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January 12, 2023

Transmitted via email: [opengov@oag.state.md.us](mailto:opengov@oag.state.md.us)

Rachel Simmons, Assistant Attorney General  
Counsel to the Open Meetings Compliance Board  
c/o Attorney General's Office  
200 St. Paul Place  
Baltimore, MD 21202

Re: Open Meetings Act Complaint No. 23-18

Dear Ms. Simmons:

Please accept this submittal in response to the December 14, 2022 complaint filed with the Open Meetings Compliance Board (“OMCB”) by Jillian Atelsek, Education Reporter with *The Frederick News-Post* and the December 15, 2022 notification issued to Frederick County Public Schools (“FCPS”) of Open Meetings Act (“OMA”) Complaint No 23-18.

**I. Background**

On December 14, 2022, Ms. Atelsek submitted a complaint to the OMCB based on a concern that FCPS was forming a committee that she believed met the definition of a public body under the Maryland OMA. (see Exhibit 1) Ms. Atelsek indicated in her complaint that FCPS announced it was forming a Reconsideration Committee pursuant to FCPS Regulation 500-39 *Reconsideration of Instructional Materials Already in Use*. The Reconsideration Committee was being formed in response to a complaint filed by a local parent requesting FCPS remove 35 books from its library shelves. In an email dated December 15, 2022, FCPS was apprised of the complaint from the OMCB seeking a timely response to be filed by FCPS on or before January 17, 2023. (see Exhibit 2). On behalf the Board of Education of Frederick County (“BOE”), the undersigned attorneys submit this response and for the reasons stated herein, deny that the BOE violated the OMA.

**II. Relevant Legal Citations/Open Meetings Compliance Board Opinions**

In accordance with § 3-101(h), General Provisions Article, *Annotated Code of Maryland*, a public body is defined, in part as:

Public body

(h)(1) “Public body” means an entity that:

(i) consists of at least two individuals; and

(ii) is created by:

1. the Maryland Constitution;
2. a State statute;
3. a county or municipal charter;
4. a memorandum of understanding or a master agreement to which a majority of the county boards of education and the State Department of Education are signatories;
5. an ordinance;
6. a rule, resolution, or bylaw;
7. an executive order of the Governor; or
8. an executive order of the chief executive authority of a political subdivision of the State.

(2) “Public body” includes:

(i) any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least two individuals not employed by the State or the political subdivision;

(ii) any multimember board, commission, or committee that:

1. is appointed by:

A. an entity in the Executive Branch of the State government, the members of which are appointed by the Governor, and that otherwise meets the definition of a public body under this subsection; or

B. an official who is subject to the policy direction of an entity described in item A of this item; and

2. includes in its membership at least two individuals who are not members of the appointing entity or employed by the State; and

(iii) The Maryland School for the Blind.

The OMCB has issued several Opinions regarding the definition of “public body.” An Opinion issued on March 31, 2022 applies directly to the circumstance here. The Opinion at 16 *OMCB* 88 (2022) dealt with the Montgomery County Public Schools COVID-19 Operations Advisory Team (“Advisory Team”). The Advisory Team was created by the Interim Superintendent, who appointed its members. The Advisory Team was not a Board Committee, was not required by Board Policy, and no members of the Board served on it. The OMCB, in the Opinion, reviewed the definition of “public body” contained in the OMA and the three tests set forth for determining whether an entity is a “public body;” and it concluded that the Advisory Team did not satisfy any of the three statutory tests.

Under the first test, an entity is a public body if it is created by one of eight enumerated types of instruments, including a “rule, resolution, or bylaw.” Section 3-101(h)(1). The OMCB noted that the Advisory Team was not created by any formal action of the Board, but was created by the Interim Superintendent. Therefore, the Advisory Team was not created by a “rule, resolution, or bylaw” of the Board of Education and was, therefore, not a public body under that test. The OMCB found that the Advisory Team did not satisfy the second test, because the Interim Superintendent “is not subject to the policy direction of the Governor or the county executive but, rather, the Maryland State Department of Education.” As to the third test, the OMCB concluded that the Advisory Team would not have satisfied that test, *even if* the Board of Education had appointed the Team’s members, because Board members are not appointed by the Governor, and the Interim Superintendent was not an official subject to the policy direction of a “gubernatorially-appointed public body that is ‘in the Executive Branch of the State government.’” (*Id.* at 90).

### III. Response

The Reconsideration Committee is established by FCPS Regulation, not by the BOE, and therefore is not a public body as defined above. Therefore, no violation of the OMA has occurred.

