



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

May 6, 2022

PUBLIC ACCESS OPINION 22-006
(Request for Review 2022 PAC 69940)

OPEN MEETINGS ACT:
Taking Final Action on
Matter Not on Meeting Agenda

Mr. Jay Bastian
648 Larch Drive
Carol Stream, Illinois 60188

The Honorable Scott Stone
President, Board of Education
Community Consolidated School District No. 93
230 Covington Drive
Bloomington, Illinois 60108

Dear Mr. Bastian and Mr. Stone:

This binding opinion is issued by the Attorney General pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2020)). For the reasons discussed below, this office concludes that the Board of Education (Board) of Community Consolidated School District No. 93 (District) violated OMA at its February 10, 2022, regular meeting by implementing a change in the District's masking guidelines for students and staff without setting forth the general subject matter of that final action on the meeting agenda.

BACKGROUND

On February 15, 2022, Mr. Jay Bastian submitted an e-mail to the Public Access Bureau complaining that the Board "voted to make masks optional without a vote on the

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agenda."¹ The e-mail contained a link to the agenda of the Board's February 10, 2022, meeting.² The Public Access Bureau construed this Request for Review as alleging that the Board violated section 2.02(c) of OMA³ by taking final action concerning the District's mask guidelines when it failed to include the general subject matter of that action on the meeting agenda.

On February 28, 2022, the Public Access Bureau sent a copy of the Request for Review to then-Board President Keith Briggs.⁴ The Public Access Bureau also requested a response to Mr. Bastian's allegation, as well as copies of the notice, agenda, minutes (of both open and closed sessions), and any recordings from the February 10, 2022, meeting.⁵ By e-mail dated March 9, 2022,⁶ counsel for the Board, Mr. Eric B. Bernard, provided the Public Access Bureau with a copy of the Board's schedule of regular meeting dates for the 2021-2022 school year, a copy of the February 10, 2022, regular meeting agenda, a copy of a draft of the unapproved open session minutes from the February 10, 2022, regular meeting, and a written response.⁷ Mr. Bernard also provided, for this office's confidential review, a copy of a draft of the unapproved closed session minutes and a copy of the closed session verbatim recording.⁸ In the Board's non-confidential response to this office, Mr. Bernard stated:

¹E-mail from Jay Bastian to Public Access [Bureau, Office of the Attorney General] (February 15, 2022).

²E-mail from Jay Bastian to Public Access [Bureau, Office of the Attorney General] (February 15, 2022).

³5 ILCS 120/2.02(c) (West 2020).

⁴Based on this office's review of the District's website, Mr. Scott Stone assumed the role of Board President in March 2022. Former Board President Keith Briggs was appointed Board Vice President at that same time. Community Consolidated School District 93, Board of Education Home, <https://www.ccsd93.com/domain/10> (last visited April 15, 2022).

⁵Letter from Christopher R. Boggs, Supervising Attorney, Public Access Bureau, Office of the Attorney General, to The Honorable Keith Briggs, President, Community Consolidated School District 93, Board of Education (February 28, 2022).

⁶E-mail from Eric Bernard, Petrarca, Gleason, Boyle & Izzo, LLC, to [Christopher] Boggs [Office] (March 9, 2022).

⁷Letter from Eric B. Bernard, Petrarca, Gleason, Boyle & Izzo, LLC, to Christopher R. Boggs, Office of the Attorney General (March 9, 2022).

⁸Letter from Eric B. Bernard, Petrarca, Gleason, Boyle & Izzo, LLC, to Christopher R. Boggs, Office of the Attorney General (March 9, 2022).

