Dr. Mark Levine
Commissioner of Health
Department of Health
280 State Drive
Waterbury, VT 05671-8300

February 15, 2024

Re: Open Meeting Law Violation re: Opioid Settlement Advisory Committee Funding Recommendations, FY '25

Commissioner Levine,

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Vermont

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Montpelier, VT 05601
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We write to express our serious concerns regarding the Department's recent submission of Opioid Settlement Funding Recommendations for Fiscal Year 2025. Although your January 16, 2024, recommendations to the legislature were ostensibly on behalf of the Opioid Settlement Advisory Committee, public records reveal that, following the Committee's final meeting on December 22, 2023, you altered the Committee's recommendations regarding overdose prevention centers after consultation with the Governor's Office—without taking a formal vote; noticing a public meeting; receiving public comment; or publicly documenting the change. These recent actions as nonvoting Chair violated both Vermont's Open Meeting Law and the Committee's enabling legislation—and represent an unlawful usurpation of the Committee's harm reduction mandate.

Although the Department has resisted transparency efforts from advocates, public records reveal the following: on December 22, 2023, the Opioid Settlement Advisory Committee held a public meeting to prioritize interventions and finalize its funding recommendations to the legislature for FY 2025. As you know, Vermont law requires that the "[p]riority for expenditures from the Opioid Abatement Special Fund" must be "aimed at reducing overdose deaths." 18 V.S.A. § 4772(c). Consistent with that legal mandate, Committee members have long sought to prioritize funding for overdose prevention centers (OPCs). Going into the December 22 meeting, funding for OPCs carried broad support; although there were several questions during that meeting about whether OPCs should be funded through the Opioid Abatement Special Fund or some other source—such as an appropriation through proposed legislation like H.72—numerous Committee members reiterated the importance of retaining specific funding for OPCs in the Committee's submission to the legislature. There can be little question that that view prevailed; as the Department's internal "tally" from that meeting reflects, Committee members overwhelmingly recommended prioritizing over $2.6M in funding for overdose prevention centers *from the Special Fund*. There was no formal vote at that meeting, however, as you made clear that Committee members would later take official action to formalize their submission to the legislature once you had codified their recommendations.

But the Committee did not get that chance, and their expert recommendation to allocate $2.6M for OPCs never reached the legislature. Public records suggest why: neither you nor other Administration officials wanted to include the Committee's allocation. Just days after the December 22, 2023 meeting, you exchanged a series of emails entitled "Summary of opioid recommendations" with senior administration officials. These emails included a document entitled "High level OPC discussion.docx."

The Department has refused to disclose these communications, first citing "attorney-client privilege" for communications that facially were not protected by that privilege, and then citing (but not justifying) "executive privilege" on behalf of the Governor. Even so, we were able to determine that, when you next emailed the Committee members on January 12, 2024—the Friday before a long weekend—you simply attached a "final" recommendation letter to be submitted the following business day, despite the fact that the Committee had not taken a vote. And sure enough, in the email containing the "final" proposal that allegedly memorialized the Committee's recommendations, you stated that "OPCs are not included as a spending request," ostensibly "because H.72"—legislation that has yet to be enacted or signed into law—"contains a provision for an alternate financing mechanism." As that deletion "free[d] up $2.6 million," you then unilaterally reallocated that funding to other programs, not harm reduction. "All of the above" recommendations, you noted, "enjoy support from the Governor."

The Department then submitted those recommendations on January 16 without a specific funding proposal for OPCs. Although the cover letter mentioned that OPCs were "[o]ne of the highest tier priority recommendations from the committee," the letter represented that "[i]t is clear that the legislature plans to fund these centers from a non-settlement source" and therefore the Committee "excluded this from the current set of recommendations for use of settlement funds," even though the Committee itself had done no such thing.

These unilateral actions violated multiple provisions of Vermont's Open Meeting Law and the Opioid Settlement Advisory Committee's statutory mandate.

The Open Meeting Law—which is expressly incorporated into the Committee's enabling legislation, *see* 18 V.S.A. § 4772(f)(4)—requires that any official action be fully public, *see* 1 V.S.A. § 310(3)(A). Your substantive changes to the Committee's proposal—including the reallocation of specifically earmarked settlement funds—plainly constituted a "matter over which the [Advisory Committee] has supervision, control, jurisdiction, or advisory power," *id.* § 310(1), and therefore was required to be "open to the public"—publicly noticed and open to public debate, not conducted in secret, *see id.* § 312, and certainly not exclusively via communications now withheld on an unvetted claim of executive privilege. Your email to the entire Committee explaining the unilateral change, moreover, was clearly a communication to a quorum of members "for the purpose of discussing the business of the public body"—and therefore was required to be a publicly noticed meeting of its own. *Id.* § 310(3)(A). And rather than document the Committee's consensus to fund OPCs through the Special Fund, the Department's recently

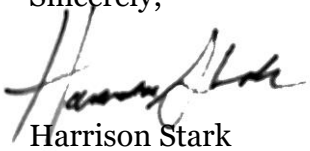
posted minutes for the December 22 meeting simply state that "[t]he entire meeting was an open discussion about the funding proposals" and "[c]onsensus on the recommendations the committee rated highest priority was achieved"—but then link to the Department's altered January 16 official recommendations. This appears to suggest, incorrectly, that the Committee arrived at the decision to omit OPCs at the December 22 meeting—and the failure to post accurate minutes is an independent violation of the law. *See* § 312(b)(1).

These actions would violate the Open Meeting Law even if they had been endorsed by the full Committee with a formal vote. But they are particularly egregious when taken unilaterally by the "nonvoting chair." 18 V.S.A. § 4772(b)(1)(A). As explained above, no formal vote ever took place—presumably because, as the Committee's proposed priorities reflected, it is unlikely the full Committee would have endorsed fully reallocating the $2.6M earmarked for OPCs. The Committee's enabling legislation makes clear that it exists to leverage a particular array of expertise toward addressing Vermont's opioid crisis, including the views of "individuals with lived experience of opioid use disorder and their family members whenever possible," *id.* § 4772(b)(1); substituting the Chair's views for the Committee as a whole undermines the group's critical mandate and violates the statute's directive that the Committee's views—not the Commissioner's—be presented to the legislature, *see* 18 V.S.A. § 4772(e).

As you know, under Vermont's Open Meeting Law, "[n]o resolution, rule, regulation, appointment, or formal action shall be considered binding except as taken or made at such open meeting." 1 V.S.A. § 312(a)(1). Because of the above violations and the lack of a formal vote, the recommendations sent to the legislature on January 16 do not—and cannot—currently reflect the official position of the Committee as contemplated by its enabling legislation.

Please consider this a written notice of specific violations under 1 V.S.A. § 314(b)(1). We look forward to your response within 10 business days, as required by law. *Id.* § 314(b)(3).

Sincerely,



Harrison Stark
ACLU of Vermont

CC:
Sen. Jane Kitchel, Chair, Senate Appropriations Committee
Rep. Diane Lanpher, Chair, House Appropriations Committee
Rep. Theresa Wood, Chair, House Committee on Human Services