STATE OF WISCONSIN
COURT OF APPEALS
District III
Appeal No. 2015AP000231

STATE OF WISCONSIN ex rel.
JOHN KRUEGER,

Plaintiff-Appellant,

v.

APPLETON AREA SCHOOL DISTRICT
BOARD OF EDUCATION AND COMMUNICATION
ARTS 1 MATERIALS REVIEW COMMITTEE,

Defendants-Respondents.

Appeal from the Circuit Court of Outagamie County
Honorable Vicki L. Clussman Presiding
Case No. 13-CV-868

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT, JOHN KRUEGER

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INTRODUCTION

The Plaintiff-Appellant, John Krueger, is an Appleton Area School District ("AASD") taxpayer and the parent of a child who attends a school in the AASD.[1] The Defendant-Respondent, Appleton Area School District Board of Education (the "Board"), is the governing body of AASD. Wisconsin statutes place responsibility on the Board to, among other things, create and review curricula and adopt textbooks for AASD.

The Board has adopted a rule acknowledging that it has the legal responsibility for all educational materials used in the district. The Board's rule delegates some of the responsibility for the selection of educational materials to AASD personnel, while retaining final approval. The Board has also promulgated a handbook delineating the process to be followed to approve and adopt new educational materials. The process in the handbook starts with the appointment of a review committee made up of AASD staff and teachers and ends with Board approval based on the committee's recommendations.

In or around September 2011, AASD formed a committee to review the instructional materials for its ninth grade Communications Arts 1 course

[1] Mr. Krueger's daughter will graduate this year.

("CA 1"). The committee, composed of 17 AASD employees, was named the Communications Arts 1 Review Materials Committee ("CAMRC"). CAMRC is a Defendant-Respondent in this case along with the Board. CAMRC met at a regular time and place, produced agendas and minutes, and took formal votes.

Mr. Krueger asked to attend the CAMRC meetings, but was informed that the CAMRC meetings were not open to the public. Notices of CAMRC's meetings were never published, and the public was denied access to those meetings. CAMRC recommended a set of books for CA 1 and that list was adopted by the Board without change.

The Open Meetings Act requires all meetings of "governmental bodies" to be held in open session and be preceded by adequate public notice. The Circuit Court below ruled that CAMRC was not a governmental body and therefore not subject to the Open Meetings Act. That decision was in error – CAMRC meets the definition of a governmental body because it was created by district administration pursuant to an official rule of the Board.

STATEMENT OF THE ISSUES

Issue 1: Is a committee like CAMRC, which is established by a public body, which has a defined membership, which holds regular meetings (with agendas and minutes), which makes collective decisions by voting, and which is charged with the responsibility of providing advice and recommendations to a public body like a school board, on matters for which the school board has legal responsibility, a "governmental body" subject to Wisconsin's Open Meetings Act?

Circuit Court's Decision: No.

Issue 2: If CAMRC is a "governmental body," did CAMRC violate Wisconsin's Open Meetings Act by holding meetings that were not open to the public and were not preceded by public notice?

Circuit Court's Decision: The Circuit Court did not reach this question because it concluded that CAMRC was not a governmental body.

STATEMENT ON ORAL ARGUMENT

The Court should hear oral argument in this case. Oral argument will be useful in fully developing the ultimate issue: whether the meetings of CAMRC should have been open to the public. The Wisconsin Attorney General has provided opinions on this question (which the Circuit Court

chose not to follow), but this is an issue which has not yet been decided by an appellate court in Wisconsin. Given that this is a new issue, oral argument would likely be useful to fully present and meet the issues on appeal, address any questions this Court has, and fully develop the theories and legal authorities on each side.

STATEMENT ON PUBLICATION

The Court should publish the decision in this matter under the considerations of Wis. Stat. § 809.23(1)(a). This Court's decision will enunciate a new rule of law with respect to Wisconsin's Open Meetings Act and decides a case of substantial and continuing public interest.

STATEMENT OF THE CASE

On June 28, 2013, the Plaintiff-Appellant filed a verified complaint with the Attorney General of the State of Wisconsin and the District Attorney of Outagamie County, requesting the commencement of a timely action under Wis. Stat. § 19.97(1). (R. 7, ¶33.) The District Attorney of Outagamie County did not commence such an action within 20 days after receiving Krueger's verified Complaint. (R. 7, ¶34.) The Plaintiff-Appellant then filed this complaint on July 29, 2013 in Outagamie County.

(R. 2.) It asserts two causes of action, both related to Wisconsin's Open Meetings Act, Wis. Stat. § 19.83. The first claim is for failure to give public notice of CAMRC's meetings. The second claim is for failing to hold CAMRC's meetings in open session.

