OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 24, 2023

Via electronic mail
[redacted]

Via electronic mail
Mr. Jay E. Greening
Miller, Hall & Triggs, LLC
416 Main Street, Suite 1125
Peoria, Illinois 61602-1154
jay.greening@mhtlaw.com

RE: OMA Request for Review – 2022 PAC 71523

Dear [redacted] and Mr. Greening:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)). For the reasons explained below, the Public Access Bureau concludes that the Board of Education (Board) of Dunlap Community School District No. 323 (District) veered into certain unauthorized topics in closed session on April 20, 2022, and implemented a policy change without properly taking final action in open session.

BACKGROUND

On April 28, 2022, the Public Access Bureau received [redacted] Request for Review alleging that during the closed session portion of the April 20, 2022, meeting, the Board improperly discussed and took final action regarding the removal of the book *Hey Boy* by Jarrett Krosoczka[1] from a high school English-Language assignment.

[1]The title of the book is *Hey, Kiddo* and will be referred to as *Hey, Kiddo* by this office in this determination letter.

On May 4, 2022, this office forwarded a copy of [redacted] Request for Review to the Board and asked it to provide a copy of the open session and closed session minutes from its April 20, 2022 meeting, along with the verbatim recording of the closed session discussion for this office's confidential review. This office asked that the Board provide a written response to the allegation that it improperly entered closed session to discuss removing the book and, if it did discuss the book, then to identify the exception in section 2(c) of OMA that served as the basis for discussing that topic. Further, this office asked the Board to address whether it made a decision and/or held a vote about the book during the closed session, or during open session or outside of the meeting. If the Board members exchanged any communications about the topic, this office asked to review copies of any such communications.

Upon her receipt of this office's inquiry letter to the Board, [redacted] sent this office a screenshot of a Facebook post from before the Board meeting on April 20, 2022, in which Board President Abby Humbles appeared to comment on a parent's complaint about the book by stating: "This is being addressed. I have shared this information with our administrators and fellow board members."[2] [redacted] alleged that "[t]his clearly shows that the board discussed this issue outside of the board meeting held that night."[3]

On May 27, 2022, the Board provided this office with its written response and copies of the open and closed session minutes, but no closed session verbatim recording and no communications among Board members. On June 21, 2022, [redacted] submitted a reply.

DETERMINATION

OMA is intended "to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (West 2020). Accordingly, section 2(a) of OMA[4] provides that all meetings of a public body must be open to the public unless the discussion falls within the scope of one of the exceptions set out in section 2(c) of OMA.[5] The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within

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[2]Abby Hulick Humbles, comment, Facebook (April 20, 2022).

[3]E-mail from [redacted] to [Steven] Silverman (May 4, 2022).

[4]5 ILCS 120/2(a) (West 2021 Supp.).

[5]5 ILCS 120/2(c) (West 2021 Supp.).

their scope."[6] *See also Henry v. Anderson*, 356 Ill. App. 3d 952, 996-97 (4th Dist. 2005) (strictly construing OMA section 2(c)(1)[7]).

Section 2(c)(1) of OMA

Section 2(c)(1) of OMA, the exception on which the Board relied for the *Hey, Kiddo*-related discussion, permits a public body to enter closed session to discuss "[t]he appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity." The section 2(c)(1) exception is designed to protect the reputation and identity of specific individuals. *See, for example*, Ill. Att'y Gen. Pub. Acc. Op. No. 15-007, issued September 16, 2015, at 4 (finding that discussions concerning the elimination of a job position held by a single employee for budgetary reasons would not implicate an employee's reputation, and therefore did not fall within the exception in section 2(c)(1)); Ill. Att'y Gen. Pub. Acc. Op. No. 16-013, issued December 23, 2016, at 4 (section 2(c)(1) did not authorize discussion of across-the-board salary increase for a broad category of employees).

In the Board's response to this office, the Board stated that a verbatim recording of the pertinent discussion does not exist as a result of a failure of the recording device. Thus, the Board appears to have inadvertently violated section 2.06(a) of OMA[8] in connection with its April 20, 2022, meeting, because section 2.06(a) requires that "[a]ll public bodies shall keep * * * a verbatim record of all their closed meetings in the form of an audio or video recording." The Board notified this office that it had since purchased a new recording device, and enclosed a receipt for that product.

