

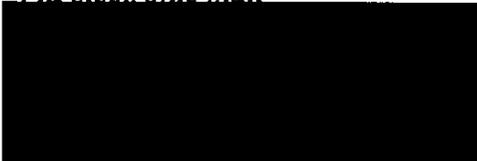


OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

Lisa Madigan  
ATTORNEY GENERAL

September 8, 2016

*Via electronic mail*



*Via electronic mail*

Mr. Kevin B. Gordon  
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RE: OMA Request for Review – 2014 PAC 27532

Dear [REDACTED] and Mr. Gordon:

This determination letter is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2015 Supp.)). For the reasons that follow, the Public Access Bureau concludes that the Joint Committee (Joint Committee) of Community Consolidated School District 46 (District) is a public body subject to requirements of OMA, and that the Committee violated OMA when it held a meeting on December 18, 2013, without providing advance notice or otherwise abiding by the requirements of OMA.

On January 4, 2014, [REDACTED] submitted a Request for Review to the Public Access Bureau alleging that the District violated OMA when the Joint Committee met on December 18, 2013, without publishing advance notice, posting an agenda, allowing public attendance, or taking minutes. On January 13, 2014, this office forwarded a copy of the Request for Review to the District and asked it to respond to [REDACTED] allegations.

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On January 24, 2014, the District responded that the December 18, 2013, meeting was a meeting of the Superintendent's evaluation committee, not the Joint Committee. The District explained that the evaluation committee was created by the Superintendent to discuss issues concerning internal teacher evaluation procedures. The District stated that the Board of Education (Board) does not control the evaluation committee and that no Board members serve on it; the membership of the evaluation committee is comprised of administrative representatives and union representatives, selected by the Superintendent and the teachers' union, respectively.

On February 4, 2014, this office forwarded a copy of the District's response to ██████████. On February 12, 2014, she replied that the Superintendent's evaluation committee is, in fact, the Joint Committee for the District. ██████████ stated that Public Act 97-8, effective June 13, 2011, amended provisions of the School Code (105 ILCS 5/1-1 *et seq.* (West 2014)) and the Illinois Educational Labor Relations Act (IELRA) (115 ILCS 5/1 *et seq.* (West 2014)) to require the District to establish a joint committee with equal representation from the administration and union to discuss teacher evaluations, ratings, and dismissals, which describes the evaluation committee.

On February 4, 2015, an Assistant Attorney General in the Public Access Bureau contacted the District by e-mail, requesting clarification as to whether it has convened a joint committee pursuant to section 24-12(c) of the School Code (105 ILCS 5/24-12(c) (West 2014)), and, if not, whether the Superintendent's evaluation committee was acting as the Joint Committee on December 18, 2013. On February 11, 2015, the District responded that the Joint Committee and the Superintendent's evaluation committee are separate committees, but both committees address performance evaluations and the membership of both committees is the same. The District stated that its previous assertion that the Joint Committee did not meet on December 18, 2013, was incorrect; on that date, the Joint Committee met immediately before the evaluation committee meeting. Nonetheless, the District maintained that the Joint Committee is not subject to OMA because the Board does not control the Joint Committee; the Joint Committee does not report to or advise the Board and does not receive direction from the Board. Moreover, the District asserted that the Joint Committee is responsible for collective bargaining on performance evaluations and reductions in force in accordance with section 24-12(c) of the School Code and section 10 of IELRA (115 ILCS 5/10 (West 2014)). The District argued that because the Joint Committee conducts collective bargaining negotiations on the items specified in section 24-12(c) of the School Code, section 18 of IELRA (115 ILCS 5/18 (West 2014)) exempts meetings of the Joint Committee from the provisions of OMA.

On March 10, 2015, this office forwarded a copy of the District's supplemental response to ██████████. On March 17, 2015, ██████████ replied, disputing the District's contention that the Joint Committee was engaged in collective bargaining during its December 18, 2013, meeting and asserting that the Joint Committee is a subsidiary body of the Board

because it was selected (in part) by the Board. [REDACTED] also alleged that if the Joint Committee had engaged in collective bargaining, then it had failed to adhere to the notice requirements in the School Code and section 7 of the Illinois Public Labor Relations Act (5 ILCS 315/7 (West 2014)).

### DETERMINATION

"In order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly." 5 ILCS 120/1 (2014). Section 1.02 of OMA (5 ILCS 120/1.02 (West 2014)) defines a "public body" as:

*all legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, except the General Assembly and committees or commissions thereof.*  
(Emphasis added.)

