (4 basis points). The interest rate paid on our accounts fell to 0.01% (1 basis point) on April 1, 2020, and has been at that rate since then. By our calculations the Association owes interest on the 2020 assessment of \$10.06 and interest on the 2021 interest of \$1.34. Thus, we intend to initiate payment tomorrow of \$155,898.50.

Thank you for your cooperation in this matter.

Charles D. Gullickson
Davenport, Evans, Hurwitz & Smith, L.L.P.
605.357.1270

DAVENPORT EVANS
LAWYERS

CONFIDENTIAL COMMUNICATION: This email and any attachment may contain information that is privileged, confidential or protected from disclosure. If you suspect you received it in error, please notify us and destroy this email.

From: Mitch A. Peterson
Sent: Tuesday, March 30, 2021 1:51 PM
To: Michael Shaw ; Randie Thompson ; Terra Fisher-Larson
Cc: Charles D. Gullickson ; Michael L. Snyder ; Margaret Withers
Subject: RE: SDLHIGA/Bankers Trust

Much appreciated – thanks, Mike.

From: Michael Shaw <mfs@mayadam.net>
Sent: Tuesday, March 30, 2021 1:45 PM
To: Mitch A. Peterson <MPeterson@dehs.com>; Randie Thompson <randie@erisalawpractice.com>; Terra Fisher-Larson <terra@mayadam.net>
Cc: Charles D. Gullickson <CGullickson@dehs.com>; Michael L. Snyder <MSnyder@dehs.com>; Margaret Withers <maw@mayadam.net>
Subject: RE: SDLHIGA/Bankers Trust

Hi Mitch,

I have visited with Randie and we agree that the refund deadline is April 6.

Mike.

From: Mitch A. Peterson <MPeterson@dehs.com>
Sent: Tuesday, March 30, 2021 1:34 PM
To: Randie Thompson <randie@erisalawpractice.com>; Michael Shaw <mfs@mayadam.net>; Terra Fisher-Larson <terra@mayadam.net>
Cc: Charles D. Gullickson <CGullickson@dehs.com>; Michael L. Snyder <MSnyder@dehs.com>
Subject: RE: SDLHIGA/Bankers Trust

Randie – I hope to connect with our client tomorrow regarding its reasons for wanting a stay. If a stay is not entered, either through stipulation or court order, is your side in agreement that April 6 is the Association's refund deadline? As we read the refund statute, the Association has ten days after the March 23, 2021, within which to refund the money. Under SDCL 15-6-6(a), any time period fewer than eleven days excludes weekends and holidays, which basically means a ten-day deadline is a ten-business-day deadline. Ten business days, or two weeks, after March 23, 2021, is April 6. Please confirm your understanding of the refund deadline.

Best regards.

Mitch Peterson
Davenport, Evans, Hurwitz & Smith, LLP
M: 605-521-4789 | DD: 605-357-1242
DAVENPORT EVANS
LAWYERS

CONFIDENTIAL COMMUNICATION: This email and any attachment may contain information that is privileged, confidential, or protected from disclosure. If you suspect you received it in error, please notify us and destroy this email.

From: Randie Thompson <randie@erisalawpractice.com>

Sent: Friday, March 26, 2021 12:53 PM

To: Mitch A. Peterson <MPeterson@dehs.com>; 'mfs@mayadam.net' <mfs@mayadam.net>; Terra Fisher-Larson (terra@mayadam.net) <terra@mayadam.net>

Cc: Charles D. Gullickson <CGullickson@dehs.com>; Michael L. Snyder <MSnyder@dehs.com>

Subject: Re: SDLHIGA/Bankers Trust

Thank you, Mitch. We will be meeting with our client next Thursday and can address your request at that time. In the meantime, can you please explain the Association's rationale for why it believes a stay is necessary or appropriate in this context? Keep in mind that the following the Hearing Examiner's decision, the funds at issue constitute ERISA plan assets. Best, Randie

From: "Mitch A. Peterson" <MPeterson@dehs.com>

Date: Thursday, March 25, 2021 at 5:09 PM

To: "'mfs@mayadam.net'" <mfs@mayadam.net>, "Terra Fisher-Larson (terra@mayadam.net)" <terra@mayadam.net>, Randie Thompson <randie@erisalawpractice.com>

Cc: "Charles D. Gullickson" <CGullickson@dehs.com>, "Michael L. Snyder" <MSnyder@dehs.com>

