STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN *ex rel*.
JOHN KRUEGER,

Plaintiff-Appellant,

Appeal No.: 2015-AP-000231

-v-

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

Defendants-Respondents.

On Appeal from a December 23, 2014 Final Order
of the Outagamie County Circuit Court
The Honorable Vicki L. Clussman, by Special Assignment, Presiding
Circuit Court Case No. 13-CV-868

BRIEF OF DEFENDANTS-RESPONDENTS APPLETON AREA SCHOOL DISTRICT BOARD OF EDUCATION AND COMMUNICATION ARTS 1 MATERIALS REVIEW COMMITTEE

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INTRODUCTION

This is an Open Meetings action in which the trial court ruled that a review committee comprised of administrators, curriculum support specialists and other district employees created internally by administration to respond to the request of Appellant, John Krueger ("Appellant" or "Krueger") and another parent for an alternative Communication Arts 1 course ("CA-1 course") was not subject to the Open Meetings Law. In granting summary judgment to the Appleton Area School District Board of Education ("Board") and the Communications Arts 1 Materials Review Committee ("Review Committee"), the trial court correctly found that there was no evidence that the Review Committee was created pursuant to a "rule or order" of the Board so as to constitute a "governmental body" required to comply with the Open Meetings Law.

On appeal, Krueger requests this Court to reverse the trial court's decision based on an incomplete and inaccurate portrayal of the law and facts. Appellant first erroneously argues that the trial court failed to properly apply a liberal construction of the Open Meetings Law in finding that the Review Committee, which conducted regular meetings in a structured manner, was not a "governmental body." Krueger asserts that the mere structure of the Review Committee warranted finding that the Review Committee was required to comply with the Open Meetings Law.

The trial court liberally construed the Open Meetings Law in deciding the issues before it. The court nonetheless correctly concluded, consistent with the

plain language of the Open Meetings Law, that there must first be evidence that a committee was created by "constitution, statute, ordinance, rule or order" under Wis. Stat. § 19.82(1) to bring a committee within the purview of the Open Meetings Law. The mere structure of a committee, alone, is insufficient to require a committee to comply with the law's provisions.

Appellant next contends that the trial court erred in concluding that the Review Committee was not created pursuant to a "rule or order" of the Board. Krueger argues that the Review Committee was the product of Board Rule 361.1 entitled "Responsibilities for the Selection of Educational Materials" and/or the District's Assessment, Curriculum & Instruction Handbook ("ACI Handbook") which Krueger contends was adopted by the Board. In the alternative, Krueger argues that the Review Committee was created by the District's Superintendent, Lee Allinger ("Allinger") pursuant to a directive from the Board.

Krueger's assertions are based on an incomplete and inaccurate presentation of the evidence. Rule 361.1 and the ACI Handbook do not mention or reference a parent's request for an alternative course, much less give direction to the District to create a committee to respond to such a request. Likewise, there is no evidence that Allinger directed the creation of the Review Committee or assigned the committee any responsibilities pursuant to authority vested in him by the Board or his own independent statutory authority. The undisputed testimony and evidentiary facts in the record demonstrate that the Review Committee was created internally by administration as part of its day-to-day responsibilities

relating to curriculum and was entirely independent of any rule or order of the Board or Superintendent Allinger.

Wisconsin court decisions as well as opinions of the Attorney General universally recognize that a committee is not subject to the Open Meetings Law in the absence of a directive in the form of a "rule or order" from a governing board or official that creates a committee and assigns responsibilities to it. There is no authority for the proposition that, in the absence of a rule or order of a governing board or official, employees who regularly meet regarding matters which arise out of their daily work activities constitute a "governmental body" subject to the Open Meetings Law. The label provided to the group, whether it be a "committee," "team," or "unit" is inconsequential. If a meeting of an employee group is not conduct at the direction of a governing body or pursuant to a rule or policy of that body, the group is not a "governmental body" subject to the Open Meetings Law.

The trial court's decision was in all respects consistent with a plain reading of the Open Meetings Law. Appellant's effort to extend the Open Meetings Law to the Review Committee in this case finds no support. Accordingly, this Court should affirm the trial court's decision dismissing Appellant's action.

STATEMENT OF THE ISSUE

Issue: Was the Review Committee subject to the Open Meetings Law?

Answered by the Trial Court: No. In granting summary judgment dismissing Krueger's amended complaint, the trial court found, based on the undisputed facts, that the Review Committee, which consisted of administrators,

curriculum specialists and employees whose day-to-day job duties included curriculum review and responding to parental complaints regarding curriculum, was not created as a result of a rule or order of the Board and, therefore, did not constitute a "governmental body" under Wis. Stat. § 19.82(1). Based on its conclusion that the Review Committee was not a "governmental body," the trial court ruled that the meetings of the Review Committee did not violate the Open Meetings Law.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This appeal may be decided on the briefs pursuant to Wis. Stat. § 809.22(2). Appellant's argument that government employees who meet, whether formally as a committee or in a less formal structure, in the course of performing their day-to-day duties rather than as the result of a rule or order of a governing board, constitute a "governmental body" is plainly contrary to the statutory definition of a "governmental body." Appellant has cited no controlling precedent, and the Respondent is aware of no such authority, which holds that internal committees created by administration and employees in the course of their day-to-day responsibilities which address and respond to concerns or requests from the public, are or can be, a "governmental body" under Wis. Stat. § 19.82(1) unless such meetings are conducted pursuant to an express rule or order of a governing board. The Parties' briefs, combined with the materials in the record, fully present and address the issues on appeal and otherwise develop the theories

and legal authorities on each side such that oral argument would be of marginal value.

The Court of Appeals' decision should nonetheless be published pursuant to Wis. Stat. § 809.23 as the Court will be applying the statutory definition of a "governmental body" to a fact situation which has not been previously addressed in any prior published decision. Publication will result in precedent confirming that the requirements of the Open Meetings Law do not apply to employee groups who, in the absence of an express rule or order from their governing body, meet to address issues which arise within the ordinary course of their employment regardless of their structure.

Publication will further provide clarity on the entities which fall within the definition of a "governmental body" for purposes of the Open Meetings Law. School districts and other municipal governments across the State of Wisconsin employ a variety of administrators, managers, and support staff that are responsible for the provision of services to the public. During the course of performing their duties, these employees often meet on a regular basis to discuss how best to provide services to the public and to address concerns and requests from the public regarding those services. This Court's decision will demonstrate that these employee groups, in whatever form they meet and whatever label they are given, do not constitute a "governmental body" as defined in Wis. Stat. § 19.82(1) unless they are expressly created pursuant to a rule or order of a governing board.

STATEMENT OF THE CASE

This is an appeal of the decision of the Outagamie Circuit Court, by Judge Vicki L. Clussman, on special assignment, holding that the Review Committee was not a "governmental body" as defined in Wis. Stat. § 19.82(1), and therefore, not subject to the requirements of the Open Meetings Law. The Review Committee was created by administration to respond to Krueger's request to the District for an alternative CA-1 course. (R.15 at 105; *see also* R.15 at 106). The committee began by reviewing the reading list for the CA-1 course to see if an alternate course was necessary but later expanded its scope to include a review of the CA-1 course materials. (R.15 at 20, 24-25, Steinhilber Dep., pp. 15-16; R.15 at 44-45, Bunnow Dep., pp. 21, 24).

