

STATE OF INDIANA) IN THE MARION CIRCUIT/SUPERIOR COURT
) ss:
 COUNTY OF MARION) CAUSE NO:

ED EILER, ANTHONY LUX,)
 CATHERINE FUENTES-ROHWER,)
 and JULIE HOLLINGSWORTH,)
)
 Plaintiffs,)
)
 -vs-)
)
 THE INDIANA STATE BOARD OF)
 EDUCATION)
)
 Defendant.)
)

) 49D04 13 12 PL 0 43 5 29

FILED
 (175) DEC 04 2013
Elizabeth J. White
 CLERK OF THE MARION CIRCUIT COURT

**COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF**

Plaintiffs, by their undersigned counsel, for their Complaint against Defendant Indiana State Board of Education, ask this Court to declare that Defendant and its members who are appointed by the Governor have violated Indiana’s Open Door Law (“ODL”), Indiana Code §5-14-1.5, by meeting and taking official and final action without providing the public with the notice required by the ODL, to declare the actions they took void, and to temporarily and permanently enjoin them from committing further violations of the ODL. In support of their claims, Plaintiffs allege as follows:

1. Plaintiffs are each citizens, residents and taxpayers of the State of Indiana.
2. Defendant, the Indiana State Board of Education (the “Board”), is a public agency subject to the ODL, I.C. §5-14-1.5-2(a), and which by virtue of I.C. §20-19-2-2(d)

is comprised of the elected Superintendent of the Public Instruction and ten (10) members each of whom is appointed by the Governor of Indiana. I.C. §20-19-2-2(a).

3. On October 16, 2013 a “meeting” occurred among certain members of the Board when Claire Fiddian-Green, Special Assistant to the Governor for Education Innovation, simultaneously e-mailed all ten (10) Governor-appointed members requesting that they reply by e-mail to authorize the use of their “already collected” respective signatures on a letter to Indiana Senate President *pro tempore* David Long and House Speaker Brian Bosma, which in turn requested that the State Legislature direct the Legislative Services Agency to take certain action with respect to Indiana’s 2012-13 A-F grading system of schools. This e-mail is attached as Exhibit A.

4. Later that same day another “meeting” occurred when members of the Board by e-mail each agreed to ratify and authorize the affixing of their respective signatures on that letter. That October 16, 2013 letter to Long and Bosma is attached as Exhibit B.

5. The October 16, 2013 letter constituted “official action” and “final action” of the Board as defined in I.C. §5-14-1.5-2(d) and (g).

6. The ODL defines a “meeting” as a “gathering of a majority of the governing body of a public agency for purpose of taking official action upon public business.” I.C. §5-14-1.5-2(c).

7. The ODL defines “official action” as to “receive information, deliberate,

make recommendations, establish policy, make decisions, or take final action.” I.C. §5-14-1.5-2(d). “Final action” is defined as “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.” I.C. §5-14-1.5-2(g). A “final action” must be taken at a meeting open to the public, I.C. §5-14-1.5-6.1(c).

8. Except as provided in I.C. §5-14-1.5-6.1, “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), and the public must be provided with at least 48 hours prior notice of such a meeting. I.C. §5-14-1.5-5(a).

9. On or about October 16, 2013 Defendant’s Governor-appointed members conducted and/or attended a “meeting” consisting of a simultaneous or temporally proximate e-mail exchange to and among members of a public agency that resulted in official action.

10. The expressed intent and purpose of the ODL is 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.

11. The aforementioned actions, as well as other actions that may subsequently come to light through discovery, violated both the letter and the spirit of the ODL, which is expressly required to be “liberally construed with a view of carrying out its policy.” I.C. §5-14-1.5-1.

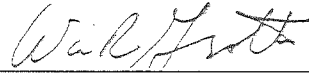
12. Plaintiffs have first sought and obtained an advisory opinion from the

Public Access Counselor, a copy of which is attached as Exhibit C, and they are thus eligible to recover their costs, expenses and reasonable attorney's fees should they prevail in this action.

