STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2015AP000231

STATE OF WISCONSIN ex. rel. JOHN KRUEGER,

Plaintiff-Appellant-Petitioner,

v.

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

Defendants-Respondents.

On Appeal from Outagamie County Circuit Court
The Honorable Vicki L. Clussman, Presiding
Outagamie County Case No. 13-CV-00868

NON-PARTY BRIEF AND APPENDIX OF THE WISCONSIN FREEDOM OF INFORMATION COUNCIL, WISCONSIN NEWSPAPER ASSOCIATION AND WISCONSIN BROADCASTERS ASSOCIATION

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INTRODUCTION

This case presents the question whether Appleton Area School District's Communications Arts I Materials Review Committee ("the committee"), which developed a list of books for use in the district's curriculum that the Board ultimately adopted based on the committee's recommendation, was "created by rule or order" so as to constitute a governmental body that should have given the public notice of and access to its meetings per the open meetings law.

Defendant-Respondents Appleton Area School District Board of Education and the committee ("AASD") argue that the committee was not "created by rule or order" because the departmental representatives who appointed members and ran the committee allegedly employed a modified process that differed in some respects from the process that was set forth in directives that had been formally approved by the Board of Education.

As explained below, the open meetings law cannot be so conveniently disregarded. Amici, the Wisconsin Freedom of Information Council, the Wisconsin Newspaper Association, and the Wisconsin Broadcasters Association, respectfully urge the Court to reject the argument advanced by AASD as inconsistent with the plain language and policy of

the statute and as contrary to prior open meetings decisions issued in Wisconsin and elsewhere.

ARGUMENT

The guiding policy for any question arising under Wisconsin's open meetings law is expressly stated in the law itself:

> **(1)** 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.
>
> …
>
> (4) This subchapter shall be liberally construed to achieve the purposes set forth in this section.

Wis. Stats. §19.81(1).

I. THE COMMITTEE WAS A GOVERNMENTAL BODY.

Wisconsin Statutes Section 19.82 defines a "governmental body" whose meetings must be public, in pertinent part, 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 …" Wis. Stats. §19.82(1). The legislative history to the 1975-76 revisions to the open meetings law indicates that the drafters understood

this to represent a comprehensive listing of all the ways that a body could be created, not an exclusionary trap. The drafters' summary of the "coverage" afforded by the meetings law states that it applies to:

> All convening of state or local agencies, boards, commissions, committees, councils, departments or subunits thereof in sessions such that the body is vested with authority, power, duties or responsibilities not vested in individual members.

Appendix at p. 2 (comparison chart from drafting records).

There is little court guidance concerning this definition. However, this Court has recognized that Attorney General interpretations are of "particular importance" in open meetings cases. *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶37; *see also* Wis. Stats. §19.98. The Attorney General has noted that the terms in Section 19.82(1) demonstrate that governmental bodies consist of "multi-member groups that act together as a unit to perform some common purpose." Attorney General's Letter to Joe Tylka, p. 2 (June 8, 2005) (Appellant-Petitioner's Appendix at 145.) A governmental body is also a body that is, "as a collective unit," convened to "exercise power or provide advice on specific matters entrusted to it …" *Id.*

But the critical factor in determining whether a group is properly characterized as a "governmental body" under the statute focuses on "the manner in which a body was created, rather than on the type of authority the body possesses." Letter to Joseph F. Paulus, pp. 2-3 (June 8, 2001) (Appellant-Petitioner's Appendix at 133-34) (citing and quoting *State v. Swanson*, 92 Wis. 2d 310, 284 N.W.2d 655 (1979)). Therefore, a committee "is not required to have the authority to bind its parent body before it is subject to the open meetings law." 78 Op. Att'y Gen. 67 (1989) (Appellant-Petitioner's Appendix at 68 (citing *Swanson*, 92 Wis. 2d at 317)).