All of the judges in Outagamie County recused themselves from the case and it was then assigned to Waupaca County Circuit Court Judge Vicki Clussman. (R. 23.) The parties filed cross motions for summary judgment. The Circuit Court heard oral argument on November 24, 2014. (R. 27.) The Circuit Court issued a Decision and Order granting summary judgment to the Defendants on December 23, 2014. (R. 24; App 101-105.) Mr. Krueger appealed on February 2, 2015. (R. 26.)

STATEMENT OF FACTS

The Board is a governmental body within the meaning of § 19.82(1) and is subject to the various requirements of the Wisconsin Open Meetings Act, §§ 19.81 – 19.98. (R. 7 (Amended Complaint) ¶3; R. 8 (Answer and Affirmative Defenses) ¶3.) State statutes place responsibility on the Board to: (1) create curricula, Wis. Stat. § 121.02(1)(k); (2) adopt textbooks, § 118.03(1); and (3) annually evaluate the district's reading curriculum, § 118.015(4). The Board has acknowledged that it "is legally responsible for

all educational materials utilized within the instructional program of the Appleton Area School District." (R. 12:31; AASD Rule 361.1, Dep. Ex. 5 at p. 1; App. at 106.)

The Board has delegated some of the responsibility for the selection of education materials to the Assessment, Curriculum, and Instruction Department (the "ACI Department") of AASD. (*Id.*) The Board also adopted a handbook (the "ACI Handbook") that delineates the process for selecting educational materials. Pursuant to AASD Rule 361.1:

> Curriculum revision is an ongoing process as defined in the AASD Assessment, Curriculum, and Instruction Handbook. The Handbook is available on the AASD website and delineates the processes leading to Board approval for curriculum revision, adoption of new courses, and implementation of curriculum materials.

(R. 12:34; Rule 361.1 at p.4, Dep. Ex. 5; App. at 109 (emphasis added).) The ACI Handbook was adopted by the Board on January 13, 2003. (R. 12:27, 54-55; Dep. Ex. 18; Barkmeier Dep., 45.)

The Plaintiff-Appellant took the deposition of three representatives of the Defendants-Respondents – Kevin Steinhilber (the Chief Academic Officer of AASD), Nanette Bunnow (the Humanities Director of AASD and one of the co-chairs of CAMRC), and Diane Barkmeier (a Board member). Ms. Bunnow made it clear that CAMRC's authority and mission

– to review reading materials for CA 1 and make recommendations as to the appropriate educational materials for that course – came solely from the Board via Rule 361.1 and the ACI Handbook:

> Q: Are you aware of anything other than Rule 361.1 and the ACI Handbook that provides any power or authority to anybody to participate in the review process for education materials?
>
> A: I don't understand the last part of your question.
>
> Q: Sure. I'm trying to figure out how does anybody get the power to do what CAMRC did? **And it strikes me that it comes from Rule 361.1** –
>
> A: Uhm-hum.
>
> Q: **-- and from the ACI Handbook? Do you agree with that?**
>
> A: **Yes. That I agree with.**
>
> Q: **Does it come from anywhere else?**
>
> A: **No.**

(R. 12:16, Bunnow Dep., 18 (emphasis added); *see also* R. 12:24-25; Barkmeier Dep., 17-18.) Ms. Bunnow also made it clear that CAMRC did its work under the provisions of Rule 361.1 and the ACI Handbook:

> Q: So in the Board's rule it says **when you're doing curriculum review as you were doing in CAMRC, it's to be done – the process is delineated in the ACI Handbook, correct?**
>
> A: **Yes.**

. . .

Q: . . . Rule 361.1 points out that the Board has the legal responsibility, but the Board delegates some of the work for that to others –

A: To the experts.

Q: **-- through the ACI Handbook. And the ACI Handbook, according to the Board rule, delineates the process, correct?**

A: **Yes.**

(R. 12:15; Bunnow Dep., 14-17 (emphasis added).)

The ACI Handbook's first step calls for the creation of a review committee. (R. 12:4, 28; Steinhilber Dep., 17; Dep. Ex. 3.) CAMRC was such a review committee. (R. 12:4,5; Steinhilber Dep., 17, 27; R. 12:16; Bunnow Dep., 20-21; R. 12:24; Barkmeier Dep., 11.) The minutes of the Board's April 23, 2012 meeting also agree and state (referring to CAMRC) that "a Communication Arts 1 Materials Review Committee was formed to review instructional materials that meet the CA 1 curriculum including the current Board adopted CA 1 materials." (R. 12:47; Dep. Ex. 11 at p. 2.)

