

May 30, 2014

VIA HAND DELIVERY

Judge John A. Des Jardins
Outagamie County Justice Center – 2nd Floor
320 South Walnut Street
Appleton, Wisconsin 54911

Re: *State of Wisconsin ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Ed, et al.*
Case No. 2013CV868
Branch 1

Dear Judge Des Jardins:

Please find enclosed for filing an original and one (1) copy of the *Defendants' Reply Brief in Support of its Motion for Summary Judgment*. Please file the enclosed and return a file-stamped copy in the enclosed self-addressed, stamped envelope. Under cover of this correspondence, opposing counsel is being served with the enclosed *via* U.S. mail and electronic mail today.

If you have any questions concerning this matter, please do not hesitate to contact us. Thank you for your time and attention to this matter.

Very truly yours,

PHILLIPS BOROWSKI, S.C.



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Enclosures

cc: Brian W. McGrath (via U.S. Mail and electronic mail (brian@will-law.org)) (w/ encls.)
Thomas C. Kamenick (via U.S. Mail and electronic mail (tom@will-law.org)) (w/ encls.)
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James R. Macy (via electronic mail) (w/ encls.)

STATE OF WISCONSIN ex rel. JOHN KRUEGER,

Plaintiff,

-v-

APPLETON AREA SCHOOL DISTRICT
BOARD OF EDUCATION

Case No.: 13-CV-868

and

Case Code: 30701

COMMUNICATION ARTS 1 MATERIALS
REVIEW COMMITTEE,

Defendants.

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiff John Krueger ("Krueger") and Paul Trelec ("Trelec") requested administration from the Appleton Area School District ("District") to consider creation of an alternative Communication Arts 1 ("CA1") course. In making their request, Krueger and Trelec made it plain that they did not want the District to review the existing course materials: rather, they wanted an alternative course utilizing different course materials.

It is undisputed the District did not maintain a rule or set of procedures to address Krueger's request for an alternative course or reading material list. Rule 361.1 of the Appleton Area School District Board of Education's ("Board") policies includes no provision which directs administration on how to address parental requests for alternative courses. Likewise, the Assessment, Curriculum and Instruction Handbook ("ACI Handbook") addressed only

comprehensive curriculum reviews conducted in formal six-year cycles and makes no reference as to how to handle an alternative course request. In an effort to address Krueger's and Trelc's request and concerns, therefore, the District's administration created its own internal process for addressing the request. This resulted in the creation of the Communications Arts 1 Materials Review Committee ("CAMRC"). It is undisputed that administration created the committee without any specific directive from the Board or Superintendent Lee Allinger.

In his response brief opposing summary judgment, Krueger does not dispute the facts and circumstances under which CAMRC was created. He does not identify any specific order from the Board requiring the creation of CAMRC (because there is none). He does not identify any specific Board rule or policy which required administration to create a committee to address his request for an alternative CA1 course (because there is none). Instead, he merely repeats the mantra that curriculum is the exclusive responsibility of the Board and that any committee created internally by administration must, as a result, be pursuant to a Board directive and, therefore, a "governmental body" subject to the Open Meetings Law.

Krueger's conclusory statements simply are unsupported by the law or facts of this case and are insufficient to defeat the Board's motion for summary judgment. School boards do not have sole authority as it relates to the review and selection of curriculum such that any meeting of any group of employees to discuss curriculum (whether formal or informal) constitutes a meeting of a "governmental body" subject to the Open Meetings Law. Administration has independent authority and responsibility for curriculum as reflected in State statutes, the administrative code and the job descriptions of the District's administrative employees. Based on this authority and responsibility, District administration fashioned an internal process for addressing Krueger's

concerns which was neither directed by the Board (or Superintendent Allinger) and which was not required by any rule or policy adopted by the Board.

The law is plain that meetings conducted internally by administration and employees within the ordinary course of their duties are not “governmental bodies” subject to the Open Meetings Law. The label provided to the assembly of administrative employees, whether it be a “committee,” “group,” “team,” “department,” or “unit” is inconsequential: if an employee meeting or series of meetings is not conducted at the direction of the governing body or pursuant to a rule or policy of that body, it is not a “governmental body” subject to the Open Meetings Law.

