STATE OF INDIANA

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November 1, 2012

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

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

Dear Ms. Kilbride:

This amended 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.*[1] Amy Steketee, Attorney, issued a written response on behalf of the School to your formal complaint.

BACKGROUND

In your formal complaint, you provide that the School Board ("Board") held an executive session on September 19, 2012. The executive session was attended by 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 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 ("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

In response to your formal complaint, Ms. Steketee advised that the School Board met in executive session on September 19, 2012 pursuant to I.C. § 5-14-3-4(b)(2)(B) to

[1] On October 30, 2012, an advisory opinion was issued in response to the formal complaint without the benefit of a response from the School. It was later determined that the School attempted to submit a response, however due to technology issues, it was never received by our office. Accordingly, an amended advisory opinion is now being issued with the benefit of having reviewed the response that the School has initially attempted to submit.

discuss the potential closure of certain school buildings in light of the School's ongoing obligations to the U.S. Department of Justice ("DOJ") in *United States of America v. South Bend Community School Corporation*, Case No. 3:80-cv-00035-TLS, which has been pending in the Northern District of Indiana Federal Court ("Court") since 1980.

On February 8, 1980, the Court approved a Consent Decree between the School and the DOJ addressing a complaint of race discrimination. The Consent Decree set out numerous obligations to be undertaken by the School to promote desegregation. The obligations of the Consent Decree continue until the School attains unitary status. A school district attains unitary status when a district has been desegregated and the Court determinates that district has eliminated the vestiges of past discrimination. The Court retains and continues to exercise jurisdiction over the lawsuit until unitary status is attained. The School and DOJ have modified the Consent Decree over the years but to date, the School has yet to attain unitary status.

In 2011, the School undertook a comprehensive evaluation of its facilities to provide School administration and the Board with the information needed to evaluate redistricting options, the possibility of building consolidation, and future capital costs. To that end, the Board authorized an architectural firm to collect data and prepare a comprehensive facilities study. In March 2012, the preliminary results of the study were presented to the Board at its regular meeting. At the presentation, the firm demonstrated how GIS mapping tools could be used to evaluate school consolidations and attendance boundary adjustments. The final report was shared with the Board at its regular meeting on June 18, 2012. In the spring of 2012, the Board adopted a comprehensive Budget Reduction Plan, which called for a reduction of approximately $12 million from the School's annual general fund expenditures. Among the cuts contemplated was the possible closure of school buildings.

Having obtained essential data from the comprehensive facilities study and received direction from the Board to pursue School closures, the Superintendent began the process of evaluating redistricting options and identifying buildings to consolidate. As the closure of a school building or alteration of any attendance boundary would require a modification to the School's current student assignment plan, the Superintendent began consulting with legal counsel to identify a plan that would comply with the School's various obligations under the Consent Decree and likely be acceptable to the DOJ and the Court. The Consent Decree requires the percentage of African American students in each school to be within 15 percentage point of the total percentage of African-American students in the school corporation. It also requires that students of other national origins to not be subjected to extreme isolation. Further, it requires equity with response to transportation, education and extracurricular programs, staff training, curriculum evaluation and revision, facilities comparability, and discipline practices. As any modification to the student attendance plan must take into account the racial composition of students, it was imperative the Superintendent to utilize the GIS mapping tools made available through the architectural firm.

By September 2012, the Superintendent was prepared to discuss some of the alternatives she had identified, including the various advantages, disadvantages, and legal risks and implications with the Board. As discussion of any of these options required advice of legal counsel regarding the School's ongoing obligations as part of the desegregation lawsuit, accordingly an executive session was scheduled for September 19, 2012. The meeting was properly noticed and provided it was being held pursuant to the allowance under I.C. § 5-14-1.5-6.1(b)(2)(B).

On September 19, 2012, the Board met in executive session with the Superintendent, legal counsel, and two individuals affiliated with the architectural firm that prepared the facilities study and provided access to GIS mapping tools in order to discuss possible building consolidation options and changes in attendance boundaries. The meeting was facilitated by legal counsel, who prepared and delivered a power point presentation titled, "Legal Issues Related to Possible School Closures and Changes in Attendance Boundaries." The presentation included a discussion of the School's ongoing obligations under the Consent Decree, the School's current compliance with the Consent Decree, and the process of seeking a modification to the Consent Decree. The Board did not take any final action during the executive session.

