NORTH DAKOTA UNIVERSITY SYSTEM

North Dakota State Board of Higher Education
Minutes – March 14, 2013

Members present:

Mr. Duaine Espegard, President  Dr. Kirsten Diederich, Vice President
Dr. Terry Hjelmstad  Ms. Kari Reichert
Mr. Sydney Hull  Mr. Grant Shaft
Mr. Don Morton  Ms. Janice Hoffarth, Staff Senate Adviser
Ms. Kathleen Neset  Dr. Douglas Munski, CCF Adviser, by phone

Staff members present:

Dr. Hamid Shirvani, Chancellor
Ms. Claire Holloway, General Counsel
Dr. John Haller, Interim Vice Chancellor for Academic Affairs, by phone
Ms. Linda Donlin, Director of Communications and Media Relations
Mr. Noah Brisbin, Special Assistant to the Chancellor
Ms. Kirsten Franzen, Chief Compliance Officer

The State Board of Higher Education met Thursday, March 14, 2013, at 2:00 p.m. CT, by conference call originating in the Horizon Building Conference Room, Bismarck State College, Bismarck, North Dakota.

President Espegard welcomed everyone in attendance to the meeting. He announced that the agenda item is a report from NDUS general counsel on her investigation into items brought forward by Mr. Hull at the March 7, 2013, Board meeting.

Ms. Holloway gave an overview of her report, explaining her responsibility to look into matter as the NDUS general counsel. She described the background of the information investigated, including Mr. Hull’s introduction of the materials and request for an investigation. Ms. Holloway stated that she reviewed the materials for legal or policy violations, conducting interviews and reviewing documentation, and has set forward her findings for the Board. She then read the executive summary of her report and explained that she included supporting documentation in her report.

Ms. Holloway’s executive summary explained that on March 7, Mr. Hull presented documents containing allegations regarding the Board and the chancellor. At that time, the Board asked Ms. Holloway to review the materials. Ms. Holloway looked into the allegations—some were already resolved, while others could be investigated by reviewing public information on the NDUS/Board website. In summary, Ms. Holloway stated that there were no substantive violations; only one or two meetings retroactively need agendas and minutes posted because they were not identified as public meetings when they occurred. She explained that the Board is responsible for following open meeting laws, and that both the Board and the chancellor have informed her that they want to follow open meetings laws. Ms. Holloway expressed her confidence that any open meetings or open records violations will be rectified, and stated that she welcomes a review of open meetings laws’ application to the work of the Board, the
development of guidelines to ensure the Board’s compliance with those laws, and the reporting of any concern about potential violations.

Ms. Reichert stated that she had every confidence in Ms. Holloway’s legal advice, and asked if the attorney general’s office would reinforce this finding. Ms. Holloway replied that she has solicited the advice of the attorney general’s office and would continue to do so. She added that she intends to ensure that the Board’s applications of open meetings laws are consistent with the assistant attorney general’s understanding, and that she will review compliance practices.

President Espegard requested that Ms. Holloway give an overview of the report’s findings on the investigated allegations. The allegations, Ms. Holloway stated, fall into broad categories of open meetings violations; failure to take public comments; improprieties involving the passage of Pathways to Student Success; policy violations during the expedition of policy revisions; improper delegation of authority to the Chancellor; directives preventing communication of concerns to the Board; threats of retaliation against an NDUS president by the Board; circumvention of legislative oversight to create office space in the NDUS IT building; and misrepresentations by the Chancellor on his application for the position.

Ms. Holloway explained that other than one unintentional oversight necessitating a retroactive notice, agenda, and minutes for a Board committee meeting, there were no violations of law or policy. She noted that the report’s documentation would clarify that many allegations are factually incorrect.

Ms. Reichert inquired as to the need for a retroactive notice, agenda, and minutes. Ms. Holloway replied that allegations concerning open meeting laws were made about Board dinner meetings, Board committee meetings, Board members’ telephone conversations, Board members’ presence at a Cabinet meeting, Board orientation meetings, and Board members’ meetings with NDUS office staff. The only occurrence that required remedial action, Ms. Holloway continued, was an October 29 phone conversation between the Chancellor and members of the Executive Committee regarding grandfathering MiSU tuition rates and the prospective 2013-15 budget. The failure to follow public meeting requirements was an oversight, as the parties involved did not identify the phone call as a public meeting.

Ms. Reichert asked if the call for corrective measures was based on the assumption that Board committees are empowered subcommittees of the entire Board, as opposed to advisory committees. Ms. Holloway clarified that subcommittees are generally subject to open meetings laws. She recommended that she meet with the Attorney General to understand their position with respect to Board committees, which are advisory, and that the Board act conservatively with respect to open meetings laws. Ms. Reichert then verified that five Board members would constitute a quorum.

