



STATE OF INDIANA

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August 27, 2012

Scott B. Smith
916 Monon Road
Lowell, Indiana 46356

*Re: Formal Complaint 12-FC-209; Alleged Violations of the Open Door Law by
the Valparaiso Community School Board*

Dear Mr. Smith:

This advisory opinion is in response to your formal complaint alleging the Valparaiso Community School Board (“Board”) violated the Open Door Law (“ODL”), Ind. Code § 5-14-1.5-1 *et seq.* David L. Hollenbeck, Attorney, responded on behalf of the Board. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on June 19, 2012 the Board violated the ODL by taking a vote on “Personnel Recommendations and Requests” without discussing its subsection in any detail. At the commencement of the June 19, 2012 meeting, the Board voted on a consent agenda which contained, among other items, the following:

6. Personnel Recommendations and Requests – Attachment 6

You provide that the Board did not give the public the opportunity to review “attachment 6” prior to the vote being taken. The Board simply voted to approve the consent agenda, which you infer that the public was not made aware of what the Board was actually voting on when it approved the consent agenda.

Thereafter, rumors began to circulate that many of the teacher’s aides who were employed by the School system had been terminated during the June 19, 2012 board meeting via the Board’s vote on the Personnel Recommendations and Requests. The letter of termination received by the aides indicated that their positions had been terminated at the June 19, 2012 meeting. You do not recall any discussion by the Board of this issue. You allege that the Board should have told you about the terminations prior to the vote, or at a minimum should have read the title “terminations” prior to taking the

vote. You were informed by Ms. McLinn, Board member, that the terminations were part of the consent agenda at the June 19, 2012 meeting. After the minutes of the June 19, 2012 meeting were made available, you were still unable to determine if the board terminated the positions as a result of the vote. Dr. McCall, interim Superintendent, in response to your inquiry on July 25, 2012 that “As it was a personnel item, it was in the consent agenda for that month. Discussion on that item or any of the personnel items in the consent agenda did not occur immediately preceding that vote at the meeting.”

You also provide that the Board held executive sessions on June 12, 2012 and July 11, 2012 but did not disclose the subject matter of the meetings. You provide that assuming the Board discussed the terminations and staff changes during these executive sessions, the sessions were inappropriate in light of the requirements of the ODL. You do concede that your opinion is based on speculation, as you have been unable to certify the subject matter of the executive sessions.

In response to your formal complaint, Mr. Hollenbeck advised that there is no statutory requirement that a governing body engage in any discussion regarding a particular agenda topic. Regardless, Mr. Hollenbeck disagrees with your characterization of the Board action’s regarding the teacher aides. Public school systems throughout Indiana are financially challenged due to a combination of issues. State funding has been reduced and local funding constrained by property tax reforms. In late 2011, the Valparaiso Community Schools determined there to be a need to cut approximately 3 million dollars in educational expenditures. This realization was culminated after a series of public discussions, meetings, and workshops addressing the issue. There were a total of eight meetings and public work sessions held between December 20, 2011 and June 19, 2012. Anyone present was allowed an opportunity to have input on the fiscal reduction plan. As the minutes reflect from these sessions reflects, reduction in the number of teacher aides retained by the School was included in the fiscal reduction plan since its inception.

Prior to the June 19, 2012 public meeting, the School retained a total of 172 instructional aides. The fiscal plan called for a reduction of approximately 100 aides. The minutes of the April 17, 2012 meeting of the Board provide that this issue was discussed in great detail with specific reference to the reduction of the number of aides. Further, discussion took place at the December 20, 2011, January 10, 2012, February 21, 2012, March 6, 2012, March 20, 2012, April 17, 2012, and May 16, 2012 meetings. Final action on the fiscal reduction plan took place at the June 19, 2012 meeting which included the termination of all 172 instructional aides and the rehiring of approximately 70 aides. This was accomplished by the Board as part of the agenda item concerning “personnel recommendation and requests presented by the Superintendent.” All of the personnel recommendations and request were attached to the agenda as “Attachment 6.” Although the fiscal reduction plan caused the personnel recommendations and requests to be voluminous, it is the common practice of the Board to receive and consider personnel recommendations and requests from the Superintendent under one agenda item. Mr. Hollenbeck advised that it would be unrealistic and not legally required for the Board to read a list of 172 aides who were to be terminated and another list of the 70 aides who

were going to be rehired. The School Administration had met with each of the aides prior to the June 19, 2012 meeting and each aide was informed of the personnel action anticipated at the June meeting.