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At the February 10, 2022 Board meeting, the Board considered a Layered Mitigation Reduction Plan recommended by [Superintendent David] Hill. This plan addressed, among other things, whether the District would continue to require all staff and students to wear masks while inside school buildings. As shown in Section 4.d.8 of the February 10, 2022 meeting minutes [citation], this discussion occurred during the Board Member Reports portion of the meeting. * * * The minutes demonstrate that the Board did not take any final action on the proposed plan. Rather, the Board "had a very thorough discussion of the plan, questions were asked, and all members expressed their opinions." Although the Board reached a "consensus" to make masks optional beginning February 14, it did not at any point take a roll call vote.

Because the Board did not take any final action on the proposed mitigation plan, it was not required to place this discussion on its agenda. Furthermore, although the mitigation plan was not listed on its agenda, [the Board] was permitted to consider and discuss the plan because the February 10 meeting was a regularly scheduled board meeting. 5 ILCS 120/2.02(a).^[9]

On March 11, 2022, the Public Access Bureau forwarded a copy of the Board's written answer to Mr. Bastian and notified him of his opportunity to reply.¹⁰ Mr. Bastian did not submit a reply.

On April 13, 2022, the Public Access Bureau extended the time within which to issue a binding opinion by 21 business days, to May 16, 2022, pursuant to section 3.5(e) of OMA.¹¹

⁹Letter from Eric B. Bernard, Petrarca, Gleason, Boyle & Izzo, LLC, to Christopher R. Boggs, Office of the Attorney General (March 9, 2022).

¹⁰Letter from Christopher R. Boggs, Supervising Attorney, Public Access Bureau, Office of the Attorney General, to Jay Bastian (March 11, 2022).

¹¹Letter from Christopher R. Boggs, Supervising Attorney, Public Access Bureau, Office of the Attorney General, to Jay Bastian, The Honorable Scott Stone, President, Board of Education, Community Consolidated School District No. 93, and Eric B. Bernard, Petrarca, Gleason, Boyle & Izzo, LLC (April 13, 2022).

ANALYSIS

"It is the public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1 (West 2020). "The Open Meetings Act provides that public agencies exist to aid in the conduct of the people's business, and that the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly." *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989).

Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2020)) provides, in relevant part, that "[a]n agenda for each regular meeting shall be posted at the principal office of the public body and at the location where the meeting is to be held at least 48 hours in advance of the holding of the meeting." A public body that has a website maintained by its full-time staff also must post on its website agendas of any regular meetings of the public body's governing body. 5 ILCS 120/2.02(a) (West 2020). Section 2.02(a) adds that "[t]he requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda." Section 2.02(c) of OMA (5 ILCS 120/2.02(c) (West 2020)) further provides that "[a]ny agenda required under this Section shall set forth the **general subject matter of any resolution or ordinance that will be the subject of final action at the meeting.**" (Emphasis added.)

In this matter, the Board's response to this office acknowledged that it did not list the District's COVID-19 Layered Mitigation Reduction Plan (Reduction Plan) on the agenda for its February 10, 2022, regular meeting.¹² The response also acknowledged that the unapproved draft minutes demonstrate that the Board discussed the Reduction Plan, but the Board asserted that section 2.02(a) authorized it to do so without including it on the agenda because the Board did not take final action on the Reduction Plan.¹³ The portion of the draft minutes documenting the Board's discussion of¹⁴ the Reduction Plan provides, in pertinent part:

¹²Letter from Eric B. Bernard, Petrarca, Gleason, Boyle & Izzo, LLC, to Christopher R. Boggs, Office of the Attorney General (March 9, 2022), at 1.

¹³Letter from Eric B. Bernard, Petrarca, Gleason, Boyle & Izzo, LLC, to Christopher R. Boggs, Office of the Attorney General (March 9, 2022), at 1-2.

¹⁴The approved February 10, 2022, meeting minutes, which are identical to the draft minutes provided by the Board to this office, are presently available on the District's website. *See* <https://meetings.boardbook.org/Documents/CustomMinutesForMeeting/1266?meeting=515548>.