CAMRC had all the formalities of a typical committee. It had seventeen members consisting of AASD administrators, teachers, and staff. (R. 12:12-14; Bunnow Dep., 5-6, 9-10; R.12;67; Defs' Resp. to Interr. No.

2.) It held nine meetings between October 3, 2011 and March 26, 2012. (R. 12:68; Defs' Resp. to Interr. No. 5.) Except for its last meeting, it always met on Mondays at 3:45 p.m. in the same location. (*Id.*) Ms. Bunnow, as co-chair, prepared the agendas for the meetings and took and distributed the meeting minutes. (R. 12:18; Bunnow Dep., 29.) CAMRC made decisions on specific matters by one of two methods – either ordinary voting or using a weighted voting system referred to as "consensus." (R. 12:22; Bunnow Dep., 51.)

CAMRC was created in 2011 for three reasons. First, it was created in reaction to Mr. Krueger's request for a reading list for CA 1 that contained books at the ninth-grade reading level, without obscenities, and without any sexualized content. (R.12:6,8; Steinhilber Dep., 33, 38; R. 12:13, 16-17; Bunnow Dep., 7-8, 20, 21-22, 24; R. 12:42-43; Dep. Ex. 8.) Second, it was created in light of the new Common Core State Standards for English Language Arts. (R. 12:6,8; Steinhilber Dep., 33-34, 38; R. 12:16-17; Bunnow Dep., 21-22, 24; R. 12:42-43; Dep. Ex. 8.) Third, the instructional materials being used in Communications Arts 1 were eight years old at that time except for one book that had been added in 2006. (R.

12:7-8; Steinhilber Dep., 37-38; R. 12:16-17; Bunnow Dep., 21-22, 24; R. 12:41; Dep. Ex. 7.)

CAMRC read approximately 93 fiction books, assessed their suitability to meet various curricular needs, and forwarded a recommended list of 23 books to the Programs & Services Committee of the Board. (R. 12: 19-20; Bunnow Dep., 33-34, 36-37; R. 12:42-47, Dep. Exs. 8, 10, 11.) During that process, Mr. Krueger asked to attend the CAMRC meetings but was told by district administrators that the meetings were not open to the public. (R. 11:1; Krueger Aff., ¶3.) Mr. Krueger sent an email to the AASD's Superintendent on November 17, 2011, copying Ms. Bunnow and Mr. Steihhilber, stating:

> Another major concern is that the entire process is being conducted in behind closed doors. Unfortunately, it is this closed door process that produced the objectionable materials in the first place. In the interest of openness, fairness, and public service, this selection process must be opened to the public. **In fact, we believe this process is subject to Wisconsin Open Meetings Law and we request that they be conducted in accordance with that law from this point forward.**

(R. 11:2-4; Krueger Aff., ¶4, Ex. A; R. 12:52; Dep. Ex. 16 (emphasis added).)

Mr. Krueger's email was forwarded to the Board on November 18, 2011 (R. 12;70-71; Defs' Supp. Resp. to Interr. 13; R. 12:26; Barkmeier Dep., 32; R. 12:52; Dep. Ex. 16), but the Board did not open the CAMRC meetings to the public (R. 11:2; Krueger Aff., ¶5). Public notices were not sent relating to the CAMRC meetings. (R. 12:69; Defs' Supp. Resp. to Interr. 7.) The public, in general, and Mr. Krueger in particular, were not allowed to attend CAMRC's meetings. (R. 12:70-71; Defs' Supp. Resp. to Interr. 8.) On April 12, 2012, the Programs & Services Committee of the Board adopted CAMRC's recommended reading list without any changes. (R. 12:20; Bunnow Dep. 37; R. 12:25; Barkmeier Dep., 18; R. 12:45; Dep. Ex. 10.) CAMRC then took its recommendations to the full Board, which adopted the recommendations without changes on April 23, 2012. (R. 12:20-21; Bunnow Dep. 37-38; R. 12:25; Barkmeier Dep., 18-19; r. 12:48-50; Dep. Ex. 11.)

