



STATE OF INDIANA

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December 14, 2010

Director Eric B. Knox
1904 E. Southdowns Dr.
Bloomington, IN 47401

Re: Formal Complaint 10-FC-309; Alleged Violation of the Open Door Law by the Monroe County Community School Corporation

Dear Director Knox:

This advisory opinion is in response to your formal complaint alleging the Monroe County Community School Corporation ("School Corporation" or "Board") violated the Open Door Law ("ODL") I.C. § 5-14-1.5-1 *et seq.* I granted your request for priority status pursuant to 62 Ind. Admin. Code 1-1-3(3). The School Corporation's response is enclosed for your reference.

BACKGROUND

You allege that on December 1, 2010, the Board posted a notice of a December 7th executive session. The notice cited "IC 5-14-1.5-6.1(2)(b)(5) [sic]," and stated "The Board of School Trustees of the Monroe County School Corporation will meet in Executive Session at 5:00 PM, Tuesday, December 7, 2010, in the Administration Center, which is located at 315 E. North Drive in Bloomington, Indiana. The purpose of this Executive Session is to discuss personnel matters" (the "Notice").

You allege that the Notice conflicts with a statement by the president of the Board, D. Jeannine Butler. During a work session on November 30th, Ms. Butler was discussing a proposal to form an executive committee chaired by the acting superintendent of the School Corporation -- instead of hiring an interim superintendent -- to fill the role of superintendent following the departure of the current superintendent. At the end of the November 30th meeting, Ms. Butler mentioned the December 7th executive session and said that the Board "hope[d] to discuss the filling of the interim position" at that meeting. She also mentioned that the board hoped to come to "some solution as to how we can have someone, or some set of people, sitting in the superintendent's office come January 1." Later, the *Herald-Times* reported that the Board would meet in executive session to discuss filling the superintendent position on

an interim basis and, “provided [the board] reaches a decision, will announce it to the public at its Dec. 14 meeting.”

You argue that the Board cannot discuss the proposal in executive session based on the statutory provision cited in the Notice. Rather, the policy changes posited in the proposal must be discussed in a public meeting, and any final action must be taken publicly as well. You note that you are seeking clarification as to whether the Board should cite to another provision in the ODL if it is to meet in executive session to discuss the appointment of a current employee as acting superintendent.

In response to your complaint, Thomas Bunger, attorney for the Board, argues that the Notice was posted in accordance with the ODL. He states that the intent of the Board was merely “[t]o receive information about and interview perspective employees” under subsection (b)(5) of the ODL. Specifically, the Board sought to interview interim superintendent candidates. Mr. Bunger claims that the School Corporation recognizes that the proposal to appoint an executive committee of principals and curriculum directors to operate the School Corporation could not be discussed in an executive session. That is why the Board conducted its November 30th work session in a public meeting.

Mr. Bunger also acknowledges your request for clarification as to whether the appointment of a current employee as acting superintendent and chair of a committee would require a reference to a provision in the ODL other than subsection (b)(5). However, he says that because no mechanism exists for such a committee in the policies or procedures of the School Corporation, the Board will have to take that action in a public meeting before even discussing candidates for such a committee.

ANALYSIS

The General Assembly enacted the ODL with the intent that the official actions 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. 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. 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. . .

* * *

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. §§ 5-14-1.5-5(a); 5-14-1.5-6.1(d). The ODL does not permit executive sessions for general “personnel matters.” However, several provisions in the section regarding executive sessions pertain to the discussion of “personnel matters,” including interviewing prospective employees, receiving information concerning alleged employee misconduct, and discussing job performance of an employee. All three instances are discrete instances of the executive session provisions that must be specifically referenced in the notice.

Here, the Board cited to “IC 5-14-1.5-6.1(2)(b)(5),” which does not exist, but which I assume was an attempt to cite to I.C. § 5-14-1.5-6.1(b)(5). That provision allows 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 materials or interviews, that conduct would be authorized by I.C. § 5-14-1.5-6.1(b)(5). Although the Board attempted to cite to an applicable provision of the ODL, the Board failed to include the associated subject matter in the meeting when it listed “personnel matters” as the topic of discussion. To be fully compliant with the ODL, the Board should have cited to I.C. § 5-14-1.5-6.1(b)(5) and stated that the meeting was for the purpose of receiving information about and interviewing perspective employees under.

The School Corporation avers that it did not take any action other than what is permitted under subsection (b)(5) of the ODL. The School Corporation agrees that a final action must be taken at a meeting open to the public under I.C. § 5-14-1.5-6.1(c). “Final action” means a vote by a governing body on a proposal, motion, resolution, rule, regulation, ordinance or order. I.C. § 5-14-1.5-2(g). Thus, the Board should not vote on the proposal unless it does so in a public meeting. Moreover, because personnel *policies* are not permissible subjects for discussion under section 6.1 of the ODL, discussion of the proposal should occur in a public meeting as well.

If the Board holds an executive session under subsections (b)(9) and/or (b)(10) of the ODL, the Board should confine its discussion and actions to those permitted by those subsections. As to whether the Board may meet in executive session to discuss whether to appoint a current employee as acting superintendent and chair of an executive committee, in my opinion the ODL does not provide that authority. Subsection (b)(10) permits governing bodies to meet in executive session at certain stages during the process of appointing a public official, but I do not see a provision in the ODL that would allow a governing body to meet in executive session to discuss the creation or modification of a public official’s *position*. If the Board chooses to adopt the proposal and then proceeds to appointing an official to the new position, the Board could meet in executive session in accordance with subsection (b)(10), provided that the appointee meets the definition of a “public official” in I.C. § 5-14-1.5-6.1(a).

CONCLUSION

For the foregoing reasons, it is my opinion that the School Corporation failed to comply with the ODL because the notice of its December 7th executive session cited to the incorrect provision of the ODL and listed a non-applicable reason for conducting an executive session. The School Corporation has not otherwise violated the ODL.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive style with a large, sweeping initial 'A'.

Andrew J. Kossack
Public Access Counselor

cc: Thomas Bunger