CAMRC, while designated as a committee, constituted nothing more than a group of employees who came together to address a parental concern from Krueger in the form of a request for an alternative course. As a matter of law, therefore, CAMRC was not a “governmental body” and there is no authority that mandates the group comply with the Open Meetings Law. Accordingly, the Board did not, as a matter of law, violate the Open Meetings Law by virtue of CAMRC’s meetings and the Board’s motion for summary judgment should be granted.

II. ARGUMENT

In determining whether there is any basis to Krueger’s claim of an Open Meetings violation, the Court should be cognizant of the exact nature of Krueger’s request. Krueger did not request a review of course materials or a challenge to those materials. Rather, Krueger requested the District create an alternative CA1 course with new reading materials. In his discovery responses, Krueger leaves no doubt that he was requesting an entirely different CA1 course:

Mr. Krueger did not make a request to Superintendent Allinger to review the book list for CA 1. To review the existing reading list would have been a waste of time. Those books had already been approved by the Board. Mr. Krueger was asking for an alternate course, in which the books used would be selected using more stringent criteria than those used for the existing list. Specifically,

he was requesting books that were at the 9th grade reading level, contained no profanities or obscenities and contained no sexualized content. He understood that if AASD were to offer such a course, additional books would need to go through the review process...

Hamiel Aff., Ex. F, Krueger's Responses to the Board's First Set of Written Discovery Requests, Response to Request to Admit No. 19; see also Response to Request to Admit No. 20.

It was Krueger's request for a new CA1 course to which the District responded by creating CAMRC. As noted in the Board's brief in support of summary judgment, CAMRC was created internally by administration in response to Krueger's request. There was no Board directive to create it nor policy or rule by which it was created. Based on the undisputed facts and application of the Open Meetings Law, however, Krueger's arguments fail as a matter of law. Accordingly, the Court should grant the District's motion for summary judgment and dismiss Krueger's claims.

A. Krueger's Request for an Alternative Course Falls Outside of Rule 361.1 and the ACI Handbook.

Krueger urges the Court to blindly find that the District's response to his request for a new CA1 course, i.e., the creation of CAMRC, was pursuant to the direction of Board Rule 361.1 or the ACI Handbook and, therefore, CAMRC was a "governmental body" under the Open Meetings Law. Krueger asserts:

CAMRC was created from the top down, by high-ranking District administrators acting under authority and direction provided by Rule 361.1 and the ACI Handbook, which were respectively enacted and adopted by the Board. CAMRC existed and had the authority to review and make recommendations regarding the curriculum and reading list for CA 1 *solely* by virtue of AASD Rule 361.1 and the ACI Handbook.

Plaintiff's Response Brief ("Pl. Resp. Br."), p. 5 (emphasis in original).

Krueger, however, fails to identify any specific language in these guidelines that either cover a parental request for an alternative course as Krueger made in this case or command that

administration create a committee in response to such a request. It stands to reason that if CAMRC was created by a directive in Rule 361.1 or the ACI Handbook as Krueger contends, Krueger would at least be able to cite to the language in his response brief which supports his conclusion. There is, however, no such language and, as such, his claims under the Open Meetings Law must fail.

1. Board Rule 361.1.

There is no provision in Rule 361.1 which addresses how to handle Krueger's request for an alternative course or provides any directive for a response. Rule 361.1 begins by setting forth general statements regarding the responsibilities of the Board and administration as it relates to the adoption of textbooks and selection of school materials. The rule recognizes that the selection of materials is delegated to "professionally trained and certified personnel employed by the school system." However, the rule does not direct that the "professionally trained and certified personnel" create any committees whatsoever in the process of performing their work. *Kamenick Aff., Ex. E.*

Rule 361.1 does include a process for reviewing or reexamining existing course materials in response to an objection from a parent or community member. *Id.* The process is initiated by the submission of a "Request for Reconsideration of Educational Material Form" by the parent or community member which triggers a several step process culminating in review of the objection and recommendation for resolution by a Materials Review Committee, a decision on the objection by the Superintendent and a right to appeal the Superintendent's decision to the Board. *Id.*

The process for addressing specific objections to course materials set forth in Rule 361.1, however, is of no consequence in this case. Krueger, by his own admission, indicates that he was not interested in a review of existing course materials. *Hamiel Aff., Ex. F, Responses to Requests for Admission, 19-20.* Rather, Krueger was requesting the District create an alternative course, complete with its own materials selected based on more rigorous criteria. *Id.*

Krueger takes no different position in his summary judgment response brief. Nowhere in the brief does Krueger contend that his request for a different CA1 course was, in reality, an objection or challenge to existing course materials, that he submitted a Request for Reconsideration of Educational Material Form, or that the District was required to follow the process in Rule 361.1 for reconsidering educational materials in evaluating his alternative course request. Krueger's claims that administration was required to create a committee such as CAMRC in response to his requests is inconsistent with Rule 361.1 and lacks merit.