Committees created by a board's rules or orders are "governmental bodies." *Id.* at p. 68. Moreover, a governing body "may delegate and redelegate" the authority to create and appoint committees, from boards to top administrators who in turn delegate authority to heads of departments and to "any officer or employee of the department …" 78 Op. Att'y Gen. at 69. "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 Letter, p. 4 (citing 78 Op. Att'y Gen. at 70).

By tying status under the open meetings law to the manner in which a group was created, the Legislature was not elevating form over substance or relying on arbitrary considerations. Rather, the manner of a group's creation tells us to whom the committee answers, and therefore, whether it is doing the work of governing, through delegation or otherwise.

As the Attorney General has also noted, advisory committees are an "affair of government" when "their actions affect the decisions of" the government body and its employees. 78 Op. Att'y Gen. at 70. Therefore, especially where a committee is doing the work of another governmental body, such as a governing board, "the public is entitled to the fullest information about [that body's work], pursuant to the policy stated in section 19.81(1))." *Id.*

A. The Committee Was Formed In Part By Order of the ACI Department Head and His Immediate Subordinate.

The terms "rule or order" as used in Section 19.82 have been broadly construed to include any directive, formal or informal, that creates a body and assigns it duties. Tylka Letter, p. 2 (citing 78 Op. Att'y Gen. at 68-69) (P.App. 145.) As the Attorney General warned, strictly construing these terms to require a formal order would permit the "open meetings law [to

be] evaded by the creation of 'informal bodies.'" Paulus letter at p. 3 (citing 78 Op. Att'y Gen. at 69) (P.App. 134.)

In this case, the head of the Assessment, Curriculum and Instruction ("ACI") Department, Kevin Steinhilber, and his immediate subordinate, Nanette Bunnow, did the work of appointing committee members and running the committee. (P.App. at 159-60.) Board rules delegated them authority to do so, as explained in Section I.B, *infra*. The Court of Appeals refused to consider whether these individuals' order created the committee, claiming that Appellant-Petitioner waived the argument. Appellant-Petitioner disputes that proposition, but either way, it is appropriate to decide this issue.

Longstanding authority of this Court establishes that waiver is appropriately disregarded when an issue of public importance reaches this Court, and particularly when, as here, the alleged waiver concerns a purely legal issue. *See, e.g., State ex. rel. General Motors Corp.*, 49 Wis. 2d 299, 318-320 (1971) (considering issue raised for the first time on appeal "because of its fundamental nature and importance"). Government bodies and the public would benefit from guidance from this Court on this issue.

B. The Committee Was Also Created By Rules and Orders Set Forth in the Board's Formal Rules and the ACI Department Handbook.

The Board formally adopted Rule 361.1, which states:

> 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.

(P.App. 177). Rule 361.1 unmistakably delegates to the staff generally, and the ACI department specifically, the authority to select educational materials and to coordinate and maintain the standards to be employed in the selection process. Rule 361.1 also designates the AASD Assessment, Curriculum and Instruction Handbook ("Handbook") as "delineat[ing] the processes leading to Board approval for curriculum revision …" (P.App. 180, ¶II.)

The Handbook, in turn, sets out a specific path for curriculum review that includes establishing a committee for program review, providing information to committee members, composing written recommendations, and providing them to the Board of Education if significant changes are recommended. (P.App. 174-75.) The Handbook directives also specify the

steps to be undertaken in obtaining Board of Education approval. (Id. at 176.)

The curriculum revision processes set forth in the Handbook are therefore properly characterized both as rules (and orders) of 1) the Board, which referenced the Handbook as its directed process for curriculum review in Rule 361.1, and which also separately formally adopted the Handbook; and 2) the ACI department, operating through the authority delegated to it by Rule 361.1.

The committee was created by Rule 361.1 and Handbook. In common usage, for the committee to have been "created by" the Rule and the Handbook, the committee need only have come into being through the agency, participation, or authority of the Rule and the Handbook. This conclusion follows from dictionary definitions of the words "created" and "by," which include the following:

> Create:
>
> to cause to come into being …; 5. to be the cause or occasion of; give rise to ... . 6. To cause to happen, bring about …

Random House Dictionary of the English Language (2d ed. 1987) (unabridged) at p. 472.

