



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By KRIS MAYES ATTORNEY GENERAL February 23, 2024	No. I24-004 (R23-021) Re: Open Meeting Law's application to school district advisory committees and governing board communications
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To: Jennifer MacLennan, Gust Rosenfeld PLC, on behalf of Scottsdale Unified School District No. 48 and Paradise Valley Unified School District No. 69

Pursuant to A.R.S. § 15-253(B), this opinion affirms in part and revises in part the opinions that you prepared for the Scottsdale Unified School District No. 48 (“SUSD”) and Paradise Valley Unified School District No. 69 (“PVUSD”) (collectively, “the Districts”) regarding the application of Open Meeting Law to school district advisory committees and communications with governing board members. Those opinions are attached hereto as Appendix A.

Background

The Attorney General’s Office received complaints alleging that Scottsdale Unified School District No. 48’s use of certain advisory committees and 2x2x1 meetings¹ with governing board members violates the Open Meeting Law, A.R.S. §§ 38-431 *et seq.* Following an investigation,

¹ “2x2x1” meetings refers to the District’s practice of holding three separate meetings with the five governing board members to present them with information in advance of a public meeting. Two of the meetings are held with two members, and the third meeting with a single member, hence “2x2x1.”

the Office concluded that some of the District's uses of advisory committees had violated the Open Meeting Law while others had not. The Office also concluded that the District's use of 2x2x1 meetings violated the Open Meeting Law. The Office also determined, however, that all violations were unintentional and declined to impose penalties beyond corrective action.

Shortly thereafter, counsel representing Scottsdale Unified School District No. 48 and Paradise Valley Unified School District No. 69 submitted legal opinions to this Office for review under A.R.S. § 15-253(B) regarding the parameters of the Open Meeting Law with respect to school district committees and 2x2x1 meetings. Those submissions conclude that "there must be evidence that a board was actively involved in the creation of a committee for the committee to be a board advisory committee under A.R.S. § 38-431(1)," and that, "without further evidence of intent to discuss among a quorum, providing the board with updated information in a 2x2x1 [meeting format] does not violate the OML."

The Office agrees with the submitted opinions regarding the application of the Open Meeting Law to school district advisory committees, but adds a few points of emphasis and clarification here. Regarding a district's use of 2x2x1 meetings, the Office revises the submitted opinions and wishes to make clear here that while the use of 2x2x1 meetings (or similar formats) is not a *per se* violation of the Open Meeting Law, whether a particular meeting format with smaller groups of members violates the Open Meeting Law depends on the particular facts.

Analysis

I. Advisory Committees

The opinions you prepared for the Districts focus on advisory committees, and conclude that under A.R.S. § 38-431(1), "Board formation of the committee is a prerequisite . . . , whether that formation is by vote, policy or by acts or statements that lead to the conclusion of board intent." Although we generally agree with the opinions you've prepared, we write further to clarify that

the circumstances of the committee's formation are not the sole dispositive factor in determining whether a committee must comply with the Open Meeting Law. Other factors that may affect the determination include the circumstances of the committee's membership, purpose, and subsequent operation.

Your analysis focuses on the definition of "advisory committee" in A.R.S. § 38-431(1) to conclude that "there must be evidence that a board was actively involved in the creation of a committee for the committee to be a board advisory committee." Although we agree that board involvement in the "creation" or "formation" of a committee is a critical component of an "advisory committee" under § 38-431(1), this language must be read in conjunction with the broader definition of "public body" in § 38-431(6). The Open Meeting Law does not permit a governing board to evade the public meeting requirements by "informally" forming or establishing, or by directing a superintendent to establish, a committee to perform work that would otherwise need to be conducted in public. For that reason, we caution against an overly narrow reading of the law focused exclusively on the circumstances of a committee's creation.

For example, we agree that a committee established by a district superintendent rather than the governing board is not subject to the Open Meeting Law merely because the work of the committee may result in the superintendent bringing a recommendation to the governing board. A superintendent committee, for example, may voluntarily form recommendations to the board on matters of policy for which the superintendent sees a need. If the superintendent is not developing such a proposal in response to a directive (or other close involvement) of the board in the exercise of this governance function, the Open Meeting Law typically will not apply. Indeed, absent any board involvement at all, the superintendent and his or her committee are no different than any individual constituent, district employee, or group of constituents or employees, all of whom could

undoubtedly recommend that the board consider a particular policy without being subject to the Open Meeting Law in their deliberations before approaching the board.

On the other hand, if a committee initially formed by a superintendent is subsequently tasked by the governing board with developing further policy recommendations for the board's consideration, the committee's subsequent work on that issue would need to be conducted in public meetings. Put simply, the degree and type of the board's involvement matters, and it is not just the initial moment at which the committee is formed that is relevant to the analysis.

Similarly, as you note in the appended opinions, while the mere fact that two board members sit on a committee is not in and of itself dispositive when determining whether the committee is subject to the Open Meeting Law, the membership of a committee is a relevant factor. As you correctly observe, the presence of multiple board members heightens the risk that a committee will be engaged in the proposal, discussion, or deliberation of board matters, in which case the Open Meeting Law should apply. *See* A.R.S. § 38-431(3)-(4); *id.* § 38-431.01.

Accordingly, we approve of the submitted opinions but caution that any Open Meeting Law analysis requires a holistic view of all relevant factors, including but not limited to the circumstances of the committee's formation, membership, purpose, and subsequent operation.

II. 2x2x1 Meetings

The opinion you prepared for SUSD also addresses the use of "2x2x1 meetings." This term refers to the District's practice of holding three separate meetings with the five governing board members to allow the superintendent to present them with information in advance of a public meeting.

As you note, this Office previously concluded that SUSD's use of such meetings violated the Open Meeting Law. The Office's disposition notes that the 2x2x1 model utilized by SUSD

risks improperly “splintering the quorum” by permitting “separate or serial discussions with a majority of the public body members.” *See* Ariz. Att’y Gen. Agency Handbook § 7.5.2. (“Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions with a majority of the public body members.”). We explained,

Even if the Board members are not speaking directly to each other during these meetings, the members present have the benefit of hearing the other members' questions and the answers to those questions. The remaining Board members and the public do not have this benefit. The public is entitled to hear this deliberative process, including the questions that the Board members ask the presenter during the meetings. Further, because these meetings were not recorded or open to the public, there is no way for the public to be sure that the Board members present were not discussing the matters amongst themselves.