2. The ACI Handbook.

The ACI Handbook also does not include any process for addressing a parental request for an alternative course and Krueger does not claim that it does. Indeed, the ACI Handbook was not designed to address parental concerns. *See Kamenick Aff., Ex. D.* Rather, the ACI Handbook establishes a process for reviewing and rewriting curriculum for programs/levels/courses (collectively "program") based on a six year cycle. *Id.*

It is undisputed in this case that CAMRC was not created under the six year curriculum review process described in the ACI Handbook. District employees Nanette Bunnow ("Bunnow") and Kevin Steinhilber ("Steinhilber") confirmed that the process outlined in the ACI Handbook did not dictate CAMRC's creation or establish the process used by CAMRC. *Bunnow Dep., pp. 13-14; Steinhilber Dep., pp. 9-10.* While Bunnow and Steinhilber acknowledged that they borrowed concepts from the ACI Handbook in creating CAMRC and defining the process under which the committee operated, they confirmed that the processes eventually adopted for CAMRC were modified ones which were neither governed by or followed those in the ACI Handbook. *Bunnow Dep., pp. 13-14, 18-19; Steinhilber Dep., p. 11.*

In his response brief opposing summary judgment, Krueger does not point to any language in the ACI Handbook that supports his contention that CAMRC was created under the Handbook or that CAMRC operated according to the Handbook. This is because the guidelines set forth in the ACI Handbook plainly do not apply to Krueger's request for an alternative course.

Initially, neither the phrase "alternative course request" nor similar terms appears anywhere in the ACI Handbook. This is critical because for Krueger's theory of recovery to prevail, CAMRC must have been created by virtue of a rule within the ACI Handbook. Since the Handbook does not address requests for course alternatives, the Handbook cannot, per se, be the source of the rule directing its creation.

There is also little in how CAMRC operated which tracks the requirements of the ACI Handbook such that any claim by Krueger that CAMRC was a de facto committee created under the Handbook could have any merit. It is undisputed that administration did not follow any of the steps identified in Phase I of the ACI Handbook in any respect as it pertains to CAMRC. *Bunnow Dep., pp. 40-41*. Phase I under the ACI Handbook involves a self-study of the program at issue including achievement and other data and generating a recommendation for the program in the remaining years of the cycle. *Id.* Phase I also includes establishing a steering committee for the program, providing information to committee members, and conducting committee meetings. *Id.* After the committee meeting process is complete, a written analysis is prepared for the program, written recommendations are provided for the next stage of the process, and the Board is provided with an item of information if significant changes to curriculum are recommended by the committee. *Id.*

Various aspects of Phase II of the ACI Handbook process were incorporated within CAMRC but, again, the process employed was a different one due to the nature of Krueger's

request. *Bunnow Dep.*, p. 41. Phase II begins with a review of existing curriculum and making preliminary changes to the same. *Id.* The committee then reviews possible materials and resources to support the curriculum changes. *Id.* Thereafter, the District engages in a curriculum writing process, and the proposed revised curriculum is then provided to department, administrators, and the ACI Department for feedback, after which necessary adjustments are made. *Id.* Ultimately, the revised and rewritten curriculum is presented to the Program and Services Committee for consideration and approval and then to the Board. *Id.*

CAMRC did not follow the required process in Phase II. Aside from utilizing the concept of a committee consisting of teachers and administrators and department staff to review the existing and suggested books for the CA1 course, CAMRC looks little like a Phase II committee. CAMRC did not review all of the CA1 course materials as required by a Phase II committee. *Bunnow Dep.*, pp. 33, 41. Moreover, CAMRC did not rewrite curriculum as required under Phase II. *Bunnow Dep.*, p. 41.

