OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

June 11, 2019

Via electronic mail
[redacted]

Via electronic mail
Ms. Jackie Wernz
Franczek Radelet
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606
jfw@franczek.com

RE: OMA Request for Review – 2018 PAC 55832

Dear [redacted] and Ms. Wernz:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons that follow, the Public Access Bureau concludes that the Board of Education (Board) of Elmhurst Community Unit School District 205 (School District) did not violate the requirements of OMA during its November 13, 2018, meeting.

On November 24, 2018, [redacted] submitted this Request for Review alleging that the Board violated OMA at its meeting on November 13, 2018, by taking final action on items that were not listed on the agenda in violation of section 2.02(c) of OMA (5 ILCS 120/2.02(c) (West 2016)). Specifically, [redacted] alleged that "the Board decided on belief statements and resolutions for an upcoming meeting of the Illinois Association of School Boards (IASB) without placing those items on the agenda[.]"[1] On November 29, 2018, this office forwarded a copy of the Request for Review to the Board and asked it to provide a detailed

[1]Letter from [redacted] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 24, 2018).

written response to [redacted] allegations, together with copies of the agenda, minutes, and any audio or video recordings of the November 13, 2018, meeting. On December 21, 2018, an attorney representing the Board provided the requested materials. On December 26, 2018, this office forwarded a copy of the Board's response to [redacted]; he did not reply to that response.[2]

In its response to this office, the Board asserted that it "did not take final action on belief statements or resolutions at the November 13 meeting, or even take a vote or gain general Board consensus on the statements and resolutions at issue."[3] Instead, the Board stated, its intention was merely to discuss the resolutions and statements in light of significant public interest in the resolution about arming teachers in schools. The Board explained that although it "seemed to be considering a vote on the IASB proposals" in comments both prior to and during the meeting, Board member John McDonough "put the Board back on track to only have a discussion" by stating that "procedurally, we don't have an agenda item for voting."[4] The Board also asserted that "although Board member McDonough stated that" Dr. Margaret Harrell, the Vice President of the Board who would serve as the School District's representative at the IASB conference, "could 'gather the consensus from the responses' of the Board members, a review of the video of the meeting establishes that there was no consensus reached on any of the IASB proposals discussed by the Board."[5] Additionally, the Board asserted that Dr. Harrell was permitted to exercise her own discretion at the conference and "was not bound by any of the opinions she received at the meeting."[6]

In his correspondence to this office, [redacted] included a copy of an e-mail Dr. Harrell sent to the rest of the Board on November 13, 2018, which stated:

> Attached is a summary of the information that must be decided during the Board Communication portion of tonight's meeting for the IASB Process.

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[2]However [redacted] did send this office a supplement to his Request for Review on December 17, 2018, before the Board had submitted its response. In this determination, this office took into account all information received regarding this matter.

[3]Letter from Jackie Wernz, Franczek Radelet, to Leo Draws, Assistant Attorney General, Public Access Bureau (December 21, 2018), at 1.

[4]Letter from Jackie Wernz, Franczek Radelet, to Leo Draws, Assistant Attorney General, Public Access Bureau (December 21, 2018), at 3.

[5]Letter from Jackie Wernz, Franczek Radelet, to Leo Draws, Assistant Attorney General, Public Access Bureau (December 21, 2018), at 3.

[6]Letter from Jackie Wernz, Franczek Radelet, to Leo Draws, Assistant Attorney General, Public Access Bureau (December 21, 2018), at 4.

> Included in this attachment is the "voting ballot" and the description of issues being decided. Please review the attached and be prepared to "vote" on each of the 8 statements.[7]

[redacted] alleged that at the November 13, 2018, meeting, Dr. Harrell "describe[d] each of the belief statements and resolutions, and asked the Board to vote on those matters, so that she may act accordingly during the conference."[8] [redacted] further alleged that "Board members expressed opinions to help arrive at a consensus and make a recommendation to Dr. Harrell on whether to vote 'yes' or no' at the conference."[9] He argued that "[e]ven though the Board purposefully avoided the appearance of voting, this method of arriving at a consensus should still be construed as 'final action'."[10] In other words, "[w]hile not framed as a formal 'vote', giving 'direction' to the delegate seems akin to final action on a Board resolution."[11]

DETERMINATION

"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(c) of OMA 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.) OMA does not define "final action," and no Illinois court has precisely defined that term. Illinois courts have indicated, however, that "final action" generally must bring a matter to a resolution. *Compare 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

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[7]E-mail from Margaret Harrell to boe@elmhurst205.org (November 13, 2018).