WHEREFORE, Plaintiffs pray that this Court:

- a. declare that the Board through its Governor-appointed members violated the ODL in the manner set forth herein and/or in the manner as revealed through discovery;
- b. declare void any actions found by this Court to have violated the ODL pursuant to the authority granted to it by I.C. §5-14-1.5-7(b);
- c. preliminarily and permanently enjoin further violations of the ODL, pursuant to authority granted to it by I.C. §5-14-1.5-7(e);
- d. award Plaintiffs their costs, expenses and reasonable attorneys' fees pursuant to I.C. §5-14-1.5-7(f);
- e. grant a speedy hearing of this action by provided by I.C. §5-14-1.5-7(g) and Trial Rule 57; and
- f. grant such other or further relief as the Court may deem necessary to fully vindicate the public purposes and policies of the ODL.

Respectfully submitted,



William R. Groth, #7325-49

Attorney for Plaintiffs

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E-mail: wgroth@fdgtlaborlaw.com

p/290/je

Davis, Anne M

From: Fiddian-Green, Claire
Sent: Wednesday, October 16, 2013 10:57 AM
To: 'Troy Albert (TAlbert@wclark.k12.in.us)'; 'Delsener@marian.edu';
'drdavidfreitas@comcast.net'; Neal, Andrea; 'smobrien@avon-schools.org';
'brad4education@gmail.com'; 'tony@walkerlawgroup.biz' (tony@walkerlawgroup.biz);
'bj.watts@evsc.k12.in.us' (bj.watts@evsc.k12.in.us); 'Cari Whicker
(CWhicker@hccsc.k12.in.us)'; 'education@gordonhendry.com'
Cc: Davis, Anne M; Mckeown, Michelle; Baker, Lou Ann (CECI)
Subject: A-F Letter for your review
Attachments: A-F Grades Letter October 2013.docx

Importance: High

Dear Gubernatorial Appointees to the State Board of Education:

Please see the attached letter that SBOE staff has prepared. Assuming you approve of the letter, please reply to this email and we will utilize the signatures we have already collected from you to attach to the letter. Once we have heard back from each Board member, we will submit the letter to Senator Long and Speaker Bosma on your behalf.

I did discuss the delay in issuing the A-F grades with Craig Hartzler, IDOE's Chief of Staff, this morning. He told me that IDOE was currently looking into the required appeals timeline and thinking through how to engage with the Board in the appeals process. He said he would get back to me later today but it did not sound as if there was a clear timeline yet established.

Please call me on my cell phone should you have any questions: 317-508-6186.

Thank you!
Claire

Claire Fiddian-Green
Special Assistant to the Governor for Education Innovation
Center for Education & Career Innovation
Governor Mike Pence
Email: cfgreen@gov.in.gov
Office: (317) 232-9080
Website: www.in.gov/ceci

EXHIBIT:

A



INDIANA STATE BOARD OF EDUCATION

100 N. Senate Ave., RM N1049
Indianapolis, IN 46204

October 16, 2013

Senate President Pro Tempore David Long
House Speaker Brian Bosma
State House
200 W. Washington St.
Indianapolis, IN 46204

RE: LSA Support for Calculating A-F Grades

Dear Senator Long and Speaker Bosma,

We are writing to express our concern regarding the delay by the Indiana Department of Education ("Department") in providing A-F Grades for the 2012-2013 school year to the State Board of Education ("Board"), and to request the assistance of Legislative Services Agency ("LSA") in calculating the grades in time for the Board's official approval this November.

As members of the Board, we send this letter out of concern for ensuring that school accountability information is provided to Indiana schools, educators, and families in as timely a manner as possible. We are now mid-way through October, and the Department has yet to report 2012-2013 A-F grades or release teacher effectiveness ratings as required under Indiana law.

Although the typical A-F calculation timeline may have been affected by the ISTEP testing interruptions that occurred this past spring, the validity studies on ISTEP data were completed by the testing vendor (CTB/McGraw-Hill) and the Department's independent third-party expert in July. At that point, the Department was in a position to rely upon ISTEP data for purposes of calculating A-F grades, which the Department's staff has stated takes no more than three days. However, it wasn't until September that the Department finally released the underlying accountability data for schools and corporations. Now, almost a full month later, the Department still has not provided preliminary A-F grades or teacher effectiveness ratings.