In his response brief, Krueger claims that CAMRC was somehow a creation of the ACI Handbook even though the Board “broke the rules” in creating it. *Response Br.*, p. 8. Krueger’s argument misses the point. The reason that CAMRC did not “comply” with the “rules” in the ACI Handbook is that it was not a product of the ACI Handbook. Again, nothing in the ACI Handbook addressed parental requests for a new course—the Handbook addressed review of curriculum on a six year basis. CAMRC was created outside of the Handbook and did not have to comply with any of its requirements because it did not fall within the scope of the Handbook’s coverage.

For Krueger to prevail, he must show the existence of a formal policy that calls for the creation of a committee under the facts and circumstances of the case. *Id.* However, Krueger fails to cite to any directive, rule or policy that required administration create a committee in response

to a request from a parent for an alternative course. In this regard, he asks the Court to apply the following rule to this case:

If a governmental body enacts or adopts a formal policy that calls for the creation of a committee to advise the body on how it should exercise its governmental authority, and the administrative officers of that governmental body do in fact create such a committee to undertake such an advisory task, the Open Meetings Act applies to that particular committee.

Pl. Resp. Br., p. 3.

As shown above, neither Rule 361.1 nor the ACI Handbook constitute a formal policy that called for the creation of CAMRC in response to Krueger's request for an alternative CA1 course. Krueger has failed to identify any other directive, formal or informal, which required CAMRC's creation. Accordingly, even under Krueger's own rule, there is no basis for his claim that CAMRC was a "governmental body" which was required to comply with the Open Meetings Law.

B. CAMRC's Consideration of the CA1 Reading List and the Potential Impact of Common Core Does Not Convert CAMRC into a Committee Created at the Direction of the Board or Under a Rule or Policy of the Board.

Krueger next asserts that because the scope of CAMRC was extended beyond Krueger's request for an alternative CA1 course to include evaluation of the CA1 reading list as well as the potential impact of the pending common core standards, it must have been acting at the direction of the Board. *Pl. Resp. Br., p. 9.* Again, however, Krueger ignores the everyday responsibilities of the ACI Department, administration, and staff to evaluate, develop, and revise curriculum. The very job responsibilities of Steinhilber, Bunnow, and their staff were to remain current on standards and to assess and evaluate the District's course materials. That administration took Krueger's request for an alternative course as an opportunity to address other areas within the scope of their day-to-day job responsibilities, such as evaluating the impact of the common core on the CA1 course, does not alter how CAMRC was created, nor change the fact that there was no

directive, rule, or order from the Board that required administration to create CAMRC in this instance.

Moreover, Krueger cites no authority for the proposition that a group or committee created internally by administration loses its identity simply because it expands the scope of its work to other areas within its authority. In this regard, Krueger fails to cite the Court to any language or evidence in support of his contention that the expansion of CAMRC's purpose to consider the CA1 reading list or to evaluate the potential impact of the common core triggered any specific obligations under Rule 361.1 or the ACI Handbook. Neither 361.1 nor the ACI Handbook mandates the creation of a committee when administration evaluates a course reading list or considers the impact of pending standards on curriculum. Again, these are everyday responsibilities of the ACI Department, administration, and District staff.

C. CAMRC Was Created in the Ordinary Course of Business as Part of the Ongoing and Daily Process of Curriculum Development in the District.

Krueger argues that the District's creation of CAMRC could not have been in the ordinary course of business because it was part of the curriculum cycle under the ACI Handbook, parents do not make requests for changes to reading lists every day, and standards for education do not go through drastic changes on a "routine" basis. *Pl. Resp. Br.*, p. 9. Krueger's arguments again miss the mark.

Krueger's reliance on the frequency of reviews in the ACI Handbook is circular and proves nothing. As set forth at length above, the ACI Handbook does not address or govern the handling of parental requests for alternative course materials as made by Krueger. Therefore, the fact that curriculum reviews under the ACI Handbook occur every six years does nothing to demonstrate that the work of CAMRC was not done in the ordinary course of administration's work and within the scope of their job responsibilities. The reason why, in fact, the District created CAMRC outside

of any established policy was because administration received a concern in the ordinary course of business and had no established procedure or policy to respond to it.