The opinion you have submitted questions the correctness of this disposition because it “does not account for the requirement that each potential violation be examined on a case-by-case basis.” We respectfully disagree with that characterization of the prior disposition and wish to make clear here that a case-by-case evaluation is required. In its prior disposition, the Office did not conclude that all 2x2x1 meetings (or similar meeting structures involving a subset of board members) are *per se* prohibited by the Open Meeting Law. Rather, the Office examined the particular circumstances of SUSD’s practice and concluded that this specific practice did not comply with the Open Meeting Law. We reaffirm that position here and find that whether a particular meeting format violates the Open Meeting Law will depend upon the particular circumstances.

We recognize that SUSD and other boards may sometimes benefit from having information presented to board members in a 2x2x1 (or similar) format. And we recognize that merely providing information to board members in that format will not always run afoul of the Open Meeting Law. After all, board members are not prohibited from gathering information independently outside of a public meeting, nor are they prohibited from discussing matters with

another board member so long as the discussion does not directly or indirectly involve a quorum of board members. *See* Ariz. Att’y Gen. Agency Handbook §§ 7.5.1, 7.5.2, 7.5.3. The SUSD practice we evaluated, however, went beyond merely providing information to board members and, importantly, was discussed in a public meeting as a means to avoid having additional or more lengthy public meetings of the entire board. In the relevant SUSD 2x2x1 meetings, SUSD board members asked questions, received answers, and thus engaged in a dialogue with the presenter that aided their deliberative process. And this practice was repeated with every member of the board with the express intent of decreasing board deliberation at the public meeting. That practice (under those unique facts) violated the Open Meeting Law, which must be construed “in favor of open and public meetings.” A.R.S. § 38-431.09(A); *see also* Ariz. Att’y Gen. Op. I96-012 (finding that lengthy information-gathering meetings that explore the operation of the district’s programs cannot be held in executive session under the guise of a personnel evaluation).

Of course, school districts can take steps to ensure any 2x2x1 (or similar) meetings do not run afoul of the Open Meeting Law. For example, a school district might consider admonishing board members to simply receive the information presented and save their questions and any discussion for the public meeting. Board members should also be reminded at these meetings that they are not to discuss the information received with other board members who are not present until they can do so in a public meeting. In addition, there are fewer concerns about splintering the quorum or inadvertently preventing public observation of board deliberations if the information presented is not about a matter on which the board is planning to take legal action.

However, even with these (and perhaps other) precautions, the use of multiple meetings with a smaller number of board members should be undertaken with the utmost caution. “Public officials should refrain from any activities that may undermine public confidence in the public

decision-making process established in the Open Meeting Law, including actions that may appear to remove discussions and decisions from public view.” Ariz. Att’y Gen. Agency Handbook § 7.5.2. (“Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions with a majority of the public body members.”). And while “technically, a committee which meets solely to receive information, which does not discuss the information, nor makes recommendations with regard to it could avoid the public meeting requirements,” “[p]ractically speaking, such a passive committee is difficult to imagine.” Ariz. Op. Att’y Gen. I80-202. Therefore, while it may be possible for a superintendent or other person to present information to a group of board members that is less than a quorum without violating the Open Meeting Law, this practice should be used sparingly and with substantial precautionary measures.

Conclusion

We agree with the submitted opinions’ conclusions regarding school district advisory committees, subject to the points of clarification made above. We revise the submitted opinions on the subject of 2x2x1 meetings to clarify that although a meeting at which information is provided to less than a quorum of board members is not a *per se* violation of the Open Meeting Law, the practice should be used carefully to avoid Open Meeting Law violations and to preserve public confidence.

Kris Mayes
Attorney General

APPENDIX A

**GUST
ROSENFELD**
ATTORNEYS SINCE 1921 P.L.C.

■ ONE E. WASHINGTON, SUITE 1600 ■ PHOENIX, ARIZONA 85004-2553 ■ TELEPHONE 602-257-7422 ■ FACSIMILE 602-254-4878 ■

JENNIFER N. MACLENNAN
602-257-7475
FAX: 602-340-1538
macleNNan@gustlaw.com

December 27, 2023

Scott Menzel, Ph.D.
Superintendent
Scottsdale Unified School District No. 48
8500 E. Jackrabbit Road
Scottsdale, AZ 85250

Re: *Open Meeting Law Requirements re: Advisory Committee and Board
Communication*

Dear Dr. Menzel:

This law firm represents Scottsdale Unified School District No. 48 and its Governing Board (collectively the "District"). The purpose of this communication is to provide a legal opinion regarding the parameters of the Open Meeting Law (OML) with respect to advisory committees and communication with the Governing Board. The District is specifically seeking review by the Attorney General's office and respectfully requests a formal review pursuant to A.R.S. § 15-253(B).

I. Background

The Attorney General's office recently completed an open meeting law investigation (Investigation No. OML2021-00067) and issued a disposition letter on December 1, 2023 (Exhibit A). The disposition found non-intentional violations of the OML with respect to the use of some (but not all) committees operated by the District and with respect to the use of 2x2x1 meetings with Board members.

The District administration has asked legal counsel to clarify certain elements of the findings and obtain additional guidance from the Attorney General's office via this request for a formal written opinion. The District is cognizant and appreciative of the Attorney General's findings that the violations were not made with any intentional disregard of the OML. However, as noted in the disposition letter, any future violations could subject the public officers or personnel to additional penalties as a second violation; hence, the intent to seek clarification.

II. Relevant Definitions and Guidance

The relevant statutory definitions that govern when the parameters of the OML applies are as follows:

1. "Advisory committee" or "subcommittee" means any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.

...

6. "Public body" means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of this state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by this state or a political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.

A.R.S. § 38-431(1) and (6).

The Attorney General Agency Handbook states as follows:

This definition does not include advisory groups established by the single head of an agency unless they are created pursuant to a statute, city charter, or other provision of law or by an official act pursuant to some legal authority. See Ariz. Att'y Gen. Op. I92-007; Section 7.3.2.