Ms. Holloway next addressed the allegations regarding public comment periods at Board meetings. She stated that although the Board typically provides for public comment, there is no legal requirement that the Board do so.
Two types of allegations were raised regarding the adoption of Pathways, Ms. Holloway continued; the allegations either alleged that stakeholder input was quashed or that the vote on the plan was inappropriate. Ms. Holloway noted that the report contains a document showing the input that the NDUS gathered from constituencies regarding Pathways. She also cited to North Dakota statute to support her conclusion that the law is not so rigid as to require an agenda to state explicitly that a vote will occur in order for the Board to vote on an item such as Pathways.

As for the timing and validity of policy changes the Board enacted in the fall, there are no legal or policy issues, Ms. Holloway reported. Board members, including Mr. Hull, moved to waive second readings of policy changes, and the Board supported policy revisions unanimously. Allegations that policies were not appropriately noticed in the agenda, Ms. Holloway continued, do not raise issues under North Dakota law or Board policy.

Ms. Holloway then discussed the allegations of delegation of policymaking authority to the Chancellor. She noted that her report includes relevant policy that dictates that the Chancellor recommends policy to the Board, but cannot make policy himself. Also included in the report are the minutes of the September 26 Board meeting, at which the Board authorized the Chancellor to bring policies into line with Pathways. Ms. Holloway stated that the Chancellor has not unilaterally changed any Board policy; instead, he has recommended policy revisions to the Board, in keeping with best practices.

Ms. Holloway next reviewed the report’s consideration of allegations regarding communication with Board members. She stated that during his term as president, Mr. Shaft sent letters to presidents and campus communities outlining the communication structure under the new Chancellor. The allegations, Ms. Holloway stated, alleged that people were not allowed to speak to the Board and would be rebuked for speaking through anyone other than the Chancellor, thereby bypassing campus presidents. Ms. Holloway noted that the letters, included in the report’s materials, reinforced the Board’s intention to step back from day-to-day management to concentrate on its policymaking responsibility; there were no legal, policy, or ethical issues raised by these allegations.

Ms. Holloway explained the allegation that a Board member had threatened a campus president. She stated that she spoke separately with the Board member and the president noted in the allegation, who both verified that a comment made in jest was interpreted as a threat. Ms. Holloway added that an email from the president verifying this is included in the report documentation.

The next allegation addressed plans for the use of the NDUS IT building; Mr. Hull’s submitted documentation contained related emails and floor plans. Ms. Holloway stated that the issue was addressed exhaustively in a previous legislative hearing. The legal allegation involved, Ms. Holloway said, suggested that the Board bypassed legislative approval necessary for changes to the building. In the legislative hearing, however, the committee chair stated that the Board does not need legislative approval to make such changes.

The final category of allegations raised by Mr. Hull’s submission, Ms. Holloway noted, alleged that the Chancellor misrepresented his involvement with buildings on the campus where he was
president before coming to North Dakota. Ms. Holloway explained that the Modesto Bee aired the issue through a letter and the Chancellor’s response to the letter, though the Chancellor’s response was not included in materials provided to the Board. The Chancellor’s application materials, Ms. Holloway continued, appropriately reflected his involvement in raising funds for one building and completing the construction of another.

After reviewing the report’s findings regarding the allegations raised, Ms. Holloway encouraged bringing forward all concerns or allegations to herself, Ms. Franzen, or others in the NDUS or on the Board to be addressed expeditiously and effectively. President Espegard thanked Ms. Holloway for her report, and asked if the Board had additional questions of her.

Mr. Shaft asked Dr. Haller to outline the steps taken to gauge constituents before the implementation of Pathways. Dr. Haller replied that since the initial presentation of the Pathways concept in August, there have been multiple layers of consultation within and without the NDUS. Campus presidents met by tier with the Chancellor twice in early August and were directed to take the plan to their campuses for comment. Campus input was collected and transmitted to the NDUS. In mid-August, the Chancellor and former Superintendent of Public Instruction Sanstead signed a joint letter to high school and college administrators outlining expectations for delivery of dual credit, including expected course rigor, dual credit being one part of Pathways. In September, Dr. Haller introduced the plan to the Academic Affairs Council and Student Affairs Councils in September, with students represented in both councils, and the Chancellor presented Pathways to the Board for approval.