Krueger's claims that parents do not make requests for alternative courses or entirely different reading lists every day likewise proves nothing.¹ The test for whether a matter arises in the ordinary course of administration's work is not based on frequency but, rather, how the matter was brought to the attention of administration and how it was addressed. In this case, Krueger's request for a new course was brought to the attention of Superintendent Allinger and administration. Allinger passed the matter onto Steinhilber and Bunnow for handling as part of their everyday responsibilities. Steinhilber and Bunnow subsequently analyzed the request and designed a means, CAMRC, for addressing it. Everything Bunnow and Steinhilber did was pursuant to their duties within the District and the discretion vested in them under their job descriptions to address such matters.

Krueger's assertion that educational standards are not changed on a "routine" basis likewise does nothing to support his case on summary judgment.² State academic standards provide only a foundational framework within which curriculum is developed at a local level. *Allinger Aff.*, ¶4. The standards represent educational requirements that must be achieved by the District. *Id.* Curriculum development is the process by which the District selects materials which achieve those educational standards. *Id.*, ¶¶6-16. To ensure that curriculum complies with state standards, the District maintains an ACI Department comprised of administrative professionals and staff who are responsible for planning, revising and implementing curriculum consistent with state standards as part of their everyday job duties. *Id.*, ¶3.

¹Krueger cites to no factual support in the record as to the frequency of such requests. Accordingly, his assertion should be disregarded on summary judgment.

²Krueger's assertion as to how frequently changes are made again is not supported by any citation in the record on summary judgment. Accordingly, Krueger's argument should be disregarded.

Curriculum development is not a static process that occurs only when state standards are changed as asserted by Krueger. Rather, the process of developing and evaluating curriculum to meet state standards is an ongoing, daily process which involves administration, supervisory staff, building principals and professional educators. *Id.*, ¶¶6-16. The District makes changes to curriculum as necessary based on instructional and assessment data. *Id.*, ¶15.

Wisconsin law, in fact, places a legal responsibility on administrators such as Steinhilber and Bunnow to engage in an ongoing process of curriculum development to meet state standards. Steinhilber and Bunnow each must hold a Director of Instruction license pursuant to Wis. Admin. Code §§ PI 34.32(1) and (4) which mandates that they be proficient in a number of areas including facilitating processes to create and implement a comprehensive, rigorous and coherent curricular program based on state standards; implementing, monitoring and evaluating the use of instructional materials, technology and learning strategies in the instruction of students; and using best practices and educational research to improve curriculum. *Id.*, ¶9.

Krueger further asserts that CAMRC was not created in the ordinary course of business because it was involved in decisions which could have a District-wide impact and constitutes “policy-making.” *Pl. Resp. Br.*, p. 10. Again, however, Wisconsin statutes and regulations contemplate that school boards will not be directly involved in “creating curriculum.” Instead, the statutory and regulatory scheme contemplates that school boards will hire professionals to evaluate and develop curriculum consistent with state standards.

Krueger suggests that because CAMRC was formally set up as a committee and participated in several meetings over a period of time renders it a “governmental body” as opposed to merely organized meetings among administration. Again, however, a group of employees that meets regularly in the absence of a directive of a Board or pursuant to a rule or order is not a

“governmental body” under the Open Meetings Law. The structure of the organization or the number of times it meets is essentially irrelevant if there has been no directive to create the committee by a governmental body. The directive is an essential aspect of the Open Meetings Law. As recognized by Krueger in his response brief, the Attorney General opined in the *Tylka* Correspondence that “*meetings between an individual department head and his or her staff, or even meetings of the entire staff of a department*” are not automatically “meetings” of “governmental bodies” under the Open Meetings Act but can become so if they are convened under a “formal or informal directive.” *Pl. Resp. Br.*, p. 3 (emphasis added). There was no formal or informal directive creating CAMRC in this case. Consequently, no matter how it was structured or how many times it met, it was not a governmental body and, therefore, not subject to the requirements of the Open Meetings Law.

In the end, and contrary to Krueger’s assertions, the relevant inquiry is not how often new state standards, such as the common core, are adopted. The issue with respect to curriculum development is that it is an ongoing, fluid and daily process engaged by number employees whose very job responsibility it is to evaluate, revise and develop curriculum that meets such standards.

D. Krueger’s Reliance on the Purported “Admissions” of the District’s Representatives as to the Authority under Which They Acted Is the Development of CAMRC is Factually and Legally Baseless.