Ariz. Att'y Agency Handbook, § 7.3.5 (revised 2018).

The 1992 Arizona Attorney General opinion cited in the Agency Handbook opined that advisory committees appointed by the Governor to provide the Governor with advice and counsel are not public bodies subject to the Open Meeting Law. Ariz. Att'y Gen. Op. I92-007 (1992).¹

III. Clarifying Advice regarding Advisory Committees

¹ A superintendent's cabinet is traditionally comprised of only school district employees. It assists with making operation decisions in addition to formulating board presentations and recommendations. In my opinion, the cabinet is not subject to OML. Ariz. Att'y Gen. Op. I92-007 (1992).

The Attorney General's disposition letter relied upon the 1992 opinion to clarify that if an advisory group is created by an agency head for the purpose of advising the chief officer in conducting their own official duties, then it is not subject to the Open Meeting Law.

The District's Governing Board did not officially establish any of the advisory committees which were found to have acted outside the bounds of the OML.² The OML violations are predicated on not elevating form over substance – if there are sufficient indicia that a governing board directed the creation of the committee, then the committee would be subject to OML requirements even without a formal board vote or policy. One of the key factors noted numerous times in the disposition was that various committee made recommendations to the Governing Board and therefore were formed for the purpose of advising the Board and not the superintendent.

A governing board is required by statute to make many decisions based upon recommendations from the district administration. For example, only a governing board has the power to hire and fire employees. A.R.S. § 15-502(A) (“The governing board at any time may employ and fix the salaries and benefits of employees necessary . . .”). Almost all hiring recommendations stem from a committee's selection of the candidate to be recommended. Often, the hiring committees will include parents.

I do not think the intent of the Attorney General's office is to preclude school superintendents from gaining feedback through a committee process with community members to assist in making recommendations to the governing board. That would also elevate form over substance.

School districts invite community members to participate in committees on many subject matters, many with the intent to formulate a recommendation for a board decision. Examples of committees currently operating at a variety of school districts include:

1. Hiring committees as described above;
2. School calendar committees;
3. Committees to make recommendations regarding boundary changes or school closures;
4. Procurement evaluation committees, which make recommendations regarding vendors;
5. Capital planning committees;

² The Governing Board did not create by policy or official act the Strategic Planning Design Team, the finance and facility, the policy committee or the communication and marketing committee. The Governing Board has acted by policy to create other committees such as an audit committee, which the District operates as an OML compliant public body.

6. Task force to address needs for sub groups of students such as gifted students or Native American students;
7. Wellness committees to assist in lowering employee benefit costs;
8. Equity advisory councils;
9. Parent councils;
10. Technology oversight committees;
11. Climate oversight committees; and
12. Bond oversight committees.

These committees are formed with the intent to provide input to the school administration prior to presentation of a final recommendation to the governing board. The function of the committees is to further the operation of the district (superintendent's role) by formulating recommendations for board consideration (governance role). For example, school districts are required under the Arizona Procurement Code to use a committee process to score and evaluate vendors in certain circumstances. Ariz. Admin. Code R7-2-1107 (defining the selection committee for the procurement of construction using alternative delivery methods). The intent is to create a recommendation that will ultimately go to the Governing Board for approval; that goal does not create a separate requirement that the procurement committees comply with OML.

School districts are required to operate textbook adoption committees in accordance with the OML. A.R.S. § 15-721 and § 15-722. The legislature has not extended this requirement to other school based committees. As noted recently by the Arizona Supreme Court:

It is a foundational rule of statutory construction “that courts will not read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself,” and similarly the “court will not inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions.” *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133, 407 P.2d 91, 94 (1965).

Roberts v. State of Arizona, 253 Ariz. 259, 266, 512 P.3d 1007, 1014 (2022).

In my opinion, there must be evidence that a board was actively involved in the creation of a committee for the committee to be a board advisory committee under A.R.S. § 38-431(1). For example, evidence that board members and not the superintendent selected committee members could lead to the conclusion that a committee was “established” by the board. In my opinion, an OML violation must be based upon the actions or statements of board members in order for the committee to be determined to be an advisory committee. Board formation of the committee is a prerequisite under A.R.S. § 38-431(1), whether that formation is by vote, policy or by acts or statements that lead to the conclusion of board intent.

The following factors do not, in and of themselves, require a committee to function as an OML compliant advisory committee:

- Whether the purpose of the committee is to ultimately present a recommendation to the governing board.
- Whether a board member sits on the committee. A single board member is not a quorum of the board such that a meeting has occurred. A.R.S. 38-431(4). Additional evidence would be needed, such the board dictated that the board member participate. The inclusion of a board member on a committee does not violate the OML if it is the superintendent's sole decision and discretion to include the board member.
- Whether two board members sit on the committee. In order for there to be an OML violation, there must be actual evidence that a quorum discussed a matter that is likely to be on an upcoming agenda. Ariz. Att'y Agency Handbook § 7.5.2 (revised 2018). While the presence of two members may heighten the risk of that occurrence, it does not violate OML unless a third member of the board is looped into a discussion or deliberation.
- Whether the superintendent presented use of the committee at a board meeting. Most school leaders will keep their boards apprised of the operational process. If a superintendent informs the board that the superintendent intends to use a committee to assist in formulating recommendations, that transparency should not translate into an OML violation without further evidence that the board deliberated regarding whether a committee should be used or who should be on the committee, this could be evidence of board intent to create.

IV. Clarifying Advice regarding 2x2x1 Meetings

The Attorney General's determination found that the District's practice of presenting complicated materials to board members in separate meetings with two board members, two board members and then a single board member (2x2x1) violated the OML. Central to this finding was that the board members could potentially begin deliberation outside of a public meeting during those presentations.

The Attorney General's Agency Handbook states as follows:

Discussions and deliberations (in person or otherwise) between less than a majority of the members of a governing body, violate the Open Meeting Law when used to circumvent the purposes of the Open Meeting Law. See Ariz. Att'y Gen. Op. 75-8; Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974). Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions with a majority of the public body members.

Ariz. Att'y Agency Handbook, § 7.5.2 (revised 2018) (emphasis added).

