ACLU
AMERICAN CIVIL LIBERTIES UNION of KANSAS
FOUNDATION

By First Class Mail & Email: dwhiteman@kasb.org

August 11, 2017

Donna L. Whiteman, Esq.
Assistant Executive Director, Legal Services
Kansas Association of School Boards
1420 SW Arrowhead Road
Topeka, KS 66604-4024

Re: First Amendment Rights of Speakers During Public Comment Part of Board Meetings

Dear Ms. Whiteman:

Thank you for your recent response to my June 23 letter to the Tonganoxie Board of Education ("school board" or "board") regarding its rules regulating comments made during the public participation period of the school board's regular monthly meetings.

In your letter, you mentioned KASB Model Policy BCBD and a Tonganoxie board policy on public participation. In addition, according to your letter, the board policy on public participation refers to "rules for public comment," which appear to be separate from the board policy on public participation. As far as I can tell, neither the KASB website nor the USD 464 website makes those policies and rules available to the public. Thus, I would appreciate it if you would email those policies and rules to me along with any other documents that you believe are relevant to the restrictions we are discussing in our exchange of letters.

You have asserted that, pursuant to K.S.A. 72-8205(e)(1), "the Board may place controls on the public's right to speak, but it cannot be arbitrary or capricious in applying the rules." The First Amendment – not a Kansas statute – sets the standards applicable to the regulation of public comments during the public participation portion of the school board's regular monthly meetings, and – as I will demonstrate in this letter – the First Amendment standard is much stricter than "arbitrary and capricious."

When a government entity intentionally opens "a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects," it creates a designated public forum for purposes of First Amendment analysis. *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 802 (1985). *See also Hawkins v. City & County of Denver*, 170 F.3d 1281, 1286 (10th Cir. 1999). The courts have held that, where a governing body such as a school board or a city council has intentionally opened its meeting to public discourse, those meetings constitute designated public forums. *See, e.g., City of Madison, Jt. Sch. Dist. No. 8 v. Wisc. Emp. Rel. Comm.*, 429 U.S. 167, 426 (1976) (teacher had right to speak at public meeting where school board had "opened [the] forum for direct citizen involvement"); *Mesa v. White*, 197 F.3d 1041, 1046 (10th Cir. 1999) (county

"commission's intentional practice and tradition of allowing public comment at the meetings" created a designated public forum); *Scroggins v. City of Topeka*, 2 F. Supp. 2d 1362, 1370 (D. Kan. 1998) (public comment portion of city council meeting was a designated public forum); *Farnsworth v. City of Mulvane*, 660 F. Supp. 2d 1217, 1225 (D. Kan. 2009) (same). Thus, because the Tonganoxie school board has intentionally opened its regular monthly meetings for public comment, it has created a designated public forum.

As long as the school board retains the public participation portion of its regular monthly meetings, "it is bound by the same [First Amendment] standards as apply in a traditional public forum." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). "[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), quoting from *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Where government regulates speech based on content, the regulation is subject to strict scrutiny so that, in order "to enforce a content-based exclusion [the government] must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Ed. Assn.*, 460 U.S. at 45.

Here, each of the agendas for the school board's recent meetings has included the following restriction on public comments: "Individuals may not publicly address the board concerning matters relating to named individuals or students." That restriction is content-based because it completely bars a particular subject ("matters relating to named individuals or students") from discussion during the public participation portion on the regular board meeting. *See Boos v. Barry*, 485 U.S. 312, 319 (1988) (statute banning picketing near a foreign embassy was content-based because "[o]ne category of speech has been completely prohibited").

Because the board's restriction is content-based, it is subject to strict scrutiny, which the rule cannot survive because it neither serves a compelling state interest nor is narrowly drawn to achieve such an end. Even assuming for the sake of argument that the restriction were not content based, it would be unconstitutional because – even under the less rigorous standard applicable to reasonable time, place, and manner restrictions – it would not be narrowly tailored to achieve a substantial government interest.

To demonstrate that the board's restriction is not narrowly tailored, I merely need to refer to your letter, in which you characterized the intent behind the board's restriction as "simply ask[ing] the public to refrain from discussing named individuals in public whereby such discussion could lead to defamation or an invasion of privacy or breach of confidentiality." If that is truly the rationale for the restriction, the board could achieve that end by narrowly tailoring the restriction to prohibit defamatory comments, invasions of privacy, and breaches of confidentiality. As written, the rule completely bans the mere mention of any individuals by name, which is the opposite of a narrowly tailored rule.

In addition, I will note that precisely defining prohibited "invasions of privacy" or "breaches of confidentiality" will be difficult. Furthermore, any such restrictions would likely be susceptible to constitutional challenge because they would give the enforcement authority unfettered discretion to decide what speech is permissible and what speech is banned. *Lakewood v. Cleveland Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988).

Overall, the board would be better off requiring all comments to be related to school district issues, prohibiting disruptive *behavior* (as opposed to disruptive speech), and skipping any effort to regulate the decency of individual comments. Although the court in *Scroggins* upheld the Topeka City Council's rule prohibiting speakers from making "personal, rude or slanderous remarks," 2 F. Supp. 2d at 1372, the court's analysis in that case was hindered by the fact that the plaintiff did not challenge the rule's constitutionality, *id.*, and the total failure of any of the lawyers in the case to brief the court on the First Amendment standards applicable to the issues posed, *id.* at 1371. Other courts have reached different results. *See Gault v. City of Battle Creek*, 73 F. Supp. 2d 811 (W.D. Mich. 1999) (holding that comments about police chief's extramarital affair were protected speech and could not be banned as a "personal attack").

As I noted in my original letter, "Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." *New York Times v. Sullivan,* 376 U.S. 254, 273 (1964). *See also, e.g., Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 958 (S.D. Cal. 1997) ("Debate over public issues, including the qualifications and performance of public officials (such as a school superintendent), lies at the heart of the First Amendment."). Thus, the people have a well-established First Amendment right to criticize *both* elected officials *and other public servants*, and the school board cannot – consistent with the First Amendment – take away the people's right to comment on the conduct of school officials and employees by name.

For these reasons, I once again strongly urge the school board to rescind any rules that prohibit public participants in the board's regular meetings from mentioning district employees by name.

I look forward to hearing from you at your earliest convenience regarding the policy matters that I have addressed here.

Sincerely,

Doug Bonney
Chief Counsel & Legal Director
Direct Dial: (913) 490-4102