Krueger attempts to portray the deposition testimony of District representatives Bunnow, Steinhilber, and Barkmeier as “admissions” that the District was acting pursuant to Rule 361.1 and the ACI Handbook in creating CAMRC. Krueger, however, misstates the nature and legal effect of the witnesses’ testimony.

As noted at length in the District’s response brief in support of summary judgment, Krueger repeatedly misstates the deposition testimony of the District’s witnesses. Steinhilber, Bunnow and

Barkmeier repeatedly testified that CAMRC was *not* created pursuant to any directive in Rule 361.1 or the ACI Handbook but pursuant to their day-to-day job responsibilities. *See Bunnow Dep., pp. 7, 11, 13-14, 18-19; Steinhilber Dep., pp. 5, 9-10, 14-15, 22-23; Barkmeier Dep., 5-7, 12-16.* The witnesses repeatedly explained that CAMRC was a *modified* process which incorporated various aspects of the ACI Handbook but was not created at the direction of the Board or pursuant to any rule or policy adopted by the Board. *Id.*

The isolated portions of the testimony of Bunnow, Barkmeier and Steinhilber on which Krueger relies do not constitute admissions that CAMRC was the by-product of a directive, rule or order from the Board so as to require CAMRC to comply with the Open Meetings Law. *Pl. Resp. Br., pp. 6-7.* The testimony, at the very most, establishes the witnesses' lay opinion as to the origins of the authority for their job responsibilities in the District. *Id.*

The witnesses' testimony as to the source of the authority for their job responsibilities is irrelevant and immaterial to the Open Meetings issues in this case. Initially, the witnesses' testimony as to the legal foundation of their authority is not legally correct or complete. As noted at length in the District's previous submissions on summary judgment, the Board does not have the responsibility to "create curriculum" as Krueger contends. The Board's statutory obligation is limited to ensuring that the District's curriculum complies with state standards and that the District maintains curriculum plans. Wis. Stat. § 121.02(k).

Moreover, Wisconsin's statutes and regulations, including Wis. Stat. § 118.24, provide administration with the authority and, in fact, the *responsibility* to evaluate and provide curriculum and a course of study which complies with state standards. Wis. Stat. § 118.24; Wis. Admin. Code §§ PI 34.32(1) and (4). The authority granted to administration is reflected in the job descriptions

of Steinhilber and Bunnow as well as the Curriculum Support Specialists, building principals and teaching professionals. *Allinger Aff.*, ¶¶6-16.

Equally important, the test for purposes of whether a committee must comply with the Open Meetings Law is not the source of the legal authority of administration in creating CAMRC but, rather whether CAMRC was created by virtue of a directive of the Board or pursuant to a rule or order of the Board. The distinction is critical. School boards have the ultimate responsibility for ensuring that the District operates in compliance with the law in a number of areas including certifying that the District maintains curriculum and curriculum plans which meet state academic standards. To achieve this end, the Board hires administration, teaching professionals and staff to ensure that the District meets its legal obligations to the citizens of its community. Administration, teachers and staff all have day-to-day job responsibilities which all contribute to and aid in ensuring that the District meets its legal obligations.

The fact, however, that administration, teachers and staff are hired by and report to the Board does not convert each and every action that administration and staff takes which involves group action or decision making into a directive, rule or order of the Board to create the group under the Open Meetings Law such that the group constitutes a “governmental body” which must comply with the law’s requirements. As reflected in the *Pepelnjak Correspondence*, the reach of the Open Meetings Law does not extend to meetings of public employees which occur as part of their day-to-day activities. For a meeting of a group or committee to be covered by the Open Meetings Law, there must be evidence that the group of employees was created by or meeting at the direction of a governing body or official.

In this case, there simply is no evidence of any directive by the Board or from Superintendent Allinger for that matter which mandated the creation of CAMRC in response to

Krueger's request for an alternative CA1 course. The undisputed facts demonstrate that CAMRC was created internally by administration as part of an effort to address Krueger's concerns and request for an alternative CA1 course.

To determine the source of authority, the Court must look to the actual law. The statutes, Board Rules, and ACI Handbook upon which Krueger relies simply do not support the proposition that CAMRC was created pursuant to a directive, rule or order of the Board. CAMRC was created by administration internally in response to Krueger's request for an alternative CA1 course. Meetings of groups of employees in the ordinary course of business, whether the group is designated as a committee, unit, department, or otherwise, fall outside of the scope of the Open Meetings Law. Krueger has cited to no authority to the contrary.