An OML violation must be predicated on discussion or deliberations between a majority of the quorum. The determination letter notes that it was that the 2x2x1 meetings are of concern because board members could ask questions and the public was not a witness to the answers. It is not a violation of the OML for board members to gather information outside of an open meeting. They do so in all sorts of ways – email, review of board packets, independent inquiry. Gathering information to make an informed decision does not violate the OML unless there is a discussion with a quorum of the Board. As noted in the Agency Handbook:

Put simply, all discussions, deliberations, considerations, or consultations among a majority of the members of a public body regarding matters that may foreseeably require final action or a final decision by the governing body, constitute "legal action" and, therefore, must be conducted in a public meeting or executive session in accordance with the Open Meeting Law. Ariz. Att'y Gen. Ops. 75-8, I79-4.

Ariz. Att'y Agency Handbook, § 7.5.1 (revised 2018).

In my opinion, without further evidence of intent to discuss among a quorum, providing the board with updated information in a 2x2x1 does not violate the OML. Board members are even permitted to voice their opinions and telegraph their decision making outside an open meeting without violating OML.³ The determination that the format of the 2x2x1 presentations violates OML does not account for the requirement that each potential violation be examined on a case-by-case basis.

If the District is permitted to continue to use this efficient process, one option could include issuing an admonition during a two board member meeting so as to remind Board members of their obligations. The use of an admonition is approved for other circumstances such as on group emails or at executive sessions. A proposed admonition is as follows: the information and discussion you are about to receive shall not be utilized to gain a consensus in a quorum or to splinter the quorum through serial discussions with other board members. The


³ The Agency Handbook notes “[t]he Open Meeting Law does not prohibit a member of a public body from voicing an opinion or discussing an issue with the public either at a venue other than a public meeting of the body, or through media outlets or other public broadcast communications or technological means, so long as the "opinion or discussion is not principally directed at or directly given to another member of the public body," and "there is no concerted plan to engage in collective deliberation to take legal action." A.R.S. § 38-431.09(B); Ariz. Att'y Gen. Op I07-013.” Ariz. Att'y Agency Handbook, § 7.5.1 (revised 2018).

deliberative process shall be conducted at an open meeting and this meeting is permissible only because there is no quorum present.

V. Conclusion

The District seeks a formal opinion from the Attorney General's office with respect to the advice provided herein. Until such time as guidance is received (or review denied), I advise that the District administration operate cautiously with respect to the use of committees and the use of communication protocol such as the 2x2x1 meetings.

Very truly yours,



Jennifer N. MacLennan
For the Firm

EXHIBIT A



OFFICE OF THE ARIZONA ATTORNEY GENERAL

KRIS MAYES
ARIZONA ATTORNEY
GENERAL

SOLICITOR GENERAL'S OFFICE
OPEN MEETING LAW ENFORCEMENT TEAM

Shannon Hawley Mataele
Assistant Attorney General
(602) 542-3333

December 1, 2023

VIA EMAIL and U.S. MAIL

Jennifer MacLennan
Gust Rosenfeld
One East Washington Street, Suite 1600
Phoenix, AZ 85004
maclennan@gustlaw.com

Re: Disposition of Open Meeting Law Investigation
Investigation No. OML2021-0067

Dear Ms. MacLennan:

As you know, the Office of the Attorney General has been investigating complaints alleging Open Meeting Law ("OML") violations by the Scottsdale Unified School District (the "District" or "SUSD") Governing Board (the "Board"). Thank you for your patience as we have worked to identify the OML investigations that have remained pending from the previous administration and resolve them as efficiently as possible.

The Office has concluded its review of the allegations pertaining to the events discussed below, which were the subject of the inquiry letter this Office sent to the Board on June 28, 2022. We find that the Board has violated the Open Meeting Law with respect to its Textbook Adoption Committee and the Strategic Planning Design Team, and in its use of Board subcommittees and "2x2x1" meetings. We also find that the Board did not violate the Open Meeting Law with respect to the Superintendent's Equity, Diversity, and Inclusion Committee and the Incident Command System. Because we are satisfied that the violations found were not made with intentional disregard for the Open Meeting Law, and because the Board reportedly has modified its practices after becoming aware of the problems with the Textbook Adoption Committee, we will not require any remedy beyond the training identified in this letter. However, these violations will be noted as prior violations, should this Office find any future Open Meeting Law violations.

The facts recited in this letter serve as a basis for these conclusions, but are not administrative findings of fact and are not made for purposes other than those set forth in A.R.S. §§ 38-431 *et seq.*

Committees

I. Textbook Adoption Committee

In 2017, the State Legislature enacted a specific statutory requirement that all committees established for “review and selection” of high school textbooks be held in compliance with the Open Meeting Law. A.R.S. § 15-722(B)(2). This includes a requirement that the committees keep minutes or a recording of the meetings. A.R.S. § 38-431.01(C). The minutes or recording of the meeting must be open for public inspection no later than three working days after the meeting, except as otherwise provided in the statute. A.R.S. § 38-431.01(E).

The complaint received by this Office alleged that the District failed to hold open meetings of its Textbook Adoption Committee during the 2020-2021 school year. Our investigation shows that the District timely posted agendas and curriculum presentations on its website in advance of each Textbook Adoption Committee meeting in 2020 and 2021. Further, each of these meetings was held in a public meeting via the Microsoft Teams platform. The District asserts that a live link to the meeting was contemporaneously posted on the District’s website. However, the District acknowledges that the Committee did not keep minutes of most of its meetings, nor did it record any of the meetings, and no minutes were subsequently posted on the website pursuant to the statutory requirements.

During a January 5, 2021 Board meeting, the District’s general counsel provided Open Meeting Law training to the Board and explained that the Open Meeting Law specifically applied to textbook selection committees. She also told the Board that she regularly trains those committees on the rules of the Open Meeting Law and that they “do all the things” that a governing board would do pertaining to the Open Meeting Law.

