



# STATE OF INDIANA

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January 14, 2009

Terry Turner  
Starke County NewsHawk  
4 South Main  
Knox, Indiana 46534

*Re: Formal Complaint 09-FC-10; Alleged Violation of the Open Door Law by  
the Knox Community Schools Board of Trustees*

Dear Mr. Turner:

This advisory opinion is in response to your formal complaint alleging the Knox Community Schools Board of Trustees ("Board") violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) by conducting an improper executive session. A copy of the Board's response to the complaint is enclosed for your reference. In my opinion the Board has not violated the ODL.

## BACKGROUND

You filed a complaint on December 16, 2008, raising a number of issues. Because issues of election law and issues of the duties of the superintendent are outside the purview of the public access counselor, I here address only the issue you raise relating to the ODL. You allege that the Board must have discussed the decision to contest Mr. Marcum's election in a meeting closed to the public. Further, you allege the Board violated the ODL when it did not answer questions you posed during a public meeting.

The Board responded to the complaint by electronic mail message dated December 29 from Interim Superintendent Dr. Jacqueline Berry. The Board contends notice was posted in accordance with the ODL regarding the December 15 executive session at issue. Further, the Board contends it was authorized to conduct an executive session to discuss strategy with its attorney regarding whether it should challenge Mr. Marcum's eligibility to serve on the Board. The Board also contends that it discussed strategy with respect to collective bargaining. Finally, the Board contends it discussed interview materials related to the search for a permanent superintendent and cites "criteria #4."

The Board contends that discussion and official action as to how to proceed regarding Mr. Marcum's eligibility was done during a public meeting. The Board

contends it voted to authorize the Board attorney to file with Mr. Marcum and his attorney for declaratory judgment, and, if Mr. Marcum declined this action, to file for declaratory judgment on behalf of the school.

Further, the Board contends the superintendent has the authority to seek legal advice from the attorney and to instruct the attorney to send communications on behalf of the School. Finally, the Board contends it was not required to respond to your questions at the December 15 meeting.

## ANALYSIS

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, 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 Open Door Law, 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).

Regarding notice, the ODL provides the following:

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 (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. . .  
I.C. § 5-14-1.5-5(a).

Further,

Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). . .  
I.C. § 5-14-1.5-6.1(d).

Here, the Board contends notice was posted in accordance with the ODL. I do not understand your complaint to include an allegation that sufficient notice was not posted for the executive session. Rather, you complain that the Board was not authorized to conduct an executive session to discuss the issues presented by Mr. Marcum's election and was not authorized to make a decision during an executive session about legal action relating to Mr. Marcum.

The Board contends it was authorized to conduct the executive session. Dr. Berry refers to "criteria #2B," "criteria #2A," and "criteria #4." While this is not the nomenclature generally used, I would interpret that to mean the Board relied on subsections (b)(2)(A), (b)(2)(B), and (b)(4) of I.C. § 5-14-1.5-6.1 as authorization to conduct the executive session to discuss Mr. Marcum's status and consider legal action.

I.C. § 5-14-1.5-6.1(b) provides, in part, the following:

Executive sessions may be held only in the following instances:

- (2) For discussion of strategy with respect to any of the following:
  - (A) Collective bargaining.
  - (B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing. . .

The Board contends it was authorized to conduct an executive session on the basis of I.C. § 5-14-1.5-6.1(b)(2)(A) because the Board is currently involved in contract negotiations with the teachers' association. The Board contends that collective bargaining was discussed at the December 15 executive session. Certainly the Board is authorized to conduct an executive session to discuss strategy with respect to collective bargaining, pursuant to I.C. § 5-14-1.5-6.1(b)(2)(A).

Further, the Board contends it was authorized to conduct an executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) to discuss strategy with respect to initiating litigation related to Mr. Marcum's election to the Board. This, too, was appropriate in my opinion, as I.C. § 5-14-1.5-6.1(b)(2)(B) specifically authorizes the Board to discuss strategy with respect to initiating litigation, which is what the Board was considering.

Finally, the Board contends it was authorized to conduct an executive session on the basis of I.C. § 5-14-1.5-6.1(b)(4) to discuss the interview materials of candidates for superintendent. In my opinion, the Board incorrectly cited I.C. § 5-14-1.5-6.1(b)(4), which authorizes an executive session for interviews and negotiations with industrial or commercial prospects. Hiring a superintendent does not fall under this exception. In my opinion this is a technical violation of the ODL, though, because I.C. § 5-14-1.5-6.1(b)(5) does allow an executive session to "receive information about and interview prospective employees." If during the executive session the Board received information about superintendent candidates, in the form of application or interview materials, that conduct would be authorized by I.C. § 5-14-1.5-6.1(b)(5).

As such, it is my opinion the Board was authorized to conduct an executive session on December 15 to discuss matters which fell under these three instances, so long as notice was posted in accordance with I.C. § 5-14-1.5-5 and I.C. § 5-14-1.5-6.1(d).

You allege that the Board made decisions during executive session and those decisions should have been made during an open meeting. A final action must be taken at a meeting open to the public. I.C. § 5-14-1.5-6.1(c). "Final action" means a vote by a governing body on a motion, proposal, resolution, rule, regulation, ordinance or order. I.C. § 5-14-1.5-2(g). If the Board made the decision during executive session to initiate litigation, that action would have been permissible pursuant to *Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001), so long as a vote was not taken at the executive session.

In *Baker*, Town Marshal Baker alleged that during an executive session to discuss his job performance, the Town Council had violated the ODL by compiling a list of persons to be rehired and keeping his name off the list. The list was later used in a public meeting to make decisions on who would be rehired. The court held that the compilation of the list was not "final action" and that creating the list did not go beyond the scope of the General Assembly's expressed intent to permit governing bodies the ability to meet privately to discuss certain personnel matters. Instead, the court said the "final action" consisted of the Council's vote at the public meeting. *Id.* at 71. Similarly, any decisions made by the Board during executive session in the present matter would not constitute final action. Final action was the vote on the motion to proceed with the two-pronged approach, and that vote was taken during a meeting open to the public.

Further, you allege the Board violated the ODL when it declined to answer your questions posed at its December 15 public meeting. Indiana law only requires that public meetings be open; it does not require that the public be given the opportunity to speak. *Brademas v. South Bend Cmty. Sch. Corp.*, 783 N.E.2d 745 (Ind. Ct. App. 2003), *trans. denied*, 2003. Further, nothing in the ODL requires that if an agency does allow a person to speak, it must answer questions posed. As such, it is my opinion the Board did not violate the ODL by declining to answer your questions.

Finally, you raise issues related to the superintendent's actions working with the attorney. Nothing in the ODL or other public access law addresses which duties fall upon a Board and which duties may be carried out by the superintendent. As such, this issue is outside the purview of this office.

#### CONCLUSION

For the foregoing reasons, it is my opinion the Board has not violated the ODL.

Best regards,



Heather Willis Neal  
Public Access Counselor

Cc: Dr. Jacqueline Berry, Knox Community Schools Board of Trustees