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Public Comment and Your Board: *Best Practices for Effective Communication*

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https://m.youtube.com/watch?v=yF2pNtoHxDk&ra=m

What We'll Cover Today

- A Public Comment Primer and Some Initial Considerations
- An Overview of the Legal Landscape
- A Review of Potential Best Practices for Your Board

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Public Comment – A Primer

- ***Public comment periods have a long and established history in the United States and Connecticut but…***

- ***Public comment periods are not mandated under Connecticut law.***
  - No requirement for public comment under the Freedom of Information Act
    - FOIA grants the public the right to attend meetings (with the exception of executive session)

- No requirement for public comment periods under Roberts Rules of Order

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Public Comment – A Primer

- The decision to hold public comment rests entirely with the individual board

- Most boards specifically address public comment in board bylaws (9000 series – “Meeting Conduct,” “Agendas,” etc.) and/or board policies (1000 series -- Community Relations)

- If and when a board holds public comment specific legal requirements apply

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Pros and Cons to Public Comment

Pros

- Can bring unexamined matters to the attention of the Board
- Gives community members a forum to express their concerns
- Allows the Board to hear all potential sides to an issue
- Respect for an established tradition
- Democracy in action!

Cons

- Potential for disruption
- Potential for distraction
- Time concerns
- Voices of vocal minority stakeholders drown out the “silent majority”
- Potential legal liability!

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The Legal Landscape

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The First Amendment

- Defining the exact contours of First Amendment protected speech is difficult, however speech on matters ***of public concern is generally protected.***
- Certain categories of speech are not protected:
  - Obscenity;
  - Inciting violence;
  - Defamation;
  - Speech integral to criminal conduct.



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Public Forum Analysis

- Just because a certain type of speech/expressive activity may be protected does not mean that there is a First Amendment ***right to speak in all locations***.

- When it comes to speech on or within government owned or ***controlled*** property the question is whether the space in question is a "public forum."

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Public Forum Analysis

- ***A continuum*** for evaluating the degree to which the government may legally restrict speech in a given context.
- A physical and ***metaphysical*** analysis.
- A public forum can be ***either a physical location or property or a "space" or "channel" of expression*** contained within a broader location or space.
- Court cases often turn on ***whether the property or space in question has been "opened" for speech*** by government officials.
- The type of forum at issue dictates how much the government can regulate speech within the forum.

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Traditional Public Forums

- The Supreme Court has recognized four different types of forums on the public forum continuum.

1. **<u>Traditional Public Forums</u>:**
   - Public places which have history of being devoted to political speech.
   - The government can only regulate speech in a traditional public forum through narrowly tailored means designed to serve a compelling government interest.
   - <u>Examples</u>: Public parks, sidewalks, streets.





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Designated Public Forums



2. **<u>Designated Public Forums</u>:**
   - Public places the government has intentionally opened for speech ***for a wide variety of speakers and topics.***
   - The forum may be limited to certain subjects or classes of speakers and does not have to remain open indefinitely, but cannot be closed by government to exclude speech based on viewpoint.
   - <u>Examples</u>: Some public facilities made available for rental; comment sections left open for public dialogue in public social media accounts

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Limited Public Forums

3. **<u>Designated Public Forums</u>:**
   - Public places the government has intentionally opened ***for limited types of speakers or the discussion of limited subjects.***
   - Speech outside of the limited types of speakers and topics opened for discussion can be restricted so long as the restrictions are reasonable and viewpoint neutral.
   - <u>Examples</u>: Public comment portions of BOE meetings; student newspapers.





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Nonpublic Forums

4. **Nonpublic Forums:**
   - Government-owned properties that are not traditional forums or spaces that have been designated as limited public forums.
   - Restrictions on speech need only be reasonable – i.e. must satisfy the "rational basis" standard.
   - Examples: Military bases, jails, airports, inside courthouses.



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Public Forum Analysis

- ***"Viewpoint discrimination"*** by the government is prohibited regardless of the type of forum.
  - If viewpoint discrimination is found the prospective speaker's ability to speak through another channel does not necessarily cure the issue.

- The ***"government speech"*** doctrine provides that government officials are not required to maintain viewpoint neutrality when ***they themselves speak.***

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Reasonable Restrictions in Limited Public Fora

- ***Within limited public fora*** – such as public comment periods – government officials can impose ***reasonable restrictions*** on speech.

