



STATE OF INDIANA

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March 28, 2013

Ms. Robin C. Clay
310 N. Alabama Street, Suite 300
Indianapolis, Indiana 46204

*Re: Formal Complaint 13-FC-97; Alleged Violation of the Open Door Law by
Ball State University*

Dear Ms. Clay:

This advisory opinion is in response to your formal complaint alleging Ball State University ("University") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Jon H. Moll and Matthew L. Kelsey, Attorneys, responded on behalf of the University. Their response is enclosed for your reference. I have granted your request priority status pursuant to 62 Indiana Administrative Code 1-1-3(2).

BACKGROUND

In your formal complaint you provide that the University and specifically its Office of Charter Schools ("Office"), a public agency pursuant to I.C. § 5-14-1.5-2(a), serves as the authorizer (also known as "sponsor") to approximately 42 charter school throughout the State of Indiana. The relationship between the University and its sponsored charter schools is essentially a contractual relationship in that the University and the School have an agreement that outlines the terms and conditions of their association. The agreement is known as the "Charter", authorizes an organizer to establish and operate a charter school. As a charter school sponsor, it is the University's responsibility to establish and implement standards for accountability, monitor the school at regular intervals, and provide other applicable oversight responsibilities that assist the schools in operating successfully.

On or about January 18, 2013, the University notified seven of its sponsored charter schools regarding its decision not to renew their charters. You provide that the University's decision affects approximately 2,200 families directly and countless other families because education options in their communities will be limited. You argue that the public has a right to know and observe whether the charter schools have been operated in the best interest of the students and whether the University has been responsible in its role as a sponsor.

When a charter school is notified that the University does not intend to renew the charter, the charter school may request a reconsideration hearing. As part of the reconsideration process, the University President, or his or her designee, appoints a hearing panel (“Panel”) consisting of three persons. The President also appoints a hearing officer to preside over the hearing process. Notice of the hearing is not posted, but is provided pursuant to the provisions of the Charter, which require notice to be mailed directly to the Organizer. The procedures further limit the number of persons who can attend the hearing to one administrator, one parent, one teacher, and one student. Additional attendees must receive prior approval by the Hearing Officer and no audio or video recording is allowed. The hearing panel will issue a written recommendation to the University President within ten (10) business days of the hearing date. You provide that the deliberations and final action of the Panel will be conducted in secret.

You provide that the Panel is a governing body and as such, all meetings conducted by the Panel must comply with the requirements of the ODL. You believe that the Panel qualifies as a governing body pursuant to I.C. § 5-14-1.5-2(b)(2) as the Office and/or members of the Panel are a “body” of a public agency and are scheduled to take official action on the renewal of the charter school. Further, you believe that the Panel meets the definition of I.C. § 5-14-1.5-2(b)(3) as the Panel is appointed by the University President to take official action on public business. The University’s President has delegated public business to the Panel to receive information at the reconsideration hearing. Subsequent to the reconsideration hearing, the Panel will forward a written recommendation to the University President.

In response to your formal complaint, Mr. Moll provided that the University is a state-assisted institution of higher education. It is a public agency as defined by section 2(a) of the ODL. The University’s “governing body,” as defined in Section 2(b) of the ODL, is the Board of Trustees. The Board of Trustees’ presiding officer is its President, Hollis Hughes. Dr. Jo Ann Gora is the President of the University. The University sponsors numerous charter schools within the State of Indiana. The University has entered into a Charter agreement with each school that states the terms and conditions governing the agreement. The Charter includes provisions setting forth the term of years for which the Charter has been granted, the circumstances under which it may be revoked, and the procedures for renewal (or nonrenewal) of the Charter.

