



BOARD OF EDUCATION MEETINGS – WHAT YOU SHOULD KNOW

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PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- The Open Meetings Law does not require a public body to permit the public to speak at its meetings.
 - The Open Meetings Law is silent regarding the ability of members of the public to speak.
 - Courts and the Commissioner of Education have recognized that the Open Meetings Law does not require any level of public participation, commentary or input at meetings of public bodies. See e.g. *Appeal of Hockswender*, Decision 16,400 (2012).

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- The Open Meetings Law provides the public with the right to:
 - attend meetings of public bodies, except executive sessions that are validly convened for one or more of the topics authorized in Section 105 of the Openings Meeting Law;
 - observe the performance of public officials;
 - listen to the deliberations and decisions that go into the making of public policy; and
 - photograph, broadcast, webcast, video record or otherwise record meetings as long as the equipment used to do so is not disruptive or obtrusive.

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- Although not required by law to permit the public to speak at its meetings, most Boards of Education have a policy that grants the public the right to speak at its meetings.
 - The Commissioner of Education has encouraged allowing citizens to speak on matters under consideration. *Appeal of Wittneben*, Decision No. 12,671 (1992); *Appeal of Hockswender*, Decision 16,400 (2012).
- When a public body does permit the public to speak at its meetings, it may place reasonable rules that are viewpoint neutral. Any content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- Under US Supreme Court decisions, the extent to which a public entity can restrict speech on its property depends in part on the nature of the forum involved.
 - Courts have recognized three different types of fora: the traditional public forum, the “limited” public forum, and the non-public forum
 - In a traditional public forum, like a street or park, a governmental entity may enforce a content-based restriction on speech only if its is narrowly drawn to effectuate a compelling state interest.
 - A “limited” public forum is public property that is a non-public forum that has been opened for use by the public as a place for expressive activity on a limited basis (e.g. specified times, certain topics). Any restriction on speech in these settings must be viewpoint neutral.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- Can public participation at Board of Education meetings be limited to residents?
 - Yes – according to the Commissioner of Education. *Matter of Martin*, Decision No. 12,861 (1992).
 - No – according to the Committee On Open Government; rather, all members of the public should be treated equally. See e.g. OML-AO-3364, OML-AO-4141, OML-AO-4292, OML-AO-5210, OML-AO-5296, OML AO 5607.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

Restrictions that the Committee On Open Government has recognized as valid:

- Speakers may be limited to a certain amount of time. OML-AO-4810
- Commentary that is “abusive, threatening, profane, or in any other way illegal,” may be prohibited. OML-AO-5552.
- May limit repetitive comments in support of opinions expressed previously, as well as those that would be offensive to reasonable people of ordinary sensibilities. OML-AO-5296

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Valid restrictions - continued:

- The United States District Court, Eastern District of New York determined that prohibiting the reading of evaluations completed by students and prohibiting the student evaluators from being identified while allowing general comments about the issues raised in the evaluations was permissible in the “limited public forum” See *Schuloff v. Murphy*, 1997 WL588876 (E.D.N.Y. Sept. 17, 1997)
 - a public CUNY Board of Trustees meeting
 - the restriction effectuated a compelling governmental interest – protection of student privacy
 - Restriction did not seek to restrain discussion of “the shortcomings” of a law school professor.
 - The existence of FERPA was seen as establishing a compelling interest in student privacy.

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Valid restrictions - continued:

- Following the prior federal decision, the COOG has also recognized restricting commentary from a parent speaking about another student was a reasonable restriction. OML-AO-3405.
- Public comments may be limited to matters involving the business or operations of the public body and require a brief written summary of the subject intended to be discussed. OML-AO-4044
- A rule that requires petitions, resolutions and other communications be made in writing and submitted to the public body's clerk at a set time in advance of a meeting is acceptable; however, requiring that such submissions be signed is not. OML-AO-5607

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■ Impermissible Restrictions

- A federal court invalidated a rule prohibiting “speech which contains any ‘charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee.’” *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 730 (C.D. Cal. 1996)
 - In the Court’s view this rule allowed expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees’ conduct or performance)
 - The COOG has summarized this and other similar federal court decisions as holding that if a public body permits positive comments regarding a particular topic, the door is open all the way, and it must accept critical comments as well. See OML-AO-5552; OML-AO-4691.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- The requirement to be viewpoint neutral not only applies to the wording or content of a policy but also to how it is enforced.
 - Example: “The Board will not permit in public session discussion involving individual district personnel.”
 - Wording is viewpoint neutral.
 - How many Boards have stopped positive statements regarding a staff member?
 - Cannot stop negative statements about a staff member if you do not stop positive statements.