The delay in providing A-F grades prevents schools, educators, and families from having important information related to their school's overall performance. Moreover, without the calculation of A-F grades, Indiana cannot comply with state and federal accountability requirements. Finally, without the release of grades, the Department cannot identify updated Focus and Priority schools, which receive increased support from the Department, and the Board is not able to identify schools for which it is statutorily required to hold a hearing and consider interventions pursuant to Ind. Code 20-31-9-4.

EXHIBIT:
B

The delay in teacher effectiveness ratings similarly prevents local school corporations from identifying their most successful teachers, as well as teachers who may need targeted supports to improve their instructional methods. In addition, teacher effectiveness ratings are a factor in compensation models that are part of the prior year's collective bargaining agreement, so the postponed release of teacher effectiveness ratings delays salary increases for Hoosier teachers.

Because we are nearing November, and preliminary A-F grades have not yet been provided to schools to start the clock on the month-long appeals and review process, the Board respectfully requests that LSA enter into a data sharing MOU with the Department and calculate A-F grades for the 2012-2013 school year as soon as possible. We know that LSA recreated the A-F system as part of the Grew-Sheldrake review of the 2011-2012 grade calculations, we therefore believe that LSA is in an excellent position to provide an alternative solution to the continued postponement of the release of A-F grades by the Department.

Respectfully submitted,

Indiana State Board of Education Members

(Please see signatures below)

Cc: Governor Mike Pence
Superintendent of Public Instruction Glenda Ritz
Senator Dennis Kruse
Representative Robert Behning

Troy Albert

Troy Albert

Daniel Eisener

Daniel Eisener

David Freitas

David Freitas

Gordon Hendry

Gordon Hendry

Andrea Neal

Andrea Neal

Sarah O'Brien

Sarah O'Brien

Brad Oliver

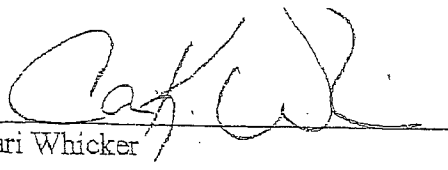
Brad Oliver

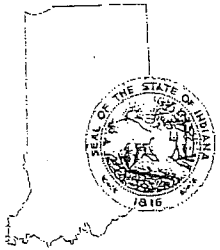
Tony Walker

Tony Walker

B.J. Watts

B.J. Watts


Cari Whicker



STATE OF INDIANA

MICHAEL R. PENCE, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

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402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-9435
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

November 21, 2013

Anthony Lux
Ed Eiler
Catherine Fuentes-Rohwer
Julie Hollingsworth
c/o William R. Groth
Fillenwarth, Dennerline, Groth & Towe, LLP
429 E. Vermont Street, Suite 200
Indianapolis, IN 46202

Re: Formal Complaint 13-FC-324; Alleged Violation of the Open Door Law by the Indiana State Board of Education¹

Dear Complainants,

This advisory opinion is in response to your formal complaint alleging the Indiana State Board of Education ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et. seq.* The Board responded to your complaint via Ms. Michelle McKeown, Board General Counsel. Her response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on November 8, 2013. Please be advised your request for priority status has been denied as there is no pending proceeding which would meet the standards enumerated in 62 IAC 1-1-3, however, it has been expedited at my discretion.

BACKGROUND

Your complaint alleges the Indiana State Board of Education violated the Open Door Law by conducting a meeting without notice.

You speculate in your formal complaint the Board met behind closed doors to draft a letter to Indiana Senate President Pro Tem David Long and Speaker of the Indiana House of Representatives Brian Bosma. The letter, dated October 16, 2013, addressed concerns with the Indiana Department of Education's alleged delay in providing the Board with timely data (A-F Grades) in order for the Board to meet accountability standards predetermined by State

¹ This cause number been consolidated at the request of the Complainants. The Formal Complaints are substantively identical.