Krueger's efforts to convert any statements made by the District's lay witnesses as to where they received their authority to act into "admissions" that CAMRC was a product of the Board is disingenuous. The District's witnesses were not produced as legal experts to testify as to the universe of authority under Wisconsin law for school boards, administration, and staff. The District's lay witnesses were produced to explain the factual circumstances surrounding the creation of CAMRC. The District did not present the witnesses as having the competency to testify on school district organization and legal authority. In this respect, it is axiomatic under the law of evidence that the permissibility and admissibility of lay witness "opinions" is limited to observations of fact, not conclusions of law. *Poston v. Burns*, 2010 WI APP 73, ¶¶22-23, 325 Wis.2d 404, 784 N.W.2d 717; *see also U.S. v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009) ("We have held repeatedly that lay testimony offering a legal conclusion is inadmissible because it is not helpful to the jury, as required by 701(b)").

Even if the testimony of the District's witnesses constituted "admissions," as Krueger contends, such "admissions" are of no legal effect. The legal organization of school districts is determined by state statutes and regulations, not on the lay opinions of employees of the school district or school board members as to their authority.

Krueger's reliance on the "admissions" of the District's witnesses as the linchpin of his case, in fact, borders on the preposterous. If the District's witnesses testified that they received their authority to create CAMRC based on Wisconsin's criminal code, such testimony could not and would not constitute a binding admission that the criminal code authorized the creation of CAMRC or governs the District's operations. The same would be true if the District's witnesses testified that their authority to act had its foundation in family law, traffic regulations, the law of trusts and estates, or the municipal code of the City of Appleton.

Last, even if the testimony of the District's witnesses as to their legal authority was somehow material, it does not constitute an admission that CAMRC was created at the direction, rule, or order of the Board. The testimony of the District's witnesses that their authority emanated from Rule 361.1 simply recognizes the respective roles and responsibilities that the Board and administration have under Wisconsin law for curriculum and school materials. No witness testified that the District considered Krueger's request for a new course to constitute a challenge to the existing materials or request to review them or that the District was bound to follow the process in Rule 361.1 for processing such a challenge. Likewise, that the District's witnesses admitted that they borrowed concepts from the ACI Handbook in creating CAMRC does not mean that the ACI Handbook dictated their actions. Each witness, in fact, denied that CAMRC was part of the curriculum review cycle set forth in the ACI Handbook.

E. CAMRC Was Not Created at the Direction of Superintendent Allinger.

For the first time in his response brief, Krueger asserts that CAMRC was created by Superintendent Allinger pursuant to a directive from the Board. *Pl. Resp. Br.*, pp. 12-13. Again, Krueger's assertion is factually unsupported and, in fact, is contrary to the undisputed facts in this case as established by Allinger's affidavit in support of the Board's motion for summary judgment.

The affidavit of Superintendent Allinger submitted by the District in connection with its response brief unequivocally demonstrates that Allinger did not instruct administration to create CAMRC pursuant to any directive of the Board. Allinger's affidavit establishes that upon receiving Krueger's request for an alternative CA1 course, he directed the request to Steinhilber and Bunnow for further handling. Steinhilber and Bunnow, pursuant to their job responsibilities in the District, internally came up with a process to address Krueger's request. This process was the committee known as CAMRC. Allinger was not involved in the development of CAMRC nor did he direct Steinhilber and Bunnow as to the process they were to utilize. *Allinger Aff.*, ¶¶17-19.

The "evidence" which Krueger cites to support his contention that Allinger directed the creation of CAMRC does not establish that Allinger directed the creation of CAMRC. The authority upon which Krueger relies is found on page 17 of the Board's brief in support of summary judgment and is merely a quote from a correspondence drafted by Krueger to Allinger (which was attached as Exhibit D to Krueger's Complaint) in which Krueger asserted that Allinger, rather than the Board, directed the creation of CAMRC.