Regarding the contents of the closed session discussion, the Board explained that "[t]his reason [section 2(c)(1)] was given, at least in part, to provide the board with information about the failure of the three teachers to utilize the appropriate process to approve curriculum materials."[9] The Board also explained that "[t]he administration advised the board of * * * the

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[6]5 ILCS 120/2(b) (West 2021 Supp.).

[7]5 ILCS 120/2(c)(1) (West 2021 Supp.).

[8]5 ILCS 120/2.06(a) (West 2021 Supp.).

[9]E-mail from Jay Greening, Miller, Hall & Triggs, LLC, to [Steven] Silverman (May 27, 2022).

way in which it intended to handle the matter with the teachers given the terms of the policy."[10] The Board provided the closed session minutes for this office's confidential review. The minutes, which comprise just two short paragraphs for a discussion that appears to have lasted approximately 48 minutes, indicate that the Board discussed the conduct and performance of two specific employees in closed session. While such a discussion of specific employees' work conduct and performance falls within the scope of section 2(c)(1), the draft minutes contain little information about this portion of the Board's discussion, and the Board failed to furnish a verbatim recording. Thus, while some if not all of this portion of the discussion may have been authorized by section 2(c)(1), this office is unable to ascertain the extent to which the Board may have improperly discussed the contents of the book.

The Board also explained that:

> Board members confirmed with the administration that there was an intent to reinforce with **all teachers** the need to follow the appropriate curriculum approval process. There was some conversation in closed session between administrators and board members about the parental complaints which lead to the discovery of failure of the teachers to follow district curriculum approval protocol by way of background to address the personnel matter. The administration explained that, **going forward, teachers** would be required to submit recommended curriculum to the Department Chair to have curriculum and books approved. At that stage in the process, the teachers are allowed to provide their reasoning for the recommended materials and then the Department Chair makes a recommendation to the administration for consideration and approval. (Emphasis added.)[11]

This portion of the Board's discussion clearly exceeded the scope of the section 2(c)(1) exception by straying from a discussion of specific employees to broader matters involving all teachers and curriculum policy.

To remedy its improper discussion of matters in closed session, this office requests that the Board vote to make publicly available this portion of its closed session minutes from its April 20, 2022, meeting. This office also cautions the Board to limit its closed session

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[10]E-mail from Jay Greening, Miller, Hall & Triggs, LLC, to [Steven] Silverman (May 27, 2022).

[11]E-mail from Jay Greening, Miller, Hall & Triggs, LLC, to [Steven] Silverman (May 27, 2022).

discussion to the scope of the exceptions that it cites to close portions of its meetings in the future. Additionally, this office cautions the Board that it must make and keep verbatim recordings of all of its closed sessions, as well as closed session minutes that sufficiently summarize its "discussion on all matters proposed, deliberated, or decided[.]" 5 ILCS 120/2.06(a)(3) (West 2021 Supp.).

Final Action

Section 2(e) of OMA[12] provides, in pertinent part, that "[n]o final action may be taken at a closed meeting." While a public body may take a preliminary vote in a closed session, all final actions must be taken in an open meeting. *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, ¶¶73-74, 77 N.E.3d 625, 637 (2017).

In its response to this office, the Board's attorney stated that: "Contrary to the allegations raised in the Request to Review, at no time did the Board vote to ban the book *Hey Kiddo* from the school or the assignment. Board members also did not decide to ban the book from the school or the assignment outside the board meeting."[13] The Board's attorney claimed that "[t]he administration decided, before the board meeting, that families that had concerns about the book would be allowed to substitute a different book for the assignment if they chose."[14] The Board's attorney further claimed that "a letter explaining the resolution of the issue to all of the parents of students in the classes that had selected the *Hey, Kiddo* book * * * was sent at 3:30 p.m. on April 22, 2022 – hours before the meeting."[15] The Board enclosed a copy of this e-mail, which indeed was sent at 3:30 p.m. on April 22, 2022, and advised that students could select a book other than *Hey, Kiddo* to complete the assignment.[16]

The Board's attorney misstated the timeline here. The Board meeting was held on April 20, 2022, not April 22, 2022; the e-mail to parents was sent out after the Board meeting.