STANDARD OF REVIEW

This dispute involves the application of Wisconsin's Open Meetings Act, Wis. Stat. §§ 19.81 – 19.98, to undisputed facts.[2] The legal issue is

[2] As noted by the Circuit Court in its Decision and Order, "Both parties agree that there is no genuine issue as to any material facts and that the case can be decided on Summary Judgment." (R. 24:1; App. 101.)

whether CAMRC is a "governmental body" within the meaning of § 19.82(1). The proper interpretation of the Open Meetings Act is resolved by the circuit court on summary judgment and reviewed by this Court *de novo*. *State ex rel. Herro v. Vill. of McFarland*, 2007 WI App 172, ¶12, 303 Wis. 2d 749, 737 N.W.2d 55 (interpretation of the Open Meeting Act and the application of that Act to the facts are questions of law; case resolved on summary judgment and reviewed *de novo*); *State ex rel. Citizens for Responsible Dev. v. City of Milton*, 2007 WI App 114, ¶¶4-5, 300 Wis. 2d 649, 731 N.W.2d 640 (interpretation of Wisconsin's Open Meetings Act and its application to the facts of a particular case is a questions of law; case resolved on summary judgment and reviewed *de novo*); *State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis. 2d 62, 70, 508 N.W.2d 603, 605 (1993) (Open Meetings Act case resolved on summary judgment and reviewed *de novo*).

ARGUMENT

The Circuit Court made four substantial errors in its Decision and Order: (1) the Circuit Court did not apply the liberal construction of the Open Meetings Act mandated by the Wisconsin Legislature and the Wisconsin Supreme Court and instead the Circuit Court expressly gave

precedence to the concerns of District administration rather than the public; (2) the Circuit Court failed to take into consideration the formal committee structure of CAMRC when deciding whether it was subject to the Open Meetings Act; (3) the Circuit Court ignored that CAMRC came into existence and had power to make a recommendation to the Board based solely upon a formal rule adopted by the Board; and (4) the Circuit Court failed to take into account that CAMRC was an advisory committee to the Board.

I. The Circuit Court Failed to Give the Open Meetings Act the Liberal Construction Required by Law.

In promulgating the Open Meetings Act, the Wisconsin Legislature stated, "In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, **it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business**." Wis. Stat. § 19.81(1) (emphasis added). Moreover, the Open Meetings Act "shall be liberally construed to achieve the purposes set forth in this section." § 19.81(4).

The Wisconsin Supreme Court has opined on why the Legislature created such a strong presumption of openness:

> We note, too, that § 19.81(1) states that the open meetings law is based on the premise that "representative government [depends] upon an informed electorate." We observe that government functions best when it is open and when people have information about its operations. It is not, however, merely a matter of enhancing the functions of government. Rather, the government must be accountable to the governed. It must be accountable to the people who underwrite government finances and provide its legitimacy. Having access to information about the workings of government undercuts arguments of subterfuge and ultimately promotes public trust and confidence.

State ex rel. Buswell v. Tomah Area Sch. Dist., 2007 WI 71, ¶26, 301 Wis. 2d 178, 732 N.W.2d 804 (alteration in original).

The Circuit Court took none of this into consideration. Instead the Circuit Court concluded that, "To find that CAMRC was a governmental body would have a significant adverse effect on the ability of School Administrators to address issues regarding curriculum that arise in the ordinary course of business." (R. 24:4; App at 104.) But that was legal error and flipped the public policy of this State on its head, advancing the interests of the government over the interests of the governed.

While public access must be "compatible with the conduct of governmental business," the Circuit Court failed to explain how permitting

public access to CAMRC meetings would impede government affairs in any way. CAMRC met at a regular time and place (Mondays at 3:45 p.m.in an identified conference room). (R. 12:68; Defs' Resp. to Interr. No. 5.) It operated based on agendas circulated by one of its co-chairs. (R. 12:18; Bunnow Dep., 29.) Because there was a schedule for the meetings and an advance agenda, giving public notice of the meetings would have been no problem.

Further, Mr. Krueger specifically asked to attend the CAMRC meetings. (R. 11:1; Krueger Aff., ¶3.) He informed the Co-Chair of CAMRC and the District Superintendent, in writing, of his request. (R. 11:2-4; Krueger Aff., ¶4, Ex. A; R. 12:52; Dep. Ex. 16.) The District Superintendent, in turn, informed the Board of Mr. Krueger's request. (R. 12;70-71; Defs' Supp. Resp. to Interr. 13; R. 12:26; Barkmeier Dep., 32; R. 12:52; Dep. Ex. 16.) But neither CAMRC nor the Board agreed to open the CAMRC meetings to the public. (R. 11:2; Krueger Aff., ¶5.) This was not a case involving lack of knowledge about the Open Meetings Act or an oversight regarding compliance with the Open Meetings Act, this was a deliberate decision to deny the public access to the CAMRC meetings.