- To be constitutional such restrictions must be:
  - ***Reasonably related to a legitimate government objective in light of the purpose of the forum, and;***
  - ***Viewpoint neutral.***

- If both of these criteria are met the government does not have to prove that the restriction is the best possible restriction or least restrictive on the public.

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Time, Place and Manner Restrictions

- The “reasonableness” standard for restrictions in limited public fora is similar but not identical to ***“time, place and manner”*** restrictions that apply to public forums and designated public forums.

- Time, place and manner restrictions are permitted within public forums so long as the restriction is:
  1. ***Content–neutral;***
  2. ***Narrowly tailored to serve a significant government interest; and,***
  3. ***Leaves open ample alternative channels for communication of the information.***

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A Recent Case Study

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Tyler v. City of Kingston, 74 F.4th 57 (2023)

- In 2021, the Common Council of the City of Kingston, New York was scheduled to hold a public meeting including a public comment period to discuss whether the City should purchase an armed rescue vehicle.

- Eight individuals affiliated with the Black Lives Matter protest movement planned to attend the meeting to protest the proposed purchase.

- ***The individuals brought signs (and puppets) to the meeting that were neither vulgar nor obscene including signs that read: "No Tanks No Thanks" and "Oh my God! No Tank! Move on!"***



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Tyler v. City of Kingston, 74 F.4th 57 (2023)

- When the protesters arrived at City Hall with their signs, they were informed that the Common Council had adopted a new rule a few days before prohibiting signs and posters.

- Notices were also posted in the Kingston City Hall that read:

> **ATTENTION: No signs or posters allowed inside the building. Interruption of speakers and/or government business will not be tolerated. Anyone who interrupts a speaker or the proceedings of a government meeting shall be removed.**

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Tyler v. City of Kingston, 74 F.4th 57 (2023) – The Plaintiffs' Claims

- The protestors sued when they were denied entry into the meeting without their signs claiming the City's policy violated their First Amendment rights.

- They argued that the fact that the Common Council allowed public comment meant that they were allowed to hold up signs that were not obscene in silent protest of the City's proposed armored vehicle purchase.

- They also argued that since the signs pertained to a matter on the Council's agenda and public comment was permitted on the items on the agenda, their signs constituted a form of speech within the public forum that should not be disallowed.

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Tyler v. City of Kingston, 74 F.4th 57 (2023) – The City's Defense

- In defense of the lawsuit the City claimed that meetings of the Common Council are ***limited public forums in which the City can restrict speech that falls outside of the type of speech permitted*** regardless of whether the protesters remained silent and held non-obscene signs.

- The City also argued that the City's interest in preventing Council meetings from devolving into a picketing session within City Hall and keeping its meeting reserved for public comment was reasonable.

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Tyler v. City of Kingston, 74 F.4th 57 (2023)



- Ultimately, the Second Circuit Court of Appeals agreed with the City.
- The Court held that since the Common Council meetings were limited public forums in which public comment was allowed, the City could mandate that public comment be the exclusive channel for expression even if the signs were not obscene and related to a matter being taken up by the Council.
- As such, the sign restriction was reasonable and content neutral and still left open another channel of expression – i.e. public comment.

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Public Comment Restrictions

- Since public comment periods are limited public forums, restrictions are permitted as long as they are reasonable and content neutral.

- ***So what does this mean in practice?***

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Public Comment Restrictions

- **Time Restrictions**: *Generally legal*
- **Advance Sign-Up Sheets**: *Generally legal*
- **Resident Only Restrictions**: *Generally legal*
- **Rule that Comments Must Relate to Agenda Items**: *Generally legal*
- **Prohibitions on Discussing FERPA-Protected Information**: *Almost certainly legal as a compelling government interest even in public forums and designated public forums.*

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Public Comment Restrictions

- **Restrictions on Use of Profanity**: ***Probably legal in light of interest in upholding decorum of the forum. Obscene speech is generally not protected by the First Amendment.***

- **Restrictions on Loud or Disruptive Speech**: ***Probably legal to uphold the decorum and tenor of the board meeting particularly in light of Tyler v. City of Kingston.***

- **Restrictions on Personal Attacks and Insults**: ***Maybe. Possible reasonable interest in maintaining decorum. Viewpoint neutrality may be difficult.***

