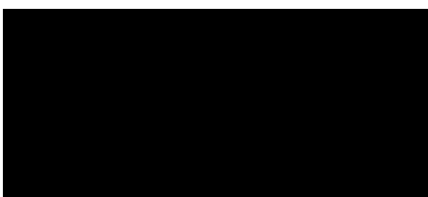




OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

December 12, 2016



Via electronic mail

Ms. Genevra Walters, Superintendent
Kankakee School District 111
240 Warren Avenue
Kankakee, Illinois 60901
genevra-walters@ksd111.org

RE: OMA Request for Review – 2016 PAC 44262

Dear [REDACTED] and Ms. Walters:

This determination 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 explained below, the Public Access Bureau concludes that the Kankakee School District 111 Board of Education (Board) violated the requirements of OMA in connection with its September 26, 2016, meeting by imposing a restriction on public comment that was not authorized by its established and recorded rules. This office further concludes that during the September 26, 2016, meeting, the Board did not adequately inform the public of its reason for going into a second closed session.

BACKGROUND

On September 28, 2016, [REDACTED] submitted this Request for Review alleging that during its September 26, 2016, meeting, the Board improperly interrupted his public comments and prevented him from using all of his allotted time to speak on one of the Board's agenda items. [REDACTED] also alleged that the Board did not accurately identify the subject of the Board's second closed session on the meeting's agenda or in a public recital before entering closed session. We construed the Request for Review as alleging

[REDACTED]
Ms. Genevra Walters

December 12, 2016

Page 2

violations of sections 2.06(g) (5 ILCS 120/2.06(g) (West 2014), as amended by Public Act 99-515, effective June 30, 2016) and 2a (5 ILCS 120/2a (West 2014)) of OMA.

On October 11, 2016, this office sent a copy of the Request for Review to the Board and requested a written response to the allegations in the Request for Review, together with copies of the Board's established and recorded rules regarding public comment. This office also requested that the Board identify the specific exception in section 2(c) of OMA (5 ILCS 120/2(c) (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016) that it publicly cited and identified as its basis for entering the second closed session during the September 26, 2016, meeting, and provide an explanation of its applicability to the content of the closed session discussion. This office also requested copies of the meeting agenda, open and closed session minutes, and the verbatim recording of the closed session portion of that meeting. On October 21, 2016, the Board provided the requested materials. On October 28, 2016, [REDACTED] submitted a reply.¹

DETERMINATION

Public Comment

Section 2.06(g) of OMA provides that "[a]ny person shall be permitted an opportunity to address public officials *under the rules established and recorded by the public body.*" (Emphasis added.) Under the plain language of section 2.06(g), a public body must establish and record rules and may restrict public comment only pursuant to those rules. See Ill. Att'y Gen. Pub. Acc. Op. No. 14-009, issued September 2, 2014 at 7.

In response to this office's request for a copy of the Board's established and recorded rules regarding public comment, the Board submitted Kankakee School District Number 111 School Board Policy 2:230, "Public Participation at Board of Education Meetings and Petitions to the Board" (Board Policy 2:230). Board Policy 2:230 lists five guidelines, which were adopted on November 14, 1994, and last amended on March 14, 2011, that require speakers to:

1. Address the Board only at the appropriate time as indicated on the agenda and when recognized by the Board President.
2. Identify oneself and be brief. Ordinarily, comments shall be limited to 5 minutes. In unusual circumstances, and when an individual has made a request in advance to speak for a longer

¹In his reply, [REDACTED] raised several novel allegations regarding the September 26, 2016, meeting. He subsequently filed those allegations in a separate Request for Review which is addressed in Ill. Att'y Gen. PAC Req. Rev. Ltr. 44862, issued December 12, 2016.

[REDACTED]
Ms. Genevra Walters

December 12, 2016

Page 3

period of time, the individual may be allowed to speak for more than 5 minutes.

3. Observe the Board President's decision to shorten public comment to conserve time and give the maximum number of individuals an opportunity to speak.

4. Observe the Board President's decision to determine procedural matters regarding public participation not otherwise covered in Board policy.