Krueger brought suit alleging that the Review Committee was a "governmental body" covered by the Open Meetings Law and that the Review Committee failed to give prior public notice of its meetings and to conduct those meetings in a place reasonably accessible and open to members of the public as required by the law. (R.7 at 7, Amended Comp., ¶¶23, 28-29, 36-44). Krueger based his claim that the Review Committee was a "governmental body" on the premise that the Board was legally responsible for curriculum in the District and delegated that responsibility to the Review Committee through, among other things, Board Rule 361.1 and the ACI Handbook (R.7 at 2-3, Amended Comp. ¶¶13-18).

The parties filed cross-motions for summary judgment. (R.9-22). On December 22, 2014, the trial court issued a written decision granting the Board's motion for summary judgment, denying Krueger's motion for summary judgment and dismissing Krueger's amended complaint in its entirety. (R.24 at 4). The court held that the Review Committee was not created at the directive of the Board, and therefore, was not a "governmental body" under Wis. Stat. § 19.82(1). (R.24 at 4). The court further held that because the Review Committee was not a "governmental body," the meetings of the Review Committee were not conducted in violation of the Open Meetings Law. *Id.* Accordingly, the court dismissed Krueger's amended complaint. (R.24 at 4).

In reaching its decision, the trial court stated that the Open Meetings Law "must be broadly construed" to ensure the public's right to "the fullest and most complete information regarding the affairs of government as is compatible with conduct of governmental business." (R.24 at 3). Notwithstanding its obligation to construe the Open Meetings Law liberally, the court recognized that the Open Meeting Law does not apply to a committee unless the committee was "created by constitution, statute, ordinance, rule or order," and therefore, a "governmental body" under Wis. Stat. § 19.82(1). *Id.* The trial court adopted the following standard to determine if the Review Committee was created by an "order":

> The Attorney General's 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. The group in question must constitute a collective body rather than a mere assembelence (sic) of individual. Further, the group must convene members

> for the purpose of exercising the responsibilities authority power or duties delegated to or vested in the body. The group must have identifiable governmental powers and duties vested in it by law or delegated to it by law when it acts formally as a body.

Id.

The trial court concluded that the Review Committee was not a "governmental body" because there was no evidence that the Review Committee was created pursuant to any directive by the Board. *Id.* The court found that the Review Committee was created internally by administration as part of an effort to address Krueger's request for an alternative CA-1 course. *Id.* The court similarly concluded that the expansion of the role of the Review Committee to include evaluation of the CA-1 reading list and the impact of pending common core standards was not pursuant to any order of the Board, but rather, a decision made internally by administration. (R.24 at 4).

The trial court rejected Krueger's argument that school boards have sole authority over the selection and review of curriculum "such that any meeting of any group of individuals to discuss curriculum constitutes a meeting of a governmental body…." (R.24 at 3-4). The court found that administrative professionals and staff are responsible for planning, revising, and implementing consistent curriculums with State standards as part of their job duties. (R.24 at 4). The court noted that finding an internally created committee, such as the Review Committee, 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." *Id.*

STATEMENT OF FACTS

I. CURRICULUM DEVELOPMENT IN THE APPLETON SCHOOL DISTRICT.

A. Administrative Staff.

The District maintains an Assessment, Curriculum and Instruction Department ("ACI Department") which is responsible for instructional programming and assessment to meet the needs of the students in the District. (R.19 at 1, Allinger Aff. ¶2). The ACI Department is comprised of administrative professionals and staff who are responsible for the planning, selection, revision and implementation of curriculum within the District. (R.19 at 1-2, Allinger Aff. ¶3). The responsibilities of the ACI Department include working with parents and the community to address issues regarding curriculum. *Id.*

Kevin Steinhilber ("Steinhilber") leads the ACI Department and is responsible for the curriculum development process. (R.19 at 2, Allinger Aff. ¶7). Steinhilber oversees a group of nine (9) curriculum directors and coordinators employed by the District, one of which is the District's Director of Humanities, Nanette Bunnow ("Bunnow"). *Id.*

Steinhilber's job responsibilities reflect the day-to-day involvement of administrative staff in the development, evaluation and implementation of curriculum within the District. (R.19 at 2, Allinger Aff. ¶7, Exhibits A and B). This process includes the formation of teams, groups, and task forces relative to curriculum planning, implementation, development and revision as part of the

District's daily operations. *Id.* Steinhilber's job responsibilities include the following:

- Assume line responsibility for curriculum planning and implementation;
- Direct and coordinate program and curriculum development;
- Review and approve proposals for curricular revision;
- Oversee the implementation and evaluation of curriculum programs adopted by the Board of Education;
- Function as a liaison to the community, Department of Public Instruction, and other districts regarding program/curriculum;
- Supervision and Coordination of Curriculum Supervisory Staff;
- Review and approve annual goals of designated curriculum supervisors;
- Assist in curriculum development (Serve and/or lead task forces, planning groups, etc.);
- Provide leadership in implementation of curriculum changes;
- Encourage teachers to experiment with innovative teaching techniques.

Id.

As a curriculum director, Bunnow provides leadership in developing curriculum, program coordination, and assisting with the curriculum development process through serving on or leading internal curriculum committees and planning groups. (R.19 at 2, Allinger Aff. ¶8). Bunnow's job responsibilities similarly reflect the day-to-day obligations of administration in the management and development of curriculum:

- Serve as liaison person for curriculum, instructional and assessment related needs for individual school improvement;
- Provide a vision for the integration of standards, curriculum and assessments;

- As part of the curriculum process development, assists in the development of performance assessments;
- Provide leadership in implementation of curriculum changes; and
- Direct and coordinate program and curriculum development.

(R.19 at 2, Allinger Aff. ¶8, Exhibit C).[1]

The District also employs several other employees who are responsible for curriculum as part of their daily job duties including Curriculum Support Specialists, principals, and teaching professionals. (R.19 at 3, Allinger Aff. ¶¶10-12). Curriculum Support Specialists are required to: (1) oversee curriculum as it relates to applicable district, state and national standards; (2) facilitate the sharing of innovative ideas, programs and subject-specific instructional resources and technology; and (3) be actively involved in textbook adoptions and textbook and material inventory. (R.19 at 3, Allinger Aff. ¶10, Exhibit D).

School principals are required to provide direction to instructional program management in the schools they oversee. (R.19 at 3, Allinger Aff. ¶11, Exhibit E). Likewise, teachers are responsible for implementing curriculum, assessing its effectiveness and identifying and assessing additional curriculum options within their areas of instruction. (R.19 at 3, Allinger Aff. ¶12). Teachers are also expected to work with administration on the development of curriculum within the District. *Id.*

[1]Steinhilber and Bunnow are required to hold a Director of Instruction license under Wis. Admin. Code §§ PI 34.32(1) and (4). (R.19 at 3, Allinger Aff. ¶9). DPI requires Directors of Instruction to demonstrate proficient performance in several areas related to curriculum. (R.19 at 3, ¶9; R.18 at 1, ¶2, Exhibit H).

The District's Superintendent, Allinger, provides leadership and support to the ACI Department. (R.19 at 4, Allinger Aff. ¶17). Allinger is not directly involved in the curriculum writing and revision process, but does provide guidance, leadership, and ideas to Steinhilber, Bunnow, and the other curriculum coordinators and directors – those who are directly responsible for curriculum. *Id.*

B. General Policies and Guidelines Relating to Curriculum.

1. The ACI Handbook.

To assist in the development of curriculum and instruction, the ACI Department developed the ACI Handbook. (R.15 at 20-21, Steinhilber Dep., 17-19). The ACI Handbook establishes internal protocols for curriculum review and revision, curriculum development and material selection. (R.15 at 20-21, Steinhilber Dep. 17-19). The ACI Handbook was developed as an internal working document by the ACI Department and was intended to serve as a guide for curriculum review. *Id.* Steinhilber explained:

> Q: And then I am correct that the ACI Handbook was then formally adopted for the district by an order of the school board?
>
> A: Not by order of the school board. Linda Dawson, for an internal working document, wanted us to create this artifact so that we had our own protocol that we could use then as we moved forward through the standard setting, curriculum review and revision as well as development process and materials selection reviewed to support us as we then went through that process and took to our Board of Education our recommendations for curriculum, as well as instructional materials, for their review.