Section 10.29(b) of the Charter provides that the “University may elect not to renew the Charter if it deems it is no longer in the best interests of the University, the student enrolled in the Charter School, and/or the community at large for the University to renew the Charter.” In accordance with this provision, University President Gora sent a written statement to your clients, informing them that the University will not renew their Charters at the conclusion of the current contract term on June 30, 2013. Your clients have requested reconsideration of the decision not to renew the Charter. The reconsideration process is governed by the Charter Schools Reconsideration Procedures (“Procedures”). Section II of the Procedures states that the President or her designee will appoint three persons to the Panel and a Hearing Officer. The Hearing Officer is a non-voting person who presides over the hearing. Section XIII of the Procedures states that

the Panel will make a written recommendation to President Gora. President Gora will then make the final decision to reconsider her previous decision not to renew the Charter. As applicable here, President Gora has designated others to appoint the Panel, with the intent of promoting objectivity and impartiality in the reconsideration process. The hearings will be held in April 2013. Section VII of the Procedures provides who may attend the hearings.

The ODL governs the meetings of governing bodies of public agencies. The Board of Trustees is the governing body of the University and as such, its meetings must comply with the requirements of the ODL. Pursuant to section 2(b)(3) of the ODL, meetings of any committee appointed directly by the Board of Trustees or its presiding officer, Hollis Hughes, would also be considered a “governing body” under the ODL. However, as applicable here, neither the Board of Trustees nor its presiding officer appoints members to the Panel. As a result, the Panel does qualify as a “governing body” or a “public agency” under the statute. The University’s President or her designee, appoints the members to the Panel. The Board of Trustees and its presiding officer are not involved in the reconsideration process.

Mr. Moll noted that the only case that has been cited in the formal complaint that was filed in support of your argument was *Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616, 623 (Ind. App. 1986), which held that a hearing committee appointed by the University Senate was part of the University’s “governing body” and thus subject to the ODL. However, the Court of Appeals suggested in *Riggin* that it was up to the Legislature to amend the statute if it did not intend such a broad reading of the ODL, which is what occurred. At its first opportunity, the General Assembly overrode the Court’s holding in *Riggin* on the reach of the statute by enacting P.L. 67-1987, which inserted the word “directly” in Section 2(b)(3) definition. Mr. Moll maintains that the effect of this amendment was to restrict the coverage of the ODL to committees appointed by the Board or its presiding officer, not other University committees, such as those appointed under the auspices of the University Senate.

The Indiana Court of Appeals addressed this issue again after the ODL was amended in *Robinson v. Indiana University*, 683 N.E.2d 435 (Ind. Ct. App. 1994). *Robinson* discussed *Riggin* and the General Assembly’s response to the case. *Robinson* held that a committee appointed by the University’s President, or the President’s designee, was not subject to the ODL. *Robinson* is applicable here as the University’s President appointed the Panel; the Panel was not appointed by the University’s Board of Trustees or its presiding officer. The Court of Appeals further addressed the issue in *Indiana State Board of Health v. The Journal Gazette Company*, 608 N.E.2d 989 (Ind. Ct. App. 1993). There the Court again tracked the history of the *Riggin* and the General Assembly’s response and held that an information reconsideration hearing of a decertification decision involving employees of the agency was not subject to the ODL. The Indiana Supreme Court affirmed the decision. *Indiana State Board of Health v. State Journal-Gazette Company*, 619 N.E.2d 273 (Ind. 1993). Further support is also found in *Frye v. Vigo County*, 769 N.E.2d 188, 196 (Ind. App. 2002), *Dillman v. Trustees of*

Indiana University, 848 N.E.2d 348, 352-53, and prior opinions of the Public Access Counselor 03-FC-87, 05-FC-219, 12-FC-91, and 12-FC-248.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

There is no question that the University is considered to be a public agency pursuant to the ODL. *See* I.C. § 5-14-1.5-2(a). Thus, if the Panel is considered to be a governing body of the University, then it would be required to comply with all requirements of the ODL. A governing body is defined as:

- (b) "Governing body" means two (2) or more individuals who are:
 - (1) a public agency that:
 - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
 - (B) takes official action on public business;
 - (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
 - (3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter. *See* I.C. § 5-14-1.5-2(b)

You maintain that the Panel is a governing body pursuant to either I.C. § 5-14-1.5-2(b)(2) or (3).