The Board cited to this quote not as an admission that Allinger directed the creation of CAMRC but as evidence that Krueger's theory of recovery changed from one in which he alleged that Allinger directed Bunnow to create CAMRC to one in which Krueger alleged that CAMRC was created at the direction of the Board. Krueger's attempt to cite his own correspondence as

authority for the proposition that CAMRC was created at the direction of Allinger proves nothing. More importantly, it does not serve as evidence on summary judgment that contradicts Allinger's affidavit establishing that he did not direct the creation of CAMRC or have any role in its creation.

Contrary to Krueger's assertions, the affidavit of Allinger confirms that CAMRC was created at the initiative of administration to address Krueger's concerns and request for an alternative course. Similar to the management team organized to assess budget issues in the hypothetical set forth in the *Tylka Correspondence*, the concept for CAMRC originated with administration in the ACI Department, under the direction of Steinhilber and Bunnow. Under these facts, as in the hypothetical posed in *Tylka*, the resultant committee created is an organic one by administration and is not a governmental body for purposes of the Open Meetings Law.

It should further be noted that under the hypothetical set forth in *Tylka*, an organic group or committee created internally by administration does not lose its character or become a "governmental body" simply because the committee provides the results of its work to a governing body. In the *Tylka* hypothetical, the management team which was created to address budgetary concerns not only organized itself but organized itself for the purpose of providing recommendations on the budget to the board. In such situation, a court could find that the "team" was not a governmental body subject to the Open Meetings Law.

F. Krueger's Theory is a Major Departure from the Current Open Meetings Law and Will Have a Devastating Effect on Operations School Districts.

In his response brief, Krueger goes to great lengths to deny that his theory of recovery in this case is unprecedented or will have a detrimental impact on the operation of school districts and other municipal governments. The nature of Krueger's theory and its detrimental effects are undeniable.

Krueger bases his entire case on the theory that because the Board has ultimate responsibility for ensuring that curriculum meets state standards, any group of employees that congregate to work on curriculum must be doing so at the Board's direction or pursuant to a delegation of authority. Krueger cites no other directives from the Board or rules or orders which require the creation of a committee, group, or other body to consider curriculum within their day-to-day responsibilities.

Applying Krueger's theory, any group of employees that meets to consider any topic that falls within the ultimate authority of the Board would be considered a "governmental body" and would be subject to the Open Meetings Law requirements. The Board's responsibilities are broad and include overseeing areas such as management and supervision of the school district, repair of school buildings, providing sanitary facilities, purchasing insurance for school property and establishing hours for the normal school day. Wis. Stat. § 120.12. Because the Board is ultimately responsible for each of these areas, any group of employees that organizes whether formally or informally to meet and discuss things such as building repairs, choice of cleaning supplies, and any financial issues related to the District would be "governmental bodies" that must comply with the requirements of the Open Meetings Law.

The unavoidable result of Krueger's theory is that District employees involved in day-to-day meetings to discuss their job responsibilities and decisions related to the execution of those responsibilities will have to stop, notice the meetings, and hold them in a forum open to the public. This will virtually shut down the operation of school districts (not to mention all public operations if Krueger's theory is extended to them).

The Open Meetings Law simply was never intended to produce such a result. As evidenced in the *Staples* and *Tylka Correspondences* relied upon by Krueger, to be considered a governmental

body for purposes of the Open Meetings Law a body must be created at the directive of the Board or pursuant to a rule or order of the Board. There simply is no such directive or order or rule of the Board which exists in this case and Krueger has identified none.

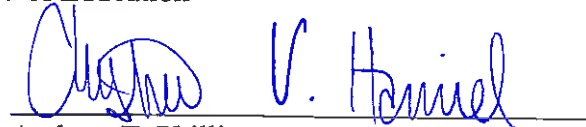
III. CONCLUSION

Based on the foregoing, the Board of Education and CAMRC respectfully request that this Court grant Defendants' motion for summary judgment, deny Plaintiff's motion for summary judgment, and dismiss Plaintiffs' Amended Complaint in its entirety.

Dated this 30th day of May, 2014.

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Board of Education

By:

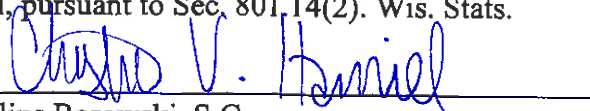


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I certify that on May 30, 2014, I served the within document on counsel of record by U.S. mail and e-mail, pursuant to Sec. 801.14(2). Wis. Stats.


Phillips Borowski, S.C.