[REDACTED] contends that the Joint Committee is an advisory body or subsidiary body of the school board. She stated that the Joint Committee is "paid for by tax revenue since many, if not all, of the members are employed by District 46, meetings [are] held in District 46 facilities, and some members are acting on behalf of the School Board."<sup>1</sup> [REDACTED] also asserted that the Joint Committee makes public policy and personnel decisions. The District's response to this office asserted that the Joint Committee is not a public body subject to OMA because it is "not a creation of the Board of Education. The Board of Education does not control the Joint RIF Committee, and in fact is responsible for appointing only half of the members, which was a task delegated to the Superintendent."<sup>2</sup> The District further stated that the Joint Committee "does not report to or advise the Board of Education. It does not receive direction from the Board of Education, and its duties are not assigned by the Board of Education. It does

<sup>1</sup>E-mail from [REDACTED] to Public Access Bureau, Office of the Attorney General (January 4, 2014).

<sup>2</sup>Letter from Kevin B. Gordon, Scariano, Himes and Petrarca, Chtd., to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 11, 2015), at 1.

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not have any by-laws."<sup>3</sup> ██████████ responded asserting "the published guidelines for implementation clearly state the Joint RIF Committee is a subcommittee since they appoint the committee."<sup>4</sup>

The establishment and duties of the Joint Committee are provided in section 24-12(c) of the School Code, which states:

***Each school district and special education joint agreement must use a joint committee composed of equal representation selected by the school board and its teachers or, if applicable, the exclusive bargaining representative of its teachers, to address the matters described in paragraphs (1) through (5) of this subsection (c) pertaining to honorable dismissals under subsection (b) of this Section.***

- 1) The joint committee must consider and may agree to criteria for excluding from grouping 2 and placing into grouping 3 a teacher whose last 2 performance evaluations include a Needs Improvement and either a Proficient or Excellent.
- 2) The joint committee must consider and may agree to an alternative definition for grouping 4, which definition must take into account prior performance evaluation ratings and may take into account other factors that relate to the school district's or program's educational objectives. An alternative definition for grouping 4 may not permit the inclusion of a teacher in the grouping with a Needs Improvement or Unsatisfactory performance evaluation rating on either of the teacher's last 2 performance evaluation ratings.
- 3) The joint committee may agree to including within the definition of a performance evaluation rating a performance evaluation rating administered by a school district or joint

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<sup>3</sup>Letter from Kevin B. Gordon, Scariano, Himes and Petrarca, Chtd., to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (February 11, 2015), at 1.

<sup>4</sup>Letter from ██████████ to Matthew Hartman, Assistant Attorney General, Public Access Bureau (March 17, 2015), at 1.

agreement other than the school district or joint agreement determining the sequence of dismissal.

- 4) For each school district or joint agreement that administers performance evaluation ratings that are inconsistent with either of the rating category systems specified in subsection (d) of Section 24A-5 of this Code, *the school district or joint agreement must consult with the joint committee on the basis for assigning a rating that complies with subsection (d) of Section 24A-5 of this Code* to each performance evaluation rating that will be used in a sequence of dismissal.
- 5) Upon request by a joint committee member submitted to the employing board by no later than 10 days after the distribution of the sequence of honorable dismissal list, *a representative of the employing board shall, within 5 days after the request, provide to members of the joint committee a list showing the most recent and prior performance evaluation ratings of each teacher* identified only by length of continuing service in the district or joint agreement and not by name. If, after review of this list, a member of the joint committee has a good faith belief that a disproportionate number of teachers with greater length of continuing service with the district or joint agreement have received a recent performance evaluation lower than the prior rating, the member may request the joint committee review the list to assess whether such a trend may exist. Following the joint committee's review, but by no later than the end of the applicable school term, *the joint committee or any member or members of the joint committee may submit a report of the review to the employing board and exclusive bargaining representative, if any.* Nothing in this paragraph (5) shall impact the order of honorable dismissal or a school district's or joint agreement's authority to carry out a dismissal in accordance with subsection (b) of this Section. (Emphasis added.)

The first meeting of the joint committee each school year must take place on or before December 1, and "[t]he joint committee must reach agreement on a matter on or before February 1 of a

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school year in order for the agreement of the joint committee to apply to the sequence of dismissal determined during that school year." 105 ILCS 5/24-12(c) (West 2014).