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- What is disruptive?
- When public comments were limited to topics on the agenda, incessantly raising non-agenda items at a Town Board meeting was found to support convictions for disorderly conduct and trespass. *People v. Albra*, 13 Misc.3d 64 (Sup Ct., App. Term, 9th and 10th J.D. 2006)
 - Warned by Town Supervisor if did not address topics on agenda, he would be asked to leave meeting
 - Provoked Town Board into heated discussions – disrupting the meeting
 - Asked to leave meeting by Town Supervisor and Police Officer – refused to leave
 - There was a dissent that believed the speech was protected and disruption was in fact perpetuated by the Town Supervisor

PUBLIC RIGHT OF EXPRESSION AT BOARD OF EDUCATION MEETINGS

- When individual addressing the Common Council did not speak on impermissible topic (public comments were expressly permitted on non-agenda items), and was not alleged to have violated the Rules of Decorum – charge of disorderly conduct was dismissed by the Court. *People v. Sandow*, 68 Misc.3d 685 (City Ct., Dutchess Cty. 2019)
 - Court found - no basis to stop speech critical of members of the Council before allotted time expired
 - Council's Rules of Decorum prohibits shouting, clapping, being unruly, distracting, defaming anyone, intimidating anyone, making personal affronts, lodging threats of violence, using profanity, or behavior that disrupts the orderly conduct of the meeting
 - Court stated appropriate remedy would have been to wait until individual exhausted her three (3) minutes to speak on non-agenda items, for the Chair to instruct her to cease speaking, warn her that she may be required to leave the Chamber if the violation continued, and only if defendant persisted, could she then be removed.

AGENDA SETTING

- Check your Board Policy Book to determine if your Board has a policy as to process for placing items on an agenda
- Typically, agenda setting is the responsibility of the Superintendent and Board president. Many districts will include the Board vice-president
- Communication with Board officers and/or Superintendent prior to an agenda setting meeting can result in items placed on the agenda from other Board members
- You have a right to add items to be discussed at the meeting, but you will need to follow the process pursuant to Robert's Rules of Order. Be considerate of fellow Board members – surprise discussions, without opportunity to prepare, may not be appreciated by your colleagues

EXECUTIVE SESSION

- Boards can enter into executive session to discuss limited topics without public participation
- Your Board must notice a Board meeting, open a public meeting, and then make a motion to enter executive session delineating the reason(s) why the Board is contemplating executive session
- There can be no action taken in executive session, other than a vote on probable cause relating to Section 3020-a charges
- Minutes are not required for executive session topics, other than for votes on 3020-a charges

PERMISSIBLE TOPICS FOR EXECUTIVE SESSION

- Matters that would jeopardize public safety if disclosed
- Discussions of pending or threatened litigation
- Collective bargaining information
- The details of medical, financial, credit, or employment history of a particular person or corporation
- Matters leading to the appointment, promotion, demotion, discipline, suspension, termination or removal of a particular person or corporation
- Discussion of proposed purchase, sale or lease of real property

BOARD GATHERINGS NOT SUBJECT TO THE OPEN MEETINGS LAW

- Social gatherings where District business is not discussed
- Board retreats
 - The OML exception is limited to gatherings “for the purpose of gaining education, training, to develop or improve team building or communication skills, or to consider interpersonal relations” OML-AO-4762
 - Board goal setting would be considered Board business and must be discussed in open session
 - Discussions of Board self-evaluations may be subject to the OML, if the evaluations focus on Board members’ duties and responsibilities, as opposed to how well members are working together