
OPINION OF THE PUBLIC ACCESS COUNSELOR

MICHAEL & JENNAH L. PHELPS,
Complainant,

v.

*DISCOVERY CHARTER SCHOOL,
Respondent.

Formal Complaint No.
23-FC-53

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to three formal complaints alleging Discovery Charter School violated the Open Door Law.¹ Attorney Monica Conrad filed an answer on behalf of the school. In accordance with Indiana Code § 5-14-5-10, this office issues the following opinion to the formal complaints received on June 5, 2023, and June 30, 2023, respectively.

¹ Ind. Code § 5-14-3-1.5-1 to -8.

BACKGROUND

This opinion addresses three complaints submitted by Michael and Jennah Phelps (Complainants) alleging the violations of the Open Door Law (ODL) by Discovery Charter School.

On June 5, 2023, Jennah Phelps filed the first complaint alleging Discovery Charter School terminated an administrator's two-year contract without a public vote and announced it to staff in early May.

The School argues that charter school boards do not operate under the same statutes as public school districts. Therefore, the executive director had sole discretion to terminate the employee without a vote of approval from the board.

Michael Phelps filed the second complaint with this office about two executive sessions held by the Discovery Charter School Board of Directors (Board) on May 27 and June 5, 2023. Although the Board posted public notice for the May session, Phelps argues the statute invoked by the Board did not align with the appropriate subject matter authorized by the ODL for the gathering. While the public notice stated the purpose of the meeting was to discuss employee evaluations,² Phelps suspects the purpose was discussing another board member.

² The notice (and subsequent uncertified memoranda) cited "Personnel Exception" and cites Indiana Code section 5-14-1.5-6.1(b)(9), which addresses job evaluation of employees. See <https://www.discoverycharter.org/agendas-and-minutes>.

Phelps also alleges the Board did not provide public notice for the executive session on June 5, 2023.

On July 21, 2023, the Board responded to Phelps' complaint by arguing the purpose of the May executive session was to discuss prospective employees in accordance with Indiana Code section 5-14-1.5-6.1(b)(5). At the same time, the Board concedes that it did not provide public notice for the executive session on June 5, 2023.

Turning to the final allegation, Jennah Phelps asserts the Board took final action at the meeting on June 15, 2023, without providing a public comment period. The meeting lasted only seven minutes. Notably, the Board concedes that it did not provide an opportunity for public comment at the meeting.

ANALYSIS

1. The Open Door Law

It is the intent of the Open Door Law that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, so the people may be fully informed. The ODL's provisions are to be liberally construed with the view of carrying out its policy. *See* Ind. Code § 5-14-1.5-1. Therefore—unless an exception applies—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* Ind. Code § 5-14-1.5-3(a).

Charter schools are public agencies for the purposes of the Open Door Law. *See* Ind. Code § 20-24-4-1(a)(15). Therefore, any governing body of a charter school must take final action at a public meeting. *See* Ind. Code § 5-14-1.5-6.1(c).

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).

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. Administrator contracts

Typically, an action such as terminating an administrator’s contract is subject to approval and ratification by a school board. Statutorily, this is explicitly the case in public school districts.³ The Board argues that the statute governing the handling of school corporations’ administrator contracts does not apply to charter schools.

³ Ind. Code § 20-26-5-4.5.

Toward that end, this office reached out to the Indiana Charter School Board for confirmation. It advised that the Discovery Charter School Board is correct in this regard and internal by-laws and governing documents win the day.

Here, the Board's by-laws only reference the Executive Director—the functional equivalent of a superintendent—as subject to direct supervision by the Board. It argues that the Executive Director unilaterally makes personnel decisions.

The confusion in this instance, however, is two-fold. First, the Board appointed another administrator on June 15, giving the impression that Board action was a prerequisite to personnel actions. Additionally, section 14 of the Board's by-laws state:

Board action to approve or modify a contract shall require an affirmative vote of a majority of all members of the Board.

Whether this applies to employment contracts is unclear based on context.

Second, the Board submitted the school's by-laws as persuasive evidence. The by-laws submitted are for the Duneland Charter School and not Discovery. Curiously, the Duneland Charter School by-laws are also on Discovery's website. In any case, because the statute does not explicitly mandate the procedure, this office will defer to the internal governance of the School and not make a value judgment as to whether the Open Door Law is implicated.

3. Executive sessions

Under the Open Door Law, “executive session” means “a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. The governing body may also admit an individual who has been elected to the governing body but has not been sworn in as a member of the governing body.” Ind. Code § 5-14-1.5-2(f). The ODL authorizes executive sessions in limited, specific circumstances, which must be properly and specifically noticed by reference. *See* Ind. Code § 5-14-1.5-6.1(b)(1) to – (15).

What is more, executive sessions require notice to be posted in accordance with the Open Door Law with a heightened requirement to state the subject matter by specific reference to the enumerated instance for which executive sessions must be held. *See* Ind. Code § 5-14-1.5-6.1(d).

Here, the Board posted notice for the May 27, 2023, executive session referencing Indiana Code section 5-14-1.5-6.1(b)(9), which states:

To discuss a job performance evaluation of individual employees. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.

The meeting was generically labeled “Personnel Exception” although it did cite the specific statute. Michael Phelps alleges this meeting was to discuss another board member instead of evaluating an employee. While the discussion of employee job performance is certainly a justifiable executive

session exercise, the discussion of other board members under that pretext is not.

The Board argues its discussion was about prospective executive director candidates; and thus, authorized under Indiana code section 5-14-6.1-1.5(b)(5). Again, while this would have been a legitimate discussion, the public notice was improper. Although the Board rationalizes the exclusion of one of the Board members from the executive session, that is not a matter included in the complaints and will not be addressed further. The excluded board member did not file a complaint.

Michael Phelps also alleges that the June 5, 2023, executive sessions was not noticed, a fact of which the Board concedes and states it will rectify for future executive sessions.

This office scrutinizes executive session complaints strictly as it is the only instance where a governing body can legally take official action behind closed doors. While it may seem draconian to pick on the details of public notice and procedure, it is a crucial element of transparency. The Board should be particularly concerned with minding the law regarding executive sessions going forward.

4. Public comment

Beginning July 1, 2022, school boards, including charter school boards, are statutorily required to allow oral public comment at public meetings before taking final action. *See* Ind. Code §§ 5-14-1.5-3(d) & -3.2.

Jannah Phelps alleges the Board held a public meeting on June 15, 2023, but did not include a public comment opportunity for attendees. At this meeting, the Board approved contracts for the executive director and assistance executive director positions. The Board concedes the omission and chalks it up to unintentional error.

Mistakes certainly happen and we give credit to the Board for admitting the error. Nonetheless, the action taken at the meeting was consequential and affected the school community at large. The comment requirements of the law should be taken seriously by the School and with genuine regard for its constituents. While this office cannot invalidate any action or declare it void, a court certainly can, and these potential consequences should not be taken lightly.

CONCLUSION

Based on the foregoing, it is the opinion of this office that Discovery Charter School violated the Open Door Law regarding two executive sessions by improperly noticing the gatherings and the June 15, 2023, public meeting for taking final action prior to a public comment forum.



Luke H. Britt
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