[8]Letter from [redacted] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 24, 2018), at 1.

[9]Letter fro[redacted] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 24, 2018), at 2.

[10]Letter from [redacted] to Sarah Pratt, Public Access Counselor, Office of the Attorney General (November 24, 2018), at 2.

[11]Letter from [redacted] to Leo Draws, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (December 17, 2018), at 2.

should be terminated and, therefore, was not final action[,]" where board subsequently took final action to terminate the superintendent's employment in open session); *with Kosoglad v. Porcelli*, 132 Ill. App. 3d 1081, 1092 (1st Dist. 1985) (vote to remove commissioner from police board in open session was final action). The fact that the agenda for the November 13, 2018, meeting did not contain any items concerning belief statements or resolutions at issue at the IASB conference is not disputed. Therefore, this office's determination hinges on whether the Board took "final action" on matters related to the IASB conference.

This office's review of the video recording of the Board's November 13, 2018, meeting confirmed that Dr. Harrell initially asked the Board to "vote" on six issues that would be on the table at the IASB conference.[12] When Dr. Harrell asked for the vote of each member on the first belief statement, however, Board member McDonough indicated that a vote would be improper, stating: "Just procedurally, we don't have an agenda for voting on here * * * so probably you can gather the consensus from the responses * * * but we'll be as clear as we can."[13] Dr. Harrell responded: "So I appreciate that, um, so while we can't vote, there needs to be a vote that is... I will be assessing, so based off your comments... I will decide what you're saying, and I will vote accordingly."[14] In response to an ensuing question from a Board member seeking clarification about the belief statements, Dr. Harrell explained that in light of public feedback to the Board about the IASB resolution on arming teachers, "there needs to be a discussion, and based off that discussion * * * I need to go and place a vote one way or the other, that will be based off the consensus of this meeting."[15] After Dr. Harrell read each IASB items, one or more Board members responded generally, noting the Board's present policies. On some statements and resolutions there was not much discussion, though some Board members did give unequivocal stances on how they believed Dr. Harrell should proceed at the conference, including all six of the Board members other than Dr. Harrell on the resolution about arming teachers. Dr. Harrell did not expressly give her opinion on any of the IASB proposals.

Because Dr. Harrell asked the Board to vote and the Board specifically declined to vote because the IASB conference issues were not on the agenda, the requester and the public

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[12]Elmhurst 205, *2018-11-13 Elmhurst 205 School Board Meeting*, YouTube (Nov. 18, 2018), https://www.youtube.com/watch?v=bqDnrn58DHs, at 1:44:56.

[13]Elmhurst 205, *2018-11-13 Elmhurst 205 School Board Meeting*, YouTube (Nov. 18, 2018), https://www.youtube.com/watch?v=bqDnrn58DHs, at 1:47:05.

[14]Elmhurst 205, *2018-11-13 Elmhurst 205 School Board Meeting*, YouTube (Nov. 18, 2018), https://www.youtube.com/watch?v=bqDnrn58DHs, at 1:47:25.

[15]Elmhurst 205, *2018-11-13 Elmhurst 205 School Board Meeting*, YouTube (Nov. 18, 2018), https://www.youtube.com/watch?v=bqDnrn58DHs, at 1:48:27.

may have been left with the impression that the ensuing discussion was improper. Although Dr. Harrell **requested** that the Board vote on the six issues she presented so that she would have clear direction for representing the Board at the IASB conference, it is clear that no vote was required and none was taken. "Without the public vote, no final action has occurred." *Board of Education of Springfield School District No. 186 v. Attorney General*, 2017 IL 120343, ¶74, 77 N.E.3d 625, 638 (2017). [redacted] suggests that even without a vote, the Board's expression of opinions and direction to Dr. Harrell was final action, which violated OMA because there was no corresponding agenda item. However, Board members mostly provided only brief, limited comments on the belief statements. Those expressions of opinions by individual Board members did not definitively establish a consensus or manifest a collective decision that amounted to a "final action" by the full Board. No matter was resolved during that portion of meeting, and nothing discussed with respect to the six beliefs and resolutions was final or binding on the Board. Because the Board simply discussed matters not on the agenda during the open session of its November 13, 2018, meeting, and no final action was taken, the Board did not violate section 2.02(c) of 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 file. If you have any questions, please contact me at (217) 782-1699, ldraws@atg.state.il.us, or the Springfield address on the bottom of the first page of this letter.

Very truly yours,

[redacted]

LEO DRAWS
Assistant Attorney General
Public Access Bureau

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