

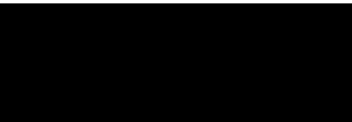


OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

August 25, 2020

Via electronic mail
Mr. Kirk Allen



Via electronic mail
Mr. Brian P. Crowley
Franczek
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606
bpc@franczek.com

RE: OMA Request for Review – 2020 PAC 64050

Dear Mr. Allen and Mr. Crowley:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2018)). For the reasons discussed below, the Public Access Bureau concludes that the Board of Education of Bloomingdale School District 13 (Board) improperly restricted public access to its July 27, 2020, regular meeting.

On July 28, 2020, Mr. Kirk Allen submitted a Request for Review alleging that for its July 27, 2020, regular meeting, which was held remotely in light of the COVID-19 pandemic, the Board "permitted attendance through ZOOM however a limit of 100 people was set, causing numerous people to be unable to attend or participate."¹ Mr. Allen alleged that by preventing interested members of the public from attending the meeting, the Board violated section 7(e)(4) of OMA.²

¹E-mails from Kirk Allen to Public Access [Bureau] (July 28, 2020).

²5 ILCS 120/7(e)(4) (West 2018), as amended by Public Act 101-640, effective June 12, 2020.

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On August 3, 2020, this office sent a copy of the Request for Review to the Board and asked it to provide this office with copies of the notice, agenda, and minutes (in draft form if necessary, for this office's confidential review) of its July 27, 2020, meeting, and a detailed written response to the allegation that it improperly limited public access to the meeting. On August 13, 2020, the Board's outside counsel submitted those materials. On August 20, 2020, Mr. Allen submitted a reply.

DETERMINATION

Section 2.01 of OMA (5 ILCS 120/2.01 (West 2018), as amended by Public Act 101-640, effective June 12, 2020) requires all public meetings to be "held at specified times and places which are convenient and open to the public." Additionally, section 7(e)(4) of OMA, which was added to OMA on June 12, 2020, to create a framework for holding remote meetings during public health emergencies such as the COVID-19 pandemic, provides:

(e) Subject to the requirements of Section 2.06 but notwithstanding any other provision of law, an open or closed meeting subject to this Act may be conducted by audio or video conference, without the physical presence of a quorum of the members, so long as the following conditions are met:

* * *

(4) for open meetings, members of the public present at the regular meeting location of the body can hear all discussion and testimony and all votes of the members of the body, unless attendance at the regular meeting location is not feasible due to the disaster, including the issued disaster declaration, in which case the public body must make alternative arrangements and provide notice pursuant to this Section of such alternative arrangements in a manner to **allow any interested member of the public access to contemporaneously hear all discussion, testimony, and roll call votes**, such as by offering a telephone number or a web-based link[.] (Emphasis added.)

In its response to this office, the Board acknowledged that the above-quoted provisions governed the public's access to its July 27, 2020, regular meeting, as the meeting was held remotely via Zoom during the COVID-19 pandemic. The Board also acknowledged that the

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School District anticipated that the meeting "would generate significant public interest[,]" as it concerned the School District's plan for reopening under the ongoing circumstances of the pandemic.³ Because no Board meeting in the previous eight years had "even come close to 100 attendees," the Board stated, it believed that the 100-person limit of the version of Zoom it was using⁴ would be sufficient to accommodate the interested members of the public.⁵ More than 100 people attempted to contemporaneously access the meeting, however, "and some were likely not able to view the meeting in real-time."⁶ Nonetheless, the Board stated, it made a video recording of the meeting available the following morning. The Board further asserted:

Importantly, there is no allegation that a member of the public was denied the opportunity to provide public comment at the July 27, 2020 Board meeting. The instructions for participation in the July 27, 2020 Board meeting included an e-mail address where individuals could submit public comment to be read aloud during the meeting and recorded in the minutes and the Board followed that process. Twenty-nine individual emails were read at the meeting.^[7]

The Board ultimately argued that it "made a good faith effort to accommodate the nuances of a Board meeting in these unprecedented times[,]" but stated that it has learned from the experience and acquired a Zoom license for meetings of up to 500 participants to accommodate interested members of the public at future meetings.⁸

³Letter from Brian P. Crowley, Franczek, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau (August 13, 2020), at 2.

