

12 Official Opinions of the Compliance Board 98 (2018)

- ◆ **1(A)(2) Public Body Definition – Determined to be a public body: Community panel created by State statute.**
- ◆ **1(B)(2) Meeting Definition – Determined to be a meeting: Initial meeting of advisory board.**
- ◆ **1(D) Advisory Function – Discussion of recommendations to be made pursuant to statute.**
- ◆ **2(A) Notice Requirement – Generally: Failure to provide notice. Violation**
- ◆ **Violations: § 3-302**

*Topic numbers and headings correspond to those in the Opinions Index posted on the Open Meetings webpage at www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/index.aspx

October 3, 2018

Re: Baltimore City Public School Board Community Panel

The complaint alleges that the Baltimore City Public School Board Community Panel (“Panel”) is a public body subject to the Open Meetings Act and violated it by meeting on November 20, 2017, without giving notice to the public. Neither the City of Baltimore nor the School Board created the Panel, and counsel for each, though acknowledging receipt of this complaint and providing us with information, stated that their clients were not proper recipients of it.

We find that the Panel, an entity created by State statute, was subject to the Act, met to discuss public business without giving notice, and thereby violated § 3-302 of the Act.¹ This matter illustrates the problems that arise when a statute or order creates a temporary advisory board without either placing it within a larger entity or assigning it staff.

As explained below, the Panel does not have a fixed membership or a parent agency. We ask the Mayor’s Office to convey this opinion to the next Panel that the Mayor convenes.

Background

A State statute, Md. Code Ann., Educ. § 3-108.1, creates the Panel for the sole purpose of recommending school board candidates to the Baltimore City Mayor for appointment. Although the Mayor is to “convene the panel,” the Mayor does not appoint the individuals who serve on it. Instead, the statute lists two public and eleven private entities that “may” be represented on the panel. The list of public entities includes the Mayor’s Office and a City Council committee, but not the School Board. Each entity may then “appoint” a “representative” of its own choosing. Educ. § 3-108.1(b)(4).² The

¹ Except as noted, statutory references are to the General Provisions Article of the Maryland Code.

² Educ. § 3. 108.1 provides:

(b)(1) There is a Baltimore City Public School Board Community Panel.

(2) The purpose of the panel is to select nominees to be recommended to the Mayor as qualified candidates for appointment to the board.

statute does not use the term “members,” does not require that the Panel be comprised of any particular number of “representatives,” does not designate a chair, does not provide for the representatives’ selection of a chair, does not place the Panel within a larger entity, such as the City or the School Board, and does not direct any entity to provide staff.³

The statute took effect on July 1, 2017. When School Board vacancies arose later that year, a member of the Mayor’s staff notified the organizations that a Panel would meet and proposed dates for a meeting in November. A roster of Panel “members” includes the Mayor’s staff member; she had been coordinating the application and appointment process for the Mayor with the help of a School Board employee. The Panel met for the sole purpose of deciding which candidates to recommend, and it fulfilled that purpose.

We do not know whether the Panel still exists as constituted. The School Board’s website contains a notice for a Panel meeting in August and a document entitled “Minutes” that lists fourteen attendees, including thirteen from the organizations that were authorized to appoint representatives, and reports on the recommendations that the Panel decided to make. The document does not identify a presiding officer.

Discussion

The questions before us are: (1) Is the Panel a public body, as defined by the Act; if so, (2) did the Panel hold a meeting subject to the Act?; and, if so, (3) did the Panel give the notice required by the Act? We will then address next steps for the Panel for its use when it is next formed.

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- (3) The Mayor shall convene the panel.
 - (4) The panel may include a representative from each of the following organizations, appointed by the organization:
 - (i) The Baltimore Teachers Union;
 - (ii) The Mayor's Office;
 - (iii) The Baltimore City Council Education and Youth Committee;
 - (iv) The Baltimore City Public School Administrators and Supervisors Association;
 - (v) The Maryland Alliance of Public Charter Schools;
 - (vi) The Downtown Baltimore Family Alliance;
 - (vii) The Fund for Educational Excellence;
 - (viii) A parent member of the PTA Council of Baltimore City;
 - (ix) The American Federation of State, County, and Municipal Employees (AFSCME);
 - (x) The Associated Student Congress of Baltimore City;
 - (xi) The American Civil Liberties Union;
 - (xii) The Parent and Community Advisory Board; and
 - (xiii) Disability Rights Maryland.
 - (5) The Mayor may reconvene the panel if the Mayor elects not to appoint a member from the list submitted by the panel under subsections (d)(1)(i) or (i)(6) of this section.
- Baltimore City Board of School Commissioners

³ In contrast, many State statutes assign advisory boards to an agency or department and provide for staff. *See, e.g.,* Md. Code Ann., Agric. §§ 2-1001 and 2-1004 (providing that “[t]here is a Young Farmers Advisory Board in the Department [of Agriculture]” and that “[t]he Department shall provide staff for the Advisory Board.”); *see also, e.g.,* State Government Article §§ 9-202 and 9-204(b) (placing the Commission on Uniform State Laws “in the Executive Department” and authorizing it to hire staff in accordance with the State budget).