Subject: SDLHIGA/Bankers Trust

Dear Mike, Terra, and Randie,

We will discuss the Hearing Examiner's decision with our client to determine whether it intends to appeal within the 30 days allowed under SDCL 1-26-31. We have a more pressing deadline, however, under SDCL 1-26-32, which allows us to request the circuit court to stay the Hearing Examiner's decision (requiring a refund of the 2020 and 2021 assessment payments) within 10 days after the decision (or by April 6). We propose stipulating that the Hearing Examiner's decision will be stayed until 10 days after the earlier of the circuit court's final decision on an appeal or the Association's failure to appeal within the time allowed under SDCL 1-26-31. The stipulation would be presented to Catherine Williamson to enter an order accordingly. If we cannot enter into such a stipulation, we will be required to file a notice of appeal immediately and an application with the circuit court requesting a stay of the decision in order to preserve the Association's rights, and that would just end up costing both sides attorney's fees.

Please let us know if your client is willing to enter into such a stipulation.

Best regards.

Mitch Peterson

Davenport, Evans, Hurwitz & Smith, LLP

M: 605-521-4789 | DD: 605-357-1242

DAVENPORT EVANS
LAWYERS

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal # 29929

SD CITIZENS FOR LIBERTY, INC.,
TONI E. WEAVER, MARCY M.
MORRISON, BRIAN T. LARSON,
AND SAMANTHA C. McCULLY,

Appellants,

v.

RAPID CITY AREA SCHOOL
DISTRICT 51-4,

Appellee.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL DISTRICT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE CRAIG A. PFEIFLE, JUDGE

APPELLANTS' REPLY BRIEF

Kenneth E. Jasper
Jasper Law Office
201 Main Street, Suite 107
P.O. Box 2093
Rapid City, SD 57709-2093

Kelsey B. Parker
Bangs, McCullen, Butler, Foye &
Simmons, L.L.P.
333 West Blvd. Ste. 400
PO Box 2670
Rapid City, SD 57709-2670

NOTICE OF APPEAL FILED: MARCH 3, 2022

A NOTICE OF REVIEW WAS NOT FILED

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal # 29929

NOTICE OF APPEAL FILED: MARCH 3, 2022

A NOTICE OF REVIEW WAS NOT FILED

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**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

**SD CITIZENS FOR LIBERTY, INC.,
TONI E. WEAVER, MARCY M.
MORRISON, BRIAN T. LARSON,
AND SAMANTHA C. McCULLY,**

Appellants,

vs.

Appeal # 29929

**RAPID CITY AREA SCHOOL
DISTRICT 51-4,**

Appellee.

PRELIMINARY STATEMENT

Throughout this Reply Brief, Appellants (Plaintiffs), will be referred to collectively as Citizens, unless a specific Appellant (Plaintiff) is referred to. In that case their name: South Dakota Citizens For Liberty, INC. (hereinafter CFL); Weaver; Morrison; Larson; or McCully will be used. The Appellee (Defendant) Rapid City Area School District 51-4 will be referred to as District or Board. References to the Record will be to the Alphabetical Index page number(s) as (AI-#).

JURISDICTIONAL STATEMENT

Citizens Appeal Circuit Judge Craig A. Pfeifle's Order, granting District's Motion for Summary Judgment and denying Citizens' Motion for Summary Judgment, dated

January 28th, 2022 (AI-348) in accordance with SDCL 15-26A-3 (2) and (4). Notice of Appeal, Docketing Statement, and Notice of Deposit of Cash Bond, and Certificate of Service, were filed with the Seventh Judicial Clerk, March 3, 2022 (AI-352-353, 354-356, and 357 respectively) and served on the District's counsel on March 3, 2022 (AI-358).

District did not file a Notice of Review nor complete Section B of a Docketing Statement all as required by SDCL 15-26A-22. Citizens have filed a Motion to strike all or portions of Appellee's Brief, as that omission is jurisdictional, *Lake Hendricks Improvement Ass'n v. Brookings County Planning & Zoning Com'n*, 2016 S.D. 48, ¶1, 882 N.W.2d 307. A copy of that Motion was served on the District on August 3rd, 2022. This Court as of this writing has not ruled on that Motion.

LEGAL ISSUES

As District rewrote the issues raised by Citizens, even though they did not file a Notice of Review, Citizens use issues identified by District not because Citizens agree they are correct but to directly REPLY to them for convenience and consistency.

District includes argument in their Statement of the Issues that exceed well the provisions of SDCL 15-26A-60 (4).