(R.15 at 21, Steinhilber Dep., p. 18).

The ACI Handbook creates a process for curriculum revision and writing based on a 6-year curriculum cycle. (R.15 at 70-73). The curriculum cycle is

broken down into two phases in the ACI Handbook. (R.15 at 42). In Phase One, a committee is established for program review; the committee is provided information regarding national, state, and local standards; an overview is provided for the curriculum review process and timelines; and goals and a written analysis of the program is developed. (R.15 at 70, 77). *Id.* In Phase Two, the review committee reviews existing curriculum and identifies possible materials/resources to support the curriculum, writes/identifies district-wide standards, and provides recommendations for staff development. *Id*.

2. Board Rule 361.1.

The Board maintains Rule 361.1 entitled "Responsibilities for the Selection of Educational Materials." Appellant App. at 106-115. The introductory section Board Rule 361.1 states:

> Responsibilities for the Selection of Educational Materials
>
> In Wisconsin, it is the role of the local school board to establish written policies, procedures, and rules for the operation of the schools within the District and to adopt textbooks. The District also has the responsibility to provide adequate materials and texts which reflect the cultural diversity and pluralistic nature of the American society….
>
> The Board of Education, as the governing body of the District, is legally responsible for all educational materials utilized within the instructional program of the Appleton Area School District. The selection of educational materials is delegated to the professionally trained and certified personnel employed by the school system. The responsibility for coordinating and maintaining qualitative standards in the selection process rests with the Assessment, Curriculum, and Instruction (ACI) department. Textbooks, however, must be formally adopted by the Board of Education since they often constitute the major content of the curriculum.

Appellant App. at 106.

Board Rule 361.1 later recognizes the role of the ACI Handbook in the District's curriculum review process:

> 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.

Appellant App. 109.

Finally, Board Rule 361.1 includes various procedures that allow parents to object to educational materials used in the District. Appellant App. 107-108.[2] The Rule does not, however, incorporate any process for addressing a parent request for an alternative course, as was made by Krueger in this case. Appellant App. 106-115.

C. Curriculum Development is a Daily Process.

The District employs a "team" approach as it relates to curriculum development due to the number and diversity of subjects taught in the District. (R.19 at 3, Allinger Aff. ¶13). Curriculum teams are responsible for developing curriculum within the instructional areas that they have been assigned. *Id.* Subject area curriculum teams drive curriculum development for the District.

[2]The Rule provides a process for handling objections and requests for reconsideration. The Rule includes a process for filing of a written complaint with the District Superintendent which is then forwarded to the District's Educational Review Committee which is composed of citizens, professional staff and students which reviews the materials and provides a written recommendation to the Superintendent regarding their continued use. Appellant App. at 107. The Superintendent reviews the recommendations of the Educational Review Committee, may ratify, amend or overrule the recommendations, and provides his or her decision to the complainant. *Id.* The complainant may appeal the Superintendent's decision to the Board which renders a final decision on the objection. *Id.* at 108.

Once curriculum is developed and put into place, District administrators and professional educators alike ensure the teaching and learning in a particular content area is actually helping to educate students, and ultimately, helping them achieve. (R.19 at 3, Allinger Aff. ¶14).

District staff meets on an ongoing basis to discuss issues related to curriculum. (R.19 at 3, Allinger Aff. ¶15). The process evolves daily, as revisions are made based on everyday progress of students in the classroom. *Id.*

II. THE REVIEW COMMITTEE.

A. Creation of the Review Committee.

1. The Review Committee Was Not Created Pursuant to Any Rule or Order.

The undisputed facts in the record demonstrate that the Review Committee was not created by any rule or order of the Board but rather, by administration in response to Krueger's request for an alternate CA-1 course. In this respect, on July 25, 2011, Krueger and community member Paul Trelc ("Trelc") approached District administration and requested the District to consider providing an alternate CA-1 course due to concerns Krueger and Trelc had regarding the content in the reading materials for the CA-1 course. (R.15 at 7-8, 105-106). Trelc and Krueger requested an alternate course in which "the books used would be selected using more stringent criteria than those used for the existing list." (R.15 at 105).

It is undisputed that Krueger did not initiate a request for reconsideration of educational materials. In his responses to the Board's requests for admissions, Krueger confirmed that the request he made to the District was for an *alternative course*, not a review of existing course materials such that the process in Rule 361.1 could possibly apply to the Review Committee. (R.15 at 105-106, Krueger Responses to Requests for Admission Nos. 19 and 20). Krueger states:

> 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.

(R.15 at 105, Krueger Response to Request for Admission No. 19).

Allinger instructed Steinhilber and Bunnow to address Trelc's and Krueger's request. (R.19 at 4, Allinger Aff. ¶19; R.15 at 44, Bunnow Dep, p. 19; R.15 at 17, 19, Steinhilber Dep., pp. 5, 10-11). Steinhilber and Bunnow ultimately decided to conduct a review of the CA-1 books to determine whether different books, as opposed to an entirely new course, would resolve Krueger's and Trelc's concerns. (R. 16 at 2, Steinhilber Aff. ¶9). Steinhilber and Bunnow created the Review Committee to conduct this evaluation. (R.15 at 20, Steinhilber Dep., pp. 15-16).

The procedures utilized for the Review Committee's evaluation of the CA-1 course materials were developed by Steinhilber and Bunnow utilizing a modified version of the process described in Board Rule 361.1 and the ACI Handbook. (R.15 at 17, 19-20, Steinhilber Dep., pp. 4-5, 11, 15-16; R.15 at 41, 44, 49,

Bunnow Dep. pp. 7-8, 19-20, 39-41). Although Steinhilber and Bunnow borrowed concepts from Board Rule 361.1 and the ACI Handbook, it is undisputed the Review Committee was not created based on any provision in Board Rule 361.1 or the ACI Handbook. (R.15 at 17-20, 22-23, Steinhilber Dep., pp. 5, 9-10, 14-15, 22-26; R.15 at 44, Bunnow Dep. pp. 18-19).[3]

Steinhilber and Bunnow subsequently expanded the Review Committee's duties to include a review the course materials for CA-1 because the materials had not been reviewed for eight years. (R.15 at 24-25, Steinhilber Dep., pp. 33-34; R.15 at 44-45, Bunnow Dep., pp. 21, 24). Review of the CA-1 reading materials allowed the District to address the impact that the common core requirements would have on the CA-1 reading materials including those common core requirements relating to non-fiction reading materials. *Id.*

Neither the Board nor any board committee took formal action to approve or direct the Review Committee's creation or the processes the Review Committee adopted to address Krueger's and Trelc's request for a course alternative. (R.16 at 2, Steinhilber Aff., ¶10). Superintendent Allinger also did not direct or order Steinhilber or Bunnow to take any specific steps or measures in response to the concerns of Krueger and Trelc, nor was Allinger involved in developing the

[3]The modified process differed from the curriculum cycle referenced in the ACI Handbook in at least two material respects. (R.15 at 47, 49, Bunnow Dep., pp. 33; 39-41). First, the Review Committee did not develop guiding principles as required in Phase One of the handbook process. (R.15 at 49, Bunnow Dep., p. 40). Second, the Review Committee reviewed, but did not rewrite, the curriculum as is done in Phase Two of the formal process. (R.15 at 49, Bunnow Dep., p. 41).

process used by Steinhilber and Bunnow to address the concerns. (R.19 at 4, Allinger Aff. ¶18).