1. *The Panel is a “public body” subject to the Act*

The Act defines the term “public body” to include an entity that “consists of at least two individuals” and is created by “a State statute.” § 3-101(h)(1)(i), (ii)(2). Here, the Panel consisted of at least two people and is created by Md. Code Ann., Educ. § 3-108.1(b)(1), which provides: “There is a Baltimore City Public School Board Community Panel.” The Panel is a “public body” as defined by the Act.

2. *The Act applied to the Panel’s meeting in November 2017*

Under § 3-302, public bodies must “give reasonable advance notice” before meeting in open or closed session, unless the meeting is exempt from the Act under § 3-103. Section 3-103 exempts various events and the performance of various types of tasks, or “functions,” from the Act’s requirements. However, the Act does *not* exempt—and therefore applies to—a public body’s meeting to perform an “advisory function.” As relevant here, the Act defines “advisory function” to include “the study of a matter of public concern, or the making of recommendations on the matter, under a delegation of responsibility by: (1) law” § 3-101(c). Md. Code Ann., Educ. § 3-108.1(b)(2) delegates responsibility by “law.” It provides: “The purpose of the panel is to select nominees to be recommended to the Mayor as qualified candidates for appointment to the board.” The Panel’s purpose is thus to perform an advisory function.

The only facts we have on the Panel’s November 2017 meeting are that thirteen individuals affiliated with the listed organizations met to perform the Panel’s advisory function. Minutes of the Panel’s November 20, 2017 meeting can now be found on the School Commissioners’ website. They show that the Panel interviewed five candidates to the Board of School Commissioners and decided whom to recommend for appointment by the Mayor. Those tasks fell within the advisory function delegated to the Panel.

3. *The Panel convened to discuss public business without giving the advance notice required by the Act*

Minutes of the Panel’s November 20, 2017 meeting and a notice for its August 14, 2018 meeting can now be found on the School Commissioners’ website. The minutes list the “attendees” at the November 20 meeting, and show that thirteen, including staff from the City School System, were affiliated with the entities entitled to appoint “representatives.” The minutes also report that the Panel took actions—it chose candidates to recommend to the Mayor—so we will infer that a quorum was present and that a meeting of the Panel occurred. *See* § 3-101(g) (defining the verb “meet” as to “convene a quorum of a public body to consider or transact public business”).

We also infer, in this case, that no notice was given. The statute that created the Panel delegates to the Mayor the responsibility for convening the Panel, and the Panel’s business pertains to the Board of School Commissioners. According to the minutes, staff from each office attended the meeting and “reviewed the applicants.” Our staff transmitted the complaint to both the City and the School Board. Each, by counsel, disclaimed responsibility for staffing the Panel, and, while each entity provided background about the Panel, neither provided a copy of a notice. The complainant’s Public Information Act requests to those entities also did not yield any mention of a notice.

4. *Next steps*

Our role is to provide guidance so as to prevent future violations of the Act, and so we are to send our opinion to the “affected public body.” § 3-207(d). When we have found a violation, the public body is to acknowledge receipt of the opinion, and a member is to summarize it. § 3-211. If a public body has ceased to exist, we are to send the complaint, and presumably any ensuing opinion, “to the official or entity that appointed the public body.” *See* § 3-206.

Here, the statute leaves unclear, at best, whether the Panel exists as an ongoing public body with ongoing members. It seems more likely that the Panel is an ad hoc committee, formed only as necessary, with such “representatives” as the listed entities may choose from time to time. And, no “official or entity” appointed the Panel, or even a quorum of its members. In the interest of seeing that the next Panel complies with the Act, we are sending this complaint to the City, as the Mayor’s Office is best positioned to provide copies of it to any representatives that non-governmental entities choose to appoint, as well as to its own staff and to any representative that it and the City Council chooses to appoint. We are also sending this opinion to the School Board, which we commend for posting notice of the August 18 meeting.

We provide the following additional guidance to the Panel. Its November 2017 discussion, as reported in the document on the School Board website, would likely have fallen within the provisions of the Act that permit a public body to exclude the public from discussions about individual personnel matters and to shield the information of applicants for public employment—had the Panel complied with the conditions that the Act places for closing a meeting under those provisions. *See* §§ 3-305(b)(1), (13); 4-311; *see also* §§ 3-305(d) and 3-213(d). If the next Panel proceeds this way, its notice must specify that the meeting will be closed after the Panel has initially voted, in public, to do so.

We also direct the next Panel to the materials posted on the open meetings webpage of the Attorney General’s website. Particularly useful might be the Compliance Checklist, the “Quick Guide” written for non-lawyers, the forms with instructions for closing a meeting, and Chapters 5 and 6 of the Open Meetings Act Manual. And, if the Mayor’s Office and City Council committee appoint representatives to the next panel, it may be that they can seek advice from the City Law Department on their own participation.

Conclusion

In conclusion, we find that the Panel violated § 3-302 in November 2017 by meeting without giving notice. For the reasons stated above, we have asked the City to provide this opinion to the Panel when it is next formed, in time for the Panel to provide notice and take any steps preparatory to closing part of its meeting, if the Panel chooses to do so. In case the Panel remains unstaffed, we have directed it to materials on the open meetings webpage of the Attorney General’s website.

This opinion is subject to the announcement and acknowledgment requirements in § 3-211. Those requirements are explained on the open meetings webpage, under the heading for the complaint process.

Open Meetings Compliance Board

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