OPINION OF THE PUBLIC ACCESS COUNSELOR

ERIC K. GROW,
Complainant,

v.

BARTHOLOMEW CONSOLIDATED SCHOOL CORP.
BD. OF TRUSTEES,
Respondent.

Formal Complaint No.
22-FC-124

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging the Bartholomew Consolidated School Corporation Board of Trustees (Board) violated the Open Door Law.[1] Attorney Séamus Boyce filed an answer on behalf of the Board. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by

[1] Ind. Code § 5-14-1.5-1—10.

the Office of the Public Access Counselor on August 16, 2022.

BACKGROUND

In this case we explore the new law requiring public comment at school board meetings.

On August 16, 2022, Eric Grow (Complainant) filed a formal complaint raising concerns with the Bartholomew Consolidated School Corporation School Board policy that limits public comment exclusively to agenda items.

On May 9, 2022, and several instances since, the Board denied Grow's request to discuss curriculum since it was not a topic listed on the meeting agenda.

On September 19, 2022,[2] the Board filed an answer to Grow's complaint. For its part, the Board argues its policy is consistent with the new statute and its rules are reasonable. Furthermore, the Board claims it has engaged with Grow in alternative ways to address his concerns.

In support of the Board's public comment policy, it argues that setting limitations on public comment is appropriate per the statute:

> A governing body *may adopt reasonable rules to govern the taking of oral public comment at a meeting*. However, the taking of oral public comment on a topic must occur before the governing body takes *final action* on the topic.

[2] The Board requested and received an extension to file a response to the complaint.

Ind. Code section 5-14-1.5-3(d). Emphasis added by the Board. It further argues that because school boards are bestowed the discretion to adopt reasonable rules to govern public comment, tying allowable comment to an agenda is acceptable.

ANALYSIS

1. The Open Door Law

The Open Door Law (ODL) requires public agencies to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. Ind. Code § 5-14-1.5-1. As a result, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. *See* Ind. Code § 5-14-1.5-3(a).

The Bartholomew Consolidated School Corporation is a public agency for purposes of the ODL; and thus, is subject to the law's requirements. Ind. Code § 5-14-1.5-2.[3] Moreover, the School's Board is a governing body for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b).

As a result, unless an exception applies, all meetings of the Board must be open at all times to allow members of the public to observe and record.

[3] *See also* Ind. Code § 16-22-8-6.

1.1 ODL definitions

Under the ODL, "meeting" means "a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business." Ind. Code § 5-14-1.5-2(c).

"Official action" means to: (1) receive information; (2) deliberate; (3) make recommendations; (4) establish policy; (5) make decisions; or (6) take final action. Ind. Code § 5-14-1.5-2(d). "Public business" means "any function upon which the public agency is empowered or authorized to take official action." Ind. Code § 5-14-1.5-2(e).

Notably, the ODL defines "final action" as "a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order." Ind. Code § 5-14-1.5-2(g). Additionally, the ODL mandates a governing body to take all final action at public meeting. *See* Ind. Code § 5-14-1.5-6.1(c).

2. Public comment

Given the recency of the public comment requirement for school boards, this particular – and narrow - question is one of first impression for this office: is it reasonable to restrict public comment only to items listed on an agenda?

Effective July 1, 2022, Indiana code section 5-14-1.5-3(d) states the following in relevant part:

> (d) This subsection applies only to the governing body of a school corporation or charter school. The governing body:
>
> > (1) shall allow a member of the public who is physically present at the meeting location, including a meeting conducted under section 3.5 of this chapter, to provide oral public comment;
>
> …
>
> A governing body may adopt reasonable rules to govern the taking of oral public comment at a meeting. However, the taking of oral public comment on a topic must occur before the governing body takes final action on the topic. The governing body may set a limit on the total amount of time for receiving oral public comment on a topic.

Here, the issue is whether a constituent has the right to speak on items which are not explicitly listed on an agenda yet may still be germane to school board business overall. The Board's policy prohibits "irrelevant" statements which, while not defined by statute, can reasonably be interpreted as comments addressing matters not currently being considered by the Board.

When a statute creates a forum for expression like the new law does, a school board must treat each commenter

equally. Therefore, an act or board policy, whether implicit or express, cannot limit a speaker based on viewpoint[4].

A designated public forum can, however, include regulations on speech based on a time, place and manner standard. A limitation will pass muster so long as it is equally applied to everyone wishing to comment and simultaneously advances a significant public interest[5]. The orderly procession of a public meeting is a legitimate government interest.

Here, the Board seeks to implement a policy that limits public comment to issues of substance that require official action. It qualifies that by referencing pending agenda items.

Notably, agendas for public meetings are completely optional. See Ind. Code § 5-14-1.5-4(a). The law does not enumerate what an agenda must look like if used, nor does it mandate items which must be placed on an itinerary. They can also be fluid in that items not on the agenda can still be addressed under new business or general discussion (voting on items not on an agenda is discouraged, however).

Therefore, if an agenda is perfunctory, or only lists generic action items - or if one is never used at all - the public must guess what topics they are allowed to address and what might be off-limits for that particular meeting. Moreover, a school board may very well choose never to include on the agenda uncomfortable or controversial

---

[4] See generally *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011)
[5] *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S.37, 46 (1983)

items at all, freezing out viewpoints with which they disagree.

The purpose of the new legislation is to give a space to parents and community members to engage their representatives, even if outlying voices can sometimes be misinformed or occasionally ill-intentioned. A mere three minutes is a short time to absorb public input - including undue scrutiny.

These listening exercises can even benefit a governing body. Although it can be challenging, enduring occasional misguided comments can be an opportunity for a board to dispel rumors or set a record straight on an issue. On the other hand, neutering public comment often leads to more agitation and can court more vague legislation.

That is not to say that public comment should be a free-for-all-anything-goes exercise. The topics should be germane to issues over which the school board has authority to address. Moreover, rules can be placed on the *manner* in which comments are provided including the prohibition of disorderly behavior, unduly repetitive comments or disruption. Therefore, the comment period should be decorous and business-like.

There appears to be little question that the School Corporation has gone to significant lengths to engage with this Complainant. It could very well be determined that his ongoing comments and approach could be considered repetitious at subsequent meetings. Therefore, this opinion is not a referendum on how the Board has addressed Grow specifically, but rather on its policy generally.

Ultimately it is unclear how the courts may rule on the issue, but this office is not convinced that "reasonable rules" is synonymous with restricting comment to pre-selected items on an optional agenda.

CONCLUSION

Based on the foregoing, it is the opinion of this office that limiting subject matter for comment to a discretionary – and fungible - concept of an agenda is too narrow of an interpretation of the new statute.

Luke H. Britt
Public Access Counselor

Issued: October 18, 2022