In analyzing whether entities are advisory bodies, the Illinois Appellate Court has distinguished those that function independently and informal groups with limited duties from entities with defined responsibilities that are part of a public body's formal structure. In *University Professionals of Illinois, Local 4100 of the Illinois Federation of Teachers v. Stukel*, 344 Ill. App. 3d 856, 865 (1st Dist. 2003), the plaintiff alleged that a group of presidents and chancellors of public universities (the Council), which made recommendations to the Illinois Board of Higher Education (IBHE), violated OMA by meeting privately before IBHE meetings to discuss issues related to funding for public education. *Stukel*, 344 Ill. App.3d at 858. The court identified following factors as relevant to the determination of whether an entity is an advisory body, for purposes of FOIA:

who appoints the members of the entity, the formality of their appointment, and whether they are paid for their tenure; the entity's assigned duties, including duties reflected in the entity's bylaws or authorizing statute; whether its role is solely advisory or whether it also has a deliberative or investigative function; whether the entity is subject to government control or otherwise accountable to any public body; whether the group has a budget; its place within the larger organization or institution of which it is a part; and the impact of decisions or recommendations that the group makes. *Stukel*, 344 Ill. App. 3d at 865.

In *Stukel*, the court held that the group was not an advisory body of IBHE in part because it was not incorporated into the formal organizational structure of IBHE, a factor that the court identified as a "**primary consideration** in determining whether an organization is a public body under the Meetings Act." (Emphasis added.) *Stukel*, 344 Ill. App. 3d at 865. The court explained that "the Council was formed by the presidents and chancellors of the various state universities to express its views to the IBHE. Granted, its role is advisory but that role is one that the Council [and not IBHE] created." *Stukel*, 344 Ill. App. 3d at 866. The court also noted that the plaintiff's complaint did not allege that the group had a "deliberative or investigative function in relation to the IBHE or that the Council is subject to government control. It does not appear that the Council is otherwise accountable to any public body. It does not appear to have a budget[,] and no member of the Council is a member of the IBHE." *Stukel*, 344 Ill. App. 3d at 866; see also *Pope v. Parkinson*, 48 Ill. App. 3d 797, 800 (4th Dist. 1997) (committee of four faculty members and four students that advised director of sports stadium and chancellor was not an advisory body because OMA is "not intended to open to the public the deliberations of merely informal advisory committees who discuss internal University affairs."); *People ex rel. Cooper v.*

*Carlson*, 28 Ill. App. 3d 569, 572 (OMA does not apply to voluntary "technical staff" meetings of "department heads or employees who seek to improve with dispatch their performance or function of assisting in the conduct of the people's business.").

Conversely, in *Board of Regents of Regency University System v. Reynard*, 292 Ill. App. 3d 968 (4th Dist. 1997), the appellate court concluded that the Athletic Council of Illinois State University (ISU) was an advisory body subject to FOIA. The Athletic Council served "as an advisory body to the athletic director, with primary advisory responsibility to the president. It gives advice on the development of budgets and policies governing the intercollegiate athletic program." *Reynard*, 292 Ill. App. 3d at 971. The Athletic Council "exists to provide faculty input to the decision-making bodies at ISU." *Reynard*, 292 Ill. App. 3d at 972. Although the athletic director "is free to reject its advice and there have been occasions when he has done so" and "[t]he Council deals only with internal ISU matters, it has no budget, and none of its members are paid" (*Reynard*, 292 Ill. App. 3d at 972), the court concluded that the Athletic Council was nonetheless an advisory body of ISU which was subject to the requirements of OMA. The court emphasized that the Council was "part of the formal organizational structure of ISU and its duties and responsibilities are set forth in the supplement [to the bylaws of the ISU Senate]. The broad scope of the Council's responsibilities as set forth in the supplement contrasts sharply with the limited duties of the committee in *Pope v. Parkinson*." *Reynard*, 292 Ill. App. 3d at 978.

In contrast to the informal advisory committee in *Pope*, the self-created group of university presidents in *Stukel*, or the group of department heads that held technical staff meetings in *Carlson*, the Joint Committee is a statutorily created entity. Half of its representatives are selected by a representative of the District. The duties of the Joint Committee are assigned by the School Code. The Board supports the operations of the Joint Committee by providing lists of current and past teacher evaluations upon request and by consulting with the Joint Committee when the performance evaluation ratings used by the District differ from the ratings set forth in section 24A-5 of the School Code (105 ILCS 5/24A-5 (West 2014)). The Joint Committee may also issue a report to the Board if it has a good faith belief that a disproportionate number of teachers with seniority have received lower performance evaluation ratings than in previous evaluations. Further, the District must adhere to any decisions made by the Joint Committee when establishing the 4 groupings of teachers qualified to hold each position. *See*, 105 ILCS 5/24/12(b) (West 2014).