- **Restrictions on Criticisms or Complaints About Public Employees/Officials**: ***Maybe????? Possible reasonable interest in maintaining decorum as well as interest in affording privacy interest of employee on certain topics. Policies/bylaws that provide alternative avenue for criticisms – i.e. formal complaint procedure -- may help support restriction. Viewpoint neutrality may be difficult.***

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Special FOIA Remote Meeting Considerations

- Prior to COVID-19, there was occasional telephonic (or Skype) participation by missing board members. Then came COVID-19.
- Public Act 22-3 amended the FOIA, preserving for the most part elements of pandemic-era Executive Orders concerning "remote" and "hybrid" meetings.
- A public agency (such as a board or any of its committees) ***can*** hold meetings that are accessible to the public through 1) electronic equipment only (i.e., **"remote meetings"**) or 2) remote participation in conjunction with an in-person meeting (i.e., "**hybrid meetings**").
- For these meetings, boards must use technology that "facilitates real-time public access to meetings," such as "telephonic, video or other conferencing platforms."

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Remote/Hybrid Meetings and Public Comments

- Per Public Act 22-3, members of the public attending remotely must be provided with the same opportunity to provide comment and participate in the meeting ***that they would be accorded if it was in-person***.

- ***Boards are NOT required to offer persons attending a meeting remotely the opportunity for comment if they are not required by law for persons attending in-person.***

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Best Practices for Public Comment

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https://www.youtube.com/watch?v=_RqZ7FQlXeU

The Starting Point…

- Crafting effective bylaw and/or policy language is critical for managing public comment ***before an issue arises.***
- Consider the following:
  - Clarifying exactly when public comment will be recognized (i.e. at the start of regular meetings only);
  - Rule limiting comment to topics on the agenda;
  - Resident only restrictions;
  - Overall time limit for public comment;
  - Time limits for individual speakers;
  - Sign-up sheets;
  - "Decorum" rules;
  - Adoption of alternative complaint procedure to ***potentially*** avoid criticisms of district employees.

Follow the Rules . . .

- Provide advance notice of public comment rules (website, board chair announcement at the start of comments).

- **FOLLOW YOUR OWN RULES/BYLAWS**
  - Keep track of time – stopwatch, phone, etc.
    - Do not allow speakers to “give” remaining time to others;
  - Keep speakers on track. The chair should remind the speaker of bylaw/policy requirements if necessary.
  - Have staff members take notes and follow-up as needed.

- ***Arbitrary enforcement of public comment rules can open the board up to claims of First Amendment and other constitutional violations.***
  - Selective enforcement of the rules is not viewpoint neutral.

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Avoid Discussion of the Issue with Speaker

- The board chair should simply thank each speaker and may provide limited factual responses to comments (i.e. “Thank you. You should speak with XYZ administrator regarding that issue…”)

- Back and forth dialogue between board members and a member of the public during public comment may give rise to a FOIA claim that the board failed to properly notice a discussion topic on its agenda thereby depriving potentially interested members of the public the right to attend the meeting.
  - NOTE: Agenda items can be added to regular meeting agendas by a 2/3 vote of members present and voting

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Dealing with Extreme Behaviors

- The board has the absolute right to conduct its business without unnecessary disruptions or abuse. ***The meeting belongs to the board.***

- While members of the public have the right under FOIA to attend board meetings they must comply with the rules of the forum.

- Shouting, booing, signs (if you have a prior rule per *Tyler v. Kingston*) should not be permitted and should be addressed evenhandedly.
  - Board and subcommittee chairs have the power ***and the responsibility*** under Roberts Rules to maintain order and decorum during meetings.



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Dealing with Extreme Behaviors

- Work with your superintendent and consider contacting your police department in advance if you believe that there is a strong likelihood that a meeting could get out of hand.

- Members of the public who do not comply with the board's rules of decorum and directives of the chair ***lose their right to attend and may be deemed a trespasser.***

- Conn. Gen. Stat. § 1-232 of the FOIA allows a public agency to clear the room and continue a meeting if members of the public "render the orderly conduct of [the] meeting unfeasible and order cannot be restored by the removal of individuals who are wilfully interrupting the meeting . . ." Members of the press not participating in any disturbance must be allowed to stay.

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Liability for Missteps?

- Defamation claims for false and malicious statements against others during public comment are unlikely to be viable against a board member for “allowing” the speech in question by a member of the public.

