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## **Limiting Public Comment at School Board Meetings and the First Amendment**

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# New Mexico Open Meetings Act

## Public Comment

- Open Meetings Act does not require local boards of education to allow for public comments at any of its board meetings.
- The OMA merely requires:
  1. school boards are to be conduct their meetings in public;
  2. except for the ten specific statutory reasons for which local boards of education may meet in closed executive session.

# New Mexico Open Meetings Act

- The OMA expressly states that “all persons desiring shall be permitted to attend and listen to the deliberations and proceedings.” N.M. Stat. Ann. § 10-15-1(A) (1978).
- Many school boards have decided to allow for public comments during board meetings by specifying a place on the board meeting agenda for receiving such comments.

# First Amendment

## Fundamental Right of all Americans

- The First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.
- Local school boards may not abridge citizens’ freedom of speech when the board adopts rules governing speech during the public comment period of school board meetings.

# First Amendment

- *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)
  - school board meeting was an open forum for direct citizen involvement.
  - school board meeting cannot be categorized as a traditional public forum for First Amendment purposes. “Plainly, public bodies may confine their meetings to the specified subject matter and may hold nonpublic sessions to transact business.”
  - The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.” *Minn. State Bd. of Community Colleges v. Knight*, 465 U.S. 280, 283 (1984).

# First Amendment

- There are two types of public forums the local school board may create to allow for public speech at school board meetings:
- First, a **designated public forum** is public property not traditionally open that the government has “opened for use by the public” as a place for speech and expressive activity. *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45 (1983).

# First Amendment

- The best example of this is when, in accordance with state law or through policy, a local school board grants the public general access to the board to comment on any specific matters or any matter within the subject matter jurisdiction of the board of education.
- A local school board may choose whether or not to designate a forum as public, but once it does so, it is very limited in how it can restrict speech there.

# First Amendment

- Public Comment on any matter within the jurisdiction/authority of the school board.
  - Only necessary time and place restrictions
    - Limiting time for comments
- Comments on Superintendent and other employees of the School District
  - Comments cannot be limited except for fighting words causing disruption
  - Warning about defamation
- Comments on Board members
  - Comments cannot be limited except for fighting words causing disruption
  - Warning about defamation

# First Amendment

- The second forum that can be created is a **limited public forum**.
- A limited public forum is public property that the government allows to be used by certain groups or dedicated solely to the discussion of certain subjects. *Christian Legal Soc’y. v. Martinez*, \_\_\_ U.S. \_\_\_, \_\_\_, 130 S. Ct. 2971, 2984 n.11 (2010).

# First Amendment

- On one side, in “a designated public forum there is no limit on speech when the meeting is open.
- On the other side, in “a limited public forum” a school board may restrict speech to the subject matter of the meeting to which the local school board intended to address in conducting its business.

# First Amendment

- In a limited public forum, a government entity is justified in limiting its meeting to discussion of specified agenda items and imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business.
- Such restrictions may not, however, discriminate on the basis of the speaker's viewpoint. *Steinberg v. Chesterfield County Planning Comm'n*, 527 F.3d 377, 387 (4<sup>th</sup> Cir. 2008).

# First Amendment

- For example, city council meetings are regarded as public forums, albeit limited ones. A city council does not violate the First Amendment when it restricts public speakers to the subject at hand. *White v. City of Norwalk*, 900 F.2d 1421 (9<sup>th</sup> Cir. 1990); see also *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9<sup>th</sup> Cir. 1995)

# New Law on First Amendment

- *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747 (5<sup>th</sup> Cir. 2010)
- School Board meetings can be limited public forums
  - local school board meetings here “fits the hornbook definition of a limited -- not designated -- public forum, in which “the State is not required to and does not allow persons to engage in every type of speech.” *Fairchild*, 597 F.3d at 759, quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

# Designated compared to Limited Public Forums

- The OMA states that meeting notices “shall include an agenda containing a list of ***specific items of business*** to be discussed or transacted at the meeting.” N.M. Stat. Ann. § 10-15-1(F) (1978) (emphasis added).
- If the Board should create a limited public forum, the Board’s agenda shall be the extent that the Board can receive public comment, and as each matter is on the agenda, the Board may also take formal action or engage in further discussion, including on information provided in public comment.