In reviewing the June 19, 2012 Board meeting minutes, specific reference was made to the consent agenda and pursuant to a Board member request, the consent agenda was modified. With the consent agenda, specific reference is made to the personnel matters, which is reflected in the minutes. The Board is also cognizant of the need to protect confidential information which often appears in the personnel recommendations and requests, which would include personal health information. In sum, the termination of 172 instructional aides and reemployment of approximately 70 aides was done in conjunction with a comprehensive fiscal reduction plan adopted over the course of six months at eight separate Board meetings. Final action was taken at an open meeting in conjunction with personnel recommendations and requests of the Superintendent as presented to the Board under the consent agenda item line; all of which is confirmed and substantiated by the meeting minutes and agenda items.

ANALYSIS

It is the intent of the ODL 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. *See* I.C. § 5-14-1.5-1. Accordingly, 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. *See* I.C. § 5-14-1.5-3(a).

A “meeting” is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See* I.C. § 5-14-1.5-2(c). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). “Public business” means any function upon which the public agency is empowered or authorized to take official action.

The ODL provides no guidelines for the content or structure of a meeting agenda, and this office has indicated that an agenda can take essentially any form. *Opinion of the Public Access Counselor 04-FC-02 and 08-FC-17*. A governing body of a public agency is not required to use an agenda, but if it chooses to utilize one, the agency must post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. *See* I.C. § 5-14-1.5-4(a). If a public agency utilizes an agenda, the ODL does not prohibit it from changing or adding to the agenda during the meeting. *See Opinion of the Public Access Counselor 04-FC-166; 09-FC-40; and 12-FC-43*. Further, the ODL does not require that a governing body to deliberate prior to final action being taken. “Final action” is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). However, a rule, regulation, ordinance, or other final action adopted by reference to the agenda number or item alone is void. *See* I.C. § 5-14-1.5-4(a). As applicable here, it is my opinion that the

Board did not violate the ODL, as there is no requirement that deliberation occur prior to final action being taken. Further, it is my opinion that the Board did not violate I.C. § 5-14-1.5-4(a) by adopting (i.e. voting) on the measure by reference to agenda number of item alone. The minutes of the June 19, 2012 meeting detail that the personnel recommendations and request item was modified prior to final action being taken and within the agenda, specific reference is made to personnel matters. From the Board's response, it is apparent that it was not aware at the June 19, 2012 meeting of any confusion regarding the issues that you have raised in your formal complaint. In the future should the Board become aware of any such confusion during a public meeting concerning an item that is under consideration for final action, I would encourage the Board to respond to any inquiries prior to final action being taken.

I would note that notice of an executive session must be given 48 hours in advance, excluding nights and weekends, and contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and list the specific statutory citation. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.* In order to satisfy the requirements of 6.1(d), a proper notice for an executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(9) would include, in addition to the time, date, and location of the executive session, the following statement: "To discuss a job performance evaluation of an individual employee pursuant to I.C. § 5-14-1.5-6.1(b)(9)." The executive session notice provided by the Board for the July 11, 2012 executive session cited I.C. § 5-14-1.5-6.1(b)(5), but failed to provide the actual language of (b)(5) (i.e. "to receive information about and interview prospective employees"). In the future, in order to comply with the requirements of I.C. § 5-14-1.5-6.1(d), the Board would need to provide the actual language of the statute in addition to citing to the statute itself.

CONCLUSION

Based on the foregoing, it is my opinion that the Board did not violate the ODL.

Best regards,



Joseph B. Hoage
Public Access Counselor

cc: David L. Hollenbeck