As to the allegations contained in your formal complaint, the Board would argue that it could properly meet in executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) in regards to the Consent Decree as the litigation involving the DOJ is still pending before the Court. As provided, a desegregation case is not dismissed by the Court when a Consent Decree is entered into by the parties and approved by the Court. As the Court has yet to find that the School has attained unitary status, the lawsuit is still pending and thus the School would be allowed to meet in executive session pursuant to (b)(2)(B) to discuss issues related to the Consent Decree.

As to the allegation that discussions during the September 19, 2012 executive session went beyond the Consent Decree, Ms. Steketee advised that you did not attend the executive session and are not aware of the topics that were discussed; nor are you aware of the context surrounding any discussion on the particular topics that have been alleged to be inappropriate. Your allegations are based on the report of a single Board Member, who chose not to file a complaint with the Public Access Counselor's Office. The Board Secretary, Michel Engel, has certified in the minutes from the executive session that the only topic discussed where those referred to in the public notice. As provided, the discussion at the September 19, 2012 executive session dealt with the School's ongoing obligations under the Consent Decree, the School's current compliance with the Consent Decree, and the process of seeking a modification to the Consent Decree. The obligations under the Consent Decree are quite broad. Among other things, the School is obligated under the Consent Decree to ensure equity in facilities comparability, to allocate revenues to building modifications, and make program changes necessary to promote the success of amendments that have been entered into under the Consent Decree. Thus, the information concerning the condition of school building and the funding devoted to building modification is directly relevant, in the appropriate context, to the School desegregation lawsuit, its ongoing obligations to the DOJ and the

Court, and its desire and need to modify those obligations. As to the Board Member who expressed concern about the issues that were discussed at the executive session, Ms. Steketee advised that the Board member may not have understood why the condition of a particular building or the School plans for that building is relevant to whether the DOJ and Court would approve a modification to the Consent Decree or any amended plan previously issued.

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.

The burden would be on the School to demonstrate that it complied with the requirements of the ODL. I 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. The School has provided that it met in executive session on September 19, 2012 pursuant to I.C. § 5-14-3-4(b)(2)(B) to discuss the potential closure of certain school buildings in light of the School's ongoing obligations to the DOJ in *United States of America v. South Bend Community School Corporation*. On February 8, 1980, the Court approved a Consent Decree between the School and the DOJ. The Consent Decree set out numerous obligations to be undertaken by the School to promote desegregation. The Court retains and continues to exercise jurisdiction over the lawsuit until unitary status is attained. A school district attains unitary status when a district has been desegregated and the court determinates that district has eliminated the vestiges of past discrimination. While the School and DOJ have modified the Consent Decree over the years, to date the School has not attained unitary status. As such, it is my opinion that the School has met its burden to demonstrate that it complied with I.C. § 5-14-1.5-6.1(b)(2)(B) as to the September 19, 2012 executive session that was held to discuss the Consent Decree and thus did not violate the ODL.

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. 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.* You provide that a current member of the Board who was in attendance at the September 19, 2012 executive session stated that the discussion went beyond the Consent Decree to matters concerning what would become of vacant school buildings and the condition of each building. In response, the School has provided that it met in executive session to discuss the potential closure of certain school buildings in light of the School's ongoing obligations under the Consent Decree. The discussions were limited its ongoing obligations under the Consent Decree, its current compliance with the Consent Decree, and the process of seeking a modification to the Consent Decree. Further, the School Board's Secretary certified in the minutes from the executive session that the only topic discussed where those referred to in the public notice. 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).

CONCLUSION

Based on the foregoing, it is my opinion that the School did not violate I.C. § 5-14-1.5-6.1(b)(2)(B) by meeting in executive session on September 19, 2012 as the matter of *United States of America v. South Bend Community School Corporation* was still pending before the Court, as the School has yet to attain unitary status. 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: Ms. Amy Steketee, Ms. Carol Schmidt