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**STATE OF MARYLAND**  
**OPEN MEETINGS COMPLIANCE BOARD**

***17 Official Opinions of the Compliance Board 13 (2023)***

**February 13, 2023**

**Frederick County Public Schools Reconsideration Committee**

The Complainant alleges that a committee that will weigh in on whether to remove certain books from Frederick County Public Schools (the “School District”) is a “public body” subject to the Open Meetings Act (the “Act”). The School District responds that the committee does not meet the Act’s definition of “public body” and, thus, need not convene in meetings open to the public. For reasons we explain below, we conclude that the committee is not a public body subject to the Act.

**Background**

The Board of Education of Frederick County (the “Board”) “sets policy not otherwise controlled by state and federal laws.” Frederick County Public Schools, “Policies and Regulations,” <https://www.fcps.org/boe/policies> (last visited Feb. 13, 2023). “Regulations, set by the superintendent [of Frederick County Public Schools], define the procedures by which Board policy is carried out within the school system.” *Id.*

In 1993, the Board adopted a policy that “delegates to the superintendent the responsibility of selecting instructional materials.”<sup>1</sup> The policy provides in relevant part:

The superintendent is authorized to adopt regulations to administer the review and selection of instructional materials.

Instructional materials shall be selected after review and evaluation by appropriate staff following the criteria for selection of instructional materials. Textbooks for student use will be made available for public inspection and review. If, after public review, the textbooks are alleged to be inappropriate, the complainant(s) may request a review by following the regulations established by the superintendent.

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<sup>1</sup> This policy was amended in 2007.

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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.

Pursuant to this policy, the Frederick County Schools superintendent approved a regulation giving the deputy superintendent the option to appoint a “reconsideration committee” upon receipt of a complaint about instructional materials already in use. The regulation states that any such reconsideration committee “may be composed of at least nine members,” including four to five staff members, five community representatives, and two high school students (when the matter deals with a secondary level instructional material). A reconsideration committee established under this regulation “will meet and receive testimony from the complainant and staff concerning the contested material” and “may, at its discretion, receive oral or written testimony from proponents of the material.” The committee will, “[b]arring extenuating circumstances,” “render its report within 45 school days after receiving final testimony.” The deputy superintendent will provide the report and a recommendation to the superintendent, who will decide whether to remove the material. The decision is appealable to the Board of Education of Frederick County.

On December 1, 2022, the School District announced that it was forming a reconsideration committee in response to a parent’s complaint about thirty-five library books in circulation at Frederick County schools. The committee will have about sixty members—including parents, students, administrators, media specialists, and teachers—and the School District has indicated that the Committee will convene in meetings closed to the public.

### Analysis

The Complainant alleges that the reconsideration committee’s meetings must, under the Act, be open to the public. The School District responds that the committee is not a “public body” as defined by the Act and, thus, is not subject to the Act’s openness requirements.

“As we have previously explained, an entity is subject to the Act only if it qualifies as a ‘public body’ as defined by the Act, which sets forth three separate tests.” 16 *OMCB Opinions* 101, 103 (2022). Under the first test, a multimember entity is a “public body” “if it was created by, among other legal instruments, ‘a rule, resolution, or bylaw.’” 13 *OMCB Opinions* 21, 22 (2019) (quoting § 3-101(h)(1)(ii)(6)).<sup>2</sup> The Complainant asserts that the reconsideration committee satisfies this test because it was created by what the Complainant characterizes as a “school system regulation.” To be sure, we have previously

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<sup>2</sup> Unless otherwise noted, statutory references are to the General Provisions Article of the Maryland Annotated Code.

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said that “a ‘public body’ means an ‘entity’ that ‘is created’ by a legal instrument such as a charter, law, *regulation*, or bylaw.” 10 *OMCB Opinions* 101, 102 (2016) (emphasis added) (quoting § 3-101(h)(1)) (concluding that a city clerk and city staff did not collectively constitute a “public body”); *see also* 13 *OMCB Opinions* 16, 16 (2019) (recognizing that a committee created by a State regulation was a “public body”). But the School District points out that the regulation here, authorizing the creation of a “reconsideration committee,” was issued by the county *superintendent*, not the *Board of Education of Frederick County*, which itself is a public body subject to the Act. *See* Md. Code. Ann., Educ. § 3-103 (establishing a board of education for each county); § 3-5B-01 (specifying the composition of the Board of Education of Frederick County); Gen. Prov. § 3-101(h)(1)(ii)(2) (defining “public body” to include a multi-member entity established by statute). The School District argues that this distinction is critical when determining whether the reconsideration committee is also a public body.

As we explain below, we agree, based on the facts before us, that the school board’s policy did not establish the reconsideration committee. We also conclude that the superintendent’s regulation does not satisfy the “legal instrument” test in § 3-101(h).

In prior matters involving committees created by local school superintendents or their staff, we have looked to how involved the local school board was in establishing the committee to determine whether the entity is a public body for purposes of the Act. For example, in 7 *OMCB Opinions* 69 (2010), we found that a redistricting committee, established by the local superintendent, was not a public body, because “it was not established by formal action of the County Board [of Education].” 7 *OMCB Opinions* at 73. Although a policy of the local board “require[d] that the Superintendent develop procedures to implement the . . . Board’s redistricting policy,” *id.* at 70, the Board was not involved in “the creation, adoption, administration or interpretation of the Superintendent’s administrative procedures,” and there was no requirement that the Superintendent establish a redistricting committee to implement the Board’s policy, *id.* at 70-71. *See also* 16 *OMCB Opinions* 88, 88-89 (2021) (concluding that a Covid-19 operations advisory team, created by an interim local schools superintendent and not any formal action by the local school board, was not a public body subject to the Act); 12 *OMCB Opinions* 58, 58 (2018) (concluding that an enrollment task force was not a public body because the local schools chief executive officer “appointed the Task Force on her own volition”); 10 *OMCB Opinions* 51, 51 (2016) (concluding that a task force formed and appointed by the chief executive officer of a local school district was not a public body); 9 *OMCB Opinions* 81, 81 (2013) (concluding that a committee created by a local superintendent, under procedures adopted by the superintendent to carry out policies of the local school board, was not a public body subject to the Act).

