



August 3, 2017

Doug Bonney, Chief Counsel & Legal Director  
ACLU Foundation of Kansas  
Legal Department  
6701 W. 64<sup>th</sup> Street, Suite 210  
Overland Park, Kansas 66202

Re: USD 464 Tonganoxie Public Schools

Dear Mr. Bonney:

I represent USD 464 Tonganoxie Public Schools and have been asked to respond to your letter dated June 23, 2017 addressing concerns about USD 464 Tonganoxie's rules for the public comment period in the Board's agendas.

The Board adopted KASB Model Policy BCBP regarding Agendas. The second paragraph of that policy states the following about public commentary: "The agenda may include a period of time when the public may speak to the board."

Tonganoxie also has the following policy on public participation at Board Meetings:

"The general public will be invited to attend all board meetings, except executive sessions. [See the Kansas Open Meetings Act (KOMA)]. At each meeting of the board, the president or the presiding officer of the board shall welcome all visitors to the board meeting. The board president shall, at all regular board meetings, ask those patrons attending the board meeting if any of them have something to bring to the attention of the board. The rules for public comment are available through the clerk of the board prior to the board meeting and at the meeting itself. The board president may impose a limit on the amount of time a visitor may have to address the board and the total time devoted to public comment at any given meeting. The board president may ask groups with the same special interest to appoint a spokesperson. If it appears that the matter a visitor wishes the board to consider will consume an amount of time the board feels cannot be spared at said meeting, the board will invite such visitor to return at another regular meeting or at a designated special meeting. Board study sessions and board appointed advisory committees meet for a specific purpose or for the completion of a previously scheduled agenda. These are open meetings at which the public is welcome. Time for public comment at these meetings is at the discretion of the chairperson or at the direction of the board. Written public comment may be submitted to a chairperson at any time."

K.S.A. 72-8205(e) (1) gives the Board the power to “transact all school district business and adopt policies that the board deems appropriate to perform its constitutional duty to maintain, develop and operate local public schools.” Pursuant to this power, the Board may place controls on the public’s right to speak, but it cannot be arbitrary or capricious in applying the rules.

Freedom of speech is not absolute. “A violation of the Free Speech Clause occurs only when the restricted speech is constitutionally protected and when the government’s justification for the restrictions is insufficient [Citations omitted].” *Scroggins v. City of Topeka*, 2 F. Supp. 2d 1363, 1368 (1998).

In *Scroggins*, the court upheld city council rules that required public comments be limited to topics directly relevant to the business of the council and prohibited personal, rude, or slanderous remarks as part of public comments. The court concluded the rules were a reasonable means for achieving the governmental interest in orderly, efficient, effective and dignified meetings.

In adopting policies and rules such as the one challenged here, the Board must balance the free speech rights of its patrons with its duty to protect confidential personnel and student matters. Libel and defamatory speech are not protected under the First Amendment. See *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72, (1987) (such speech not essential to exposition of ideas and any benefit from them is clearly outweighed by the social interest in order and morality).

The Board does not prohibit its patrons from discussing named individuals with the Board. It simply asks the public to refrain from discussing named individuals in public whereby such discussion could lead to defamation or an invasion privacy or breach of confidentiality. The Board has a KN Policy that requires all complaints be handled at the lowest level possible including, talking to the teachers, talking to the principal, and talking to the superintendent before a patron comes to the school board. Specifically, the policy states:

“The board encourages all complaints regarding the district not otherwise provided for under specific policies to be resolved at the lowest possible administrative level. Complaints about district policy, curriculum, instructional materials, facilities, services, personnel, and other school related matters will be handled according to administrative policy and procedures. After all administrative policy and procedures regarding such complaints have been utilized, the superintendent shall report any unresolved complaint about policies to the board at the next regularly scheduled board meeting. Whenever a general complaint is made directly to the board as a whole or to a board member as an individual, it will first be referred to the administration for investigation and resolution. If the administration cannot effect a resolution, such will be reported to the board.”

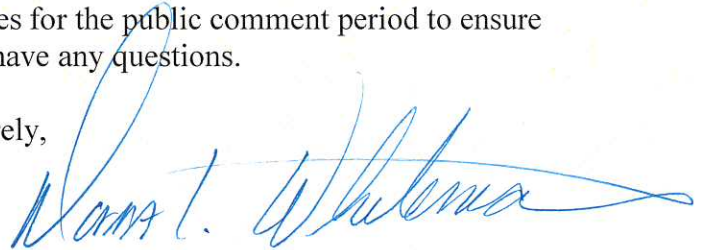
Thus, if a patron brings a complaint or a criticism of a named individual to the Board, the Board must first refer it back to the building level where the matter occurred to ensure all the facts were gathered and both sides were heard.

The Board’s rules are not meant to stifle criticism of official conduct, but the Board may place controls on the public’s right to speak. The Board’s rule about refraining from publicly

discussing a named individual or student serves the vital purpose of protecting the Board from a defamation claim and protecting the privacy rights of students (and teachers in some circumstances). The rule does not violate the First Amendment as it is neither arbitrary nor capricious in its application.

I will be working with USD 464 to review their rules for the public comment period to ensure everyone's rights are protected. Please call if you have any questions.

Sincerely,



Donna L. Whiteman, Attorney  
Assistant Executive Director Legal Services

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