2. Appellant's Assertion that the Review Committee Was Created Based on Board Rule 361.1 or the ACI Handbook Is Based on an Incomplete Presentation of the Facts.

Throughout his brief on appeal, Krueger cites to various deposition testimony from Bunnow and Steinhilber for the proposition that the Review Committee was created pursuant to Board Rule 361.1 and the ACI Handbook. Appellant Br. at 6-8, 24. The excerpts relied upon by Krueger, however, are incomplete and misleading.

From the outset of her testimony, Bunnow established that the Review Committee was created internally by administration in response to Krueger's and Trelc's request for an alternative CA-1 course:

> Q: When was CAMRC created?
>
> A: After -- In August is when the -- it came in response to the request for the alternative CA1 course from Mr. Krueger and Mr. Trelc. And so in response to that request, a process was put into place to address the request and that – the committee was the result of that, a committee put in place to address the request.

(R.15 at 40, Bunnow Dep., p. 4).

Bunnow repeatedly emphasized that the Review Committee was not created pursuant to the ACI Handbook but, rather, pursuant to a modified process developed by Bunnow and Steinhilber. (R.15 at 42-43, Bunnow Dep., pp. 13-14). Bunnow testified:

> Q Would you turn to Exhibit 3 in the exhibits in front of you? Do you recognize Exhibit 3 as an excerpt from the ACI Handbook?
>
> A: Yes.
>
> Q: And Exhibit 3 is the section of the ACI Handbook that provides the procedures for educational materials review committees, correct?
>
> A: Yes. Well, again, educational review committees are a portion of what these committees do. We modify the process for this request.
>
> Q: So Exhibit 4, as I understand it, is the modified process that you just referenced, right?
>
> A: Yes.

(R.15 at 42, Bunnow Dep., p. 13).

In response to a direct question from Krueger's counsel regarding the underlying authority for the Review Committee, Bunnow again testified that the Review Committee was not created pursuant to Board Rule 361.1 or the ACI Handbook:

> Q: Where did it get its power from to do anything other than Rule 361.1 and the ACI Handbook?
>
> A: I would say in this case that when Mr. Trelc and Mr. Krueger came forward and asked for this alternative course, Superintendent Allinger could have said, no, we're not going to look at it. So in this case if that request hadn't been brought forward, we wouldn't have started the process or done anything until our normal curriculum cycle, which would have been -- which we just completed this last two years.
>
> * * * * *
>
> In this case I would say that Superintendent Allinger asked us, or said that he would like Kevin and I to move forward to address Mr. Trelc and Mr. Krueger's concerns. We used the process that was in place through 361.1 in the Handbook in a modified process.

(R.15 at 44, Bunnow Dep., pp. 18-19).

Steinhilber likewise testified that the Review Committee was created specifically to address Krueger's and Trelc's concerns and request for an alternative CA-1 course rather than pursuant to any established rule or process:

> Q: What was your role, if any, with respect to CAMRC?
>
> A: Originally, when concerns were brought forward, as part of an original meeting between the plaintiff that had concerns, and I sat in with Nan Bunnow, Lee Allinger, our superintendent, and Ben Vogel, who was an assistant superintendent. And we heard the concerns, and from that the direction that our superintendent gave us, Nan and myself, was to, you know, respond to the concerns that were raised and come up with a process. So I was involved with Nan in looking at our -- the processes we had in place to see how we could streamline them to address the concerns that were raised in a responsible manner, realizing that we were entering at an atypical time from how we usually do business.

(R.15 at 17, Steinhilber Dep, p. 5)

Steinhilber testified that the process adopted for the Review Committee was a modified version of the process described in the ACI Handbook:

> Q: And the process that you adopted for that purpose the process (sic) found in the ACI Handbook?
>
> A: We used that as a basis. And we modified from the handbook. We have a phase one and two. We looked at those and did a modification because we did not fulfill fully the intent of either one of those two processes.

(R.15 at 20, Steinhilber Dep., pp. 15-16).

Later in his testimony, Steinhilber again confirmed that the Review Committee was not developed pursuant to Board Rule 361.1 or the provisions of the ACI Handbook:

> Q: All right. Let me see if I can put some of that together. We know under Rule 361.1 that the legal responsibility for educational materials rests with the Board. And I take it that you would add to that as a practical matter the work for that is done by the ACI Department, is that correct?
>
> A: I would say the background work is done by, in this case, the curriculum review group and they brought forward the recommendations.

Q: And the Board…created the process by which CAMRC was to do that work in the ACI Handbook, correct?

A: I would disagree with that.

*****

Q: All right. And you don't have the power in the ACI Department practically to do it different than the Board tells you you're supposed to do it, correct?

A: In practice I would disagree with that.

Q: So you're saying that from your standpoint the ACI Department can overrule the policies of the Board?

A: We had identified a process which we feel is appropriate to the curriculum and the situation that we're addressing.

Q: And from your standpoint, you can do that no matter what the Board says, is that right?

A: We may alter it. We may not follow it identically to the way it is in our handbook.

(R.15 at 22-23, Steinhilber Dep., pp. 23-26).

B. Membership and Meetings.

At the end of August 2011, Bunnow began seeking volunteers in the English and Language Arts Department for the Review Committee. (R.15 at 40-41; Bunnow Dep., pp. 5-6). Bunnow sought individual teachers and library specialists who either taught the CA-1 course or who were familiar with its content. (R.15 at 40; Bunnow Dep., pp. 6-8). Seventeen individuals expressed interest and agreed to become members of the Review Committee. (R.15 at 40-42, Bunnow Dep., pp. 5, 8-10).

Because of the type of committee that was formed—a committee in response to a parent and community member concern, rather than a traditional

materials review committee—Steinhilber and Bunnow determined that it would be advisable for an administrator to chair the committee. (R.15 at 42, Bunnow Dep., pp. 10-11). Accordingly, Bunnow was appointed to serve as co-chair along with Principal James Huggins ("Huggins"). (R.15 at 24, Steinhilber Dep., pp. 30-31; R.15 at 42, Bunnow Dep., pp. 10-11).

The first meeting of the Review Committee was held on October 3, 2011. (R.15 at 40, 46, Bunnow Dep., pp. 5, 26; R.15 at 23, Steinhilber Dep., p. 29). Ultimately nine Review Committee meetings were held—eight meetings consisting of the full committee and one meeting of a work group subcommittee for those who were available. (R.15 at 46, Bunnow Dep., pp. 26-27).

With respect to the Review Committee's evaluation of books for the CA-1 course, the committee began with a list of 93 books. (R.16 at 2, Steinhilber Aff. ¶11). The books selected for review included books which were currently being utilized in the CA-1 course, books recommended by Krueger, Trelc and other community members, as well as books suggested by educators in the District. (R.16 at 2, Steinhilber Aff. ¶12).

The initial analysis included looking at the professional reviews of the books in professional resources/journals. (R.16 at 2, Steinhilber Aff. ¶13). The Review Committee then reviewed and discussed the books and either took a vote by majority or by consensus to determine which books met the District's criteria to support the curriculum. (R.16 at 2, Steinhilber Aff. ¶14). Books which met the criteria were passed to reading teams for a more complete analysis. *Id.* Reading

team recommendations were then taken to the Review Committee as a whole to review the synopsis, discuss the materials and determine which books had the support of the committee for moving forward. (R.15 at 51, Bunnow Dep., pp. 50-51).