1. Whether SDCL 1-25-1 is plain, clear, and unambiguous?

The trial court declared that SDCL 1-25-1 was clear, plain and unambiguous even though a plain meaning of the words "Regularly scheduled" supported the Citizens interpretation.

Most relevant cases: *Eite v. Rapid City Area School Dist 51-4*, 2007 S.D. 95 ¶ 23, 739 N.W.2d 264.
Ibrahim v. Department of Public Safety, 2021 S.D. 17, ¶24, 956 N.W.2d 799.
State ex rel. Oster v. Jorgenson, 81 S.D. 447, 455, 136 N.W.2d 870, 874 (1965).

Relevant statutes: SDCL 1-25-1
SDCL 1-25-1.1
SDCL 1-25-1.5
SDCL 1-25-1.6
SDCL 1-25-12(3)
SDCL 13-8-10

2. Whether the words “regularly scheduled official meetings” as found in SDCL 1-25-1 are ambiguous?

The trial court found that “regularly scheduled official meetings” as contained in SDCL 1-25-1 were unambiguous and did not address the scheduling method in SDCL 1-25-1.1 as the Citizens’ basis for their interpretation of the words “regularly scheduled”.

Most relevant cases: N/A

Relevant statutes: SDCL Chapter 1-25
SDCL 1-25-1
SDCL 1-25-1.1
SDCL 13-8-10

3. Whether Appellants’ failure to request a declaration from the Circuit Court was error?

The trial court did not address Citizens’ request for a declaration that District had violated its own Policies even though it was requested to so do.

Most relevant cases: N/A

Relevant Statutes: SDCL Chapter 1-25
SDCL 1-25-2

4. Whether Appellants unnecessarily sought Court intervention, in contradiction to SDCL 13-46-1, when an informal resolution process was readily available?

The trial court Found that a Declaratory Judgment action was appropriate and that and action in accordance with SDCL 13-46-1 was not required in this situation.

Most relevant cases: *Lake Hendricks Improvement Ass’n v. Brookings County Planning & Zoning Com’n*, 2016 S.D. 48, ¶1, 882 N.W.2d 307

Relevant statutes: SDCL 15-26A-22

5. Whether the Circuit Court correctly granted District's Motion for Summary Judgment and Denied Plaintiffs' Motion for Summary Judgment simultaneously?

The trial court granted District's Motion for Summary Judgment and Denied Plaintiffs' Motion for Summary Judgment simultaneously.

Most relevant cases: *Hanna v. Landsman*, 2020 S.D. 33, ¶18, 945 N.W.2d 534
Stover v. Critchfield, 510 N. W. 2d 681, 682 (S.D. 1994).

Relevant statutes: N/A

6. Whether the Circuit Court correctly declined to declare that the District violated an open meeting law, contrary to the findings of State's Attorney Mark Vargo?.

The trial court Declined to declare that the District had violated the state open meeting law and deferred that to the State's Attorney and the South Dakota Open Meetings Commission.

Most relevant cases: *Agar school Dist. No. 58-1 Bd. of Educ., Agar, S.D .v. Mcgee*, 527 N.W.2d 282, 287 (S.D. 1995)
Barnes v. Spearfish School District No. 40-2, 2006 S.D. 13, ¶6, 725 N.W.2d 226
Cass v. Olson, 349 N.W.2d 435, 436 (S.D. 1984)
Hicks v. Gayville-Volin, 2003 S.D. 92, ¶10, 668 N.W.2d 69

Relevant statutes: SDCL 1-25-6
SDCL 1-25-6.1
SDCL 1-25-7
SDCL Chapter 21-24
SDCL 21-24-1
SDCL 21-24-2
SDCL 21-24-7
SDCL 21-24-14

STATEMENT OF THE CASE

Citizens supplement the STATEMENT OF THE CASE as contained in Appellants' Brief by the addition of noting Citizens filed a Motion to Strike all or portions of Appellee's Brief because of District's failure to file a Notice Of Review.

Citizens further note that District has added inaccurate comments, supposition, and facts not of record in their: Statement of the Issues on pages 2-5 of Appellee's Brief; as well as in their statements of the case on pages 6-7; statement of facts pages 7-12; and throughout District's Argument.

