OPINION OF THE PUBLIC ACCESS COUNSELOR

AMY M. HARNESS,
Complainant,

v.

SHELBYVILLE CENTRAL SCHOOLS,
Respondent.

Formal Complaint No.
23-FC-*32*

Luke H. Britt
Public Access Counselor

BRITT, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging Shelbyville Central Schools, through its Board of School Trustees, violated the Open Door Law.[1] Attorney John C. DePrez 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 received

[1] Ind. Code § 5-14-1.5-1—10.

by the Office of the Public Access Counselor on March 20, 2022.

BACKGROUND

In this case we examine whether a school board policy prohibiting nonresidents from participating in public comment and limiting public comment only to agenda items is reasonable under the Open Door Law's (ODL) public comment requirements.

On March 20, 2023, Amy Harness (Complainant) filed a formal complaint raising concerns with the Shelbyville Central School Board policy that limits public comment exclusively to agenda items and that input may only come from those who live within the school district.

On March 13, 2023, Harness requested that she be placed on the agenda to discuss the topic of bullying at the school. She was denied that same day. During the meeting on March 20, 2023, Harness attempted to speak during the public input period. The Board president denied her the opportunity after she identified herself as a resident of Franklin, which is outside the district. Harness claims that every other person who attempted to speak was also denied the opportunity to do so.

On April 7, 2023, the SCS Board filed an answer to Harness's complaint denying any violation of the Open Door Law. The Board contends its internal policy H225 empowers the Board President—in their sole discretion—to prohibit public comment from individuals that do not reside in the school district.

The Board argues that requiring it to take public comment from outside the district's boundaries is unreasonable; and therefore, is not required under the ODL's public comment provision.

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).

Shelbyville Central Schools 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. Moreover, the SCS's Board of Trustees (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.

2. Restricting public comment to agenda items

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, as in 22-FC-124, the issue is whether a constituent has the right to speak on items that are not explicitly listed on an agenda yet may still be germane to school board business overall. In that opinion, this office observed:

> 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[2].
>
> 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

[2] *See Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011).

simultaneously advances a significant public interest[3]. 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 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

[3] *Perry Educ. Ass'n v. Perry Local Educator's Ass'n,* 460 U.S.37, 46 (1983).

> 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.

…

> 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.

Here, the issue of bullying is ostensibly a matter germane to school business. While the administration, faculty, or staff may ultimately be the best sounding board for these matters, it is still relevant to the enumerated

responsibilities of a school board. Identifying individual students should be avoided for obvious reasons, however, it stands to reason that rules should not be so strict to freeze out matters that fall under the purview of a school board, regardless of agenda.

3. Residency requirements

The second issue is whether a school board can—consistent with the Open Door Law—restrict public comment based on a person's residency. Harness is not a resident of the school district, but nonetheless has ties to the community.

The law governing public comment at school board meetings is silent as to any residence prerequisite to qualify as a speaker. Had the legislature wanted to limit public comment to only residents of a school district, it could have done so.

Here, the legislature did not include language limiting public comment to only school district residents; and thus, we are left to presume that it intended to include anyone who wishes to speak. While residents may be given priority when time is limited and commenters are numerous, a blanket policy elbowing out nonresidents is not consistent with the letter or the spirit of the law. This policy should be amended as soon as practicable.

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, as is the requirement that commenters be residents of the school district.

Luke H. Britt
Public Access Counselor

Issued: June 15, 2023