Applying this process, the Review Committee generated a list of 24 books for public input. (R.15 at 27, Steinhilber Dep., p. 48; R.15 at 47, Bunnow Dep., p. 33). After receiving feedback from the public, the Review Committee decided one book would be removed from the recommended list. (R.15 at 27, Steinhilber Dep., p. 49; R.15 at 48, Bunnow Dep., pp. 34-35). The remaining 23 books were taken first to the Board's Programs and Services Committee and then to the full Board for approval. (R.15 at 27-28, Steinhilber Dep., pp. 49-51). The full Board unanimously approved the reading list. (R.15 at 28, Steinhilber Dep., p. 51; R.15 at 37-38, Bunnow Dep., pp. 37-38).

STANDARD OF REVIEW

The sole issue on appeal is whether the Review Committee is a "governmental body" which is subject to the requirements of the Open Meetings Law. This is a question of law which this Court reviews *de novo* on appeal. *State ex rel. Hodge v. Town of Turtle Lake,* 180 Wis.2d 62, 70, 508 N.W.2d 603 (1993).

ARGUMENT

I. THE TRIAL COURT CORRECTLY INTERPRETED AND APPLIED THE OPEN MEETINGS LAW IN REACHING ITS DECISION.

Krueger first argues that the trial court's decision should be reversed because the court failed to give the Open Meetings Law the "liberal construction required by law." Appellant Br. at 13. Krueger asserts that had the trial court applied this "construction," the court was bound, as a matter of law, to find that the Review Committee was a "governmental body" subject to the Open Meetings Law. *Id.* at 13-18. Krueger's arguments, however, are belied by the trial court's decision and by the plain language and meaning of the Open Meetings Law.

Krueger misstates the analysis conducted by the trial court. Contrary to Krueger's claims, the trial court applied the "liberal construction" required by the Open Meetings Law in reaching its decision. The trial court expressly recognized that the Open Meetings Law "must be broadly construed to ensure the publics (sic) right to the fullest and most complete information regarding the affairs of government as is compatible with conduct of governmental business." (R.24 at 3).

Moreover, Krueger misapplies the "liberal construction" requirement. The liberal construction of the Open Meetings Law does not, as Krueger urges, mandate finding that any meeting of governmental employees constitutes a meeting of a "governmental body" under the Open Meetings Law. Such a

construction ignores the plain language of Open Meetings Law and the limitations the legislature placed on the scope of its application.

In enacting the Open Meetings Law, the legislature declared that it is the policy of the State of Wisconsin 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). Notwithstanding the policy behind the Open Meetings Law, not all meetings which occur in school districts or other governmental entities must be open to the public. The legislature limited the application of the Open Meetings law to "meetings" of a "governmental body":

> To implement and ensure the public policy herein expressed, *all meetings of all state and local governmental bodies* shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.

Wis. Stat. § 19.81(1) (emphasis added).

Section 19.83(1), Wis. Stat., incorporates the same limitation:

> **(1)** *Every meeting of a governmental body* shall be preceded by public notice as provided in s. 19.84, and shall be held in open session. At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.

Wis. Stat. § 19.83(1) (emphasis added).

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 … or a formally

constituted subunit of any of the foregoing." Wis. Stat. § 19.82(1). A "meeting" is defined as "the convening of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body…" Wis. Stat. § 19.82(2).

The plain language of Wis. Stat. §§ 19.82 (1) and (2) contemplates that the mere gathering of government employees, however structured or named, to discuss or address matters that that fall within the scope of their day-to-day job duties, is insufficient, in and of itself, to bring the group within the ambit of the Open Meetings Law. In order to be subject to the Open Meetings Law, the group or committee must be "created" by a "constitution, statute, ordinance, rule or order." Wis. Stat. § 19.82(1). Likewise, there must be some indicia that the committee has "responsibilities, authority, power or duties delegated to or vested" in it. Wis. Stat. § 19.82(2).

The trial court interpreted the Open Meetings Law consistent with the plain language of the statute. While recognizing the policy of liberal construction of the law in order to provide the public with "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business," the trial court appropriately limited the scope of the Open Meetings Law to entities which fall within the definition of a "governmental body" as defined in Wis. Stat. § 19.82(1).

The trial court's construction is consistent with court decisions interpreting the Open Meetings Law. The Wisconsin Supreme Court has long recognized that

in order for a group of government employees who meet to be subject to the Open Meetings Law, the group must be the product of a "rule or order" of a governing body. *State ex. rel Lynch v. Conta*, 71 Wis. 2d 662, 681, 239 N.W.2d 313 (1976). The Court in *Conta* recognized that the Open Meetings Law "defers the determination of the existence or composition of a particular government body to the enactment which creates the body." *Id.* The Court stated that the question of whether a particular group of members of government comprise a "governmental body" is answered in the "affirmative only if there is a 'constitution, statute, ordinance, rule or order' conferring collective power and defining when it exists." *Id.*[4]

The trial court's construction is further in accord with the Attorney General's construction of Wis. Stat. § 19.82(1) which the trial court relied upon for guidance in reaching its decision. (R.24 at 3). Like the Wisconsin Supreme Court, the Attorney General has recognized that to be subject to the Open Meetings Law, a committee or group of government employees must be the product of a "rule or order" which includes any directive, formal, or informal, that

[4] The Court in *Conta* dealt with the predecessor version to the current Open Meetings Law. As recognized by the Wisconsin Supreme Court in *State ex. rel. Newspapers Inc. v. Showers*, 135 Wis. 2d 77, 90, 398 N.W.2d 154 (1997) the legislature revised the Open Meetings Law following *Conta* to, among other things, require liberal construction of the statute. *Showers*, 135 Wis. 2d at 93-103. The legislature did not, however, change the definition of "governmental body." The *Conta* court's interpretation of "governmental body," therefore, is still good law and governs in this case.

creates a body and assigns duties to the body. *Tylka Correspondence*, (June 8, 2005).[5]

Appellant's reliance on the Wisconsin Supreme Court's decision in *State ex rel. Buswell v. Tomah Area Sch. Dist*, 2007 WI 71, ¶26, 301 Wis. 2d 178, 732 N.W.2d 804, that the Open Meetings Law should be interpreted consistent with a "presumption of openness" does not alter the result in this case. Appellant Br. at 18. The "presumption of openness" does not operate to compel the conclusion that all committees of government employees created in the course of providing government services are subject to the Open Meetings Law. The "presumption of openness" does not override the plain language of Wis. Stat. § 19.82 which expressly limits the law's application to committees created by a "rule or order" of a governing body.

Application of the "presumption of openness" as Appellant urges would impermissibly render meaningless the limitations in the definition of "governmental body." The trial court was bound to interpret the Open Meetings Law based upon its plain language, giving effect to all words in the statute. *State ex rel. Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶¶ 44-46, 271 Wis.2d 633, 681 N.W.2d 110.

Appellant's reliance on *State ex. rel. Newspapers Inc. v. Showers*, 135 Wis. 2d 77, 90, 398 N.W.2d 154 (1997) also provides no basis to reverse the trial

[5]The Attorney General is charged with interpretation of the Open Meetings Law and opinions of the attorney general are persuasive as to its meaning. *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶37, 312 Wis.2d 84, 752 N.W.2d 295.

court's decision. In *Showers*, there was no dispute as to whether the commission at issue constituted members of a "governmental body." *Showers*, 135 Wis. 2d at 81. Rather, the issue in *Showers* was whether the Open Meetings Law applies to meetings of members of a governmental body at which less than one-half of the members are in attendance. The *Showers* Court concluded that in certain circumstances in which the members can determine the outcome of a vote on an issue through a "negative quorum," a "meeting" occurs under the Open Meetings Law. *Showers*, 135 Wis. 2d at 102. In reaching its decision, the Court further recognized that a formal convening of a body is not required in order for a "meeting" to occur within under the Open Meetings Law. *Id.* at 92. The Court held a "convening of members" occurs when a group of a governmental body's members gather to engage in formal or informal governmental business. *Id.*

The decision in *Showers* does not stand for the proposition that any meeting of government employees, whether formal or informal, constitutes a meeting of a "governmental body" under the Open Meetings Law. The *Showers* Court did not adopt any rule or otherwise suggest that a committee internally created in the ordinary course of business to respond to a concern from the public can, in the absence of a "rule or order" directing the creation of the committee and assigning it duties, constitute a "governmental body."