STATEMENT OF FACTS

Citizens supplement their STATEMENT OF FACTS as contained in Appellants' Brief by the addition of the following:

1. District notes that Weaver is a registered lobbyist for CFL and has no children in the District –only grandchildren. (District's Brief, page 10, lines 11-13, and footnote 5.) They ignore that Weaver is a homeowner and taxpayer of the District granting her standing. Weaver Affidavit (AI-61, paragraph 3.) District intimates that a lobbyist lacks standing without providing authority for that proposition.

2. District notes that McCully is the only Appellant that lives in the District and has a child in the District. (District's Brief, page 10, line 13, and page 11 lines 1-2.) They also presume, with nothing in the record to support it, that McCully is Weaver's daughter. (District's Brief, page 10, Line 13). They also ignore that McCully is also a homeowner and taxpayer of the District. (AI-139, paragraph 2.)

3. District presumes, with nothing in the record to support it, that Citizens Amended their Complaint because McCully is the only Appellant that lives within the District and has a child (she actually has three children) in the District. (Appellee's Brief, Page 11, footnote 6). Affidavit of McCully (AI-139, Paragraphs 3., 4., and 5.)

4. District resumes their argument to the Trial Court that Citizens were required to comply with SDCL 13-46-1 but the District has not filed a Notice of Review. (Appellee's Brief, Page 12, Lines 3-9.)

5. District states Citizens sought only interpretation of SDCL 1-25-1. (Appellee's Brief, page 6, lines 13-16, and footnote 1, page 7, lines 1-3.) They ignore the Amended Complaint, request for Judgment paragraph 6, seeking: "Such other and further equitable remedies as Plaintiffs are entitled to receive." (AI-23, Paragraph 6.)

Further District ignores Citizens specific requests to the Trial Court for:

"In this case, Plaintiffs are asking this court to require the RCASD School Board to follow their own policies and comply with the spirit and intent of Chapter 1-25 and provide for "Open Forum" at all official meetings except those exceptions specifically defined in § 1-25-2." (Brief Of Plaintiff, AI-163, page 11, lines 28 30)

and:

"Additionally, in this case the Plaintiffs ask the court to require the RCASD School Board to also follow § 1-25-2 and the Board Meeting Procedures, Parliamentary Procedure, of District Code: BED (Exhibit O in Ms. Weaver's Affidavit). That states in relevant part:

"The Board of Education shall utilize Robert's Rules of Order for Parliamentary Procedure for conducting official meetings held by the Board of Education." (Brief of Plaintiff, AI-163 page 11, lines 28-30 and page 12, Lines 1-7.)

Further, District's misstatement of Citizens' position is repeated in Appellee's Argument, page 14, lines 7-9; "This singular question was the only declaration Appellants sought from the Circuit Court." Citizens' requests are specifically outlined as above and show this statement by District is erroneous.

ARGUMENT AND AUTHORITIES

While the District has rewritten Citizen's Statement of the Issues, without a Notice of Review, Citizens use District's headings in this Brief, not because they are correct, but for continuity, consistence, and convenience for Citizens Reply.

Standard of Review

Citizens rely on their Standard of Review in Appellants' Brief.

Argument

A. The Circuit Court correctly declared that SDCL § (sic) 1-25-1 is clear, plain, and unambiguous.

Citizens contend the Circuit Court was in error with this statement, as it is contrary to the clear, plain, simple, and common understanding of the ordinary intelligent person as exemplified by a Board Member, and later President of the Board, Kate Thomas' statement (Exhibit G of Appellants' Brief, page 65, Lines 2-14.), that she viewed those additional meetings as regularly scheduled as they were held every other week opposite of when those meetings scheduled in accordance with SDCL 13-8-10 were held. District acknowledges she is correct by arguing in accordance with <http://www.merriam.webster.com/dictionary/regular> that "Regular" means "recurring, attending, or functioning at fixed, uniform, normal intervals" or "constituted, conducted, scheduled, or done in conformity with established or prescribed usages, rules or discipline." (Emphasis added.) The established rule that was followed in setting these meetings was SDCL 1-25-1.1. (Appellee's Brief page 19.) They are also in accordance with the established rule, SDCL 1-25-1. "[S]pecial" as defined by Merriam Webster, means: 'being other than the usual' or 'designed for a particular purpose or occasion'." (Appellee's Brief, page 19.) This is in keeping with the provision for emergency meetings with less formal notice being required in the second last sentence of SDCL 1-25-1.1.

Further,

"...Black's Law Dictionary, 4th Ed., defines the word 'ordinary' in its adjectival sense as "Regular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or

unusual circumstances***”. *State ex rel. Oster v. Jorgenson*, 81 S.D. 447, 455, 136 N.W.2d 870, 874 (S.D.1965).