5. Conduct oneself with respect and civility toward others and otherwise abide by Board policy 8:30, *Visitors to and Conduct on School Property*.^[2]

However, the open session recording of the September 26, 2016, meeting shows that the Board president recited a different set of guidelines before the public comment period. Specifically, the Board president stated:

Please give your name and direct your comments to the President. Comments are limited to five minutes. No personal attacks upon Board members, staff, or other persons in attendance or absent will be permitted. In addition, discussion of matters which are currently under legal review will not be permitted.^[3]

During [REDACTED] public comments, the Board president announced an additional guideline that was not listed in Board Policy 2:230 or in the rules recited by the Board president: that commenters "cannot speak of personnel issues." There is no evidence that the Board has established and recorded a rule restricting public comment on personnel matters. The rule appears to have been announced extemporaneously by the Board president in response to [REDACTED] comments. The open session recording shows that the Board president interrupted [REDACTED] remarks four times to assert that he could not speak of

²Kankakee School District 111 School Board Policy 2:230, "Public Participation at Board of Education Meetings and Petitions to the Board."

³Kankakee School District 111 Board of Education, Meeting, September 26, 2016, Audio File (on file with the Public Access Bureau). When asked to address whether the rules recited by the Board president were established and recorded pursuant to section 2.06(g) of OMA, the Board responded that the statement began appearing on Board meeting agendas in 1994, but it did not recall how the remarks evolved. Although this set of rules is beyond the scope of this Request for Review, this office recommends that the Board take appropriate steps to establish and record any rules regarding public comment. A public body may promulgate reasonable rules related to public comment in order to govern meeting decorum and procedure. *Timmon v. Wood*, 633 F. Supp. 2d 453, 465 (W.D. Mich. 2008). Notwithstanding the legitimate interest in establishing rules governing decorum, in order to withstand constitutional muster, any restrictions on public comment that are content-based must be narrowly drawn to serve the purpose of preserving decorum. See *I.A. Rana Enterprises, Inc. v. City of Aurora*, 630 F. Supp. 2d 912, 922 (N.D. Ill. 2009).

[REDACTED]
Mrs. Geneva Walters

December 12, 2016

Page 4

personnel items. Although the Board allowed [REDACTED] to speak for slightly longer than five minutes and permitted him to stop speaking of his own accord, [REDACTED] contends that because of the Board's restriction on personnel issues, he "had to use the remainder of [his] time talking in allegories."⁴ The Board argues that the Board president made a "request that [REDACTED] not mention [the employee]'s situation by name because the matter involved a personnel issue and was currently under review by the Board."⁵

Contrary to the Board's assertion, the open session recording establishes that the Board president did more than merely make a request of [REDACTED] rather, she imposed an ad hoc rule by interrupting him repeatedly and stating that "our public guidelines state that you cannot speak of personnel issues."⁶ Although the Board president did not completely prohibit [REDACTED] comments, it does appear that the ad hoc rule caused him to refrain from fully expressing his views and required him to adopt indirect language to make his point. Accordingly, this office concludes that the Board violated section 2.06(g) of OMA by restricting [REDACTED] statutory right to address the Board based on a restriction that is not among its established and recorded rules governing public comment.

Second Closed Session

The Request for Review also alleged that the Board entered into a second closed session without citing an accurate basis under section 2(c) of OMA. Section 2(a) of OMA (5 ILCS 120/2(a) (West 2015 Supp.), as amended by Public Acts 99-642, effective July 28, 2016; 99-646, effective July 28, 2016) 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." Section 2a of OMA (5 ILCS 120/2a (West 2014)) requires that "a citation to the specific exception contained in Section 2[(c)] of this Act which authorizes the closing of the meeting to the public shall be publicly disclosed **at the time of the vote** and shall be recorded and entered into the minutes of the meeting." (Emphasis added.) Although a public body does not need to provide a specific citation to the OMA statute before going into closed session, it must "adequately identif[y] the exception" in section 2(c) on which it will rely to close the meeting. *Wyman v. Schweighart*, 385 Ill. App. 3d 1099, 1105 (2008). See also Ill. Att'y Gen. PAC Req. Rev. Ltr. 12658, issued July 7, 2011, at 2 (a public body's motion to close a meeting "must provide a sufficiently clear reference to each of the exception(s) it is relying on.").

⁴Email from [REDACTED] to Laura Harter, Assistant Attorney General, Public Access Bureau (October 28, 2016).