Given the general counsel’s assertion and apparent belief that the textbook committees were in compliance with the Open Meeting Law, it is unclear why the Committee neglected to record and post meeting minutes during this time. However, our investigation has not shown that this failure was deliberate or that the Committee intended to shield information from the public. This conclusion is supported by the fact that meeting materials, including the presentations and agendas, were posted on the District’s website, as were links to the live meetings and to the learning materials that the committee ultimately recommended to the Board. Further, the curriculum materials were ultimately approved at properly noticed public Board meetings. Accordingly, the textbook adoptions are not nullified under A.R.S. § 38-431.05(A); *Carefree Imp. Ass’n v. City of Scottsdale*, 133 Ariz. 106, 112 (App. 1982) (“[T]echnical violations and minor deviations from the requirements of the open meeting law should not render action by a public body null and void, so long as there is substantial compliance with the open meeting law.”). Accordingly, we find that, although the District properly posted agendas and held its Textbook Adoption Committee meetings in public, it failed to keep and post minutes or recordings of its

meetings pursuant to A.R.S. § 38-431.01(C). However, we do not find this violation to be knowing.

II. Advisory Committees

The purpose of the Open Meeting Law is to open the conduct of the business of government to the scrutiny of the public and to ban government decision-making in secret. *Welch v. Cochise Cty. Bd. of Supervisors*, 251 Ariz. 519, 526 (2021). Accordingly, the Open Meeting Law applies to all meetings of a public body, including any official advisory committees or subcommittees. A.R.S. §§ 38-431.01(A). An advisory committee or subcommittee includes “any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.” A.R.S. § 38-431(1).

This definition does not include advisory groups established by the single head of an agency, including a school Superintendent, unless they are created pursuant to a statute or other provision of law. *See* Ariz. Att’y Gen. Op. I92-007; Ariz. Att’y Gen. Agency Handbook, § 7.3.2. As this Office has stated, “[s]ingle heads of agencies, during the course of conducting their official business in such capacity, are not ‘governing bodies’ capable of taking ‘legal action’ and therefore not subject to the Arizona Open Meeting [Law].” Att’y Gen. Op. I75-7. Accordingly, any advisory group that is created by an agency head for the purpose of advising them in the conduct of their own official duties is not subject to the Open Meeting Law. Att’y Gen. Op. I92-007.

Arizona law directs school district governing boards to “[p]rescribe and enforce policies” for the districts. A.R.S. § 15-341(A)(1). The law also provides governing boards authority to delegate to the Superintendent “the authority to prescribe procedures that are consistent with the governing board’s policies.” *Id.* (F). In line with these statutes, the District’s policy provides that “[t]he establishment of policies is the responsibility of the Board, and the execution of those policies is a function of the Superintendent.” SUSD Policy BDD (adopted May 13, 2014). This policy also states:

The Superintendent is responsible for the administration of the District. The Superintendent may delegate the necessary authority to other employees and develop such procedures and regulations as the Superintendent considers necessary to ensure efficient operation of the District.

Id.

The District’s policy also authorizes “the Superintendent to establish advisory councils, cabinets, and committees when deemed necessary for proper administration of Board policies and for the improvement of the total educational program.” SUSD Policy CE (version adopted June 8, 2004). “The number, composition, and work to be done by such cabinets, councils, and committees” is to be “defined by the Superintendent and reported to the Board.” *Id.* The District’s policy in effect during the relevant time provided that the Board itself may also create its own ad hoc committees “by majority vote” to “present[] to the Board recommendations for action.” SUSD

Policy BDF (version adopted Feb. 18, 2000). This policy provided that the Board President must develop guidelines for any committees created, which must be approved by the Board prior to the committee's first meeting. *Id.* The Superintendent was charged under this policy with ensuring that the committee was trained in the requirements of the Open Meeting Law. *Id.*

The complaint alleges that the Board and the Superintendent devised a system of advisory committees and mini-Board meetings to circumvent the Open Meeting Law and to deliberate on important issues of Board business outside of the public view. In light of the law and policies described above, the key inquiry in determining whether a particular committee is subject to the Open Meeting Law is whether it was formed by the Superintendent for the purpose of assisting him in the execution of his administrative duties, or whether the committee was formed by, or at the direction of, the Board "for the specific purpose of making a recommendation concerning a decision to be made" by the Board. A.R.S. § 38-431(1); SUSD Policies CE, BDF. The former is not subject to the Open Meeting Law, while the latter is.

a. Equity, Diversity, and Inclusion Committee

We find the allegation that the Board created a "Equity, Diversity, and Inclusion Committee" (the "Committee"), which subsequently held closed meetings in violation of the Open Meeting Law, to be unsubstantiated. A review of the relevant meeting recordings and other documentation show that this advisory group was formed by the Superintendent to advise the District administration. It was not formed by the Board, nor was it created with the purpose of advising the Board on some action to be taken. *See* Ariz. Att'y Gen. Op. I92-007; Ariz. Att'y Gen. Agency Handbook, § 7.3.2. Accordingly, any meetings of this advisory group were not subject to the Open Meeting Law.

During the June 9, 2020 Board meeting, pursuant to the listed agenda item, then-Superintendent John Krierkard discussed that he had just begun "putting together a group of concerned students, teachers, [and] administrators" to discuss goals related to how the District can improve its practices in the areas of inclusion and equity. He stated that his plan was to bring those goals to the Board to obtain "input" and "thoughts" from the Board, but not for Board "approval." He stated the Committee was to be led by other members of the District administration who would report to the Superintendent. One Board member suggested that a member of the Board should sit on the Committee to help keep the Board informed on its activities, though it is unclear whether this occurred. At the time the Committee was formed, the District had in place a policy titled "Non-Discrimination/Equal Opportunity," which stated that the "Governing Board is committed to creating an environment where celebrating cultural diversity stimulates the awareness of others by recognizing our similarities, acknowledging our differences, and developing global respect for the values of others." SUSD Policy AC (adopted June 8, 2004).