District’s business meetings are regularly scheduled twice a month and their other meetings are scheduled with the same regularity as they have been customarily scheduled for several years, as shown by Exhibit H of Appellants’ Brief.

While South Dakota does not appear to have a definition of the ordinary intelligent person in statute or case law in civil matters, there are too numerous to mention cases in criminal law defining unconstitutionally vague as

“...the statute as it applied to the facts of his case was so vague that it did not give a person of ordinary intelligence...fair notice that his contemplated conduct was forbidden.” *Ibrahim v. Department of Public Safety*, 2021 S.D. 17, ¶24, 956 N.W.2d 799. (Emphasis Added.)

Further, This Court has observed:

“The facts regarding Eite’s job search included ...regularly checking with the Career Center, regularly reading the Rapid City Journal,...” (Emphasis added). *Eite v. Rapid City Area School Dist 51-4*, 2007 S.D. 95 ¶ 23, 739 N.W.2d 264.

on no specific timetable, were sufficient to show he was fulfilling his obligation to find suitable work . Again, while not exactly on point, this demonstrates a person doing the same thing repeatedly, even though not on a set schedule, as being “regular”.

Citizens do not assert that SDCL 1-25-1 is unconstitutionally vague but point out that This Court is confident in proclaiming what ordinary intelligent persons are capable of understanding and conversely misunderstanding. Ordinarily intelligent persons think they know the meaning of “bi-weekly” and “bi-monthly”, and yet when they consult a reputable dictionary discover they mean both twice a week and every other week, and twice a month and every other month, respectively. Even attorneys have failed to note

that confusion in contracts. (Counsel observed “bi-monthly” as an engineer for Boeing in a government contract with Boeing and another with Boeing’s subcontractors.)

District contends special meetings are

“indeed, special[.]” as they are for a particular purpose, as are Study Sessions and Board Retreats, that “...relate to specialized topics which require additional consulting, research, and information for the board.”

District then gives specific examples. (Appellee’s Brief, pages 8-9.) It should be obvious to even the casual observer, those topics would likely be of major interest to parents, taxpayers, and other members of the public, as they may be associated with spending taxpayer money and affect children’s grades. These should be prime examples of when public comment should be welcomed by the Board—not ignored or refused.

Citizens contend their prior citations of authorities in Appellants’ Brief are consistent with the above-argument.

1. Appellants’ requested reading SDCL § (sic) 1-25-1 would require this Court to re-write or misread the same.

This is contrary to any of Citizens’ assertions and cannot be found on page 28 of Appellants’ Brief. Citizens respectfully request that “regularly scheduled official meetings” be interpreted to mean all meetings regularly scheduled in accordance with SDCL 1-25-1.1 as stated at the top of page 28 of their Appellants’ Brief. This statute allows for less formal Notice for emergencies—i.e., special or rescheduled meetings as stated in the second last sentence of SDCL 1-25-1.1. An “official meeting” as District points out is defined by statute, SDCL 1-25-12 (3), and nothing in SDCL 1-25-1 relates to how Notice is to be accomplished and that omission includes the provisions of SDCL 1-25-1.5 and SDCL 1-25-1.6 that provide for teleconferences to have public comment.

Citizens contend their prior citations of authorities in Appellants' Brief, and especially the legislative history is consistent with the correct interpretation of the law.

B. The words “regularly scheduled official meeting” are not ambiguous, nor does the literal interpretation of the same lead to an absurd or unreasonable result.

Citizens contend the wording “regularly scheduled official meeting” when read in context and with the other statutes in Chapter SDCL 1-25 are ambiguous. Just as ambiguous as “bi-weekly” and “bi-monthly”. Yes, “bi-weekly” means twice a week and every other week, similar to “bi-monthly” which result in confusion with ordinary intelligent person, and many professionals as well. Using “Regular” to most people means “just like clockwork” on a fixed schedule—just like the District has their business meeting twice a month and other meetings twice a month during weeks when the business meetings are not being held. Kate Thomas, a well-educated member of the Board and President, stated such as cited above.