⁴According to the pricing page on its website (<https://zoom.us/pricing>), Zoom offers various video conferencing options at different price points, including a free version for up to 100 participants with a 40-minute limit, a \$14.99 per month "Pro" version for up to 100 participants, but with a 24-hour limit and other features, and a \$19.99 per month "Enterprise" version for up to 500 participants with expanded features.

⁵Letter from Brian P. Crowley, Franczek, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau (August 13, 2020), at 2.

⁶Letter from Brian P. Crowley, Franczek, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau (August 13, 2020), at 2.

⁷Letter from Brian P. Crowley, Franczek, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau (August 13, 2020), at 2.

⁸Letter from Brian P. Crowley, Franczek, to Joshua M. Jones, Deputy Bureau Chief, Public Access Bureau (August 13, 2020), at 2.

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In reply, Mr. Allen argued that the Board "confirmed the limit set for people to attend the meeting electronically was below what was needed. Those who could not connect were not able to provide public comment. The fact they made the meeting available after the fact does not negate the fact people could not attend and participate."⁹ He attached Facebook posts in which a couple of members of the public stated that they were unable to contemporaneously access the meeting as a result of the 100-person limit.

Although this office acknowledges the Board's efforts and the difficulties public bodies may encounter when hosting remote meetings, the Board did not demonstrate that it afforded the public sufficient access to its July 27, 2020, meeting. In construing section 2.01 of OMA long before the COVID-19 pandemic, the Illinois Appellate Court in *Gerwin v. Livingston Co. Council*, 345 Ill. App. 3d 352, 362 (4th Dist. 2003) explained that "[t]he concept of public convenience seems to imply a rule of reasonableness, not 'absolute accessibility' but 'reasonable accessibility.'" The court was of course referring to in-person meeting rooms, and no provision of OMA specifically addressed accommodating the members of the public interested in attending a meeting. The plain language of the recently-enacted section 7(e)(4), in contrast, requires a public body to hold a remote meeting in a manner that allows "any interested member of the public" contemporaneous access. Public bodies may find that they have significantly increased public attendance at remote meetings given the flexibility of electronic access.

It is undisputed that interested members of the public were prevented from attending the Board's July 27, 2020, meeting. Although the Board asserted that it believed that the 100-person limit of its version of Zoom would be sufficient to accommodate the interested members public based on past physical meeting attendance, the Board also confirmed that it was aware before the meeting that the agenda item regarding approval of the School District's reopening plan during the COVID-19 pandemic had generated substantial public interest. In any event, in light of the plain language of section 7(e)(4) that requires public bodies to provide "any interested member of the public" contemporaneous access to remote meetings necessitated by public health disasters such as the current pandemic, this office concludes that the Board violated OMA in connection with its July 27, 2020, meeting.

Additionally, although the Board's response stated that the Request for Review did not expressly allege a public comment violation, it did allege that the Zoom meeting limit caused "people to be unable to attend **or participate**." (Emphasis added.)¹⁰ Section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 2018)) provides that "[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." The Attorney General has concluded that section 2.06(g) of OMA "requires that all

⁹E-mail from Kirk Allen to Joshua Jones (August 20, 2020).

¹⁰E-mails from Kirk Allen to Public Access [Bureau] (July 28, 2020).

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public bodies subject to the Act provide an opportunity for members of the public to address public officials at open meetings." See Ill. Att'y Gen. Pub. Acc. Op. No. 14-012, issued September 30, 2014, at 5. In this instance, the Board's webinar instructions for its July 27, 2020, remote meeting stated: "If you are unable to participate in the webinar, please email [a School District e-mail address] with any questions you may have for the Board. Your question will be read during Public Comment and recorded in the Board minutes."¹¹ This language gave the impression that any interested member of the public could offer public comment over Zoom during the meeting. Therefore, although the Board incorporated public comment in the meeting by reading aloud e-mails it had received, the 100-person limit may have prevented interested members of the public who relied on the webinar instructions from addressing the Board during the meeting.

Because the School District has since acquired a Zoom license for more than 500 participants, no further remedial action is necessary under these circumstances. 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 questions, please contact me at jjones@atg.state.il.us.

Very truly yours,



JOSHUA M. JONES
Deputy Bureau Chief
Public Access Bureau

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cc: *Via electronic mail*
Mr. Matt Boebel
President, Board of Education
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164 Euclid Avenue
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¹¹Letter to the Bloomington Community from Bloomington, Illinois School District 13 (undated).