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The Board had reviewed the plan recommended by Dr. Hill prior to the meeting. Dr. Hill explained to the Board that he worked with his Senior Leadership Team and the District nurses to develop this plan in light of the temporary restraining order against Governor Pritzker's Executive Order to mandate masks and other mitigation strategies. He explained that [the District] was not named in the case, and therefore, the case does not apply to our District, and the District will continue to abide by the Executive Order. A strategy to remove some of the mitigations to keep kids safe is dependent upon the transmission level in Carol Stream, zip code 60188, which is still High Transmission Level. The Board had a very thorough discussion of the plan, questions were asked, and all members expressed their opinions. After some debate on the timing (before or after the conclusion of the appeal process), the consensus of the Board was to remove the mask requirement beginning Monday, February 14. **The Board directed the Superintendent to send out messaging** that beginning Monday, February 14, masks in [the District] are recommended, but not required.^[15] (Emphasis added.)

Although not provided by the District in its response in this matter, this office has also reviewed the District's publicly-available "CCSD93 Mitigation Guide: 2021-22 School Year - Family Edition," which includes an introductory letter from the District's Superintendent that provides, in relevant part: **"This message is to inform you that after careful consideration of the state of the TRO halting the Governor's mask mandate for some Illinois school districts, at last night's Board of Education meeting the decision was made to transition CCSD93 from masks required to mask recommended but not required beginning Monday, February 14."**¹⁶ (Emphasis in original.)

The Board's written response to this office contended that the Board did not manifest final action by reaching "a 'consensus' to make masks optional beginning February 14

¹⁵Community Consolidated School District 93, Board of Education Meeting, Draft Minutes of February 10, 2022, at 4-5.

¹⁶Letter from David H. Hill, Ed.D., Superintendent of Schools, CCSD93, to CCSD93 Community (updated February 27, 2022), https://docs.google.com/document/d/1fHhRV6ScURPILVvxdwjNlmMM7vz7_MaEj_6evpOTNJU/edit (last visited April 19, 2022).

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[]" because "it did not at any point take a roll call vote."¹⁷ The Board's *discussion* of the Reduction Plan did not violate OMA because section 2.02(a) of OMA specifically authorizes public bodies to discuss subjects that do not appear on agendas of regular meetings. The issue in this Request for Review is whether the Board took "final action" to change the masking guidelines without providing advance notice of the general subject matter of that change on the agenda of the February 10, 2022, meeting.

OMA does not define "final action," and no Illinois reviewing court has precisely defined that term. Courts have indicated, however, that "final action" generally must bring a matter to a resolution. *Davis v. Board of Education of Farmer City – Mansfield Community Unit School District No. 17*, 63 Ill. App. 3d 495, 499 (4th Dist. 1978) (adoption of resolution in closed session stating tentative intent to terminate superintendent's employment "did not dispose of the question of whether that employment should be terminated and, therefore, was not final action[.]" where board subsequently took final action to terminate the superintendent's employment in open session).

Here, the Board disposed of the question of whether to change the District's masking requirement for students and staff in the Reduction Plan recommended by the Superintendent, as demonstrated both by the February 10, 2022, meeting minutes and the Superintendent's introductory letter in the Mitigation Guide as quoted above. The meeting minutes plainly reflect that the Board (1) discussed the opportune moment to remove the masking requirement and make masking optional, (2) reached a consensus to eliminate the masking requirement on February 14, 2022, and (3) directed the Superintendent to notify the District community of its effective date, thus bringing the matter to a resolution. It is undisputed that the Board did not ratify its decision by voting on it in open session.

The Board also did not dispute that the District's masking policy changed and that the Superintendent implemented that change at the Board's direction. Nevertheless, the Board argues that it did not take final action on this issue because it did not take a roll call vote.¹⁸ To be sure, in *Board of Education of Springfield School District No. 186 v. Attorney General of Illinois*, 2017 IL 120343, 77 N.E.3d 625 (2017), the Illinois Supreme Court concluded that a school board did not improperly take final action in closed session by reaching a consensus to enter into a settlement agreement because the school board voted at a later meeting to approve the agreement in open session. The Court explained: "Under the plain language of section 2(e) of the Open Meetings Act, the public vote is not merely a ratification of final action taken earlier

¹⁷Letter from Eric B. Bernard, Petrarca, Gleason, Boyle & Izzo, LLC, to Christopher R. Boggs, Office of the Attorney General (March 9, 2022), at 2.

