STATE OF INDIANA

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October 30, 2012

Kim Kilbride
225 W. Colfax Avenue
South Bend, Indiana 46626

Re: Formal Complaint 12-FC-287; Alleged Violation of the Open Door Law by the South Bend Community School Corporation

Dear Ms. Kilbride:

This advisory opinion is in response to your formal complaint alleging the South Bend Community School Corporation ("School") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq*. Our office forwarded a copy of your formal complaint to the School. As of today's date, we have yet to receive a response.

BACKGROUND

In your formal complaint, you provide that the School Board held an executive session on September 19, 2012. The executive session was attended by School Board members, the School Superintendent, and an architectural firm that had previously been hired to conduct a feasibility study relating to potential school closures. The School Board cited I.C. § 5-14-1.5-6.1(b)(2)(B) as the exception allowing for the executive session. The Board President thereafter commented that the executive session was held to discuss the consent decree requiring racial desegregation.

You argue that the I.C. § 5-14-1.5-6.1(b)(2)(B) only covers pending or threatened litigation, not litigation that has already been settled. Further, one of the School Board members has stated that the discussion that occurred during the executive session went beyond matters related to the consent decree, including issues related to vacant buildings and the condition of each building discussed for closure

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).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). Exceptions listed pursuant to the statute include receiving information about and interviewing prospective employees to discussing the job performance evaluation of an individual employee. *See* I.C. § 5-14-1.5-6.1(b)(5); § 5-14-1.5-6.1(b)(9). A governing holding an executive session may admit those persons necessary to carry out its purpose. *See* I.C. § 5-14-1.5-2(f). The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). "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).

Notice of an executive session must be given 48 hours in advance of every session and must 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 the citation to the specific instance; hence, "To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-1.5-6.1(b)(9)" would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.*

I.C. § 5-14-1.5-6.1(b)(2)(B) provides that:

> (b) Executive sessions may be hold only in the following instances:
> (2) For *discussion of strategy* with respect to any of the following:
> (B) Initiation of litigation or litigation that is either pending or has been threatened in writing.
>
> However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.

Without the benefit of a response from the School, it is difficult for me to issue an opinion as to whether it complied with the requirements of the ODL, specifically I.C. § 5-14-1.5-6.1(b)(2)(B), as to the September 19, 2012 executive session. The burden would be on the School to demonstrate that it complied with the requirements of law. I would agree with your assertion that based on the plain language of I.C. § 5-14-1.5-6.1(b)(2)(B), the litigation must either be pending or have been threatened in writing. From what has been provided, I am unable to issue an opinion if the consent decree is still considered to be pending before the federal court. It is possible that the School has ongoing reporting requirements to the federal court in order to show compliance with any Order that has been issued. If the litigation has been settled, this would prevent a governing body from

meeting in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B).[1] Based on my review of the record that has been presented, it is my opinion that the School has failed to meet its burden to demonstrate that it has complied with the requirements of the I.C. § 5-14-1.5-6.1(b)(2)(B) as it relates to the September 19, 2012 executive session.

As to the allegations that have been made by certain School Board members that discussions that occurred during the September 19, 2012 executive session went beyond what the statute would allow, governing bodies that conduct meetings are required to keep memoranda. I.C. § 5-14-1.5-4(b) provides that the following memoranda shall be kept:

> (1) The date, time, and place of the meeting.
> (2) The members of the governing body recorded as either present or absent.
> (3) The general substance of all matters proposed, discussed, or decided.
> (4) A record of all votes taken, by individual members if there is a roll call.
> (5) Any additional information required under I.C. § 5-1.5-2-2.4. I.C. § 5-14-1.5-4(b).

In the case of executive sessions, the memoranda requirements are modified in that the memoranda "must identify the subject matter considered by specific reference to the enumerated instance or instances for which public notice was given." *See* I.C. § 5-14-1.5-6.1(d). The public agency must also certify in a statement in the memoranda that no subject was discussed other than the subject specified in the public notice. Id.

Only those members who were in attendance at the September 19, 2012 executive session would be able to speak as to what exactly was discussed during the executive session. As noted *supra*, the memoranda of the executive session must contain a statement that no subject was discussed other than the subject specified in the public notice. If the consent decree is considered to still be pending before the federal court, it is my opinion that the School would be able to discuss how the closure of a certain schools would affect the School's compliance with the consent decree. However, the School would not be allowed to have an open, general conversation as to all of the pros and cons of closing certain schools pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B). Further, the public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* As such, *if* the discussions that occurred during the September 19, 2012 executive session were limited to what was provided in the notice, it is my opinion that the School did not violate the ODL (emphasis added).

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[1] I would also note that the General Assembly during the 2012 Legislative Session amended the ODL so as to allow governing bodies to meet in executive session to discuss school consolidation. *See* I.C. § 5-14-1.5-6.1(b)(2)(E). This exception would not be applicable here though as the notice provided by the School for the September 19, 2012 executive session only cited to I.C. § 5-14-1.5-6.1(b)(2)(B).

CONCLUSION

Based on the foregoing, it is my opinion that the School has failed to meet its burden to demonstrate that the September 19, 2012 executive session complied with the requirements of I.C. § 5-14-1.5-6.1(b)(2)(B). Further, it is my opinion that *if* the discussions that occurred during the September 19, 2012 executive session were limited to those topics provided for in the notice of the executive session, then the School did not violate the ODL.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: South Bend Community School Corporation