We find this Committee was created by the Superintendent on his own initiative to inform his administration, in furtherance of the Board's approved non-discrimination policy. There is no evidence in either the agenda or in the Board's discussion that the Board initiated the formation of the Committee. Nor is there any evidence that the purpose of the Committee was to bring recommendations to the Board for potential future action. To the contrary, the discussion in the

June 9, 2020 meeting made clear that the Board would be provided updates and could give input on the administration's goals, but would not be asked to approve any action. Any potential involvement of a Board member on the Committee does not affect this analysis because there is no evidence suggesting the number of Board members participating constituted a quorum. *See* A.R.S. § 1-216(B); Ariz. Att'y Gen. Agency Handbook 7.11. Accordingly, we find no Open Meeting Law violation with regard to the Committee.

b. Strategic Planning Design Team

We find the District violated the Open Meeting Law with regard to the meetings of the Strategic Planning Design Team (the "Team").¹ Although the Superintendent may create advisory committees to assist him in his administration of the District, the formation and adoption of Board policy is the prerogative of the Board itself. *See* A.R.S. § 15-341(A)(1).

The Open Meeting Law specifically contemplates that committees "whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made . . . by the public body" should be subject to the requirements of the Open Meeting Law. A.R.S. §§ 38-431(1), -431.01(A). Here, although Superintendent Scott Menzel spearheaded the Team, it is clear that the Team was designed to—and did in fact—advise the Board regarding matters on which it ultimately took legal action. Further, Board member Jann-Michael Greenberg stated at the June 9, 2020 special board meeting that the Board had "properly tasked" the Superintendent with creating the strategic plan. Although not done by official vote, the Board clearly directed the creation of the Team. And the Board ultimately considered and adopted the recommendations of the Team in three phases at public meetings held on June 22, 2021, January 25, 2022, and June 28, 2022.

To say that the Team is not subject to the Open Meeting Law simply because the Board did not officially create it by vote would elevate form over substance and defeat the purpose of the Open Meeting Law. *See* A.R.S. § 38-431.09(A) ("[A]ny . . . entity charged with the interpretation of this article shall construe any provision of this article in favor of open and public meetings."). Further, this Office has stated that any scheme or device designed to circumvent the purposes of the Open Meeting Law is subject to close scrutiny, and would constitute a violation subjecting the governing body and participating members to the sanctions provided for in the Open Meeting Law. Ariz. Att'y Gen. Op. I83-025.

However, our investigation does not show that the Board intended to circumvent the Open Meeting Law here, but rather that the Board sought to do its work more efficiently within the parameters of the law as the members understood it. The Open Meeting Law training the Board received in January 2020 emphasized that the Open Meeting Law applied only to those advisory committees created by a vote of the Board. While this training correctly quoted the statutory

¹ We do not find any violation related to the District's hiring of a consultant to lead the Team. District policy allows the Superintendent to employ consultants in circumstances such as those found here. *See* SUSD Policy BDH (adopted March 3, 2009).

requirements related to board advisory committees, it did not explain the implications of A.R.S. § 38-431.09(A) and Ariz. Att’y Gen. Op. I83-025 as they relate to the *purpose* of the committee. Accordingly, we do not find this violation to be knowing.

We also find the law does not require nullification of the Strategic Plan, because the ultimate approval and ratification of the plan was done in a public meeting. *See* A.R.S. § 38-431.05(A). Further, the strategic planning process provided significant opportunity for public input. The Superintendent held Town Hall meetings around the city during the planning period and the Team solicited input from the public using surveys. And at public Board meetings, the Team provided detailed presentations on each phase of the strategic plan prior to Board adoption. Accordingly, we do not find that the Board or District leadership intended to hide the strategic planning process from public view.

c. Incident Command System

We find that the Superintendent’s Incident Command System (“ICS”) is an internal administrative committee that is not subject to the Open Meeting Law. The District reports that the ICS meets regularly to address emergency management and hazard mitigation for staff and students. This action is consistent with the Board-approved District policy requiring the Superintendent to “establish procedures to protect the safety of all students, employees, visitors, and others present on District property or at school-sponsored events.” SUSD Policy EB (adopted June 8, 2004).

Our review revealed no indication that the purpose of the ICS is to bring recommendations to or otherwise advise the Board. The mere fact that items discussed in a Superintendent advisory group meeting may prompt the Superintendent to bring a matter to the Board’s attention does not transform the group to a Board committee, as suggesting policy changes is part of the Superintendent’s responsibilities. *See* SUSD Policy CHD (adopted June 8, 2004) (“It is the Superintendent’s duty to inform the Board of . . . the need to develop an official policy.”). Once again, it is the purpose for which the committee is formed that is of primary concern for purposes of the Open Meeting Law. *See* A.R.S. § 38-431(1). Accordingly, we find the District did not violate the Open Meeting Law with respect to the ICS.

d. Board Subcommittees

Our investigation shows that during the 2020-2021 school year, the Board and Superintendent Menzel together created several additional advisory committees, including a finance and facilities committee, a policy committee, and a communications and marketing committee. Each of these committees was apparently designed to include two participating board members.

At the February 2, 2021 special meeting, an agenda item addressed Board meeting structure. The Board discussed several suggestions related to meeting efficiency. One suggestion was to add an additional “study session” each month to discuss items that require extra attention and thereby shorten discussions held at the regular Board meetings. Another tool discussed was the use of Board “subcommittees” to discussing weighty, time-consuming issues in detail within

the small group, and then the group would bring summaries and recommendations to the Board as a whole. The Board discussed that these subcommittee meetings could “supplant the need for a study session” or otherwise take the place of additional Board meetings that would be needed to discuss the topics being delegated to the subcommittees. The Superintendent stated that the work of the committees accomplished the “same purpose” of a study session, at least in part. The Board’s conversation indicates that the motivation for creating this system was the extra Board work that had been generated because of the ongoing COVID-19 pandemic. The subcommittee system was apparently intended to help the Board address its workload more efficiently. None of these smaller group meetings were open to the public, and at least two of these committees made direct recommendations to the Board.

This subcommittee system is not equivalent to an agency head advisory committee, as contemplated by the Ariz. Att’y Gen. Op. 175-7 and I92-007. These subcommittees were created by the Board for the purpose of performing Board business more efficiently. This practice violates the Open Meeting Law because it removes some of the Board’s deliberations on important topics from the public view. Further, while the presence of less than a quorum of Board members on an advisory committee does not alone determine the status of the committee for purposes of the Open Meeting Law, in this instance, the fact that each of these committees was specifically designed to include two Board members supports the conclusion that these committees were simply subcommittees of the Board itself. If the Board wishes to form committees to break down its work on particular issues, it certainly may do so. But such groups must be officially established pursuant to District policy and their meetings must comply with the Open Meeting Law. *See* A.R.S. § 38-431(1).