Subsequent to Pathways’ passage, Dr. Haller had discussions with the AAC and SAC at their November, December, and January meetings. Campus staff members met for a half day with the provost workgroup to address questions regarding implementation of the plan, Dr. Haller continued. The NDUS office also prepared and disseminated a decision points document addressing specific issues raised by campuses and resolved by consultations with involved parties; examples of the issues addressed include admissions scores, resident tuition charges, transparency between tuition and non-mandatory fees, and tuition waivers.

Ms. Glatt met with the Administrative Affairs Council regarding the Pathways tuition model in August and several subsequent months, Dr. Haller reported, and has met with campus and tier representatives from December on. Pathways was presented at the Tribal College Consortium in August, and at the P-20 council in the fall. The Chancellor presented Pathways to the Council of College Faculties in September.

NDUS staff has met with presidents and vice presidents since October to negotiate aspects of the plan, Dr. Haller stated. The NDUS requested formal written responses of the campuses, and campuses provided them. The Chancellor met with the North Dakota Student Association in September and January, and spoke at high schools in Minot and elsewhere, to discuss Pathways and take students’ comments. The NDUS discussed Pathways at the October K-12 meeting, in addition to meeting several other North Dakota K-12 education councils from October forward. The Chancellor has also presented Pathways to community organizations since October.
In conclusion, Dr. Haller stated, there has been thorough vetting of Pathways before a multitude of groups. The aforementioned list, he added, excludes numerous individual calls, emails, and one-on-one meetings with stakeholders throughout the state.

Mr. Shaft said that it was important for the Board to hear that, stating that it paints an exceptionally different picture of the input involved in Pathways’ adoption and refinement than what other sources report. Mr. Shaft opined that the Chancellor and the NDUS undertook an exhaustive effort in gathering input on Pathways.

Dr. Munski noted that Dr. Haller did not mention the Chancellor’s thorough presentation to the North Dakota Public Employees Association, a majority of whose membership is NDUS faculty, at the annual delegate assembly in Bismarck early last fall. Dr. Munski added that the presentation was very well received, and that the NDUS presented Pathways with openness, honesty, and a willingness to listen. Even in cases of disagreement, those involved left the meeting with additional knowledge, Dr. Munski concluded.

Ms. Hoffarth noted the report’s finding that compliance with open meetings laws is the Board’s responsibility and the NDUS personnel perform functions needed to ensure compliance, asking what the Board should do to address its responsibility. Ms. Holloway explained that it is generally the general counsel’s obligation to inform Board members of their responsibility and to make sure that those obligations are performed. She suggested that if any Board member feels as if something is not happening, she or he should inform the NDUS office, which would take care of it.

Ms. Reichert stated that she has plenty of respect for Ms. Holloway’s responsibility to notify us of minimum compliance requirements. She also noted the report’s thoroughness. Stepping back from the report, Ms. Reichert said, there is an issue of trust. She asked that Ms. Holloway put together guidance for the Board to inform it of statutory minimums for compliance with open meetings laws, such that the Board can go beyond those minimums if it can. Ms. Reichert indicated her respect for the fact that it is the Board’s responsibility to ensure compliance with open meetings laws, rather than the Chancellor’s. She noted that she would have hoped that the former general counsel would have come forward to inform the Board of noncompliance.

Ms. Holloway replied that a common thread in conversations with many Board members was that Board members consistently said that they want to be in full compliance. The issue, Ms. Holloway noted, is not as simple as opening a book and having a directive, as there are several codifications and Attorney General opinions of import. She stated that the Board needs clear guidance, and that she will take a step back to ensure that the Board has that guidance.

Mr. Shaft agreed with Ms. Reichert’s statements. He noted that at the time the Chancellor arrived, the Board became far more proactive in complying with open meetings and open records laws than it had been before. Mr. Shaft suggested that the position generally taken by the Board is that it should notice every occasion approaching the purview of the open meetings laws. In past, Mr. Shaft stated, the Board did not receive much clarity from NDUS staff about open meetings issues; under the current Chancellor, he continued, the Board is more proactive. Mr. Shaft concluded by stating that it is unfair to characterize the Chancellor as someone trying to
circumvent public notices when the Board broadened its compliance with open meetings laws once he came aboard.

President Espegard asked for a motion to accept the report. It was moved by Morton, seconded by Diederich, to accept the NDUS general counsel’s Report to the State Board of Higher Education regarding the investigation into the materials submitted by Mr. Hull on March 7 for legal or policy violations. Diederich, Espegard, Hjelmstad, Hull, Morton, Neset, Reichert, and Shaft voted yes. The motion carried unanimously.

The meeting adjourned at 2:50 p.m.