- ***Board members and district employees are legally indemnified*** under Conn. Gen. Stat. § 10-235 as well as the legal doctrine of governmental immunity for conduct undertaken within the scope of their duties ***so long as such conduct is not wanton, reckless or malicious towards the rights of others.***

- The doctrine of legislative immunity may also protect the conduct of board members when acting in a legislative capacity.

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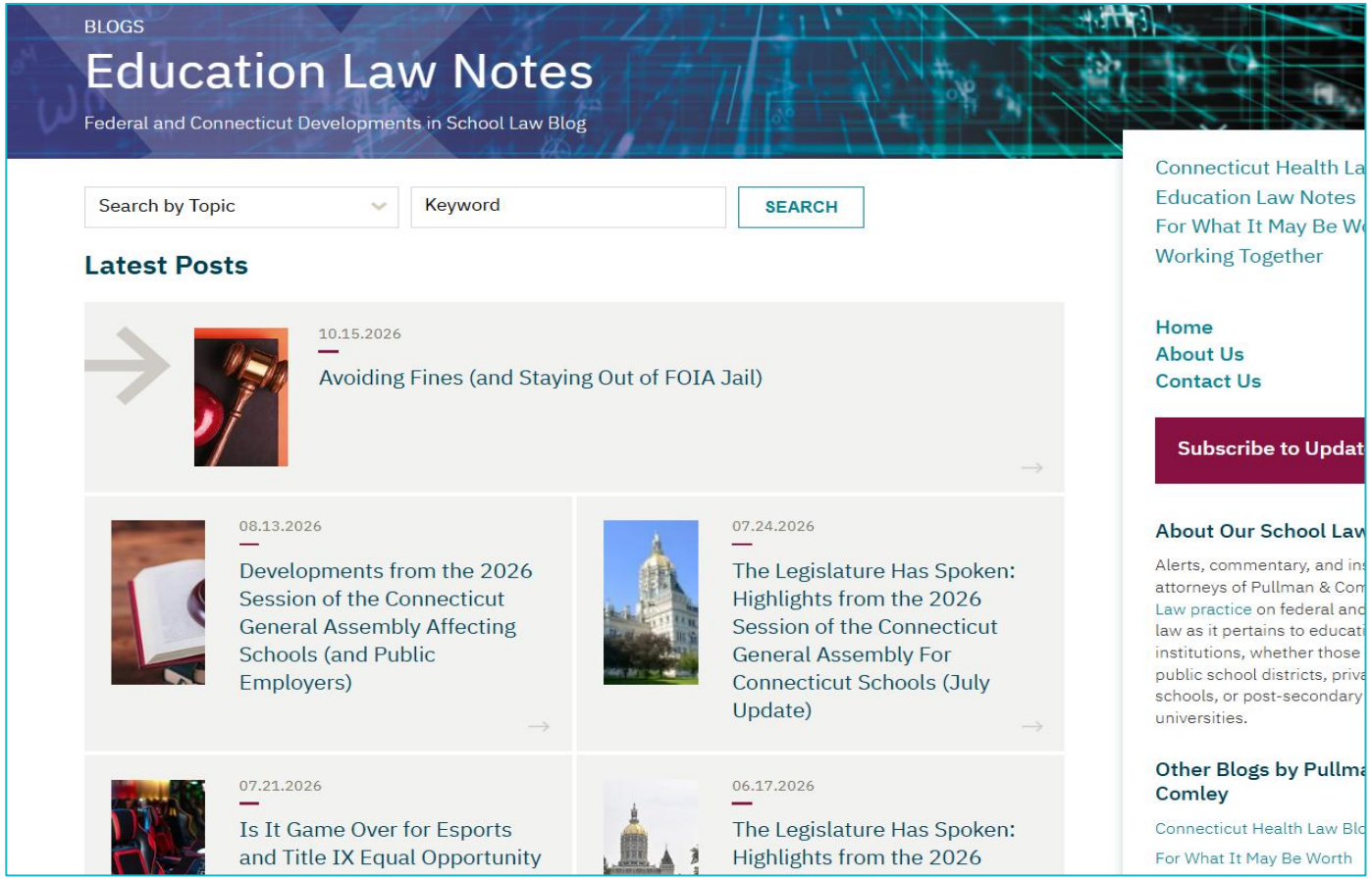
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Questions?

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