MEMORANDUM

To: Brigid Nease, Superintendent, Harwood Unified Union School District
From: Lynn, Lynn, Blackman & Manitsky, P.C.
Date: October 9, 2017
Re: Open Meeting Law concerns

You have requested an opinion concerning Open Meeting Law issues raised by HUUSD Board member Gabriel M. Gilman's September 26, 2017 letter and the subsequent October 6, 2017 letter from the Valley Reporter. My understanding is that there are differences of opinion concerning whether an executive session held on May 24, 2017 may have violated the Open Meeting Law.

Much of the concern appears to stem from differing perceptions of what was discussed during the May 24 executive session. As I was not present and there are no notes or recordings of the session, it is difficult for me to offer an opinion about the content specifically. Additionally, it does not appear that the Board took any action as a result of the May 24 executive session, making it difficult to assess the need for corrective action. Nonetheless, my general understanding is that the Board elected to go into executive session to consider personnel matters, specifically as they related to certain interactions between administrators and Board members, including the potential resignation of an administrator as a result thereof. The stated purpose of the May 24 executive session was to consider "a matter of personnel contracts." The Board did not make a specific finding that premature general public knowledge would clearly place the public body or a person involved at a substantial disadvantage. No Board members objected to the basis for or content of the executive session before, during, or after the executive session and the Board took no action when it returned to open session.

Under the Open Meeting Law, the Board must meet in public unless the topic falls under one of the enumerated exceptions under 1 V.S.A. § 313. Section 313(a) provides ten enumerated exceptions. Section 313(a)(1) is different from the other enumerated exceptions in that it lists six separate subjects where the Board must make "a specific finding that premature general public knowledge would clearly place the public body or a person involved at a substantial disadvantage" prior to going into executive session to consider the subject. Among other subjects, § 313(a)(1) includes "contracts" and "labor relations agreements with employees." In other words, before going into executive session to consider "contracts" or "labor relations agreements with employees," the Board must make "a specific finding that premature general public knowledge would clearly place the public body or a person involved at a substantial disadvantage." This must occur in the public meeting, before the Board goes into executive session. Section 313(a)(1) does not require the Board to undertake any particular review or study of the issue prior to making a finding of "substantial disadvantage."

Section 313(a) has at least two other sections relevant to personnel issues. Under § 313(a)(3), the Board can go into executive session to consider "the appointment or employment or

evaluation of a public officer or employee, provided that the public body shall make a final decision to hire or appoint a public officer or employee in an open meeting and shall explain the reasons for its final decision during the open meeting." Under § 313(a)(4), the Board can go into executive session to consider "a disciplinary or dismissal action against a public officer or employee; but nothing in this subsection shall be construed to impair the right of such officer or employee to a public hearing if formal charges are brought." Unlike § 313(a)(1), the Board does not need to make a finding of "substantial disadvantage" prior to entering executive session under sections (3) and (4); the Board can simply introduce a motion to go into executive session to consider such topics.

There is no question that school administrators are "public employees" and that a school board can meet in executive session to discuss the evaluation or disciplinary matters concerning an administrator. In *Katz v. S. Burlington Sch. Dist.*, 2009 VT 6, ¶ 7, 185 Vt. 621, 623, 970 A.2d 1226, 1228 (2009), the Court rejected the Open Meeting Law claim, stating, "there is no question that the Board would have been entitled to discuss, negotiate and even draft the separation agreement in private as a matter involving "[t]he appointment or employment or evaluation of a public officer or employee" under § 313(a)(3). While plainly the Board must ratify such an agreement in open session under § 312(a), we discern no statutory requirement that it specifically disclose or discuss the underlying details at the public meeting."

Additionally, Board members are "public officers" and boards can meet in executive session to consider the evaluation or discipline of a member. In *LaFlamme v. Essex Junction Sch. Dist.*, 170 Vt. 475, 477, 750 A.2d 993, 995-96 (2000), the board met in executive session to consider the public censure of a board member. The only issue was whether the motion to censure needed to occur in open session, not whether the board could consider the issue of censure in executive session. Since the board returned to open session to vote on the motion, there was no Open Meeting Law violation.

Other jurisdictions interpreting similar language have also concluded that a board may meet in executive session to consider the evaluation and discipline of its employees and members. *See, e.g., Lilly v. Lewiston-Porter Cent. Sch. Dist.*, 853 F. Supp. 2d 346, 360 (W.D.N.Y. 2011) (removal proceedings against school board members properly closed because "certain personnel decisions, including 'matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person,' to be made in executive session"); *Brennan v Chatham County Comm'rs*, 209 Ga App 177, 433 SE2d 597, 93 (1993) (state open meetings law did not apply to meeting at which dismissal of public officer was under consideration); *Cumberland Publishers, Inc. v. Carlisle Area Bd. of Sch. Directors*, 166 Pa. Cmwlth. 176, 178, 646 A.2d 69, 70 (1994) ("Section 8 of the Sunshine Act, 65 P.S. § 278 permits a school board to discuss any matter regarding the appointment of one of its members in executive session."); *Bd. of Educ. of City of Danbury v. Freedom of Info. Comm'n*, 213 Conn. 216, 566 A.2d 1362 (1989) (same); *Royce v. Freedom of Info. Comm'n*, No. CV000505232, 2001 WL 752722, at *3 (Conn. Super. Ct. June 11, 2001) ("The plaintiffs claim that a single member of a multi-member

board is not a public officer is also contradicted by a long line of Connecticut case law that a single member of the Board of Education is a public officer. ").

Based on the foregoing, it does not appear that the Board violated the Open Meeting Law on May 24. Under § 313(a)(3) & (4), the Board can enter executive session to consider the evaluation and discipline of public officers and employees, subject to the conditions that any final action be taken in public session and consistent with the officer or employee's due process rights. My understanding is that the May 24 executive session addressed sensitive issues concerning Board member interactions with administrators, including criticisms and issues with communication related to evaluation and discipline. As Board members are public officers and administrators are employees, these matters would be appropriate subjects for executive session. While the specific details are not clear, all of the parties characterize the topic to have concerned dysfunction, dynamics, and morale, including criticisms of administrators and Board members in the context of that relationship. At least part of the session concerned an administrator's potential resignation under his contract. Accordingly, these topics are permitted for executive session under the Open Meeting Law.

It appears that some of the confusion is related to the characterization of the executive session as addressing "a matter of personnel contracts." As noted above, personnel issues may be covered under multiple exceptions and are subject to differing requirements. In order to consider a "contract," the Board must make a finding of substantial disadvantage, which it did not do here. However, it appears that the session did not strictly deal with a contract as much as the as potential resignation of an administrator under the contract due to the actions of Board members.

There is no question that it is important for the Board to properly designate the purpose of the executive session. However, an imprecise description of the purpose for an otherwise proper executive session does not amount to a violation of the Open Meeting Law. *See State ex rel. Schaeve v Van Lare*, 125 Wis 2d 40, 370 NW2d 271 (1985) (deviation from strict requirements of statute by failing to state specific statutory exemption under which closed session was held did not compromise public's right to full and complete information).

Based on the information provided, the Board appears to have considered matters otherwise appropriate for executive session on May 24. Accordingly, there is no need for corrective action, nor is there a need to adopt additional measures beyond what is required under the Open Meeting Law prior to entering into executive session.