To: Board of Education President of the Camdenton R-III School District

From: Attorney Betsey A. Helfrich

Re: Public Comment Regarding Personnel Matters

Date: July 24, 2013

A public meeting, within the meaning of Missouri law, is any meeting at which "public business is discussed, decided or public policy formulated." *Hudson v. Sch. Dist. of KC*, 578 S.W.2d 301 (Mo App. 1979). A public meeting is not necessarily a meeting held for the public. Indeed, "the constitution does not grant the members of the public generally a right to be heard by public bodies…." *Minn. State Bd. of Community Colleges v. Knight*, 465 U.S. 280, 283 (1984).

It is the legal opinion of our firm that if a school board allows public comment during its regular board meetings, the board should be careful to limit the topic of discussion to items on the agenda for the evening and stick to board of education policy regarding time limitations and rules for each speaker.

When dealing with public comment, boards must be very mindful of First Amendment concerns and must not deny or limit speech based on its content. If a school board allows public comment and allows one speaker to address the board for ten minutes but cuts another speaker off at three minutes, that speaker may have a claim that he/she was not treated fairly because of the content of their speech. Also, boards need to be aware that if they allow public comment and members of the public ask to be on the agenda, the board cannot restrict speech simply because of the speaker's message or that their message may offend the audience. *Phelps–Roper v. City of Manchester, Mo.*, 697 F.3d 678, 686 (8th Cir.2012). Indeed, if the Board allows public comment on one side of an issue, it must also allow comment on the other side of an issue. Content-based speech regulations are presumptively invalid, and are subject to the most exacting scrutiny in a First Amendment challenge. *Id.* For example, the board cannot restrict members of the public to only make positive comments about a personnel matter and disallow speech or put restrictions on speech which may be negative about an employee. This would violate the First Amendment rights of the speaker who wished to express a negative comment about an employee.

It is the very strong opinion of our firm that personnel matters should not be discussed during public comment sessions. If a person has a grievance with an employee, the appropriate administrative channels should be followed. By allowing negative or positive comments in open session, you run the risk of violating that employee's privacy and opening the door to many other legal concerns.

Specifically, by allowing general "public comment" in which both positive and negative comments about any employee must be allowed, you run the risk that it may be construed that

the board has conducted a hearing regarding the employment of a particular employee. Keep in mind that most school employees that are not teachers or administrators are not under contract and are not entitled to a hearing prior to their dismissal or even redress from the board following their dismissal. If public comment about employee's status, whether positive or negative, is heard in open session, you may have created an avenue of redress before the board of education that was not required and which may have strong legal implications. If the board members ask questions, or respond to the public, and subsequently make a decision regarding the employee's employment status, has the board just conducted a hearing regarding a person's employment? What if that employee was not even present for the comments? Can the employee now appeal to the court system from this "quasi hearing"? These are open legal questions which must be considered before allowing employment matters to be discussed by the public.

Also, with claims continually on the rise under the Missouri Human Rights Act, which is one of the most employee-friendly laws in the county, schools have to be careful about opening the door to these claims. If public comment about employees is allowed and a member of the public makes an inappropriate comment about an employee, that comment may later be used by an employee as evidence against the District. For example, if a member of the public refers to a coach as "old" in his address to the board and then the board later makes an employment decision to terminate the coach, for a reason completely unrelated to his age, the coach would nonetheless have a prima facie case that the Board considered his age, an inappropriate factor, when making his employment decision. In the ACLU case filed against the District, the Judge in her Order, used a statement from a member of the public to reflect directly on the motive and intention of the board of education. That case drives the point home that even though the board may not be making inappropriate comments, some courts will construe the comments of members of the public expressed to the board as the sentiment of the board of education. This is risky under the current state of the Missouri Human Rights Act.

Also, there have been cases across the country in which an employee, who was the subject of public comment at a board of education meeting, later sued the members of the public and in some cases, the board, for slander for comments made during a board meeting. For example, in *O'Connor v. Burningham*, 2007 UT 58 (2007), dissatisfied parents took their complaints regarding the girls' basketball coach to the school board and expressed their concerns regarding the coach publicly. A few months later the coach was terminated by the District. The coach then sued the parents for defamation.

As in the *O'Connor* case, if a board of education allows members of the public to speak out against an employee in public, the members of the public may unknowingly open themselves up to defamation claims as well as the board and any individual board members who may repeat the comments or who in any way take action on those comments.

As set forth herein, there are numerous reasons to restrict public comment regarding employees. By restricting public discussion on this topic, the District will limit its legal liability and protect the privacy interests of its employees.