Specifically, BOE Policy 501 *Curriculum Distribution* states: (see Exhibit 3)

If a Frederick County resident alleges that instructional materials already in use are inappropriate, that person may request a review. Regulations governing the reconsideration of materials currently in use are *established by the Superintendent*. (Emphasis added)

FCPS Regulation 500-39 outlines the creation and purpose of the Reconsideration Committee as follows: (see Exhibit 4)

#### B. Reconsideration of Instructional Materials Already in Use

4. Upon receipt of staff’s recommendation and the “Request for Reconsideration of Instructional Material,” the Deputy Superintendent will study the request to determine if the matter has been covered in principle by a previous decision. *If it is determined that the matter has not been covered in principle, the Deputy Superintendent may appoint a reconsideration committee or, may refer it directly to the Superintendent as described in paragraph 5.* If it is determined that the matter has been covered in principle, the Deputy Superintendent will

typically not appoint a reconsideration committee and will refer the matter directly to the Superintendent with a recommendation. (Emphasis added)

5. If the Deputy Superintendent has recommended that a reconsideration committee not be formed, the Superintendent will review the Deputy Superintendent's recommendation and the request for reconsideration. *The Superintendent will either: (1) request the Deputy Superintendent convene a reconsideration committee; or (2) render a written decision and notify all individuals who filed a "Request for Reconsideration of Instructional Material" accordingly.* (Emphasis added)

As outlined above, the Reconsideration Committee members are appointed by the Deputy Superintendent as needed.

The OMA Manual offers key guidance in this area. Specifically, it addresses when questions arise as to when a committee or other sub-entity of a public body has been “created by law,” either expressly or impliedly, and offers that such committee is clearly a public body when its parent public body expressly created it by name or through bylaws or resolutions. See § 3-101(h)(3)(ix) General Provisions Article, *Annotated Code of Maryland*. See also 14 *OMCB* Opinions 98 (2020); 9 *OMCB* Opinions 151 (2014); and OMA Manual 11th Edition October 2022, 1-3, 1-4. Example: “There shall be a Finance Committee.”

BOE Policy 501 is clear. The BOE in its Policy clearly and expressly has stated that regulations governing the reconsideration of materials currently in use are established by the Superintendent. There is no reference direct, implied or otherwise that any committee is to be created to act on behalf of the BOE, rather the committee is established, as needed and determined by the Deputy Superintendent.

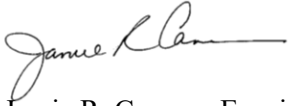
Finally, the formation of the Reconsideration Committee in the instant matter is very similar to the creation of the Advisory Team reviewed under Section II above. BOE Policy 501 *Curriculum Distribution* provides that the BOE delegates to the Superintendent the responsibility of selecting instructional materials and the Superintendent is “authorized to adopt regulations to administer the review and selection of instructional materials.” Furthermore, there are two sections that deal with objections by the public as to such materials. As to textbooks considered for approval, a complainant “may request a review by following the regulations established by the Superintendent.” A resident may also request a review of instructional materials already in use if they are alleged to be inappropriate: “Regulations governing the reconsideration of materials currently in use are established by the Superintendent.” Thus, the Reconsideration Committee at issue here was *not* created by any “rule, resolution, or bylaw” of the BOE. It was created solely by the Superintendent under her authority to establish regulations for the review of instructional materials.

It should be noted that this situation is different from the matter in 7 *OMCB* 21 (2010), where the *OMCB* discussed the question of whether a committee established to make school redistricting recommendations in anticipation of the opening of a new school in Baltimore County was a “public body” under the OMA. There, the *OMCB* concluded that the committee was a “public body” even though the committee was established by the Area Assistant Superintendent, and not by the Board of Education, finding that the “policy adopted by the Board of Education *clearly required* that the Area Assistant Superintendent appoint” the committee. (at 27) (Emphasis added) The *OMCB* noted that the Board’s “policy *mandated the Area Assistant Superintendent’s action*,” and under *those circumstances*, the committee was a public body. (*Id.*) (Emphasis added) Here, the BOE Policy did not “mandate” the formation of a committee. Rather, the Policy gave the Superintendent the authority and responsibility to establish regulations to deal with review of instructional materials and the Superintendent decided to establish a committee to assist her in the review.

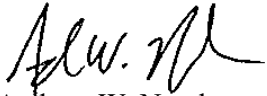
#### IV. Conclusion

For the reasons provided herein with supporting documentation and legal references, it is the BOE's position it did not violate the OMA and respectfully requests that the Open Meetings Compliance Board render a decision accordingly.

Respectfully submitted,



Jamie R. Cannon, Esquire



Andrew W. Nussbaum, Esquire

Attachments: Exhibits 1-4

cc: Dr. Cheryl L. Dyson, FCPS Superintendent  
Sue Johnson, Board of Education President  
Michelle Dauksha, FCPS Staff Attorney  
Complainant - Jillian Atelsek, *The Frederick News-Post*