Appellant suggests that because the Review Committee met at a regular time and place and operated based on agendas, the trial court was bound to find that the meetings were subject to the Open Meetings Law. Appellant Br., p. 15.

There is no authority for the proposition that a committee which is not created by a rule or order of a board may be deemed a "governmental body" merely because of the formality or regularity of its meetings. The committee still must be created "by constitution, statute, ordinance, rule or order…." to be subject to the Open Meetings Law. Wis. Stat. § 19.82(1).[6]

Appellant further erroneously suggests that the trial court should have found the Review Committee was subject to the Open Meetings Law because the committee could have provided prior notice of its meetings and allowed the public, including Krueger, to attend. Appellant Br. at 15. A committee which does not meet the definition of a "governmental body," however, has no obligation to comply with the requirements of the Open Meetings Law. It matters not whether a committee is capable of complying with the law's requirements.

The same analysis applies to Krueger's contention that the trial court erred in failing to consider administration's motivations in declining to allow Krueger to attend Review Committee meetings. Appellant Br. at 16. The motives of administration are not determinative of whether the Review Committee was legally required to comply with the Open Meetings Law.

Finally, Appellant erroneously argues that the trial court erred by recognizing the adverse effect that compliance with the Open Meetings Law would have "on the ability of School Administrators to address issues regarding

[6]To hold that the structure of a committee is determinative as Krueger suggests would place form over substance and discourage government employees from forming committees and meeting in the course of their day-to-day activities.

curriculum that arise in the ordinary course of business." Appellant Br. at 14. In observing the impact that application of the Open Meetings Law would have on entities such as the Review Committee, the trial court simply was recognizing the legislature's limitation of application of the law to meetings of a "governmental body." By imposing this limitation, the legislature recognized that government could not operate if all meetings of government employees, whether formally as a "committee," "team," or "group," or informally as a simple gathering of those with common job responsibilities and concerns, were required to provide prior notice and open their meetings to the public. The Open Meetings Law is to be interpreted to provide the public with "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).

In the end, what Krueger seeks is to have the Court read the "governmental body" requirement out of the Open Meetings Law and subject all "committees" of government employees to the law's requirements regardless of how the committee is created or its purpose. It is not for this Court to impose such a requirement. The legislature limited the application of the Open Meetings Law to a "governmental body" with full knowledge of the purpose of the law and the mandate that the law should be liberally construed. If Appellant seeks to change this structure, his remedy is with the legislature, not this Court. The decision of the trial court should be affirmed.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE REVIEW COMMITTEE WAS NOT A "GOVERNMENTAL BODY" SUBJECT TO THE OPEN MEETINGS LAW.

The issue of whether the Review Committee constitutes a "governmental body" can be answered in the affirmative only if there is a "rule or order" creating the committee. The trial court correctly found, based on the undisputed facts, that the Review Committee was not created as a result of a "rule or order" of the Board and, therefore, did not constitute a "governmental body" subject to the Open Meetings Law.

The undisputed facts show that the Review Committee was created by Steinhilber and Bunnow in the ordinary course of their duties in response to Krueger's and Trelc's requests for an alternative CA-1 course. Steinhilber and Bunnow further took the opportunity presented by the creation of the Review Committee to not only review the materials presented by Krueger and Trelc but to also review the existing course materials and consider the impact of the Common Core on those materials. The process employed by administration, i.e., the creation of a committee to address the concerns expressed by Krueger and Trelc, was a modified version of the curriculum review process contained within Board Rule 361.1 and the ACI Handbook.

There is no evidence in the record that the Review Committee was created pursuant to a rule or order of the Board, or for that matter, a directive of Allinger. There is likewise no evidence that the Board or Allinger had any control over the

processes employed by Steinhilber and Bunnow in creating the committee or determining how the Review Committee would accomplish its work.

Krueger has failed to point to any "constitution, statute, ordinance, rule or order" which created the Review Committee so as to support any argument that the Review Committee constitutes a governmental body under Wis. Stat. § 19.82(1). In his brief on appeal, Appellant erroneously contends that school boards have an obligation to "create curriculum" for the districts that they serve. Appellant Br. at 5. There is no such obligation placed on school boards under Wisconsin law. The obligation imposed on school districts is not to "create curriculum" but, rather, to merely ensure that curriculum complies with state educational standards:

> PURPOSE. Public education is a fundamental responsibility of the state. The constitution vests in the state superintendent the supervision of public instruction and directs the legislature to provide for the establishment of district schools. The effective operation of the public schools is dependent upon a common understanding of what public schools should be and do. Establishing such goals and expectations is a necessary and proper complement to the state's financial contribution to education. Each school board should provide curriculum, course requirements and instruction consistent with the goals and expectations established under sub. (2). Parents and guardians of pupils enrolled in the school district share with the state and school board the responsibility for pupils meeting the goals and expectations under sub. (2).

Wis. Stat. § 118.01(1).

The statutes cited by Krueger for his contention that school boards are solely responsible for curriculum similarly do not support his contention. Krueger first cites to Wis. Stat. § 121.02(k) for the proposition that the Board has the

responsibility to "create curricula." Appellant Br at 5. Section 121.02(k) does not impose this obligation on the Board. The words "create curricula" appear nowhere in the text of the statute. Rather, the statute merely imposes an obligation on the Board to "maintain a written, sequential curriculum plan" for various subjects.

Krueger next cites to Wis. Stat. § 118.03 and Wis. Stat. § 118.015. Again, neither of these provisions vests the authority of the Board to create curriculum. Section 118.03(1) simply references the Board's obligation to adopt textbooks used in schools under its charge. Section 118.015 imposes an obligation on school boards to develop a program for reading goals, assess the reading needs of students and annually evaluate the reading curriculum in a school district.

The trial court correctly noted that curriculum is not exclusively within the province of school boards. Section 118.24, Wis. Stat., contemplates that school districts will hire administration and other professionals who deal with curriculum on a day-to-day basis. Importantly, while Wis. Stat. § 118.24 envisions the hiring of a district administrator who can make recommendations to the Board on matters including the "course of study," the statute contains no provisions directing the administrator to delegate authority over issues relating to curriculum to committees such as the Review Committee in this case.

Krueger next relies on Board Rule 361.1 for the "rule or order" under which the Review Committee was created. Board Rule 361.1, however, is of no consequence to this case. Board Rule 361.1 does not reference a parental request

for an alternative course, such as was made by Krueger, or mandate the creation of a committee or any procedure for handling such a request.[7]

The language of Board Rule 361.1 also does not support Krueger's claim that the Board has the exclusive authority for all activities related to curriculum that occur in the District such that any committee created in the District which addresses curriculum is, by definition, a "governmental body." Appellant Br. at 23-24. Board Rule 361.1 merely reflects that the Board has the ultimate legal responsibility to ensure that educational materials in the District comply with state standards and to adopt textbooks. The reference to the Board's overall legal responsibilities does not constitute a directive to create a committee or serve as a delegation of responsibility sufficient to support any claim by Krueger that the Review Committee created in response to his request for an alternative course was a "governmental body" in this case.