¹⁸Letter from Eric B. Bernard, Petrarca, Gleason, Boyle & Izzo, LLC, to Christopher R. Boggs, Office of the Attorney General (March 9, 2022), at 2.

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in a closed session; it is the final action. Without the public vote, no final action has occurred." *Board of Education of Springfield School District No. 186*, 2017 IL 120343, ¶74, 77 N.E.3d at 637. In reaching that conclusion, the Court cited two cases that both held that written decisions issued by public bodies were invalid because the public bodies did not vote to approve them during open meetings. *Howe v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 2013 IL App (1st) 122446, ¶26, 996 N.E.2d 664, 669 (2013) ("No public body in Illinois subject to the Open Meetings Act can take final action by merely circulating some document for signature and not voting on it publicly."); *Lawrence v. Williams*, 2013 IL App (1st) 130757, ¶21, 988 N.E.2d 1039, 1043 (2013) (public body did not properly take final action when one member appeared at a meeting to issue written decisions that two of the three members of the public body had signed but not publicly voted to approve: "Issuing the signed written decisions was the 'final action' by the electoral board and had to occur in an open meeting with a quorum present."). Collectively, these three decisions stand for the proposition that public bodies must hold a vote in open session in order to take final action pursuant to OMA.

As was the case in *Howe* and *Lawrence*, the Board did not hold a ratifying vote concerning the making requirement. However, the measures described above at the February 10, 2022, meeting implemented a change to the District's masking guidelines. Adopting the Board's rationale that the omission of a roll call vote concerning that matter means this change to the masking guidelines does not constitute "final action" such that the Board was relieved of the obligation to include the general subject matter of this decision on the agenda of the meeting would yield a result that is contrary to the legislative intent of OMA and the requirements of section 2.02. *Phoenix Bond & Indemnity Co. v. Pappas*, 194 Ill. 2d 99, 107 (2000) (A statute should not be construed in a way that would defeat its purpose "or yield an absurd or unjust result."). As discussed above, section 1 of OMA states that "citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way[.]" while section 2.02(c) expressly requires public bodies to include on meeting agendas the "general subject matter of any resolution or ordinance that will be the subject of final action at the meeting." These requirements would be meaningless if public bodies could circumvent them by simply choosing not to hold formal roll call votes despite agreeing on courses of actions and issuing directives. OMA does not permit a public body to make and implement a decision concerning a substantive matter, such as masking guidelines in public schools for students and staff during a pandemic, without providing the general subject matter of that decision on the meeting agenda. Because the Board brought the matter to resolution, the Board took final action even though it did not ratify the decision with a vote as required by OMA. Accordingly, this office concludes that the Board violated OMA by taking final action to change the masking guidelines in its Reduction Plan without including the general subject matter of that final action on its February 10, 2022, meeting agenda.

FINDINGS AND CONCLUSIONS

After full examination and giving due consideration to the arguments presented, the Public Access Counselor's review, and the applicable law, the Attorney General finds that:

1) On February 15, 2022, Mr. Jay Bastian submitted this Request for Review alleging that at its February 10, 2022, meeting the Board voted on a change in the District's masking guidelines without listing that item on the meeting agenda. Mr. Bastian's Request for Review was timely filed and otherwise complies with the requirements of section 3.5(a) of OMA (5 ILCS 120/3.5(a) (West 2020)).

2) On February 28, 2022, the Public Access Bureau sent a copy of the Request for Review to then-Board President Keith Briggs and requested copies of the notice, agenda, minutes (both open and closed), and any recordings from the February 10, 2022, meeting.