Reviewing the legislative history as provided in Appellants' Brief leads one to the inescapable conclusion the legislature intended to grant the public more access with each amendment and the ability to provide for public comment with every following and successive legislative enactment. The District contends by adding “regularly scheduled” in and of itself, without regard to the regular scheduling process of SDCL 1-25-1.1 and other provisions in SDCL Chapter 1-25 stands by itself and is dispositive of its meaning. District's position is untenable, given the testimony before the committees—i.e. it was to clarify confusing provisions, add definition, allow for public comment, take out the

ceremonial types of meetings, and most importantly make no substantive changes.
Districts position results in major substantive change.

If meetings are “regularly scheduled” it is intuitive that there must also be meetings “irregularly scheduled” That is provided for by SDCL 1-25-1.1 with the provision in the second last sentence of the statute that states:

“For any special or rescheduled meeting, each political subdivision shall also comply with the public notice provisions of this section for a regular meeting to the extent that circumstances permit.” (Emphasis added.)

As citizens assert, this provision is for unexpected events and emergencies and not meetings scheduled like clockwork every week when the regular business meetings are not being held.

Citizens contend their prior citations of authorities in Appellants’ Brief, and especially the legislative history, is consistent with this interpretation of this law.

1. and 2. Citizens see no need to further Reply to subsections 1. and 2. of this portion of District’s Appellee’s Brief as all these arguments have been addressed above.

3. This Court should affirm the Circuit Court’s finding that the District complies with SDCL §§ (sic) 1-25-1 and 13-8-10, and only requires (sic) public comment at its regularly scheduled meetings.

The District disingenuously picks out paragraph 5 of Citizen’s Twelve (12) Numbered Paragraphs of Plaintiffs’ Disagreement with Defendant’s Statement of Undisputed Material Facts, (Appendix N of Appellants’ Brief, pages 97-100.) wherein Citizens cite the numerous incomplete, misleading, untrue, and sometimes a combination of two of the foregoing characterizations, of Defendant’s Undisputed Material Statements, and then boldly state this wasn’t disputed. The reality is the numbered

Paragraphs in Citizens’ Disagreement do in fact more than once disagree with District’s Statement of Undisputed Material Facts. (Appendix N of Appellants’ Brief.) Citizens assert, as previously stated, the Trial Court was in error—hence this Appeal. As Citizens state, in paragraph 1 of Plaintiffs’ Disagreement with Defendant’s Statement of Undisputed Material Facts, (Appendix N, page 97.) they did not intend to impugn the integrity of Jim Hansen because of what appears to be inaccuracies, as he may not have had sufficient time to thoroughly review all the minutes and provide an explicit summary of all meetings from 07/09/18 through 01/11/22, as Weaver did (Appendix H of Appellants’ Brief.) Further paragraph 5 appears to be a true statement—to the extent of what it says. It leaves out many facts causing this paragraph to be misleading while truthful.

Citizens contend their prior citations of authorities in Appellants’ Brief show District does not comply with the law.

C. Appellants’ failure to request a declaration from the Circuit Court regarding District Policy.

The District is correct that Citizens did not specifically request the Trial Court to address the District’s failure to follow their own Policies in their Complaint. They did however, request in their prayer for relief, Paragraph number 6: “Such other and further equitable remedies as Plaintiffs are entitled to receive.” Further, in Brief of Plaintiffs (AI-142, page 11, lines 25-34 and page 12, lines 1-13.):

“In this case, Plaintiffs are asking this court to require the RCASD School Board to follow their own policies and comply with the spirit and intent of Chapter 1-25 and provide for “Open Forum” at all official meetings except those exceptions specifically defined in § 1-25-2.”

and

“Additionally, in this case the Plaintiffs ask the court to require the RCASD School Board to also follow § 1-25-2 and the Board Meeting Procedures,

Parliamentary Procedure, of District Code: BED (Exhibit O in Ms. Weaver's Affidavit). That states in relevant part:

“The Board of Education shall utilize Robert's Rules of Order for Parliamentary Procedure for conducting official meetings held by the Board of Education.”

Citizens clearly requested the Trial Court to make such ruling and supplied all the documentation necessary for that Court to so do.

The District apparently believes that after the Trial Court made its decision know Citizens should have requested additional rulings, filed proposed Findings of Fact and Conclusions of Law even though the Court the next day signed the District's Order that granted District's Motion for Summary Judgment and denied Citizens' Motion for Summary Judgment. The decision had already been made, Citizens motion had been Dismissed. Nonetheless, the evidence is and was clear, the District violates its own Policies and the Trial Court did not address that request.