The trial court appropriately found that Krueger's construction of Board Rule 361.1 is incompatible with the conduct of governmental business in school districts. If the Open Meetings Law is applied as Krueger claims, then any meeting of employees in the District related to any subject area over which the

[7]It is noteworthy that when the Board sought to compel the creation of a committee under Board Rule 361.1, it did so in plain language. Board Rule 361.1 includes specific instructions directing administration on the handling of parental requests for alternative materials within an existing course as well as requests for reconsideration of educational materials. There is no similar process in Board Rule 361.1 directing the creation of a committee in response to a request for an alternative course as made by Krueger in this case. The absence of any such directive in Board Rule 361.1 is fatal to Krueger's assertion that the Review Committee was created under Board Rule 361.1.

Board has any statutory authority under Wisconsin law will be subject to the requirements of the Open Meetings Law. The number of meetings that will be required to be subject to Open Meetings Law in the District as well as districts across the State will be endless. Districts would be forced to notice and open to the public any employee or departmental meetings not only related to curriculum but in other areas such areas as building repairs, insurance, sanitary facilities, school hours, continuity of educational programming, and providing coordinated services.[8]

The Open Meetings Law was not intended to and does not grant or guarantee the public notice and access to each and every meeting of governmental employees which in any way relates to the authority of a governing board. The trial court correctly reasoned that such a result is incompatible with the plain language and intent of the Open Meetings Law and would have a "significant adverse effect on the ability of School Administrators" to address issues regarding curriculum and other matters that arise in the ordinary course of business. A.App. at 104.

Krueger's reliance on the ACI Handbook for the source of the "rule or order" which created the Review Committee is also misplaced. Like Board Rule 361.1, the ACI Handbook does not even mention how to address a parental request

[8]The principle advocated by Krueger will not only apply to school districts but to any other governmental entity as well. For example, human service workers who conduct departmental meetings in county government regarding the provision of social services to citizens will be required to notice their meetings. Highway departments will be required to notice any meeting discussing how to maintain or repave county roads. The possibilities are endless.

for an alternative course as was made by Krueger. Rather, the ACI Handbook establishes a process for reviewing and rewriting curriculum based on a six year cycle.

It is undisputed in this case that the Review Committee was not created under the six year curriculum review process described in the ACI Handbook. Again, the Review Committee was created in response to Krueger's and Trelc's request for an alternative course, not as part of the formal curriculum process outlined in the ACI Handbook.

There is also little in how the Review Committee operated which tracks the requirements of the ACI Handbook such that any claim by Krueger that the Review Committee 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 the Review Committee. The Review Committee also did not follow the required process in Phase II which includes rewriting the curriculum for the CA-1 course.

The expansion of the Review Committee's duties to include a review of the CA-1 course materials and the impact of the Common Core standards does not alter this analysis. The Review Committee's review of the CA-1 reading list and evaluation of the potential impact of the Common Core standards did not trigger any specific obligations under Rule 361.1 or the ACI Handbook. Neither Rule 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.

Krueger's attempt to convert any testimony made by the District's lay witnesses into "admissions" that they acted under Rule 361.1 or the ACI Handbook is disingenuous. As noted above, the text cited by Krueger is incomplete and misleading.

Moreover, 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)"). Whether the Review Committee was created under Board Rule 361.1 or the ACI Handbook can be determined by the Court based on a review of the plain language of those provisions.[9]

[9]Even if the testimony of the District's witnesses as to their legal authority was somehow material, it does not constitute an admission that Review Committee was created at the direction, rule, or order of the Board. No witness testified that the District considered Krueger's request for a new course as a challenge to the existing materials or a request to review them, or that the District was bound to follow the process in Rule 361.1 in processing Krueger's request. The fact that administrators borrowed concepts from the ACI Handbook in creating Review Committee does not mean that the ACI Handbook dictated their actions. Each witness, in fact, denied that Review Committee was part of the curriculum review cycle set forth in the ACI Handbook.

The reasoning employed by the trial court in determining that the Review Committee was not a "governmental body" under the Open Meetings Law is consistent with decisions of the Attorney General which hold that meetings of groups of administration and employees in the exercise of their work duties are not meetings of a "governmental body" subject to the Open Meetings Law. In *Tylka Correspondence* (June 8, 2005) upon which Appellant relies, the Attorney General expressly recognized that if the initiative to create a committee and conduct meetings originated internally from management rather than pursuant to a directive of the board, the meetings were not subject to the requirements of the Open Meetings Law. *Tylka Corr., p. 4.* The Attorney General observed:

> The Superintendent has informed me, however, that there was no such directive from the Board and also no directive from him to the Management Team. The Superintendent maintains, rather, that the initiative to develop the budget recommendations and submit them to the Board originated with the members of the Management Team themselves. *If that is true, then a court would probably conclude that the meetings were not held pursuant to a "rule or order" and thus were not subject to the open meetings law.*

Id., p. 4 (emphasis added).

The situation in the present case is identical to the circumstances described by the Attorney General in *Tylka.* There was no directive from the Board and also no directive from Allinger to create the Review Committee. Rather, initiative to assemble the Review Committee to respond to Krueger's request for an alternative course came from Steinhilber and Bunnow. Equally important, the Review Committee was created by administration on its own accord and the work

of the committee was performed by professionals whose day-to-day job responsibilities included developing and implementing curriculum in the District consistent with state standards.

The *Pepelnjak Correspondence* (June 8, 1998) is further instructive. At issue in *Pepelnjak* was whether meetings between the Milwaukee County Department of Human Services director, county administrators, and five private vendors involved in implementing the W-2 program were subject to the Open Meetings Law. The stated purpose of the meetings was to "streamline the W-2 childcare system payment procedure" and to "explore how best to implement existing state policy." *Id.*

The Assistant Attorney General concluded that the Open Meetings Law did not apply to the meetings because there was no information to "suggest that the group was created by statute, ordinance, rule or order." (R.15 at 125-126, *Pepelnjak Correspondence*, pp. 1-2). The Assistant Attorney General observed that the meeting was similar to routine meetings between administrators of a governmental entity and their employees to discuss how to implement specific policies or programs which are beyond the scope of the Open Meetings Law. *Id.* The Assistant Attorney General reasoned:

> The type of meeting described appears to be remarkably similar to a meeting between administrators of a governmental entity and their employees to discuss how to implement specific policies or programs. Those types of meetings take place routinely. They cannot be made subject to the open meetings law because to do so would make it impossible to carry out the day-to-day business of government. The only apparent distinguishing feature of the meeting that you describe is that it

> was between county administrators and private vendors. It appears comparable to a meeting between government employees and representatives of a contractor to discuss the day-to-day details of carrying out a contract between the two. In my opinion, such meetings, generally speaking, are not subject to the open meetings law, for the same reasons given with respect to routine meetings between government administrators and their employees.

Id.

Applying *Pepelnjak* to the present case, the meetings of the Review Committee were not meetings of a "governmental body" subject to the Open Meetings Law. The Review Committee was not created pursuant to any directive from the Board or pursuant to any rule or order of the Board. Moreover, the work of the Review Committee was all done by administrators and employees whose day-to-day job responsibilities include curriculum and addressing issues that arising in curriculum. The administrators and employees met over a series of weeks to consider the books in the CA-1 course, as well as Krueger's and Trelc's request for an alternative course and ultimately made recommendations based on its findings.

None of the authorities relied upon by Appellant in his brief supports reversal of the trial court's decision. In each of the cases, the Attorney General determined that the committees were subject to the Open Meetings law based on evidence demonstrating that the committees were created by a governing board or by administration at the direction of a governing board and were delegated decision making authority statutorily vested in the governing board or administration.