We reached a contrary conclusion in 7 *OMCB Opinions* 21 (2010), which involved a different redistricting committee. Although the committee was appointed by a local

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assistant superintendent and the committee advised the assistant superintendent rather than the local school board, we determined that the committee was nonetheless a “public body” because a policy of the school board *required* the establishment of a redistricting committee. 7 *OMCB Opinions* at 27. The policy provided “little detail prescribing the committee’s governance,” but it *required* that an assistant superintendent establish a committee before the assistant superintendent could offer recommendations for presentation to the board. *Id.*

Here, the Board policy merely delegated to the superintendent the responsibility of selecting instructional materials. While that the policy authorized the superintendent to adopt “regulations” to administer the review and selection of instructional materials, and while the superintendent approved a regulation allowing for the creation of a reconsideration committee, the school board’s policy did not *require* the superintendent to establish such a committee. Our prior opinions suggest that, under these circumstances, the reconsideration committee is not a “public body” under the first test in § 3-101(h). See 7 *OMCB Opinions* at 70-71, 73.

That the superintendent approved what was referred to as a “*regulation*” allowing for the creation of the committee here—rather than “procedures,” as in 7 *OMCB Opinions* 69—does not change our conclusion. As noted above, we have previously said that a regulation may establish a public body subject to the Act. See 10 *OMCB Opinions* at 102; 13 *OMCB Opinions* at 16. But, as far as we know, the only time that we have recognized a public body established by regulation, the entity in question was the creature of a *State* regulation issued under the Administrative Procedure Act, specifically a regulation promulgated by the State Board of Education. 13 *OMCB Opinions* at 16 (referring to COMAR 13A.05.02.13(I)(1)). Although there may well be other circumstances under which something called a “regulation” qualifies as a “rule” within the meaning of the Open Meetings Act, we do not think that a policy or procedure approved solely by a local superintendent and “subject to change without notice,” Frederick County Public Schools, “Policies and Regulations,” <https://www.fcps.org/boe/policies> (last visited Feb. 9, 2023), constitutes a “rule” that may establish a “public body” under § 3-101(h)(1)(ii)(6), merely because the School District refers to it as a “regulation.”<sup>3</sup> Rather, as we have explained in a prior opinion, “[t]he term “rule” connotes a binding requirement adopted through a formal process,” as opposed to the policy of an individual that “could presumably [be] change[d] at will” by the individual or their successor. 9 *OMCB Opinions* 314, 315 (2015) (concluding that a university president’s policy, establishing a committee, was not a “rule” under § 3-101(h)). We thus conclude that neither the school board policy nor the

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<sup>3</sup> A “rule” is the only possible legal instrument enumerated in § 3-101(h)(1) that could describe the superintendent’s regulation, which is plainly not a provision of the Constitution, a State statute, a county or municipal charter, a memorandum of understanding or master agreement among the State Department of Education and a majority of county boards of education, an ordinance, a resolution, a bylaw, or an executive order by the Governor or the chief executive authority of a political subdivision.

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superintendent's regulation is a legal instrument that could establish the reconsideration committee as a "public body" under the first test in § 3-101(h).

The committee also fails to satisfy the second test under § 3-101(h), which defines a "public body" as "any multimember board, commission, or committee" appointed by the Governor, the chief executive authority of a political subdivision, or an official 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." § 3-101(h)(2)(i). The committee's members were appointed by a deputy superintendent, who is neither the Governor nor the chief executive authority of a political subdivision nor someone subject to the policy direction of the Governor or chief executive authority of a political subdivision. *See 10 OMCB Opinions* at 52 (concluding that an entity created by the chief executive officer of the Prince George's County Public Schools did not satisfy the second test under § 3-101(h)).

Finally, we have no basis to conclude that the committee satisfies the third test, which encompasses "any multimember board, commission, or committee" that is appointed either by a public body in the executive branch, the members of which are appointed by the Governor, or by an official subject to such a public body's policy direction, provided that its membership includes at least two individuals who are neither members of the appointing entity nor employed by the State. § 3-101(h)(2)(ii). Even if the Board of Education of Frederick County had appointed the members of the reconsideration committee, the Board members themselves are not appointed by the Governor. *See Md. Code Ann., Educ. § 3-5B-01* (providing that members of the Board of Education of Frederick County are elected). And a deputy superintendent of the School District is not an official subject to the policy direction of a "gubernatorially-appointed public body that is 'in the Executive Branch of the State government.'" *10 OMCB Opinions* at 52-53 (quoting § 3-101(h)(2)(ii) and concluding that a committee established by the chief executive officer of Prince George's County Public Schools did not satisfy the third test); *see also 7 OMCB Opinion* at 26 (recognizing that neither a local board of education nor its staff is considered part of the executive branch of State government).

For all these reasons, we conclude that the reconsideration committee is not a public body subject to the Act.

**Open Meetings Compliance Board**  
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