

BOARD OF REGENTS BRIEFING PAPER

1. AGENDA ITEM TITLE: Delegation of Authority to the Chair consistent with NRS 241.0357 in the matter of *Ballas vs. State of Nevada ex. rel. Board of Regents of the Nevada System of Higher Education*

MEETING DATE: April 22, 2022

2. BACKGROUND & POLICY CONTEXT OF ISSUE:

NSHE is currently defending the class action lawsuit of *Kelsie Ballas and Rebecca Ostrander, individually and on behalf of all others similarly situated vs State of Nevada ex. rel. Board of Regents of the Nevada System of Higher Education on Behalf of the College of Southern Nevada, Great Basin College, Truckee Meadows Community College, University of Nevada - Las Vegas, University of Nevada – Reno, and Western Nevada College (Ballas)*.

In mid-March 2020, Governor Steve Sisolak ordered K-12 schools to close due to the onset of the Covid-19 pandemic. Similarly, around the same time, NSHE institutions transitioned to remote classes for the rest of the school year. The *Ballas* lawsuit was filed in June 2020, alleging NSHE deprived students of the benefits of in-person instruction and access to campus facilities during the COVID-19 shutdown. The complaint alleges students were deprived of “recognizing the benefits of in-person instruction, access to campus facilities, student activities, and other benefits and services they had been promised in exchange for which they had already paid tuition and fees.”

Title 1, Article III, Section 3 of the Board of Regents’ *Handbook* (Bylaws of the Board of Regents) states, “The Board of Regents shall be responsible for the management and control of the System of Higher Education but may delegate specific authority to its officers.” Title 1, Article IV, Section 4 defines the duties of the Chair and states among other things, that the Chair of the Board is to perform any and all other duties assigned or delegated to the Chair by these Bylaws or policies adopted by the Board.

NRS 241.0357 addresses the authority to delegate decisions regarding litigation and provides, “A public body may delegate authority to the chair or the executive director of the public body, or an equivalent position, to make any decision regarding litigation concerning any action or proceeding in which the public body or any member or employee of the public body is a party in an official capacity or participates or intervenes in an official capacity.” Authorizing the Chair to make decisions regarding the *Ballas* litigation would best serve NSHE as time constraints associated with setting an open and public meeting may negatively impact timely litigation actions.

3. SPECIFIC ACTIONS BEING RECOMMENDED OR REQUESTED:

Consistent with NRS 241.0357, approve the Chair of the Board as the delegation authority to make any decision regarding the *Ballas* litigation concerning any defensive action or proceeding, after consultation with the Chancellor, or the individual authorized by the Board of Regents to serve in the role of Chancellor, and System General Counsel.

4. IMPETUS (WHY NOW?):

NSHE’s Motion to Dismiss the lawsuit was denied. Relatedly, timely and strategic litigation decisions need to be made as litigation continues. Pursuant to NRS Chapter 241, as a public body, Board deliberation and action must occur in an open and public meeting. In litigation, significant consequences can be imposed on a party for failing to take action within a specific timeframe. Therefore, it is important for public bodies to be able to delegate authority concerning litigation decisions to protect them from legal liability stemming from timeliness issues created by traditional decision-making processes.

5. CHECK THE NSHE STRATEGIC PLAN GOAL THAT IS SUPPORTED BY THIS REQUEST:

- Access (Increase participation in post-secondary education)
- Success (Increase student success)
- Close the Achievement Gap (Close the achievement gap among underserved student populations)

- Workforce (Collaboratively address the challenges of the workforce and industry education needs of Nevada)
- Research (Co-develop solutions to the critical issues facing 21st century Nevada and raise the overall research profile)
- Not Applicable to NSHE Strategic Plan Goals

INDICATE HOW THE PROPOSAL SUPPORTS THE SPECIFIC STRATEGIC PLAN GOAL

N/A

6. BULLET POINTS TO SUPPORT REQUEST/RECOMMENDATION:

- Pursuant to NRS Chapter 241, as a public body, Board deliberation and action must occur in an open and public meeting.
- Except in an emergency, written notice of all meetings must be given at least 3 working days before the meeting. “emergency” means an unforeseen circumstance that requires immediate action and does not include litigation.
- It is important for public bodies to have the ability to delegate authority concerning litigation decisions to protect them from legal liability as a result of traditional decision-making processes.

7. POTENTIAL ARGUMENTS AGAINST THE REQUEST/RECOMMENDATION:

N/A

8. ALTERNATIVE(S) TO WHAT IS BEING REQUESTED/RECOMMENDED:

The Board could decide to take no action, which would require *Ballas* litigation decisions to be voted on by the Board in an open and public meeting after the lawful notice provisions of NRS Chapter 241 have been met.

9. RECOMMENDATION FROM THE CHANCELLOR’S OFFICE:

Officer in Charge recommends that the Board approve the Chair of the Board as the delegation authority, consistent with NRS 241.0357, to make any decision regarding the *Ballas* litigation concerning any defensive action or proceeding after consultation with the Chancellor, or the individual authorized by the Board of Regents to serve in the role of Chancellor, and System General Counsel.

10. COMPLIANCE WITH BOARD POLICY:

- Consistent With Current Board Policy: Title # 1 Article III and Article IV
- Amends Current Board Policy: Title # __ Chapter # __ Section # __
- Amends Current Procedures & Guidelines Manual: Chapter # _____ Section # _____
- Other: _____
- Fiscal Impact: Yes _____ No X _____
Explain: _____

Nevada System of Higher Education

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MEMORANDUM

FROM: Crystal Abba, Officer in Charge
TO: Board of Regents
DATE: April 11, 2022
SUBJECT: Board of Regents Agenda Item - *Ballas* Litigation Delegation

In May 2018, the Nevada Supreme Court published an Opinion¹ stating that an attorney for a public body must have authorization from a client in a public meeting prior to initiating a case, settling a case, or filing a notice of appeal on litigation concerning the public body.

In the 2019 session, the Assembly Committee on Government Affairs sponsored Assembly Bill 70 which, in addition to making various changes to Nevada's Open Meeting Law, addressed the Supreme Court Opinion and specified in section 2.5 that:

A public body may delegate authority to the chair or the executive director of the public body, or an equivalent position, to make any decision regarding litigation concerning any action or proceeding in which the public body or any member or employee of the public body is a party in an official capacity or participates or intervenes in an official capacity.

The Attorney General's Office testified in favor of this section stating that during litigation, since significant consequences can be imposed on a party for failing to take action within a specific timeframe, it is important for public bodies to be able to delegate litigation decisions to protect them from legal liability. Assembly Bill 70 is now codified as NRS 241.0357.

Since the Board of Regents is a full-time board, the main issues concerning timely litigation decision-making involve the manner and strategy of defense, settlement decisions, and the decision to appeal rulings.

As such, I recommend that consistent with NRS 241.0357, the Board delegate to the Chair the authority to make any decision regarding the *Ballas* litigation concerning any defensive action or proceeding, after consultation with the Chancellor or the individual authorized by the Board of Regents to serve in the role of Chancellor, and System General Counsel.

If the Board concurs with this recommendation, the motion may be worded as:

I move that the Board delegate to the Chair the authority, consistent with NRS 241.0357, to make any decision regarding the *Ballas* litigation concerning any defensive

¹ *The Comm'n on Ethics of the State of Nevada v. Hansen*, 134 Nev. 304, 419 P.3d 140 (2018).

action or proceeding, after consultation with the Chancellor or the individual authorized by the Board of Regents to serve in the role of Chancellor, and System General Counsel.