⁵Letter from Brian P. Crowley, Franczek Radelet, to Laura S. Harter, Assistant Attorney General, Public Access Bureau (October 21, 2016), at 3.

⁶Kankakee School District 111 Board of Education, Meeting, September 26, 2016, Audio File (on file with Public Access Bureau).

Ms. Geneva Walters

December 12, 2016

Page 5

Before entering its second closed session, the Board president stated "we are now on item I [of the agenda], I will ask for a motion to go back into closed session."⁷ Item I of the September 26, 2016, Board meeting agenda provided that a second closed session would be convened concerning the "Appointment, Employment, Compensation, Discipline, Performance, or Dismissal of Specific Employees of the Public Body."⁸ This language is a verbatim excerpt from the exception in section 2(c)(1) of OMA.⁹ The Board, however, did not recite this language in its motion.

In its October 21, 2016, response to this office, the Board acknowledged that the "better practice" is "to expressly state the reason for the closed session in the motion for the public to hear" and indicated that it intends to do so in the future. Still, the Board claimed that the motion at issue "should not have caused any confusion for the public, as the reason for the closed session was clearly set forth in the agenda and the Board referenced the relevant agenda item in its motion."¹⁰ This office disagrees. Even though the Board recited the statutory language of the 2(c)(1) exception in its agenda, merely stating the letter of the relevant agenda item did not adequately identify that exception "at the time of the vote" to go into closed session, as required by the plain language of section 2a. Accordingly, this office concludes that the Board violated section 2a of OMA by failing to publicly disclose the relevant exception in section 2(c) of OMA at the time of its vote to close the meeting.

Lastly, [REDACTED] appears to contend that the Board should have informed the public that the nature of the second closed session was a due process hearing for the employee at issue. The Board's response to this office, this office's review of the closed session minutes, and review of the closed session verbatim recording all confirmed that the subject of the closed session was a specific employee's employment and potential termination. Consideration

⁷Kankakee School District 111 Board of Education, Meeting, September 26, 2016, Audio File (on file with the Public Access Bureau).

⁸Kankakee School District 111 Board of Education, Meeting, Agenda Item I. (September 26, 2016).

⁹Section 2(c)(1) of OMA provides that a public body may hold a closed meeting to consider:

The appointment, employment, compensation, discipline, performance, or dismissal of specific employees of the public body or legal counsel for the public body, including hearing testimony on a complaint lodged against an employee of the public body or against legal counsel for the public body to determine its validity. However, a meeting to consider an increase in compensation to a specific employee of a public body that is subject to the Local Government Wage Increase Transparency Act may not be closed and shall be open to the public and posted and held in accordance with this Act.

¹⁰Letter from Brian P. Crowley, Franczek Radelet, to Laura S. Harter, Assistant Attorney General, Public Access Bureau (October 21, 2016), at 3, n.1.


Ms. Genevra Walters

December 12, 2016

Page 6

of a specific employee's employment and termination fall squarely within the scope of the section 2(c)(1) exception that the Board cited in item I of the agenda and in the open session minutes. Although OMA requires a citation to a specific exception contained in section 2(c), it does not require a public body also to articulate the specific subject matter of its closed session. To require a public recitation of the subject matter of the closed session would defeat the purpose of holding a session in private. The general language of section 2(c)(1) cited in the Board's agenda adequately identified the exception that authorized the Board to close the meeting. Had the Board verbally recited this language before voting to enter into a second closed session, it would have satisfied the requirements of OMA.

Because the Board's second closed session discussion was authorized by section 2(c)(1) even though it did not adequately identify that exception before closing the meeting and because there is no way to remedy its violation of section 2.06(g) at this time, no remedial action by the Board is necessary. However, this office cautions the Board to be mindful in the future of its obligation to adequately inform the public of the exceptions that authorize it to enter closed session at the time of its votes to do so, and to limit restrictions on public comment to reasonable rules that it has established and recorded.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at the Springfield address on the first page of this letter. This letter serves to close this file.

Very truly yours,


LAURA S. HARTER
Assistant Attorney General
Public Access Bureau

44262 o 206g pub comment improper 2a improper sd

cc: *Via electronic mail*
Mr. Brian P. Crowley
Franczek Radelet P.C.
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606
BPC@franczek.com