EXHIBIT:
C

and Federal regulations. Therein, the Board requested that President Pro Tem Long and Speaker Bosma forward the letter to the Legislative Services Agency for assistance in gathering the required data. They did so jointly on October 18, 2013. Ten Board members in total signed the letter. Chairwoman Glenda Ritz, Indiana Superintendent of Public Instruction, did not participate in the drafting or the signing of the letter.

The Board, through Ms. McKeown, filed a timely response to your complaint on November 15, 2013. In their response, the Board contends that no "secret" meeting of a majority of the Board took place to take official action on public business. It argues all communication regarding the letter was via email and a quorum of members was not present to constitute a majority. Furthermore, the Board asserts the letter itself, although signed by the members, was drafted by Board staffers who do not sit on the Board itself. The letter was then distributed individually to the Board members who indicated whether they wanted their name affixed to the letter. All ten members approved the letter and provided authorization for signature. Emails reflecting as such are attached to the Board's response.

Additionally, the Board posits that Ind. Code § 5-14-1.5-3.1 *et. seq.* excludes email communications from serial meetings. Furthermore, the Board argues the term "gathering" as intended by the serial meeting prohibition is not defined anywhere else the ODL as relating to email communication, therefore, online contact does not rise to the level of a "gathering".

ANALYSIS

It is the intent of the Open Door Law (ODL) 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 Ind. Code § 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 Ind. Code § 5-14-1.5-3(a).

"Meeting" means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. Ind. Code 5-14-1.5-2(c). "Public business" means "any function upon which the public agency is empowered or authorized to take official action." Ind. Code 5-14-1.5-2(e). "Official action" is very broadly defined by our state legislature to include everything from merely "receiving information" and "deliberating" (defined by Indiana Code 5-14-1.5-2(i) as discussing), to making recommendations, establishing policy, making decisions, or taking a vote. Ind. Code § 5-14-1.5-2(d). A majority of a governing body that gathers together for any one or more of these purposes is required to post notice of the date, time and place of its meetings at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. Ind. Code § 5-14-1.5-5(a).

The Board concedes it is a public agency subject to the ODL and its response provides a limited history of the genesis of the letter in question. It contends the letter arose from an open meeting on October 2, 2013 regarding the grade calculations. On October 15, 2013 it became clear the grade calculations would not be released by the Indiana Department of Education until late 2013 and the Board took exception to the delay. To help expedite the

release of data, the October 16, 2013 letter was generated to bring the matter to the attention of the General Assembly.

Among other duties, the responsibilities of the Board include making recommendations to the governor and general assembly concerning the educational needs of the state. Ind. Code § 20-19-2-14(5). Clearly the Board had authorization to issue the letter. You assert the origination of the notion of issuing the letter may have been born out of a closed discussion.

I cannot state conclusively whether a discussion directing the Board's staff to draft the letter took place behind closed doors. You have not provided any evidence that any secret meeting took place. It may very well be the Board's staff would not unilaterally draft the letter without some kind of direction from the Board. Even so, there is no indication a *majority* of the Board directed them to do so. Therefore, it cannot be conclusively stated or inferred whether a quorum of the Board met to discuss the letter in advance. To be clear, if a majority of the Board (six or more members) directed the staff members to draft the letter, then a violation would have occurred.

In an October 16, 2013 email from Claire Fiddian-Green of the Center for Education and Career Innovation, Ms. Fiddian-Green clearly states the letter was drafted by the State Board of Education staff and not by the members themselves. She went on in the letter to solicit email input from the members of the Board as to their consent to affix their signatures to the letter.

The question remains if the online exchange constituted a serial meeting which is prohibited by the Open Door Law. While a serial meeting would typically be a violation of the Open Door Law, electronic mail is not considered to establish physical presence for a meeting. The Board did not violate the Open Door Law simply by communicating over email. In 2007, as the Board points out in its response, the Indiana General Assembly excluded email exchanges from serial meetings in Ind. Code § 5-14-1.5-3.1(a):

[T]he governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.

(2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business.

For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, **excluding electronic mail.**

Emphasis added.