D. Appellants have unnecessarily sought Court intervention when an informal resolution process was readily available.

Citizens will not address this issue inasmuch as the District did not file a Notice of Review as required by SDCL 15-26A-22 nor did they file Section B of the Docketing Statement. Failure to do so is jurisdictional. *Lake Hendricks Improvement Ass'n v. Brookings County Planning & Zoning Com'n*, 2016 S.D. 48, ¶1, 882 N.W.2d 307.

E. The Circuit Court correctly granted District's Motion for Summary Judgment and Denied Plaintiff's Motion for Summary Judgment simultaneously.

Apparently the District believes Citizens fault the Trial Court for the manner or order in which the issues presented to it were decided. Citizens contend the Trial Court, for the most part, followed the rules and prior decisions on resolving Summary Judgment issues presented simultaneously. Citizens do not know of any controlling statutes or decisions of this Court specifying the manner of deciding opposing Motions. At least two cases have been decided at which simultaneous or opposing Motions for Summary Judgment have been decided by this Court but no procedure for so doing were discussed. (*Hanna v. Landsman*, 2020 S.D. 33, ¶18, 945 N.W.2d 534, 541) and (*Stover v. Critchfield*, 510 N. W. 2d 681, 682 (S.D. 1994)). Both Citizens and District cite prior decisions of this Court for deciding Summary Judgment and Citizens contend their prior citations are correct. Citizens only appeal the result of the Trial Court's Decisions, not the process.

F. The Circuit Court correctly denied Appellants' invitation to declare that the District violated any open meeting laws, contrary to the finding of States' Attorney Marko Vargo.

While SDCL 1-25-6 to SDCL 1-25-7, inclusive, provide a duty for the State's Attorney and a procedure to have a Complaint heard by the South Dakota Open Meetings Commission there is no provision in this Chapter for relief from a negative decision by the State's Attorney and therefore the Commission never hears the Complaint. That is why this matter is presently before this Court.

SDCL Chapter 21-24 provides for Declaratory Relief, the relief requested by Citizens. SDCL 21-24-1 states:

“Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either

affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.” (Emphasis added.)

Citizens are requesting a positive declaration that the District violated its own policies. Citizens do not request any penalty be assessed for having done so, they want the District to follow their own Policies and the law.

As the District is a public Corporation, it is subject to Declaratory Judgment.

SDCL 21-24-2 provides:

“The word, person, wherever used in this chapter shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal, public or other corporation of any character whatsoever.” (emphasis added.)

SDCL 21-24-7 requires:

“When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”

CFL is a public interest corporation formed for, among other things: “...improving political process,...open, accountable government...” (Affidavit of Mike Mueller, AI-54, paragraph 6.); Weaver is their registered lobbyist, a taxpayer and grandparent of children in the District; McCully is a taxpayer and parent of three children in the District; and Larson and Morrison are parents of children in the district; and the District is responsible for following their own policies, all interested parties are represented. District Policies have the force and effect of law. *Barnes v. Spearfish School District No. 40-2*, 2006 S.D.108, ¶6, 725 N.W.2d 226, 228-229. This court went on to state: “”[S]chool board policies have the force and effect of law and must be complied with.” *Hicks v. Gayville--Volin*, 2003 SD 92, ¶10, 668 NW2d 69, 73, *Barnes* at ¶ 6, 229”. All Citizens have an

interest in ensuring that District follow not just SDCL Chapter 1-25, but their own Policies and Procedures. This lawsuit is intended to make them comply.

Finally, SDCL 21-24-14 declares:

“This Chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.”

As Declaratory Judgments are to be remedial, and the Pennington County State’s Attorney has in reality “ducked” the issue by claiming it was a “Straw Poll” and of no legal effect, Citizens’ sole remedy is Declaratory Judgment. Proof that a decision was made in Executive Session and action taken as a result thereof, is demonstrated by letters being sent to the unsuccessful applicants, clearly showing the open meeting law was violated. This is not like *Cass v. Olson*, 349 N.W.2d 435, 436 (S.D. 1984) where the open meeting law was followed.

While District appears to contend SDCL 1-25-6, to SDCL 1-25-7, inclusive are the exclusive remedy for an open meeting violation, *Agar School Dist. No. 58-1 Bd. of Educ., Agar, S.D. v. McGee*, 527 N.W.2d 282, 287 (S.D. 1995) holds otherwise by stating declaratory relief may be allowed even when another adequate remedy exists. If the State’s Attorney does not follow the law the Open Meetings Commission never has an opportunity to provide Citizens a remedy—essentially no other remedy exists if Declaratory Judgment is unavailable.