By:

> 9. according to, in conformity with … 11. Through the agency, efficacy, work, participation, or authority of …

Id. at p. 287.

It cannot reasonably be disputed that ACI Department head Steinhilber, acting along with Bunnow, put together and ran the committee as a result of the authority delegated to them by Rule 361.1 and working from the directions provided in the Handbook. (See Petitioner's Brief at pp. 33-34.)

Applying the common definitions to the facts of this case, and considering the broad scope to be afforded the open meetings law, the "participation" or "authority" of Board Rule 361.1 and the Handbook collectively, and each independently, authorized and "gave rise to" the committee, so that the committee "came into being" through the agency, participation or authority of the Rule and the Handbook.

C. The Events That Supposedly Prompted the Curriculum Review Are Irrelevant.

In its submissions in the Court of Appeals, AASD argued that Rule 361.1's separate procedures for responding to a parent request for alternative materials, such as Appellant-Petitioner's initial request for an

alternative course, were not followed. But that is not the issue in this case. AASD has admitted that the ACI Department elected not to act on Appellant-Petitioner's request, and instead opted to conduct a curriculum review. (Defendant-Respondent's Response Brief in the Court of Appeals at p. 16.)

Having refused to treat the process as one covered under the parent request procedures, AASD should not be heard to now claim that the rule for the policy that it refused to apply is what governs the question whether it complied with the open meetings law. The rules that matter in the analysis before the Court are those that govern curriculum review, which is what AASD actually did.

The Attorney General has explained that purpose is not relevant in determining whether a governing body's meetings are subject to the law. Attorney General's Letter to Jim Pepelnjak (June 8, 1998) at 1 (P.App. 137). Therefore, that one purpose of undertaking the curriculum review was allegedly a response to a parent request is irrelevant.

D. Any Modification of the Handbook Directives Occurred Through Validly Delegated Authority.

AASD also claimed below that because Steinhilber and Bunnow assert that they modified the Handbook process governing Review

Committees, this shows that the committee was not truly created by the Handbook. But any modification that they made to the Board's and the department's review committee rules must be presumed to have occurred through validly delegated authority. 78 Op. Att'y Gen. at 69 (citing *Herro v. Dept. of Natural Resources*, 67 Wis. 2d 407, 426, 227 N.W.2d 456 (1975) and *Ferguson v. Kenosha*, 5 Wis. 2d 556, 568, 93 N.W.2d 460 (1958)). The committee must therefore be "treated the same as if [it] were created by the board … and [is] subject to the open meetings law." 78 Op. Att'y Gen. at 69-70.

This conclusion is also consistent with the Attorney General's observation that delegation may occur through either express or implied authorization or acquiescence by a government body or others to whom a body has delegated authority. *See, e.g.*, Paulus Letter at pp. 3-4 (P.App. 134-35.) Otherwise, "any governmental body could avoid the strictures of the open meetings law by the simple expedient of having one of its employees create a committee." *Id.*

The Board should not be allowed to accept recommendations from the committee based on a process set forth in a Board-adopted handbook, then claim that the employees themselves created the committee. That is

the very evil identified in the Attorney General's guidance to Mr. Paulus. *Id.*

II. THE LAW SHOULD BE CONSTRUED TO AVOID CIRCUMVENTION.

As Wisconsin Attorney General guidance has recognized, the open meetings law "should be construed so as to frustrate all evasive devices." 78 Op. Att'y Gen. 67 at 69 (quoting *Wood v. Marston*, 442 So. 2d 934, 940 (Fla. 1983)); *see also State ex. rel. Lawton re Town of Barton,* 2005 WI App 16, ¶19. In construing Wisconsin's public records law, which incorporates a virtually identical statement of guiding policy, the Court of Appeals refused to allow a school district to rely on alleged delegation of the custody and creation of a record to a third party as a basis for arguing that it did not owe a responsibility to produce the record. *Journal/Sentinel v. School District of Shorewood,* 186 Wis. 2d 443, 452-53 (Ct. App. 1994).

