

# Wisconsin Supreme Court Makes Significant Ruling on Open Meetings Law

Article

July 7, 2017

On June 29, the Wisconsin Supreme Court issued an opinion in State of Wisconsin ex rel. John Krueger v. Appleton Area School District Board of Education and Communication Arts 1 Materials Review Committee, No. 2015AP231 regarding what constitutes a governmental body for purposes of the Wisconsin Open Meetings Law. The Supreme Court reversed both the circuit and appeals courts, applying a very broad interpretation of what staff meetings may be considered meetings for purposes of the Open Meetings Law.

## The Facts:

A parent (Krueger) in the Appleton Area School District had some concerns about the written materials used in the district's ninth grade communications arts course. The Superintendent referred the matter to the Chief Academic Officer (CAO) who, among other things, directs the operations of the Assessment Curriculum and Instruction Department (ACI).

Initially the CAO informed the parent that the district was planning to begin the review process for Communications Arts in grades 7 through 12 in about a year and a half. After further discussion with the parent, the CAO decided to review the book list immediately, leaving the remainder of the curriculum to be reviewed in the future.

The District's Rule 361 titled "Procedures for Selection of Educational Materials and Textbooks," provided that "[c]urriculum revision is an ongoing process as defined in the Board approved Appleton Area School District (AASD) Assessment, Curriculum, & Instruction Handbook (the Handbook)."

The Handbook provides that the first step when beginning a curriculum review cycle is to "[e]stablish a committee for program review." The handbook spelled out that the review committee was to be comprised of at least 17 individuals and enumerated several staff members who were to participate.

The CAO convened a committee comprised in the manner stated in the Handbook which was known as the Communications Arts 1 Materials Review Committee ("CAMRC"). The Handbook further provided that after a review committee is formed, the committee was to perform a number of functions,

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including “identify[ing] possible materials/resources” and ultimately is to make a recommendation of which materials or resources to suggest to the Board.

The CAMRC reviewed the book list but not the entire curriculum. Although Krueger’s request was the impetus for forming CAMRC, it was undisputed that CAMRC was formed as a review committee pursuant to a modified version of the Handbook process.

When Krueger informed the CAMRC that he wished to attend their meetings, he was informed that the CAMRC was not subject to the Open Meetings Law. Krueger sued CAMRC and the District, alleging that CAMRC failed to comply with the Open Meetings Law.

#### **Circuit and Appeals Court Decisions:**

The Outagamie County circuit court granted summary judgment in favor of the Board and CAMRC and the Appeals court affirmed in an unpublished decision. The lower courts considered it dispositive that CAMRC was created by District officials in response to Krueger’s request, rather than by the Board directly. The court of appeals relied on the fact that no board rule expressly created CAMRC and that nothing in the Handbook mandated that CAMRC, specifically, be created. Consequently the lower courts concluded that CAMRC, as an ad hoc group of government employees rather than a governmental body, was not subject to the Open Meetings Law.

#### **The Supreme Court’s General Holding**

The Supreme Court read the District’s rules as authorizing the committee, finding:

Where a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are “created by . . . rule” under § 19.82(1) and the Open Meetings Law applies to them. Here, the Board’s Rule 361 provided that the review of educational materials should be done according to the Board-approved Assessment, Curriculum, & Instruction Handbook (the “Handbook”). The Handbook, in turn, authorized the formation of committees with a defined membership and the power to review educational materials and make formal recommendations for Board approval.

#### **The Supreme Court’s Reasoning**

The Supreme Court began its discussion by observing that an entity is subject to the Open Meetings Law if it is a “governmental body” as defined in Wis. Stat. § 19.82(1). It reasoned that the under the Open Meetings Law “[g]overnmental body” means 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

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foregoing . . .”:

Taken together, these provisions define a “governmental body” not by the purpose behind its formation or by the subject matter of its meetings, but simply by two criteria: (1) the form it takes and (2) the source of its existence in a constitution, statute, ordinance, rule, or order.

With regard to the requirement that the governmental body must be “created by constitution, statute, ordinance, rule or order” the Court concluded:

- a school board is vested with the authority to “adopt all the textbooks necessary for use in the schools under its charge.”
- Through Rule 361 the Appleton School Board:
  - recognized that the Board, “as the governing body of the School District, is legally responsible for all educational materials utilized within the instructional program”;
  - provided that “[t]he selection of educational materials is delegated to the professionally trained and certified personnel employed by the school system.”; and
  - directed that “[c]urriculum revision is an ongoing process as defined in the Board approved Appleton Area School District (AASD) Assessment, Curriculum, & Instruction Handbook. The Handbook delineates the processes leading to Board approval for curriculum revision, adoption of new courses, and implementation of curriculum materials.”

The Court concluded that Rule 361 represented the Board’s formal authorization for the ACI Department to review and recommend educational materials for Board approval pursuant to the processes in the Handbook, concluding that the CAMRC is therefore a body created by rule and consequently subject to the Open Meetings Law.

The Supreme Court thus rejected the notion that the purpose of the CAMRC (to review the concerns raised by Krueger) was relevant to the determination of whether the CAMRC was a governmental body. So long as the CAMRC was in form a committee that was authorized to review curriculum issues and, because Krueger’s questions could be considered curriculum issues, the meetings of that body were subject to the Open Meetings Law.

### **Concurring Opinion**

The concurrence by Justice Abrahamson listed 5 reasons it disagreed with the majority opinion, but determined the CAMRC was a governmental body for open meetings purposes, concluding that the committee was not created by rule but by order.

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The concurrence made the following suggestion:

Because of the continuing need for clarity and guidance in the meaning of the phrase “created by rule or order” used in Wis. Stat. § 19.82(1), I suggest that school boards and school officials consider the adoption of formal rules or orders for the creation of governmental bodies by rule or order to be governed by the Open Meetings Law. They should consider in their various functions whether they are acting by rule or order, whether they are creating a governmental body subject to the Open Meetings Law, and whether they are clearly delineating the functions and responsibilities of the entity they create. Their designation is, of course, not dispositive for purposes of the Open Meetings Law but would assist them, school employees, and the public.

### **What does this mean to public entities?**

Absent legislative clarification, the Krueger decision clearly expands the scope of what will be considered a meeting of a governmental body for Open Meetings Law purposes. Governmental entities (not limited to school districts) would be wise to heed the advice of the concurring opinion and review their policies and procedures with the following objectives in mind:

1. Review existing policies and handbooks for rules that authorize committees to address duties of the governing body or chief administrators. The clear intent of the Court is that the creation and authorization of a committee by a school, county, town or village board or city council action alone creates a governmental body subject to the open meeting law, even if the sub-unit is not precisely performing the task it was authorized to carry out;
2. Consider practices with regard to appointing staff review committees. Existing Attorney General opinions and the concurring opinion in this case suggest that the directive of a superintendent or other ranking public official creating a committee to carry out a statutory or board delegated function would likewise be treated as a governmental body;
3. Staff should be asked to consider issues informally, making sure not to create a committee structure or confer collective authority to act. As long as there is no collective power or form of committee, it would appear that under the majority opinion there is no governmental body.
4. If there are committees or other entities formed by board rules that authorize or delegate board duties to staff, publish appropriate notice of the meetings as required by the Open Meetings Law. Nothing in the Krueger case limits the closed session provisions that may be applicable.

It is likely this decision will prompt more requests from the media and public for access to meetings that have previously been considered internal operating meetings. Such requests will need to be analyzed under the standards articulated by the Supreme Court in the Krueger case.