Second, the Circuit Court ignored that the decision not to have public access was made, in substantial part, to avoid public scrutiny of the discussion regarding the reading list for CA 1 – the very scrutiny compelled and protected by the Open Meetings Act. Mr. Steinhilber testified that one reason they wanted the CAMRC meetings to be closed to the public is that they did not want Mr. Krueger to attend and publicize the statements made by CAMRC members about particular books. (R. 12:9-10; Steinhilber Dep., 44-46.) Mr. Krueger was associated with a group called Valley School Watch and had previously publicized statements made by teachers in a review committee meeting. (R. 11:2; Krueger Aff., ¶6; R. 12:8-9; Steinhilber Dep., 41-43.) The teachers on CAMRC did not want that to happen again. (R. 12:9-10; Steinhilber Dep., 44-46.)

But closing officially sanctioned advisory bodies to avoid embarrassment or controversy contravenes both the letter and the spirit of the Open Meetings Act. The Board and CAMRC are not allowed to keep the public from learning why particular decisions were made about particular books by having those discussions at a closed CAMRC meeting rather than an open Board meeting. Doing so defeats the purpose of the Open Meetings Act.

In that regard, this case is similar to *State ex rel. Newspapers, Inc, v. Showers*, 135 Wis. 2d 77, 398 N.W. 2d 154 (1987), in which the Wisconsin Supreme Court said:

> When the members of a governmental body gather in sufficient numbers to compose a quorum, and they intentionally expose themselves to the decision-making process on business of their parent body — by the receipt of evidence, advisory testimony, and the views of each other — an evasion of the law is evidenced. Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive matter may or may not be presented in its entirety to the public. Yet that persuasive occurrence may compel an automatic decision through the votes of the conference participants. ***The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be influenced dictates that compliance with the law be met.***

Showers, 135 Wis. 2d at 90, quoting *State ex rel. Lynch v. Conta*, 71 Wis. 2d 622, 685-86, 239 N.W.2d 313 (1976) (emphasis added). The *Showers* case occurred in a different context than this case (a meeting by less than a quorum of a governmental body) but the fundamental point is the same. Governmental business should be conducted in public and not behind closed doors. The Board was legally responsible for adopting a reading list for CA 1. It did so by approving, without change, the recommendations of

CAMRC. (R. 12:25; Barkmeier Dep., 18-19; R. 12:48-50; Dep. Ex. 11.) But by having CAMRC do its work behind closed doors, the Board and CAMRC shielded the public from observing – and potentially influencing – the process of government at work.

The Wisconsin Supreme Court has stated, "Having access to information about the workings of government undercuts arguments of subterfuge and ultimately promotes public trust and confidence." *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶26. But the Circuit Court ignored that admonition. When the Circuit Court said that it would not require compliance with the Open Meetings Act because to require compliance "would have a significant adverse effect on the ability of School Administrators to address issues regarding curriculum" (R. 24:4; App. at 104), the Circuit Court erred. What it should have said is that requiring compliance with the Open Meetings Act was essential so that the public would receive "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Wis. Stat. § 19.81(1).

II. CAMRC Was a Governmental Body.

The Circuit Court concluded as a matter of law that CAMRC was not a governmental body because there was no specific directive from the School Board creating CAMRC. (R. 24:4; App. at 104.) This was error.

Under § 19.82(1), a "governmental body" is defined as:

> a state or **local** agency, board, commission, **committee**, council, department or public body corporate and politic **created by** constitution, statute, ordinance, **rule or order**; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation; a local exposition district under subch. II of ch. 229; a long-term care district under s. 46.2895; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. I, IV, or V, of ch. 111.

(Emphasis added.)

CAMRC meets the definition of a governmental body. It was a local committee created by rule or order of the Board. No published Wisconsin case discusses this issue, but the Wisconsin Attorney General has provided a framework for analyzing what types of groups constitute a governmental body subject to the Open Meetings Act. Attorney General opinions on the Open Meetings Act, while not binding on courts, are nonetheless of highly persuasive value, as "the legislature has expressly charged the state attorney

general with interpreting the open meetings and public records statutes." *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶37, 312 Wis. 2d 84, 752 N.W.2d 295; *see* Wis. Stat. § 19.98 ("Any person may request advice from the attorney general as to the applicability of [the Open Meetings Act] under any circumstances.").

The Attorney General has made three important points that are material to the issue before this Court: (1) to be a governmental body, a group must constitute a collective body with a defined membership; (2) when an individual government official, acting within the scope of delegated authority, creates an advisory body, that body is treated as if it had been created directly by the governmental body with authority over that official; and (3) government bodies include committees that are created to give advice to other government bodies.

A. CAMRC Was a Collective Body with a Defined Membership Acting Through Collective Decision Making.

In construing Wisconsin's Open Meetings Act, the Wisconsin Attorney General's office has concluded that:

> **First, the group in question must constitute a collective body, rather than a mere assemblage of individuals.** . . . The open meetings law thus applies only to a meeting of a multi-member body that has a definable membership . . .