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[12]5 ILCS 120/2(e) (West 2021 Supp.).

[13]E-mail from Jay Greening, Miller, Hall & Triggs, LLC, to [Steven] Silverman (May 27, 2022).

[14]E-mail from Jay Greening, Miller, Hall & Triggs, LLC, to [Steven] Silverman (May 27, 2022).

[15]E-mail from Jay Greening, Miller, Hall & Triggs, LLC, to [Steven] Silverman (May 27, 2022).

[16]E-mail from JEP to [redacted] (April 22, 2022).

In her reply, [redacted] contended that it was difficult to discern whether final action was taken. She stated: "The board has no audio evidence from the closed session to support their claim, due to the timing of the recording device 'failure' as well as the convenient absence of the content from the secondary recording device."[17] [redacted] attached a document to her reply labeled "FOIA Book Decision – Emails," which consists of a compilation of e-mails involving District personnel. In one e-mail to several teachers on April 21, 2022, Dunlap High School Principal Dr. Scott Adreon passed along a "message * * * from Matt Andrews[,]" Assistant Superintendent of Curriculum, Instruction, & Human Resources, "resulting from last night's Board meeting."[18] In this message, Mr. Andrews mentioned parental concerns about *Hey, Kiddo* and another book, then directed that "neither book is to be used moving forward."[19] He also specified a new procedure that teachers must follow to obtain approval for any new texts. In another e-mail on April 22, 2022, Dr. Adreon responded to a parent's April 19, 2022, e-mail complaint about *Hey, Kiddo*, by advising: "we are currently working through the process of pulling a couple of books out of our curriculum, Hey Kiddo is one of them."[20] [redacted] alleged that "processes/policies were revised as part of the resolution of this matter."[21]

The April 20, 2022, closed session minutes do not state that the Board decided to ban the book *Hey, Kiddo*. Dr. Adreon's April 21, 2022, e-mail to teachers, however, reflects that District administrators ended the District's use of the book as a result of the Board meeting. The closed session minutes do document that the Board unanimously agreed on a new procedure related to curriculum in closed session and issued a directive to the Board to implement it. Additionally, the communications this office reviewed from before and after the meeting suggest that the Board decided on and began to implement such a change during the closed session without following up with action on that change in open session. When a public body finalizes action such as a policy change, that final action must be taken openly. *See Howe v. Retirement Board of Firemen's Annuity & Benefit Fund of Chicago*, 2013 IL App (1st) 122446, ¶26, 996 N.E.2d 664, 974-75 (2013) (finding board's written denial of benefits invalid because the board had circulated the decision for signatures privately rather than voting on it in open session).

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[17]E-mail from [redacted] to [Steven] Silverman (June 21, 2022) (referencing the Board's assertion that after the recording device failed, the Board Secretary used her personal phone to record the discussion, but her phone failed too before the discussion in question).

[18]E-mail from Scott Adreon, Ed. D, Principal, Dunlap High School, to [redacted], [redacted], and [redacted] (April 21, 2022).

[19]Message from Matt [Andrews] to [unspecified] (undated).

[20]E-mail from Scott Adreon, Ed. D, Principal, Dunlap High School, to [redacted] and Matt Andrews (April 22, 2022).

[21]E-mail from [redacted] to [Steven] Silverman (June 21, 2022).

Accordingly, if it has not already done so, the Board should vote on any curriculum and policy changes it has directed in connection with the April 20, 2022, meeting at a properly noticed open meeting under an agenda item that reasonably describes the general subject matter of that final action. *See* 5 ILCS 120/2.02(c) (West 2020).

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at katherine.goldsmith@ilag.gov.

Very truly yours,

[redacted]

KATIE GOLDSMITH
Assistant Attorney General
Public Access Bureau

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cc: *Via electronic mail*
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