Although the Joint Committee's creation and duties originate in the School Code and it does not have by-laws, its operations and functions are inextricably connected to those of the District. The Joint Committee makes binding decisions concerning groupings, reports to the Board, and has a statutorily-defined role that makes it part of the formal organizational structure of the District, a primary consideration in determining whether a public body is subject to OMA.

The Joint Committee is an established part of the District's formal process for determining the order of honorable dismissal, and exists to advise the District. Accordingly, we conclude that the Joint Committee is an advisory or subsidiary body of the District and a "public body" subject to the requirements of OMA.

### Collective Bargaining Negotiations

Section 2(a) of OMA (5 ILCS 120/2(a) (West 2014), as amended by Public Acts 99-78, effective July 20, 2015; 99-235, effective January 1, 2016; 99-480, effective September 9, 2015) provides that "[a]ll meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a."<sup>5</sup> Under section 2a of OMA (5 ILCS 120/2a (West 2014)) "[a] public body may hold a meeting closed to the public, or close a portion of a meeting to the public, upon a majority vote of a quorum present, taken at a meeting open to the public for which notice has been given as required by this Act." Section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2014)) provides: "[p]ublic notice of any special meeting except a meeting held in the event of a bona fide emergency, or of any rescheduled regular meeting, or of any reconvened meeting, shall be given at least 48 hours before such meeting, which notice shall also include the agenda[.]" Additionally, all public bodies are required to "keep written minutes of all their meetings, whether open or closed, and a verbatim record of all their closed meetings in the form of an audio or video recording." 5 ILCS 120/2.06(a) (West 2014)).

In its supplemental response to this office, the District asserted that the December 18, 2013, Joint Committee meeting was excluded from the requirements of OMA under section 18 of IELRA, which provides: "[t]he provisions of the Open Meetings Act shall not apply to collective bargaining negotiations and grievance arbitrations conducted pursuant to this Act." In support of its contention that the Joint Committee was engaged in collective bargaining negotiations, the District cited the provisions of section 24-12(c) of the School Code that provide for the establishment of the Joint Committee and its duties in determining the honorable dismissal of teachers.

The honorable dismissal of District teachers is by governed by section 24-12(b) of the School Code, which states that school districts must categorize every teacher into one or more positions, and that "[w]ithin each position and *subject to agreements made by the joint committee on honorable dismissals that are authorized by subsection (c) of this Section*, the school district \* \* \* must establish 4 groupings of teachers[.]" (Emphasis added.) The four groupings set forth in section 24-12(b) are based on teachers' tenure status and performance evaluation ratings. The groupings establish the sequence of dismissal "with teachers in grouping

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<sup>5</sup>We note that this determination analyzes the versions of OMA and the other relevant statutes that were in effect at the time of the December 18, 2013, Joint Committee meeting.

one dismissed first and teachers in grouping 4 dismissed last." 105 ILCS 5/24-12(b) (West 2014). As listed in section 24-12(c) of the School Code, the joint committee is tasked with addressing five issues: (1) altering the criteria for moving teachers between some groupings; (2) considering an alternative definition for grouping 4; (3) including ratings administered by another school district in the definition of a performance evaluation rating; (4) consulting with the District when it uses ratings that are inconsistent with the School Code; and (5) issuing reports to the District and bargaining representatives about concerns that a disproportionate number of senior teachers received a lower rating than in past ratings.

In construing statutes such as the School Code and IELRA, the primary goal is to ascertain and effectuate the intent of the General Assembly. See *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415, 844 N.E.2d 1, 14 (2006). The best indicator of legislative intent is the language of the statute, which must be given its plain and ordinary meaning. See, e.g., *Bettis v. Marsaglia*, 2014 IL 117050, ¶13, 23 N.E.3d 351, 356 (2014).

Under the plain language of section 18 of IELRA, "collective bargaining negotiations" are not subject to OMA. Section 10(a) of IELRA (115 ILCS 5/10(a) (West 2012)) defines "collective bargaining" as:

[T]he performance of the mutual obligations of the educational employer and the representative of the educational employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, and to execute a written contract incorporating any agreement reached by obligation, provided such obligation does not compel either party to agree to a proposal or require the making of a concession.