If the District continues to function behind closed doors, and the State’s Attorney condones such as harmless, District may continue to so do unless this Court finds a violation and expressly so states.

CONCLUSION AND RELIEF SOUGHT

Citizens have demonstrated that District Policy BEDH requires public comment at all official meetings of the District, regular or special or otherwise titled, except for Executive Sessions or portions of meetings containing Executive Session. They have also proven that the Board violated SDCL 1-25-2 by taking official action during an Executive Session. Citizens assert that “regularly scheduled” should be interpreted to mean all meetings scheduled in accordance with SDCL 1-25-1.1 as it relates to this District and believes it should be applicable in all cases.

Citizens respectfully request a decision stating that:

1. The District shall provide Open Forum during all regular and special meetings, except during Executive Sessions or portions thereof.
2. The District took official action in Executive Session by selecting the candidate announced four days later in an open meeting, as demonstrated by the letters to the unsuccessful candidates.
3. That regularly scheduled as used in SDCL 1-25-1 means all meetings noticed in accordance with SDCL 1-25-1.1.

REQUEST FOR ORAL ARGUMENT

Citizens respectfully request Oral Argument as the same may provide additional information and can answer questions this court may have that are not answered by the Briefs of the respective parties.

Dated this 4th day of August, 2022.

JASPER LAW OFFICE

/s/ Kenneth E. Jasper
Kenneth E. Jasper
Attorney for Appellants/Citizens
201 Main Street, Suite # 107
PO Box 2093
Rapid City, SD 57709-2093
Phone:(605) 342-6565
Fax: (605) 348-3299
jasperlaw@rushmore.com

CERTIFICATE OF SERVICE

Kenneth E. Jasper, the undersigned attorney, hereby certifies that on the 3rd day of August, 2022, he provided a true, complete, and correct copy of Appellants' Reply Brief , for the Citizens For Liberty, INC., et al., to the persons hereinafter next designated by emailing the same to the following persons at the following email addresses which are the last known email addresses of such parties, to-wit:

Shirley Jameson-Fergel, Clerk
South Dakota Supreme Court
SCClerkBriefs@ujs.state.sd.us

Kelsey B. Parker
Attorney for Appellees/District
kparker@bangsmccullen.com

Dated this 4th day of August, 2022.

JASPER LAW OFFICE

/s/ Kenneth E. Jasper
Kenneth E. Jasper
Attorney for Appellants/Citizens
201 Main Street, Suite # 107
PO Box 2093
Rapid City, SD 57709-2093

Phone:(605) 342-6565
Fax: (605) 348-3299
jasperlaw@rushmore.com

CERTIFICATE OF ADDITIONAL SERVICE

Kenneth E. Jasper, the undersigned attorney, hereby certifies that on the 4th day of May, 2022, he provided the Original and two (2) true, complete, and correct hardcopies of Appellant's Reply Brief, for the Citizens For Liberty, INC., et al., to the person hereinafter next designated by placing the same in a securely sealed envelope, with sufficient first-class postage prepaid thereon, and placing the same in the United States Mail. Said envelope was addressed as follows, to-wit:

Shirley Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Dated this 4th day of August, 2022.

JASPER LAW OFFICE

/s/ Kenneth E. Jasper
Kenneth E. Jasper
Attorney for Appellants
201 Main Street, Suite # 107
P. O. Box 2093
Rapid City, SD 57709-2093
Phone:(605) 342-6565
Fax: (605) 348-3299
jasperlaw@rushmore.com

CERTIFICATE OF COMPLIANCE

Kenneth E. Jasper, the undersigned attorney, hereby certifies that the foregoing Appellant's Brief of Appellant, Citizens was prepared using Times New Roman font size 12; that it contains 3,640 words, and 23,406 characters, and 14 pages, as counted by his Microsoft Office Premium 2000 word processing program, which excludes in these limitations: the table of contents; table of cases; jurisdictional statement; statement of legal issues; any addendum (Appendices) materials; or any certificates of counsel, and is in compliance with the rules and requirements set forth regarding a Brief submitted under SDCL 15-26A-66(b).

Dated this 4th day of August, 2022.

JASPER LAW OFFICE

/s/ Kenneth E. Jasper
Attorney for Appellants
201 Main Street, Suite #107
P. O. Box 2093
Rapid City, SD 57709-2093
Phone: (605) 342-6565
Fax: (605) 348-3299
jasperl@rushmore.com