> **acting as a body through some mechanism of collective decision making.**

Tylka Correspondence, Jun. 8, 2005, at 2 (R. 12: 58) (emphasis added).

CAMRC easily met this test. It was a collective body with a defined membership of 17 people. (R. 12:67.) It met at a regular time and place – Mondays at 3:45 p.m.in an identified conference room. (R. 12:68.) It operated based on agendas circulated by one of its co-chairs. (R. 12:18.) It made collective decisions on specific matters by one of two methods – either ordinary voting or using a weighted voting system referred to as "consensus." (R. 12:22.)

One of the things that may have been troubling the Circuit Court is the argument advanced by the Defendants-Respondents that requiring CAMRC to comply with the Open Meetings Act would create a slippery slope leading to the conclusion that day-to-day meetings and discussion between teachers and district employees that involved curriculum would then be subject to the Open Meetings Act. (R. 14:23-25.) But the Attorney General's construction of the Open Meetings Act solves that problem. That rule of limitation specifically avoids an overbroad interpretation of the

Open Meetings Act – it only applies to formal committees and not to random day-to-day meetings of public employees.[3]

There is no doubt that the employees of the district are authorized to discuss between themselves a host of issues relating to their duties and responsibilities, including curriculum issues and text books. The Plaintiff-Appellant does not suggest that each and every one of those meetings is subject to the Open Meetings Act. But that is not what CAMRC was. CAMRC was a committee both by name (Communications Arts I Curriculum Review Committee) and by function. It was a formal group with a defined membership and group decision-making power. CAMRC met the rule of limitation as expressed by the Attorney General.

B. CAMRC Was Created by Rule or Order of the Board.

The Circuit Court concluded that to be a governmental body, CAMRC had to be directly created and its members appointed by a specific command of the Board. The Circuit Court seemed to assume that it is not sufficient for the Board to adopt a rule that says that under a defined set of circumstances an advisory committee shall be appointed by the School Administration. Perhaps, under the Circuit Court's view, a committee is

[3] Further, day-to-day discussions between employees of the District would not be covered by the Open Meetings Act because they were not committees created pursuant to rule or order of the Board. *See* Section II.B., *infra*.

only bound by the Open Meetings Act if the Board adopts a specific directive to create that specific committee.

But if that were truly the case, governing boards across the state could avoid the Open Meetings Act simply by authorizing administrators to create committees to do their work. The Attorney General has rejected such a reading of the statute, stating, "When an individual government official, acting within the scope of properly delegated authority, creates an advisory body, that body is treated *as if it had been created directly by the governmental body* with authority over that official." Tylka Correspondence at 4 (R. 12:60) (emphasis added). Further, the Attorney General has said that the words "rule and order" contained in the statute should be broadly construed to include any directive, formal or informal, that creates a body and assigns it duties. *Id*. at 2, citing 78 Op. Att'y Gen. 67, 68-69 (1989). Here, AASD Rule 361.1 (which was promulgated by the Board) meets that test.

The Board has acknowledged that it "is legally responsible for all educational materials utilized within the instructional program of the Appleton Area School District." (R. 12:31; AASD Rule 361.1 at p. 1; App. at 106.) The Board has delegated some of the responsibility for the

selection of education materials to review committees and CAMRC was such a review committee. (R. 12:4, 5, 16 and 24.) CAMRC owed its existence to Rule 361.1. The Defendants' own witness (CAMRC's co-chair) testified that CAMRC only existed and only had authority because of Rule 361.1 and the Board's Handbook:

> Q: Are you aware of anything other than Rule 361.1 and the ACI Handbook that provides any power or authority to anybody to participate in the review process for education materials?
>
> A: I don't understand the last part of your question.
>
> Q: Sure. I'm trying to figure out how does anybody get the power to do what CAMRC did? **And it strikes me that it comes from Rule 361.1** –
>
> A: Uhm-hum.
>
> Q: **-- and from the ACI Handbook? Do you agree with that?**
>
> A: **Yes. That I agree with.**
>
> Q: **Does it come from anywhere else?**
>
> A: **No.**

(R. 12:16; Bunnow Dep., 18 (emphasis added); *see also* R. 12:24-25; Barkmeier Dep., 17-18.)

CAMRC was specifically created under Rule 361.1 and the Handbook to provide recommendations to the Board with respect to the

Board's legal duty to select the educational materials for CA 1. Rule 361.1 and the Handbook are the "rule or order" of the Board that created CAMRC and assigned it duties.