In *Sherrod Correspondence* (October 17, 1991), the Madison School Board created an ad hoc strategic planning committee. *Sherrod Corresp.* at 1. The school board charged the committee with appointing members to a Strategic Planning Team and with developing a process for strategic planning. *Id.* The committee proceeded to select the members of the Strategic Planning Team and provided the team with its charge. *Id.* at 2. Once the team completed its work, the team was to present the plan to the school board for approval. *Id.* The Attorney General determined that the Strategic Planning Team was a "government body" under Wis. Stat. § 19.82(1) on the basis that the school board authorized the Strategic Planning Team and assigned it with the duty of advising the school board on goals the district should adopt. *Id.*

In *Staples Correspondence* (February 10, 1981), the issue was whether a committee consisting of a staff librarian and faculty personnel appointed by a 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 in the school library was a "government body" under the Open Meetings Law. Under the board policies in question, the committee was charged with determining whether the materials violated board policy and reported its findings to the superintendent who then communicated the results to the board and the citizen. *Staples Corresp.* at 1. The board's policy further provided that the committee's decision could be appealed through the superintendent to the board. *Id.* The Attorney General found that the committee was subject to the Open Meetings Law

because it was created by rule of the school board although selection and appointment of the members of the committee were made by the superintendent. *Id.*

In *Tylka Correspondence* (June 8, 2005), the District's School Board directed the Superintendent to formulate and submit recommendations for addressing the District's budget deficit. As a result of the directive, the Superintendent had two meetings with his management team during which the team developed detailed budget recommendations which were submitted to the board. The Attorney General found that the management team was a governmental body subject to the Open Meetings Law on the grounds that the management team was acted under a directive given by the Board to the superintendent which was then delegated to the management team. *Tylka Corresp.,* p. 4. The Attorney General further found that the management team acted as a collective body to formulate the team's budget recommendations and submit them to the board. *Id.*, at 3.

In 78 Op. Att'y Gen. 67 (1989), the Attorney General opined that advisory committees of the Department of Natural Resources constituted a "governmental body" under Wis. Stat. § 19.82(1). Various of the advisory committees were appointed by the Governor and the natural resources board pursuant to various subsections of Wis. Stat. § 15.347. The secretary of the department also appointed committees pursuant to authority granted under Wis. Stat. § 15.05(1)(b) which

authorized the secretary to "promulgate rules for administering the department and performing duties assigned to the department":

> Except as provided in pars. (c) and (d), if a department is under the direction and supervision of a board, the board shall appoint a secretary to serve at the pleasure of the board outside the classified service. In such departments, the powers and duties of the board shall be regulatory, advisory and policy-making, and not administrative. All of the administrative powers and duties of the department are vested in the secretary, to be administered by him or her under the direction of the board. The secretary, with the approval of the board, shall promulgate rules for administering the department and performing the duties assigned to the department.

Other committees were appointed by a department district director pursuant to Wis. Stat. § 15.02(4) which expressly authorized the department head to delegate authority vested in the department head to other employees:

> **(4)** INTERNAL ORGANIZATION AND ALLOCATION OF FUNCTIONS. The head of each department or independent agency shall, subject to the approval of the governor, establish the internal organization of the department or independent agency and allocate and reallocate duties and functions not assigned by law to an officer or any subunit of the department or independent agency to promote economic and efficient administration and operation of the department or independent agency. The head may delegate and redelegate to any officer or employee of the department or independent agency any function vested by law in the head. The governor may delegate the authority to approve selected organizational changes to the head of any department or independent agency.

The Attorney General concluded that the advisory committees created appointed by the Governor and the natural resources board under Wis. Stat. § 15.347 constituted a "governmental body" under Wis. Stat. § 19.82(1) as they were created pursuant to statute. *Id.* at 68. The Attorney General noted that the committees created by the natural resources board were also "governmental bodies" because "the board is a governmental body and the committees it creates

by rule or order are, in turn, governmental bodies." *Id.* The Attorney General likewise found that the committees created by the secretary and the department heads were "governmental bodies" because they were the created pursuant to express statutory provisions authorizing the secretary and department head to delegate their statutory authority. *Id.*, at 68.

Finally, in *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979) the Common Council of La Crosse established an Annexation and Apportionment Committee which was given authority to deal with firms, persons and corporations relative to annexation and make recommendations and reports to the Common Council. The issue before the Court was not whether the committee was a "government body"—the defendant stipulated it was. Rather, the issue was whether the committee participated in a "meeting" under the Open Meetings Law when it met with a number of residents from a nearby town that the City was interested in annexing. *Swanson*, 92 Wis. 2d at 311. The Wisconsin Supreme Court found that the meeting with residents constituted a meeting under the Open Meetings Law. *Id.* at 317. In reaching its decision, the Court held that the Open Meetings Law does not require or contemplate that committees must have the authority to bind the entity that created them in order to participate in a "meeting" under the law. *Id.*

Unlike the authorities relied upon by Appellant, the Review Committee was not created as a result of delegation of legal authority of the Board or Superintendent Allinger. The Review Committee was not created pursuant to any

Board policy—neither Rule 361.1 nor the ACI Handbook required Review Committee's creation or directed its creation. Similarly, the committee was not selected by Superintendent Allinger pursuant to a directive of the Board.

Likewise, Superintendent Allinger did not direct Steinhilber and Bunnow to create a committee in response to Krueger's request for an alternative course and did not have any involvement in the creation of the Review Committee, its selection or its work. There likewise is nothing within Wis. Stat. § 118.24 creating Allinger's position which addresses or directs Allinger to create committees relating to curriculum or which suggests that any committees created under his charge are pursuant to statutory authority delegated to Allinger under Wis. Stat. § 118.24.

In sum, the question of whether a particular group of members of government comprise a "governmental body" is answered in the "affirmative only if there is a 'constitution, statute, ordinance, rule or order' conferring collective power and defining when it exists." *Conta*, 71 Wis. 2d at 681. The initiative to create and give the Review Committee direction originated from Steinhilber and Bunnow in the ordinary course of their duties and all work performed by the Review Committee was pursuant to the day-to-day responsibilities of administration and the employees involved in curriculum. There is no nexus anywhere in the record between any rule or order of the Board or directive of Allinger and the Review Committee's creation.

Accordingly, the Review Committee was not, as a matter of law, created pursuant to a "rule or order" or subject to the Open Meetings Law. The decision of the trial court dismissing Krueger's action should be affirmed.

CONCLUSION

The trial court correctly dismissed Krueger's action because the Review Committee is not a "governmental body" subject to the Open Meetings Law. Based on the foregoing, the Appleton Area School District Board of Education and the Communication Arts 1 Materials Review Committee respectfully request the Court affirm the trial court's decision.

Respectfully submitted this this 29th day of June, 2015.

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CERTIFICATION

I certify that this brief and appendix conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 10,268 words. This certification is made in reliance on the word count feature of the word processing system used to prepare this brief.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 certification has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this this 29th day of June, 2015.

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN *ex rel*.
JOHN KRUEGER,

Plaintiff-Appellant,

Appeal No.: 2015-AP-000231

-v-

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

Defendants-Respondents.

CERTIFICATE OF MAILING

I, Amanda Udell, certify that on June 29, 2015, I hand delivered ten (10) copies of the Brief of Defendants-Respondents Appleton Area School District Board of Education and Communication Arts 1 Materials Review Committee to the Clerk of the Wisconsin Court of Appeals and deposited into the U.S. Mail via First Class Mail, postage pre-paid, three (3) copies to all counsel of record.

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