Similarly, while AASD has argued that subjecting staff to the open meetings law would be unworkable, the argument misses the point. When staff members are delegated authority to act as and for a government body, they are properly subject to the open meetings law to the same extent as the government body itself.

> It is true that staff is normally not included within the Sunshine law … However, when a member of the staff ceases to function in his capacity as a member of the staff and is appointed to a committee which is delegated authority normally within the governing body, he loses his identity as staff while operating on that committee and is accordingly included within the Sunshine Law…

News-Press Publishing Co., Inc. v. Carlson, 410 So.2d 546, 548 (Fla. Ct. App. 1982).

Moreover, courts should not allow "euphemisms" such as "conference, caucus, study or work session and meeting of the committee as a whole," as a means to operate in secrecy and avoid Wisconsin's open meeting law. *See Town of Palm Beach v. Gradison*, 296 So.2d 473, 477 (Fla. 1974). "Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors." *Id.*

As other courts have also observed,

> It would be ludicrous to invalidate the actions of a public body where said actions are the results of secret meetings of that body, while at the same time giving approval to similar actions resulting from the secret meetings of committees designated by, or acting under the authority of, the public body.

Carlson, supra, 410 So.2d at 548.

In screening and deciding which materials to include and which to reject, the committee here performed "a policy-based decision-making function" delegated to it by the Board. *See Marston,* 442 So.2d at 938-39. Moreover, "[w]here a body merely reviews decisions delegated to another entity, the potential for rubber-stamping always exists. To allow a review procedure to insulate the decision itself from public scrutiny invites circumvention of the Sunshine Law." *Id.* at 939-40.

III. SOUND OPEN MEETINGS POLICY IS SOUND POLICY FOR WISCONSIN PUBLIC SCHOOLS AND DEMOCRACY.

Open meetings of governmental bodies "promote stability and public confidence in government" and provide a "checking effect" on governmental abuses. *Krause v. Reno,* 366 So.2d 1244, 1250 (Fla. Ct. App. 1979). In addition, the public can better evaluate public officials so that they may "vote intelligently on retaining officials, restructuring their offices, and approving or rejecting their projects." *Id*. at 1250-51.

Moreover, public input makes schools better and more responsive to the communities they serve. Without public input, important and fundamental questions involving public schools "are often answered in terms of how policy specialists, interest groups, and others define the

purposes and priorities of public education." Michael A. Resnick and Anne L. Bryant, "School Boards and the Power of the Public," http://www.centerforpubliceducation.org/Libraries/Document-Library/School-Boards-and-the-Power-of-the-Public.pdf, at pp. 3-4. Therefore, if schools do not engage the public, they risk becoming "disconnected from the very constituency they are intended to serve." *Id.*

This case provides an example of this phenomenon. AASD specifically intended to exclude the Petitioner from the process of selecting educational materials. (Steinhilber Depo., pp. 44-46, P.App. 155-56.) Further, there was no practice to solicit parent involvement nor to invite the public to the meetings in any way. (Id. at p. 46, lines 19-25, P.App. 156.) Rather, the public was informed only when the selections were made available for public review, after the committee had already decided and had done the work of winnowing and sifting and preparing a list of included books that necessarily did not list the excluded books. (Id. at pp. 48-49, P.App. 156.) As explained above, this is poor school policy as well as poor policy for democracy.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court reverse the decision of the Court of Appeals and hold that the committee was a "government body" subject to Wisconsin's open meetings law.

Dated this 2nd day of December, 2016.

By: _____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the Rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a 13-point body text, maximum of 60 characters per full line, and produced with a proportional serif font. The length of this Brief is 2,911 words.

Dated this 2nd day of December, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of s. 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.

Dated this 2nd day of December, 2016.

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