Based on our review of relevant documents and multiple recorded meetings, we do not find that the Board intended to circumvent the Open Meeting Law through the use of this subcommittee system, though that certainly was the effect. Further, because the ultimate Board decisions relating to the committee recommendations were made in public meetings, we do not find any of the legal actions taken to be nullified. *See* A.R.S. § 38-431.05(A). We do, however, caution the Board that any future use of Board subcommittees that do not hold public meetings will be found to be knowing violations of the Open Meeting Law.

e. “2x2x1” Meetings

At the February 2, 2021 special meeting, the Board also discussed its use of its “2x2x1” meeting model. The Superintendent described these meetings as opportunities for him or other District staff to present information to the Board in smaller groups. One Board member described the use of these meetings as an “elimination of an additional meeting.” This structure was apparently intended to increase efficiency by allowing the Board members to ask questions of the presenter within these smaller group meetings and thereby eliminate time spent on questions during the regular Board meeting. The District reports that, during these meetings, information was communicated to the Board members but no discussion took place among the Board members in the meetings.

This practice violates the Open Meeting Law. Discussions and deliberations (in person or otherwise) between less than a majority of the members of a governing body, violate the Open Meeting Law when used to circumvent the purposes of the Open Meeting Law. *See* Ariz. Att’y Gen. Op. 75-8; Ariz. Att’y Gen. Agency Handbook § 7.5.2. Even if the Board members are not speaking directly to each other during these meetings, the members present have the benefit of hearing the other members’ questions and the answers to those questions. The remaining Board members and the public do not have this benefit. The public is entitled to hear this deliberative process, including the questions that the Board members ask the presenter during the meetings. Further, because these meetings were not recorded or open to the public, there is no way for the public to be sure that the Board members present were not discussing the matters amongst themselves.

It is settled policy that public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions with a majority of the public body members. Ariz. Att’y Gen. Agency Handbook § 7.5.2. Splintering the quorum can be done by meeting in person, by telephone, electronically, or through other means to discuss a topic that has been or may later be presented to the public body for a decision. Public officials should refrain from any activities that may undermine public confidence in the public decision-making process established in the Open Meeting Law—this includes any practice that removes Board discussion from public view in the name of efficiency.

It appears from the Board discussion at the February 2, 2021 meeting that the Board members believed this practice to be within the bounds of the Open Meeting Law because there was not a quorum of the Board present at any one of the meetings. Accordingly, we do not find this violation to be knowing. However, we strongly caution the Board and the administration to avoid any devices that have the effect of removing the discussion of Board business outside of an open meeting. Any future practices such as this will be considered knowing violations.

III. Conclusion & Remedy

We recognize that a significant amount of time has passed since the events discussed here occurred, and that the District and Board have amended their practices and already remedied many of the concerns raised in our initial inquiry letter sent more than a year ago. As a remedy for the violations noted above, we require that the Board include in its annual Open Meeting Law training specific instruction about the use of Board committees, consistent with the law as explained in this letter. The training materials must be approved by this Office prior to presentation.

We understand that the time period during which these violations occurred was a difficult time for school district governing boards to navigate, and we acknowledge that it may sometimes be difficult to distinguish the line between what constitutes a Board committee and an administrative committee. Ultimately, if the purpose of the committee is to advise the Board on some potential legal action or policy formation, it is subject to the Open Meeting Law and should be officially created and supervised by the Board pursuant to the District’s policy. If the committee or advisory group is created by the Superintendent and intended to advise him or her in the

implementation of an already-approved Board policy, or in the administration of the Superintendent's other designated duties, such a group is not a public body subject to the Open Meeting Law. If a Superintendent's work with an administrative advisory committee results in a need to bring a recommendation to the Board, this does not transform the committee into a Board committee—it is the purpose for which the Board is formed that is determinative. Further, the presence of Board members on either a Board or administrative committee does not necessarily raise Open Meeting Law concerns, so long as the number of Board members on the committee does not constitute a quorum and the purpose of the committee is not to circumvent the Open Meeting Law.

Superintendent's Report

The Open Meeting Law allows the chief administrator, presiding officer or a member of a public body to present a brief summary of current events without listing in the agenda the specific matters to be summarized, provided that the summary is listed on the agenda and that the public body does not propose, discuss, deliberate, or take legal action at that meeting on any matter in the summary unless the specific matter is properly noticed for legal action. A.R.S. § 38-431.02(K). The only persons who may provide a current events summary are the chief administrator, the presiding officer of the Board, or a Board member. *Id.* The agenda should specifically list "Summary of Current Events" as an agenda item and identify who will present the summary. Ariz. Att'y Gen. Agency Handbook 7.7.8. The summary of current events consists merely of one of the above-referenced people summarizing recent occurrences without any discussion or feedback from the remainder of the public body. *Id.*

Reports that address matters other than a summary of current events, or that are delivered by someone other than a proper official with the public body, do not come within the provision authorizing current events summaries and must comply with the agenda requirements of the Open Meeting Law. *Id.* The agenda must list descriptions of the topics that will be presented and state whether the public body will discuss or take action on such matters. The agenda item must provide more than a generic description and must include information "reasonably necessary to inform the public of the matters to be discussed or decided." A.R.S. § 38-431.02(H). Public bodies should limit the use of the current events summary provision to appropriate situations and should strive to provide as much advance information as possible to the public. If a topic could come before the Board for possible action, it should not be addressed during the current events summary. Ariz. Att'y Gen. Agency Handbook 7.7.8.

The complaint submitted to this office alleged that Superintendent Menzel frequently used his time during the current events summary portion of meetings to provide updates on the work of the Strategic Planning Design Team. A review of the meetings occurring during the 2020-21 school year shows that the Superintendent provided several updates on the work of the Strategic Planning Design Team during the time allotted for his current events summary. We find this to be a violation of the Open Meeting Law. The Board may not permit the Superintendent to use the current events summary to provide committee work updates or to report on any other matters that are likely to come before the Board for action. The public was entitled to notice that updates on

the strategic planning process would be provided at these meetings, especially considering that the Team's meetings were not open to the public as they should have been.