The Circuit Court, however, found otherwise saying that CAMRC was not subject to the Open Meetings Act because it was created by administration (as opposed to the Board). (R. 12:3; App. at 103.) But this is only true in the sense that administrators appointed the members to CAMRC. That does not mean that CAMRC was not created by order or rule of the Board. To the contrary, Rule 361.1 authorized and empowered CAMRC. The administration's role was merely to populate it with members. Here, by virtue of the Rule and the Handbook, the Board directed administration to create a committee and administration followed that directive. To say that the Board did not create CAMRC is to ignore the undisputed facts.

Further, the Attorney General has specifically opined that governments cannot avoid the Open Meetings Act by having administrative officials – rather than the governing entity itself – direct the creation of a committee. In a formal opinion, the Attorney General concluded that committees created not only by the Secretary of the Department of

Revenue, but also committees created by "department district directors, bureau directors and property managers," were "governmental bodies," because the authority to create the committees had been delegated to those officials. 78 Op. Att'y Gen. 67, 69-70 (1989). Such advisory committees were "treated the same as if they were created by the board or the secretary and are subject to the open meetings law." *Id.* at 70; *see also* Staples Correspondence, Feb. 10, 1981 (a book review committee *appointed by the superintendent* concluded to be a "governmental body") (R. 12:62-63); Tylka Correspondence (management team *created by the superintendent* concluded to be a "governmental body") (R. 12:57-61).

Contrary to the decision of the Circuit Court, the Board did not need to explicitly order the creation of CAMRC and appoint its members for CAMRC to be a governmental body – the Board needed only to *authorize* the creation of a committee like CAMRC and assign it duties. *See* Sherrod Correspondence, October 17, 1991, 1 ("[T]his office has interpreted 'order,' as used in section 19.82(1), to include any directive from an existing governmental body, *that authorizes the creation of another body and assigns duties to that body*." (citing 78 Op. Att'y Gen. 67 (1989)) (R. 12:64) (emphasis added).

That test is met. The Board's directive in Rule 361.1 was to handle issues relating to the educational materials used as part of the curriculum in AASD by creating review committees such as CAMRC to make recommendations to the Board. Those committees operate under a process set forth in the Handbook adopted by the Board. Government cannot create committees outside the purview of the Open Meetings Act simply by delegating that role to administration.

C. CAMRC Was an Advisory Committee of the Board.

There is no dispute that under Wisconsin law the term "governmental body" includes advisory committees as well as committees delegated decision-making authority. *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979) ("The [Open Meetings Act] does not require or contemplate that committees must have such authority [to make final, binding decisions] before they are subject to the provisions of the Open Meeting Law.); 78 Op. Att'y Gen. 67, 68 (1989) ("The committee referred to in the [statutory] definition includes advisory committees as well as committees that have been delegated decision-making authority."). The Defendants-Respondents admitted this point below. (R. 20:20-21.) This is critical. It does not matter whether the creating body with ultimate

authority – in this instance the School Board – must approve or can alter the recommendation of the advisory committee; the advisory committee, in performing its work, is bound by the Open Meetings Act.

The Defendants-Respondents did, however, contend before the Circuit Court that CAMRC was not an advisory committee to the Board. (*Id*.) The Circuit Court did not address the issue in its decision. If the Defendants-Respondents make the same argument to this Court, it should be rejected because the testimony of the Defendants-Respondents' own witnesses and their own documents completely undercut their argument. Their witnesses testified that CAMRC's authority and mission was to review reading materials for CA 1 and make recommendations to the Board as to the appropriate educational materials for that course. (R. 12:15; Bunnow Dep., 14-15 ("We are selecting materials to recommend to the Board" . . . "we look for materials that will best meet that need, and then we take them to the Board as a recommendation."); R. 12:25 Barkmeier Dep., 18-19.) The April 23, 2012 minutes of the Board state that CAMRC "presented their recommendations" to the Board. (R. 12: 47.) CAMRC, in fact, made recommendations to the Board, which adopted the

recommendations on April 23, 2012 without change. (R. 12:20-21; Bunnow Dep. 37-38; R. 12:48-50; Dep. Ex. 11.)

The Attorney General has concluded in very similar circumstances that "a committee appointed by the school superintendent to consider school library materials" is a "governmental body." DOJ, Wisconsin Open Meetings Law: A Compliance Guide 3 (2010) (citing Staples Correspondence, Feb. 10, 1981) (R.12:62-63). Virgil Staples, Superintendent of the New Berlin Public Schools, asked the Attorney General's office whether the open meetings law applied to "a committee consisting of a staff librarian and faculty personnel, appointed by the superintendent pursuant to school district policies adopted by the school board to review a citizen's request for reconsideration of the inclusion of a book or material in the school library." (R.12:62.)