Accordingly, the plain language of section 18 of IELRA evinces the intent to remove negotiations between a school district and union representatives over wages, hours, and other terms and conditions of employment from the purview of OMA.

In order to determine whether the Joint Committee's December 18, 2013, meeting is excluded from the requirements of OMA, it is necessary to determine whether the Joint Committee was engaged in collective bargaining. The District asserted that the Joint Committee's deliberations and agreements (if any) concerning the process involved in honorable dismissals and reductions in force "directly implicate[ ] the teachers' conditions of employment[.]"<sup>6</sup> The District also stated that "[t]he Joint RIF Committee is simply the

<sup>6</sup>Letter from Kevin B. Gordon, Scariano, Himes and Petrarca, Chtd., to Matt Hartman, Assistant Attorney General, Public Access Bureau (February 11, 2015), at 2.

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statutorily required venue for conducting the negotiations over the four issues set forth in Section 24-12(c) of the School Code."<sup>7</sup> (Emphasis omitted.) Thus, the District asserted that the Joint Committee's meetings constitute collective bargaining negotiations within the meaning of section 18 of IELRA. [REDACTED] questioned whether any collective bargaining actually took place, and asserted that if collective bargaining did occur, the joint committee did not follow the Illinois Labor Relations Board's notice requirements.

Although the Joint Committee is comprised of an equal number of representatives of the Board and the bargaining representatives of the teachers, the statutorily mandated subjects of discussion are designed to assist the District, not with collective bargaining, but with complying with the provisions of section 24-12(b) of the School Code after the Board has decided to reduce the number of teachers employed. The District asserts that that section 24-12(c) provides the venue for collective bargaining negotiations over the sequence of honorable dismissal. However, section 24-12(c) does not authorize wide-ranging negotiations over seniority and performance evaluation ratings, which would directly relate to a teacher's employment security. Instead, section 24-12(c) of the School Code states "[e]xcept as explicitly set forth in this subsection (c), a joint committee has no authority to agree to any further modifications to the requirements for honorable dismissals set forth in subsection (b) of this Section." Thus, the Joint Committee's discussions and decisions are specifically limited by section 24-12(c) of the School Code to minor changes to the criteria for grouping 2, the definition of grouping 4, ratings from other school districts, and ratings inconsistent with the School Code. The Joint Committee may also report concerns about senior teachers being given low ratings, but section 24-12(c) states that any such report shall not impact the order of dismissal. The function of the Joint Committee is limited by statute and does not permit negotiations concerning wages, hours, and other terms and conditions of employment. Further, the District has not provided our office with any information regarding the discussions that took place at the Joint Committee meeting on December 18, 2013. Because section 24-14(c) limits the subjects of discussion and decisions by the joint committee to matters that do not on their face constitute collective bargaining negotiations, and because the available information does not indicate that collective bargaining negotiations occurred at the meeting in question, this office concludes that the December 18, 2013, meeting of the Joint Committee was not excluded from the requirements of OMA.

Accordingly, this office concludes that the District violated OMA when the Joint Committee met on December 18, 2013, without providing advance notice or otherwise complying with the requirements of OMA. Because the school year in which the Joint Committee met has concluded, no remedial action by the District is required to remedy the

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<sup>7</sup>Letter from Kevin B. Gordon, Scariano, Himes and Petrarca, Chtd., to Matt Hartman, Assistant Attorney General, Public Access Bureau (February 11, 2015), at 2.

  
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violations discussed above. This office, however, requests that the Joint Committee conduct its future meetings in full compliance with OMA, including posting notice and agendas, keeping minutes, allowing time for public comment, properly entering closed session, and keeping a verbatim recording of all closed sessions.

To the extent  has alleged violations of the School Code, section 7 of the Illinois Public Labor Relations Act, and rules of the Illinois Labor Relations Board, the Public Access Counselor's authority to resolve disputes is limited by section 7(c)(3) of the Attorney General Act (15 ILCS 205/7(c)(3) (West 2014)) to alleged violations of the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2014)) and OMA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, you may contact me at (217) 782-9054 or at the Springfield address on the bottom of the first page.

Very truly yours,

  
MAIT HARTMAN  
Assistant Attorney General  
Public Access Bureau

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