We do not find that the Board or the Superintendent intended to violate the Open Meeting Law here, and we recognize that it is common for Board members and other officials to misunderstand the scope of the current events summary provided for in the statute. As a remedy, we require that the Board's annual Open Meeting Law training include specific information related to the current events summary and that the Superintendent attend this training. The training materials must be consistent with the law as explained here and must receive prior approval from this Office.

Conclusion

This letter relates solely to the disposition of the aforementioned Open Meeting Law complaints, and does not relate to any non-OML matters. This is not a formal opinion of the Attorney General's Office and should not be cited as authority in other matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannon Mataele". The signature is written in a cursive, flowing style.

Shannon Hawley Mataele
Assistant Attorney General

**GUST
ROSENFELD**
ATTORNEYS SINCE 1921 P.L.C.

■ ONE E. WASHINGTON, SUITE 1600 ■ PHOENIX, ARIZONA 85004-2553 ■ TELEPHONE 602-257-7422 ■ FACSIMILE 602-254-4878 ■

JENNIFER N. MACLENNAN
602-257-7475
FAX: 602-340-1538
maclennan@gustlaw.com

December 27, 2023

Dr. Troy Bales
Superintendent
Paradise Valley Unified School District No. 69
15002 N. 32nd Street
Phoenix, AZ 85032

Re: *Open Meeting Law Requirements re Committee*

Dear Dr. Bales:

This law firm represents Paradise Valley Unified School District No. 69 and its Governing Board (collectively the "District"). The purpose of this communication is to provide a legal opinion regarding the parameters of the Open Meeting Law (OML) with respect to the formation of a committee to make recommendations regarding potential school closures and redrawing district attendance boundaries.

I. Background

The District is experiencing declining enrollment and is addressing existing and potential budget shortfalls. The Governing Board held a study session on March 2, 2023; one of the topics was a presentation for information only on demographics, enrollment projection and facility usage. During the superintendent's presentation on that topic, the superintendent announced that he would be calling for a committee to address potential school closures, repurposing, or potential boundary changes.

The superintendent formed a school closure and re-boundary committee. The superintendent was not instructed to form the committee by any board member. The superintendent chose the size of the committee and set its composition without board direction or input. The committee was apprised of twenty (20) individuals including six (6) teachers, two (2) support staff, three (3) school administrators, two (2) central office administrators, and seven (7) parents. Additionally, the group was led by two (2) assistant superintendents. Board members were not involved and did not attend committee meetings.

The committee made recommendations regarding four potential school closures and potentially altering the boundaries of twelve campuses. The superintendent's cabinet reviewed

the work and recommendations of the committee. District administrators then presented the recommendations to the Governing Board at a study session on December 5, 2023. The Governing Board took action on December 7, 2023 to schedule a public hearing to consider the potential closures of four schools and potential boundary changes to twelve schools on January 23, 2024. A public hearing and notice are required under state law. A.R.S. § 15-341(32) and (37).

II. Relevant Definitions and Guidance

The relevant statutory definitions that govern when the parameters of the OML applies are as follows:

1. "Advisory committee" or "subcommittee" means any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.

...

6. "Public body" means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of this state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by this state or a political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.

A.R.S. § 38-431(1) and (6).

The Attorney General Agency Handbook states as follows:

This definition does not include advisory groups established by the single head of an agency unless they are created pursuant to a statute, city charter, or other provision of law or by an official act pursuant to some legal authority. See Ariz. Att'y Gen. Op. I92-007; Section 7.3.2.

Ariz. Att'y Agency Handbook, § 7.3.5 (revised 2018).

The 1992 Arizona Attorney General opinion cited in the Agency Handbook opined that advisory committees appointed by the Governor to provide the Governor with advice and

counsel are not public bodies subject to the Open Meeting Law. Ariz. Att'y Gen. Op. I92-007 (1992).

III. Opinion regarding Use of Committee

The Governing Board has adopted Governing Board Policy CE, which states as follows:

The Board authorizes the Superintendent to establish advisory councils, cabinets, and committees when deemed necessary for proper administration of Board policies and for the improvement of the total educational program. All cabinets, councils, and committees created by the Superintendent shall be for the purpose of obtaining to a maximum degree the advice and counsel of the personnel, clients, and patrons of the District.

The number, composition, and work to be done by such cabinets, councils, and committees shall be defined by the Superintendent.

The school closure and re-boundary committee was a committee formed under the superintendent's discretion pursuant to Governing Board Policy CE. Governing board members did not direct the superintendent to form that committee nor did they have any involvement in choosing the members of the committee.

The committee was formed with the purpose of advising the superintendent and his cabinet level administrators on which schools the District administration should recommend to close given the declining enrollment. The committee was formed with the expectation that the Governing Board would be required to ultimately make a decision, after notice to the public and a public hearing. In my opinion, the superintendent is authorized by policy to form an advisory council for this purpose even when the intent is to ultimately make a board recommendation.

The Governing Board did not take any action to "form" or "establish" the school closure and re-boundary committee. The superintendent telegraphed his intent to create the committee in a transparent manner at a public study session on March 2, 2023. The Board did not vote on that item nor did the act in any way to control the establishment or set up of the committee. In my opinion, the committee formed is not an advisory committee required to comply with the requirements of the Open Meeting Law under A.R.S. § 38-431(1).

IV. Conclusion

I recommend that the District continue with its intent to hold community forums in January 2024 and a public hearing on January 23, 2024 regarding the consideration of the potential school closures and boundary changes.

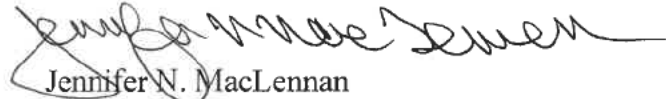
Dr. Troy Bales

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December 27, 2023

The District is specifically seeking for input from the Attorney General's office on this pressing issue and respectfully requests a formal review pursuant to A.R.S. § 15-253(B).

Very truly yours,

A handwritten signature in black ink, appearing to read "Jennifer N. MacLennan". The signature is fluid and cursive, with a large initial "J" and "M".

Jennifer N. MacLennan
For the Firm

JNM:pjs
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