3) On March 9, 2022, the Board's legal counsel provided a copy of the Board's schedule of regular meeting dates for the 2021-2022 school year, a copy of the February 10, 2022, regular meeting agenda, a copy of the unapproved draft minutes from the February 10, 2022, regular meeting, and a written response. The Board also provided, for this office's confidential review, a copy of the Board's February 10, 2022, closed session minutes and closed session verbatim recording.

4) On March 11, 2022, the Public Access Bureau forwarded a copy of the Board's written answer to Mr. Bastian and notified him of his opportunity to reply. He did not reply.

5) On April 13, 2022, the Public Access Bureau extended the time within which to issue a binding opinion in this matter by 21 business days, to May 16, 2022, pursuant to section 3.5(e) of OMA. Accordingly, the Attorney General may properly issue a binding opinion with respect to this matter.

6) Section 2.02(c) of OMA requires that a meeting agenda set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting.

7) The Board's February 10, 2022, regular meeting agenda did not contain an agenda item identifying the general subject matter of a change to the District's masking guidelines in its Reduction Plan.

8) During its February 10, 2022, meeting, the Board considered the Reduction Plan recommended by the Superintendent, reached a consensus on removing the masking

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requirement and making masks optional for students and staff, and directed the Superintendent to notify the District community of the change effective as of February 14, 2022. That decision and directive constituted final action that brought the matter to a resolution even though the Board did not conduct a formal vote to approve the change to the District's masking guidelines.

9) As a result, the agenda did not provide the public with advance notice that final action might be taken at the February 10, 2022, meeting to implement a change to the District's masking guidelines. Accordingly, the Attorney General concludes that the Board violated section 2.02(c) of OMA by failing to include the general subject matter of this final action on the February 10, 2022, regular meeting agenda.

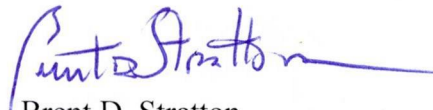
In accordance with these findings of fact and conclusions of law, the Board is directed to vote in open session on whether to change its COVID-19 Layered Mitigation Reduction Plan to make masks optional rather than mandatory for students and staff, after properly providing notice of that final action on the meeting agenda. This office also directs the Board to conduct its future meetings in full compliance with OMA. As required by section 3.5(e) of OMA, the Board shall either take necessary action as soon as practical to comply with the directives of this opinion or shall initiate administrative review under section 7.5 of OMA (5 ILCS 120/7.5 (West 2020)).

This opinion shall be considered a final decision of an administrative agency for the purpose of administrative review under the Administrative Review Law. 735 ILCS 5/3-101 *et seq.* (West 2020). An aggrieved party may obtain judicial review of the decision by filing a complaint for administrative review in the Circuit Court of Cook County or Sangamon County within 35 days of the date of this decision, naming the Attorney General of Illinois and Mr. Jay Bastian as defendants. *See* 5 ILCS 120/7.5 (West 2020).

Very truly yours,

KWAME RAOUL
ATTORNEY GENERAL

By:


Brent D. Stratton
Chief Deputy Attorney General

Mr. Jay Bastian
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cc: Mr. Eric B. Bernard
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CERTIFICATE OF SERVICE

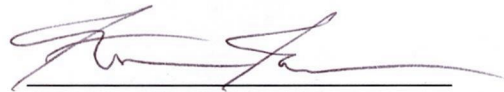
Steve Silverman, Bureau Chief, Public Access Bureau, hereby certifies that he has served a copy of the foregoing Binding Opinion (Public Access Opinion 22-006) upon:

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by causing a true copy thereof to be sent electronically to the addresses as listed above and by causing to be mailed a true copy thereof in correctly addressed, prepaid envelopes to be deposited in the United States mail at Chicago, Illinois on May 6, 2022.


STEVE SILVERMAN
Bureau Chief

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