The Attorney General concluded that such a committee was subject to the Open Meetings Act. This was true even though the selection was "an internal administrative matter" and the committee's members may have had professional interest in which books were available in the district's libraries. "[T]he final responsibility of inclusion or exclusion, subject to

constitutional constraints, is with the board and the committee is acting in aid of such board." (R. 12:63.)

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The stated public policy of Wisconsin is that the business of government should be done in the open with the public being entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business. Here the government was making decisions about an issue that the public cared about but did not do so in the open. By having the essential work of book selection done in closed session by CAMRC rather than in open session by the Board, the Board defeated the State's public policy. But that is not how the Open Meetings Act works. CAMRC was a committee with the power to advise the Board, and which had the authority to do so solely by virtue of a rule adopted by the Board. Its meetings should have been open.

III. CAMRC Met in Violation of Open Meetings Laws.

CAMRC met in violation of the Open Meetings Act by holding "meetings" without giving proper notice or holding the meetings in open session.

The Circuit Court did not reach the question of whether CAMRC met in violation of the Open Meetings Act because it concluded that CAMRC was not a "governmental body" and was therefore not subject to the Open Meetings Act. (R. 24:4; App. at 104.) If this Court concludes that CAMRC was a governmental body, it should also reach the question of whether CAMRC violated the Open Meetings Act and conclude that it did, because that is purely a question of law. First, the issue was raised below (R.10:13-15), but even if it had not been the issue would still be reviewable in this Court. *Wirth v. Ehly*, 93 Wis. 2d 433, 444, 287 N.W.2d 140, 146 (1980) (When the issues raised are legal questions, briefed by the parties and of public interest, the issues merit decision by the Court of Appeals); *see also Davis v. City of Elkhorn*, 154 Wis. 2d 523, 454 N.W.2d 808 (Ct. App. 1990) ("We will address the issues here in the interests of judicial economy and because they present a question of law on undisputed facts.").

Under the Open Meetings Act, all meetings of governmental bodies must be preceded by adequate public notice. Wis. Stat. §§ 19.83(1), 19.84. Such notice must "set forth the time, date, place and subject matter of the meeting," § 19.84(2), must be provided to the public, to the news media who request such notices, and to the officially-designated newspaper, §

19.84(1)(b), and be provided at least 24 hours in advance of the meeting, § 19.84(3). Furthermore, all meetings of governmental bodies must be held in open session, § 19.83(1), which is defined as being "held in a place reasonably accessible to members of the public and open to all citizens at all times," § 19.82(3).

The undisputed facts show that CAMRC violated both of those requirements. From approximately October, 2011, through April, 2012, CAMRC held multiple meetings as that term is defined by § 19.82(2), for the purpose of exercising the responsibilities, authority, power, and duties it had been delegated by the Board to review reading materials and make a recommendation.

None of CAMRC's meetings were preceded by public notice as required by § 19.83. (R. 12:69; Defs' Supp. Resp. to Interr. No. 7.) None of these meetings were held in open session as required by § 19.83. (R. 12: 69-70; Defs' Supp. Resp. to Interr. No. 8.)

CAMRC and the Board were put on notice of these violations. On November 17, 2011, Mr. Krueger wrote an e-mail to Superintendent Allinger, copying Ms. Bunnow and Mr. Steinhilber, criticizing the review process, in particular that it was "being conducted behind closed doors."

(R. 11:3-4; Krueger Aff., ¶4, Ex. A.) The e-mail informed the Defendants that the "process is subject to Wisconsin Open Meetings Law" and requested "that the [meetings] be conducted in accordance with that law." (*Id*.) Nevertheless, notices of the CAMRC meetings were never sent and Mr. Krueger and the rest of the public were denied access to CAMRC's meetings. These are both violations of the Open Meetings Act and the Defendants-Respondents offer no defense for them other than their argument that the Open Meetings Act should not apply to CAMRC.

CONCLUSION

For the reasons set forth above, the Plaintiff-Appellant requests that this Court reverse the decision of the Circuit Court and grant summary judgment to the Plaintiff-Appellant declaring that CAMRC was subject to the Open Meetings Act and that CAMRC and the Board violated the Open

Meetings Act by allowing CAMRC to meet without public notice or public access.

Dated this 26th day of May, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 6,695 words, calculated using the Word Count function of Microsoft Word 2010.

Dated: May 26, 2015

/S/ RICHARD M. ESENBERG
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CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, with the appendix, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: May 26, 2015

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