

August 1, 2007

Catherine Hostetler
708 North St. Joseph
South Bend, Indiana 46601-1054

*Re: Formal Complaint 07-FC-197; Alleged Violation of the Open Door Law by the
South Bend Community School Corporation Board of Trustees*

Dear Ms. Hostetler:

This is in response to your formal complaint alleging the South Bend Community School Corporation Board of Trustees (“Board”) violated the Open Door Law (“ODL”) (Ind. Code §5-14-1.5) in meetings held on May 9, 2007 and June 4, 2007. I find that the Board did not violate the ODL.

BACKGROUND

In your complaint you allege that the Board held meetings on May 9 and June 4 concerning a bond issue. You claim the May 9 meeting did not have proper legal notice (specifically, that it was not advertised in the *South Bend Tribune*) and that the June 4 meeting notice was silent on the 1028 hearing. You further claim the June 4 meeting was “conducted in a manner inconsistent with the 1028 hearing process.” Specifically, you claim that at the June 4 meeting, the notice of the meeting did not indicate it was a 1028 hearing, only one option was discussed relative to the Marquette School, there were no handouts for the public, and the Board President indicated the Board would not answer questions. This office received your complaint on July 2.

The Board responded to your complaint by letter on July 18. The Board contends the following:

1. The Board did not violate the ODL requirements or the I.C. §§5-3-1 and 20-26-7-37(b) requirements regarding notice for the June 4 meeting because neither the ODL nor any other statute require the notice to specify every item to be discussed at a meeting.
2. Because publication of the 1028 hearing is governed by I.C. §§5-3-1 and 20-26-7-37(b), the ODL does not apply.

3. Legal notice of the 1028 hearing on June 4 satisfied the requirements of I.C. §§5-3-1 and 20-26-7-37.
4. The Board satisfied the ODL requirements for posting the agenda for the June 4 meeting.
5. The Board complied with the statutory procedures for conducting a 1028 hearing.
6. The Board did not violate the ODL requirements regarding public notice and an agenda for the May 9 meeting.

ANALYSIS

The public policy of the ODL states that the official action of public agencies shall be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. I.C. §5-14-1.5-1. 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. I.C. §5-14-1.5-3(a).

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. I.C. §5-14-1.5-5(a). This section shall not apply where notice by publication is required by statute, ordinance, rule, or regulation. I.C. §5-14-1.5-5(e).

A person or public agency that chooses to file a complaint with the counselor must file the complaint not later than thirty days after:

- (1) the denial; or
 - (2) the person filing the complaint receives notice that in fact a meeting was held by a public agency, if the meeting was conducted secretly or without notice.
- I.C. §5-14-5-7(a).

A complaint is considered filed on the date it is:

- (1) received by the counselor; or
 - (2) postmarked, if received more than thirty days after the date of the denial that is the subject of the complaint.
- I.C. §5-14-5-7(b)

You postmarked your complaint regarding the May 9 and June 4 meetings on June 28, and I received the complaint on July 2. You do not allege your complaint the date on which you received notice that in fact the May 9 meeting was held. As such, the complaint as it relates to the May 9 meeting is untimely under the ODL.

As to your complaints regarding the June 4 meeting, I understand them to be as follows:

- the June 4 meeting notice was silent on the 1028 hearing,
- only one option was discussed relative to the Marquette School,
- the presentation regarding the Marquette School was given facing only the Board members and the public could not see it,

- there were no handouts for the public provided at the meeting,
- the public were told handouts and minutes would be available after the meeting pursuant to a records request and a fee for the copies would be charged, and
- the Board President indicated the Board would not answer questions from the public.

A 1028 hearing is a public hearing required by Ind. Code §20-26-7-37 for construction expenditures in excess of one million dollars for a school building. It is called a “1028 hearing” because it became law through House Bill 1028. I.C. §20-26-7-37 requires public notice under Ind. Code §5-3-1. The notice must state the day, time and place the governing body will meet to discuss and hear objections and support for the proposed construction. I.C. §20-26-7-37(b). Because a statute requires notice by publication for the 1028 hearing, notice under the ODL was not required. I.C. §5-14-1.5-5(e).

Notice for the 1028 hearing was required to be published one time, at least ten days in advance of the hearing, in two newspapers. I.C. §§5-3-1-2(b) and 4(a). The Board has submitted evidence notice was published on May 25 in two newspapers. The Board further provided evidence the notice complied with the requirements of I.C. §20-26-7-37(b), namely date, time and location of the meeting. I find that the Board complied with all notice requirements for the hearing.

Regarding your complaint the 1028 hearing was not listed specifically in the meeting agenda, a governing body is not required to use an agenda for a meeting. If it chooses to use an agenda, the agenda must be posted at the entrance to the meeting location prior to the meeting. I.C. §5-14-1.5-2. There are no requirements for what must be contained in an agenda in the ODL. Since the agenda was posted outside the meeting place prior to the meeting, there was no violation of the ODL.

You further complain that only one option was discussed relative to the Marquette School, the presentation related to this discussion was given facing the Board members, there were no handouts for the public at the meeting, the public members in attendance were told handouts would be available pursuant to a request for records and at a fee, and the Board President indicated the Board would not answer questions. None of these specific issues are addressed by the ODL. In the statute governing the 1028 hearing, the guidance regarding meeting content is that the hearing must include “explanations of the potential value of the proposed project to the school corporation and to the community.” Furthermore, interested parties must be allowed to present testimony and questions. I.C. §20-26-7-37(a).

The Board has provided evidence there was a presentation regarding the potential value of the proposed project. When it was discovered the public could not easily hear and see the presentation of the architect, the Board asked the architect to deliver the presentation again utilizing the technology available so the members of the public present could see and hear it. Further, the Board indicated more than eight individuals offered testimony and asked questions. Furthermore, on several occasions the Board President and the Superintendent invited further testimony and questions. I find the Board did not violate the ODL, or any other statute to my knowledge, relative to the procedural requirements 1028 hearing.

Regarding your complaint that the Board indicated copies of handouts and minutes would be available pursuant to a records request and at a fee, this is appropriate under the Access to Public Records Act (“APRA”) (Ind. Code §5-14-3). The APRA provides that a public agency may require a request for access to (or copies of) public records be made in writing. I.C. §5-14-3-3(a). The public agency may also charge copy fees in accordance with I.C. §5-14-3-8. As such, the Board did not violate the ODL or the APRA by not providing copies free of charge to all who attended the meeting.

CONCLUSION

For the foregoing reasons, I find that the South Bend Community School Corporation Board of Trustees did not violate the Open Door Law.

Best regards,

Heather Willis Neal
Public Access Counselor

cc: Dawn Jones, President, South Bend Community School Corporation Board of Trustees