As the Court in *Dillman v. Trs. of Ind. Univ.*, 848 N.E.2d 348 (2006) has stated the legislature has specifically defined "meeting" under the Open Door Law as a gathering of a

majority of the governing body. "Without a majority present, there can be no meeting." I find it important to note the individual members weighed in one-by-one on the letter. They all ratified the action – some by way of "reply-all" messages. *All* members were recipients of the original email from Ms. Fiddian-Green and were privy to some of the replies. For all intents and purposes, this is *a meeting of the minds*, which just so happened to take place in cyberspace as opposed to a brick-and-mortar building.

While Indiana has not addressed whether email gatherings constitute a quorum for the purposes of a meeting where a constructive vote is taken, other jurisdictions have done so. As previously addressed in 05-FC-115, former Public Access Counselor Davis offered some guidance. Referencing the non-binding Virginia Freedom of Information Act, similar to the ODL, she cites in relevant part:

"'Meeting' or 'meetings' means the meetings including work sessions, when sitting physically, or through telephonic or video equipment pursuant to § 2.2-3708, as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body."

Va. Code Ann. § 2.2-3701.

Consider also the following from Counselor Davis:

The Supreme Court of Virginia analyzed the definition of "meeting" using principles of statutory construction. The court stated:

"[T]he key to resolving the question before us is whether there was an 'assemblage.' The term 'assemble' means 'to bring together' and comes from the Latin *simul*, meaning 'together, at the same time.' The term inherently entails the quality of simultaneity. While such simultaneity may be present when e-mail technology is used in a 'chat room' or as 'instant messaging,' it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission."

Id. at 198.

The Virginia Supreme Court, under the circumstances presented, declined to find a meeting had occurred via e-mail. Applying the same logic in the case at hand, all of the replies occurred within approximately a 24-hour period. This is not "simultaneous" therefore, must be treated akin to a serial meeting. Indiana law has not yet addressed whether a meeting of the minds over an email chain would constitute constructive presence for public meetings or in an aggregate sum. To conclude as such would currently go beyond the scope of the legislature's intent. As Public Access Counselor, one of my statutory duties is to make recommendations to the general assembly concerning ways to improve public access. As such, I highly recommend that the legislature look into this issue.

Even through email, a perceived proactive ratification of an action concerning public interest is leaning against the public policy intentions of openness and transparency, but it cannot definitively be considered a violation of the Open Door Law as the legislature intended. I firmly believe the call-and-response nature of the email exchange amounted to an endorsement of the action, but I cannot say it is a vote in the traditional sense. The solicitation in the original email was for signatures only and not necessarily for approval of the issuance of the letter or input as to its content. It appears as if the letter would be sent regardless whether a majority ratified the letter. It should be noted, however, an open meeting is a condition precedent to a vote or final action under the ODL.

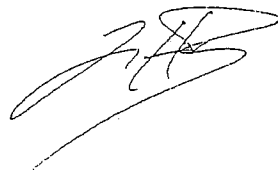
RECOMMENDATIONS

Departing from my typical Advisory Opinion format, I find it prudent to comment on this situation from an educational standpoint. By the letter of the law, the State Board of Education has not violated the Open Door Law. And although I am to liberally construe the public access laws in favor of its underlying policies, I cannot say definitively if there has been a violation.

In this instance, the email exchange could be interpreted as a ratification of a final decision by vote. I do not think it rises to that level, but the perception of the public is of significant importance. While email discussion and deliberation are excluded from serial meetings as not being violative, final decisions are meant to be open and transparent. In the future, the Board should be aware of these considerations. This is not meant to chill the exchange of ideas amongst public agencies, but to be dutiful to the ongoing pursuit of governmental accountability and accessibility.

I encourage all public agencies to be especially attentive to the purpose of public access laws to avoid ambiguous situations and arousing suspicions of prohibited activities. Regardless of intent, the *appearance* of action taken which is hidden from public view is particularly damaging to the integrity of a public agency and contrary to the purposes of transparency and open access.

Regards,



Luke H. Britt
Public Access Counselor

Cc: Ms. Michelle McKeown