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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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BENJAMIN S. DALLAS,  
*Complainant,*

v.

PENN-HARRIS-MADISON SCHOOL CORP.,  
*Respondent.*

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Formal Complaint No.  
*23-FC-5*

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Kristopher L. Cundiff  
Deputy Public Access Counselor

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CUNDIFF, opinion of the counselor:

This advisory opinion is in response to a formal complaint alleging that the Penn-Harris-Madison School Corporation, through its Board of School Trustees, violated the Open Door Law.<sup>1</sup> Attorney Julia Church Kozicki filed an answer on behalf of the school corporation. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the

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<sup>1</sup> Ind. Code § 5-14-1.5-1-8.

formal complaint received by the Office of the Public Access Counselor on January 18, 2023.

### **BACKGROUND**

On January 18, 2023, Benjamin S. Dallas<sup>2</sup> filed a complaint against Penn-Harris-Madison School Corporation (PHM) alleging a violation of the Open Door Law (ODL). In essence, Dallas argues the PHM Board of School Trustees (Board) violated the Open Door Law by failing to allow the public to comment on the agenda topic before taking final action on the issue.

Specifically, Dallas contends the Board did not allow the public to comment on the election of officers for 2023 before taking final action on the issue.

On February 7, 2023, PHM filed an answer with this office.

First, the Board does not dispute that four members of the public—including Dallas—signed up to speak about the agenda item concerning the election of 2023 board officers. Although they were given the chance afterward, the Board acknowledges the four attendees were not given the opportunity to comment on the issue before the final vote.

Even so, the Board argues its error was unintentional and did not impact the result.

Second, the Board contends that failure to provide the opportunity to comment will not void the result. Even though the Board concedes that the ODL requires a school

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<sup>2</sup>Tracy D. Coda and Kristie L. Wittl also filed substantially similar complaints against the PHM Board. These complaints are incorporated by reference.

corporation to allow oral public comment on a topic before taking final action, the Board asserts that a failure to allow public comment is not the type of action that a court can declare void under the law.

Third, the Board asserts that the public comment statute is not intended to address internal governance functions. The Board notes that the ODL requires public comment before a governing body takes final action on a topic but does not define topic. The Board argues that the election of officers is a ministerial internal governance function of the board required by statute; and thus, is not a topic covered by the public comment statute.

## 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).

Penn-Harris-Madison 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. Moreover, the Board of School 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.

### **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. Public comment at school board meetings**

The primary issue in this complaint is whether the annual election of school board officers qualifies as a topic for purposes of the Open Door Law's public comment requirement.

Under the ODL, the governing body of a school corporation or charter school must allow oral public comment at a meeting.<sup>3</sup> Specifically, the ODL provides:

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; and

(2) may allow a member of the public to provide oral public comment during a meeting conducted under section 3.7 of this chapter.

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.

Ind. Code § 5-14-1.5-3(d). Here, the parties agree that the Board failed to provide four members of the public the opportunity to speak on the agenda item concerning the election of officers before the vote.

Although the Board describes this as an unintentional error, it argues it did not impact the result, is not a voidable action,

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<sup>3</sup> Ind. Code § 5-14-1.5-3.2.

and is not a topic the public comment statute intends to address.

### **2.1 Defining the term topic**

The Open Door Law does not define the word “topic” for purposes of the public comment statute. *See* Ind. Code § 5-14-1.5-3(d). As a result, this office is required to liberally construe the provisions in the law. Ind. Code § 5-14-1.5-1.

Contextually, the statute informs us that a topic—at minimum—is a matter that a governing body takes final action on. 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).

As a result, any public business that requires a vote by the Board is arguably a topic that requires public comment before the vote. The possibilities are undoubtedly vast. We need not explore them all here.

The topic at issue in this case is the statutorily mandated selection of school board officers. Even if this action is properly described as ministerial, the selection of officers is indeed a topic for purposes of the ODL’s public comment requirement.

As a result, the four members of the public should have been given the opportunity to speak on the issue before the Board took final action. This office commends the Board for acknowledging the error and providing the attendees the opportunity to speak albeit after the vote.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the election of school board officers qualifies as a topic for purposes of the Open Door Law's public comment requirement.

A handwritten signature in black ink that reads "Kristopher Cundiff". The signature is written in a cursive style with a large initial 'K' and a long, sweeping tail on the 'f'.

Kristopher L. Cundiff  
Deputy Public Access Counselor

A handwritten signature in black ink that reads "Luke H. Britt". The signature is written in a cursive style with a large initial 'L' and a long, sweeping tail on the 't'.

Luke H. Britt  
Public Access Counselor

Issued: March 14, 2023