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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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INDIANA CHARTER SCHOOL NETWORK,  
*Complainant,*

v.

BOARD OF SCHOOL COMMISSIONERS FOR THE  
CITY OF INDIANAPOLIS,  
*Respondent.*

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Formal Complaint No.  
23-FC-83

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the counselor:

This advisory opinion is in response to the formal complaint alleging the Board of School Commissioners for the City of Indianapolis violated the Open Door Law.<sup>1</sup> Attorney Jonathan L. Mayes filed an answer on behalf of the agency. In accordance with Indiana Code § 5-14-5-10, I issue the

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<sup>1</sup> Ind. Code § 5-14-3-1.5-8.

following opinion to the formal complaint received by the Office of the Public Access Counselor on August 28, 2023.

## **BACKGROUND**

In this case we explore whether the Open Door Law (ODL) requires a governing body of a public agency to vote at a public meeting to authorize a civil lawsuit prior to filing in court.

On August 21, 2023, IPS filed a Complaint for Declaratory and Injunctive Relief in Marion Superior Court seeking a judgment declaring IPS exempt from the “Dollar Law,”<sup>2</sup> a statutory provision making certain school buildings available to eligible charter schools for a dollar.

A week later, the Indiana Charter School Network (ICSN) filed a formal complaint with this office alleging IPS violated the Open Door Law because the board never approved the filing of the lawsuit in a properly noticed public meeting. ICSN argues a vote in an open meeting is a prerequisite to authorize filing a lawsuit.

On September 8, 2023, IPS filed an answer to ICSN’s complaint with this office. For its part, IPS argues that ICSN’s assertion that school boards must take final action to authorize the filing of a civil action *before* filing in court is unsupported by the law. Instead, IPS asserts that it complied with the law when it took final action to ratify the filing at a public meeting on August 31.

IPS notes that it approved the sale of two buildings via resolution in an open meeting on July 27, 2023. It also held an

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<sup>2</sup> Ind. Code § 20-26-7.1.

executive session on August 16, 2023, to discuss the real property transaction.

Subsequently, a discussion between the superintendent and IPS' general counsel manifested in the authorization of the civil filing.

IPS reasons that the filing of the lawsuit can be approved retroactively and nothing in the Open Door Law requires a vote or decision as a condition precedent to taking action. It relies heavily on Indiana Code section 20-26-5-4(a)(19), which states that a board can ratify a decision *post hoc* if the action could have been approved in advance. It also similarly cites *Opinion of the Public Access Counselor* 12-FC-114 in which an airport authority properly approved litigation after the fact.

## ANALYSIS

### 1. The Open Door Law

The Open Door Law (ODL) requires public agencies to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. Ind. Code § 5-14-1.5-1. As a result, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. *See* Ind. Code § 5-14-1.5-3(a).

Indianapolis Public Schools (IPS) is a public agency for purposes of the ODL; and thus, is subject to the law's requirements. Ind. Code § 5-14-1.5-2. Moreover, the Board of Commissioners (Board) is a governing body for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b).

As a result, unless an exception applies, all meetings of the IPS Board must be open at all times to allow members of the public to observe and record.

### **1.1 ODL definitions**

Under the ODL, “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).

“Official action” means to: (1) receive information; (2) deliberate; (3) make recommendations; (4) establish policy; (5) make decisions; or (6) take final action. Ind. Code § 5-14-1.5-2(d). “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).

The ODL defines “final action” as “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order.” Ind. Code § 5-14-1.5-2(g). Additionally, the ODL mandates a governing body to take all final action at public meeting. *See* Ind. Code § 5-14-1.5-6.1(c).

## **2. Retroactive approval of action**

In this case the parties agree that the IPS must approve the filing of a civil lawsuit, but they disagree about when that approval must happen. ICSN argues the approval was required prior to filing a lawsuit. IPS counters that the Board has statutory authority to ratify the approval after filing.

In large part, this case echoes a previous opinion issued by this office. *See Opinion of the Public Access Counselor, 22-FC-125 (2022)*. In that case, the Marion County Health and

Hospital Corporation filed a petition for certiorari with the United States Supreme Court without prior authorization by the agency's governing body. This office concluded, in part, that the action was a violation of the Open Door Law because a public meeting was not held to vote on authorizing the action prior to filing, and there was no person delegated the authority to unilaterally file the petition.

That case is hereby incorporated by reference.

Similarly, the governing body in this instance is statutorily charged with specific powers and duties. Here, the governing body of a school corporation has the power to sue and be sued. *See* Ind. Code § 20-26-5-4(a)(1).

In the case cited by IPS, 12-FC-114, the board had delegated authority to the Board president to enter into contracts for legal services up to a certain dollar amount, including legal services. We addressed the possibility of similar potential arrangements in 22-FC-125 as well, but none existed.

Here, if the IPS Board had delegated authority to a presiding officer, retrospective ratification of the filing would have been appropriate. A school board indeed has the ability to ratify actions taken later *if an action could have been approved in advance*. *See* Ind. Code § 20-26-5-4(a)(19)<sup>3</sup>.

Here, the action could not have been approved in advance because there was no internal mechanism by which a non-

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<sup>3</sup> IPS does not provide a compelling argument that the decision to file was made by the Board in an executive session to discuss real estate transactions, nor does it provide any evidence of delegation to a non-board member to file a complaint.

board member employee of the school could have made the decision absent board action.

As we posited in 22-FC-125, what happens if the Board disagrees with the lawsuit and overturns the decision? That is a messy situation simply not contemplated by sound governance or procedure. We also stated in that prior opinion that final action by a governing body must mean *something*. Boards exist to govern the agency and not the other way around.

Therefore, we have long since parted with the absolutist position of prior PAC guidance that final action by a board is not a prerequisite to filing litigation. If that is the case, the Open Door Law is rendered meaningless in context and “powers and duties” statutes become nullity. We decline to adopt an interpretation that usurps unambiguous statutory terms.

Under the Open Door Law, final action outside a public meeting is prohibited. *See* Ind. Code § 5-14-1.5-6.1(c). If the authority to sue is delegated by a previous final action, so be it. Nonetheless, absent some kind of preapproval, retroactively rubberstamping a filing in hindsight is antithetical to any objective standard of transparency.

## CONCLUSION

Based on the foregoing, it is the opinion of this office that the IPS's action to authorize the filing of a civil lawsuit should have happened in a public meeting prior to filing the petition in court as required by the Open Door Law.



Luke H. Britt  
Public Access Counselor

Issued: November 22, 2023