Subsection (2) provides that a governing body is any "board, commission, council, or other body of a public agency which takes official action upon public business. . ." *See* I.C. § 5-14-1.5-2(b)(2). "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). "Public business" means any function upon which the public agency is empowered or authorized to take official action. The Panel is not a statutorily created governing body. *See Opinions of the Public Access Counselor 03-FC-87; 11-INF-59; and 12-FC-91*. As noted *supra* in the University's response, the Indiana Supreme Court and Court of Appeals have addressed similar issues regarding the

definition of “governing body.” In *Indiana State Board of Health*, two employees of a state agency gathered and engaged with other individuals while taking action upon public business. *Indiana State Bd. of Health*, 608 N.E.2d at 993. However, neither employee was a member of the 11 member Indiana State Board of Health, the governing body of the agency, nor were the employee’s members of any advisory committee directly appointed by the State Board of Health. *Id.* The Court of Appeals determined that the meeting was not one conducted by a “governing body” of the agency, nor was it a meeting of any advisory committee directly appointed by the State Board of Health. As a result, the meeting was not subject to the ODL. *Id.* The opinion of the Court of Appeals was later affirmed by the Supreme Court. *Indiana State Bd. of Health*, 619 N.E.2d at 273. As will be discussed *infra*, there has not been a showing that the members of the Panel were appointed by the University’s Board of Trustees or its presiding officer or that the member of the Panel comprised a majority of any other governing body. As such, in light of previous case law analyzing the provisions of the term “governing body,” it is my opinion that the Panel does not qualify as a governing body pursuant to Section 2(b)(2) of the ODL.

Subsection (3) provides that any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated would be considered a governing body. *See* I.C. § 5-14-1.5-2(b)(3). A committee that is not appointed directly by a governing body or its presiding officer does not constitute a governing body, under the plain language of the ODL. *See Opinions of the Public Access Counselor 05-FC-219, 09-INF-29, 13-INF-05.* The Indiana Court of Appeals addressed this issue in *Robinson v. Indiana University*, 638 N.E.2d 435 (Ind. Ct. App. 1994). *Robinson* was decided after the General Assembly amended the definition of “governing body” to add the word “directly” after “any committee appointed.” In *Robinson*, the Indiana University’s Board of Trustees (a governing body for ODL purposes) delegated the authority to appoint a committee and subcommittee to the university president who, in turn, passed the duty on to an associate vice president for research. *Id.* at 437. The Court held that “the Committee and Subcommittee did not derive their authority *directly* from the governing body” because the board delegated its appointment authority to the university administration. *Id.* at 438. Consequently, the committee and subcommittee were not governing bodies under the ODL. *Id.* at 437-38; *See also Frye v. Vigo County*, 769 N.E. 2d 188, 196-196 (Ind. Ct. App. 2002). The Court in *Robinson* held:

“It is apparent to us that the legislature’s enactment of the amendment [adding the word “directly”] effectively limits the types of committees that are subject to the Open Door Law...The legislature has clearly narrowed the scope of the Open Door Law’s effect as it applies to various committees.” *Id.* at 438.

It has not been challenged that the Panel was appointed by University President Gora or her designee. The University President is not the head of the University’s Board of Trustees. The University has provided that the Board of Trustees is not involved with the

selection of the Panel. As the Panel is not appointed by University's Board of Trustees or its presiding officer, it is my opinion that the Panel does not qualify as a "governing body" pursuant to section 2(b)(3) of the ODL.

CONCLUSION

Based on the foregoing, it is my opinion that the University did not violate the ODL as the Panel is not a governing body of a public agency pursuant to either I.C. § 5-14-1.5-2(b)(2) or (3).

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Jon H. Mull