



# STATE OF INDIANA

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**RE: 23-INF-7; Remote participation**

Dear Ms. Conrad,

This informal opinion explores the provisions of the Indiana Open Door Law relating to remote participation of individual members of a governing body.

## BACKGROUND

In 2021, the Indiana General Assembly enacted legislation—Indiana Code chapter 5-14-1.5-3.5—establishing legal parameters governing school board members participating in meetings virtually. This was in response to the period during the COVID-19 pandemic when executive orders allowed local government units to meet entirely via virtual platforms.

The legislature had an appetite to loosen the rules for practical reasons involving health and safety and other emergent personal considerations. Prior to 2021, local government units, including school boards, did not allow a remote participant to be counted present or vote.

Specifically, the law provides that an individual member can participate remotely in more than two consecutive meetings (or more than 50% of annual meetings) for the following reasons:

- (1) military service;
- (2) illness or other medical condition;
- (3) death of a relative; or
- (4) an emergency involving actual or threatened injury to persons or property.

Ind. Code § 5-14-1.5-3.5(h) & (j).

Here, your inquiry concerns the fourth justified factor in the list: emergency involving actual or threatened injury to persons or property. You seek clarification of those terms in the context of a member who chooses to participate remotely.

## ANALYSIS

### 1. Open Door Law

The Open Door Law (“ODL”) requires the governing body of a public agency to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. *See* 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).

School boards are governing bodies for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). So, unless an exception applies, all meetings must be open at all times to allow members of the public to observe and record.

### 2. Remote participation

It should be noted upfront that before we even begin to address the four factors found at Indiana Code section 5-14-1.5-3.5(h) & (j), we should emphasize that remote participation is an opt-in provision by the governing body. A condition precedent to qualify for remote participation is a written policy drafted by that board setting parameters for electronic participation. Indiana Code section 5-14-1.5-3.5(d) essentially serves as a menu of rules from which governing bodies may pick and choose. At issue here is the following provision from subsection 5(d):

The policy adopted under this section may include:

(1) limiting the number of members who may participate by electronic communication in any one (1) meeting;

(2) limiting the total number of meetings that the governing body may conduct in a

calendar year by electronic communication; and

(3) requiring a member, except in the case of a meeting called to deal with an emergency under section 5(d) of this chapter, who plans to attend a meeting by any electronic means of communication to notify the presiding officer within a certain period of time before the meeting, as specified by the governing body, so that arrangements may be made for the member's participation by electronic communication.

That is why this office published a guide on virtual guidance with the following language:<sup>1</sup>

This [provision] should largely be self-policed at the local level by the presiding officer of the governing body although the PAC will field complaints for any abuses of this provision.

Therefore, if a reason is invoked for remote participation, the burden is on the individual board member to justify its legitimacy. The question of whether that burden is carried is at the discretion of the presiding officer or the remainder of the board. This new statute is not intended to be a license to participate remotely on a whim or because a meeting might be uncomfortable or inconvenient. Read harmoniously with the remainder of the statute, it is for true crises, disasters, or emergencies, and on a limited basis.

Here, an emergency was cited by an individual member of a school board to justify ongoing in-person absences. Although the remote participation statute is relatively new, the term “emergency” is not. The Open Door Law defines emergency as: actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency.<sup>2</sup>

In this case, the cited reason was “condensensing [sic] and threatening tones of expression in emails and actions in executive sessions and Board meetings.” While unfortunate and uncondoned if true, that does not rise to the level of emergency without substantiation. Ideological dissonance or personal disagreements, even if vehement, do not constitute an emergency. There is no indication of any imminent risk or peril to anyone’s physical safety or health. Without more fact or detail, a conclusory statement merely referencing statutory language does not reasonably justify a sustained absence. Bruised feelings are simply not enough.

In sum, the presiding officer of a board is the frontline arbiter of what qualifies as a legitimate excuse for an absence to justify electronic participation.

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<sup>1</sup> <https://www.in.gov/pac/files/1437-guidance-final.pdf>

<sup>2</sup> Ind. Code § 5-14-1.5-5(d)

### 3. Practical considerations

Even if a board member does legitimately invoke a reason for remote participation, that board member becomes extremely limited in the actions they can legally take. While they can be counted present and vote on some items, they are prohibited in taking part in discussion or voting on the following items:

- (1) adopt a budget;
- (2) make a reduction in personnel;
- (3) initiate a referendum;
- (4) establish or increase a fee;
- (5) establish or increase a penalty;
- (6) use the governing body's eminent domain authority; or
- (7) establish, raise, or renew a tax.

Ind. Code § 5-14-1.5-3.5(i). This renders the board member little more than an *ex officio* member in absentia. It would be a disservice to the board member's constituents if an ongoing absence prevented them from taking part in these matters. They would effectively lose representation in these important decisions.

With the passage of the new legislation, the legislature wanted to provide local governing body members with some latitude and flexibility to address routine matters for temporary circumstances, but it was not intended to be a long-term solution. Once the public health emergency expired due to COVID-19, the expectation is that board members show up in person and not rely on a virtual platform to legislate.

Therefore, continued reliance on electronic participation meeting-after-meeting is antithetical to good governance and detrimental to that board member's constituency.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the Open Door Law gives presiding officers discretion to reasonably, but fairly, discern compliance with local policy regarding remote participation.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt  
Public Access Counselor

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