# Designated compared to Limited Public Forums

- If the Board, however, has created a designated public forum, the agenda cannot possibly include the unknown items which may be brought forth in public comments.
- Board should not engage in responses or discussion of issues which have not been made part of the agenda by the public during the public comments section.
- Accordingly, although the public may comment on issues not on the agenda, the Board should simply acknowledge the statements without comment to avoid an OMA violation by discussing items not on the agenda.

# Designated compared to Limited Public Forums

- Local boards should not permit speakers who wish to criticize school employees to make their comments in a closed session if it is a designated forum.

# Designated compared to Limited Public Forums

- Some courts have found that presenting a comment in a closed meeting or on a grievance form is not a sufficient alternative to presenting it in an open meeting because it does not reach the same audience. *See Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 736 (S.D. Cal. 1996).
- *Fairchild* supports the use of employee grievance procedures as a reasonable alternative means of communication for a disgruntled former employee to complain about her former supervising teacher when the meeting is a limited public forum. *Fairchild*, 597 F.3d at 761.

# Designated compared to Limited Public Forums

- Moreover, as a matter of law, a local school board has no power or legal authority to take any personnel action against any School District employee as such legal authority rests only with the local superintendent of schools. See N.M. Stat. Ann. §§ 22-5-4(B) and 22-5-14(B)(3) (2003).

# Designated compared to Limited Public Forums

- Thus, there is no action the Board can take in such matters, and allowing for such complaints in a closed session may affect the Board's ability to address the matter in a subsequent termination or discharge proceeding.
- In addition, the Board may become vulnerable to a recall action on the allegation that the Board was acting in a personnel matter outside its statutory authority.

# Designated compared to Limited Public Forums

- Under state law, only the local superintendent may make personnel decisions such as hiring, contract renewal, employee evaluation, employee discipline, discharge and termination of school personnel.

# Limiting Speech regardless of forum

- The Board must also be familiar with the sorts of restrictions which may be placed on disruptive comments and behavior at board meetings.
- The Fourth Circuit has held that the presiding officer at a board meeting has the discretion to stop speech that the officer “reasonably perceive[s] to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion.” *Collinson v. Gott*, 895 F.2d 994, 1000 (4<sup>th</sup> Cir. 1994).
- The Fourth Circuit has also concluded that “a personal attack leads almost inevitably to a responsive defense or counterattack . . . that has the real potential to disrupt the orderly conduct of the meeting.” See *Steinberg v. Chesterfield County Planning Comm’n*, 527 F.3d 377, 387 (4<sup>th</sup> Cir. 2008).
- Spectators may also be prevented from boisterously commenting upon the deliberations of the board. *Hansen v. Bennett*, 948 F.2d 397 (7<sup>th</sup> Cir. 1971).

# Limiting Speech for disruption

- In a limited public forum, a speaker may be removed from a public meeting for refusing to limit his comments to the topic at hand and responding to the chair in an antagonist manner as long as the restriction on his speech is not based merely upon disapproval of the speaker's viewpoint. *Jones v. Heyman*, 888 F.2d 1328 (11<sup>th</sup> Cir. 1989).

# Limiting Speech for disruption

- In another case, the evidence showed that the speaker was repetitive and truculent and that he repeatedly interrupted the chair during the meeting. The court upheld his ejection from the meeting as based upon the content-neutral desire to prevent his badgering and disregard for decorum. *Eichenlaub v. Township*, 385 F.3d 274 (3<sup>rd</sup> Cir. 2004).

# Limiting Speech for disruption

- Thus, the President of the Board must be clear in dealing with such individuals as to ensure that the reasons for terminating the speech and/or removing an individual from a meeting is not based on the content of the individual's speech but on the orderly completion of the Board's business, including ensuring the viewpoint neutral reasons are placed in the minutes of the meeting.

# Policy Development

- **Create limited public forum by policy**
  - Give notice of limited forum
  - Agenda items only
  - Limitations on time and place
    - Limited time
    - Only during public comment portion of meeting
- **Training of board members on control of meetings to limit speech to agenda items only.**
  - Restricting comment
  - Don't expand the forum

# Questions



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