

8³⁰-9³⁰ am in Nevada Room

PUBLIC COMMENT TIME – LOVE IT OR HATE IT

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I. Introduction and Purpose of Public Comment Time

While the public comments can provide the Board with valuable input on how citizens feel about certain school issues, the “best show in town” can also be a challenging and difficult time for administrators, Board members, and the public if that section of the meeting is not handled well. Called “public comment,” “public participation,” “audience participation,” or other time set aside for such comments, the practice is not required by law. However, many districts have such a procedure and provide for it generally in policy or board meeting procedures.

II. Legal Restrictions

A. Open Meetings Act

The New Mexico Open Meetings Act (“OMA”) provides that “all persons desiring shall be permitted to *attend and listen* to the deliberations and proceedings.” NMSA 1978 § 10-15-1(A) (1999). It is important to remember that while many New Mexico school districts have chosen to provide for public comment time, the meeting is still a board meeting governed by the OMA conducted by the board, and under the rules set by the board, within the legal parameters of the OMA. A local school board is not required under the OMA to allow public participation or public comments at its meetings; rather, the law requires only that all board meetings be public, unless a closed session is permitted by the OMA.

B. Local Processes

How much time is allowed for each presentation, whether the comment time is at the beginning or the end of the meeting, and whether the comment time is limited to regular meetings or whether it is available at all meetings are decisions that are within the discretion of the board but whatever policies, rules, or procedures are established must be

consistently applied and not based on the viewpoint itself, no matter how unpopular that viewpoint may be.

C. The Free Speech Issue

Constitutions. Both the U.S. and New Mexico Constitutions prohibit governmental entities such as school districts from taking any action to abridge a person's freedom of speech. The New Mexico Constitution also contains a right to "speak, write and publish [one's] sentiments on all subjects," while the U.S. Constitution includes the right of the people to petition the government (in our case, the school board) for redress of grievances. U.S. CONST. amend. I, and XIV; NM CONST. art. I, § 17. These provisions have been interpreted by the courts to mean that speech may be restricted as to the time, place, and manner, but not on the basis of the content of the speech or the message it conveys.

New Mexico Attorney General. The New Mexico Attorney General has said generally that a school board may limit or decline to allow public debate and may take steps necessary to maintain public order at its meetings. Similarly, in a 1990 decision, the Attorney General wrote that a school board president may permit, deny, or regulate public participation at a school board meeting, so long as the president has authority to do so under the board's rules and so long as the board president does not act "arbitrarily or capriciously" and the board's rules are not "unreasonable, arbitrary or capricious." NM Att'y Gen. Op. 90-26.

D. Response to Topic Not on Agenda

During the public comment, the board is not required to negotiate or respond to complaints; in fact, the board should not do so unless an item is properly posted on the agenda. Silence, however, is not required of the board. For example, the board President may refer the issue raised to the Superintendent, suggest that the issue be noticed and addressed at a future Board meeting, or simply thank the speaker for his/her comment and do nothing further.

E. Response to Topic on the Agenda

When a person speaks about an item already on the agenda, the board can listen during that public comment time but reserve any discussion until such time as the agenda item is reached later in the meeting. A response is not required at the time of the comments, but any later board discussion may include reference to comments made during the public comment time.

F. Responses to Complaints

Unless the meeting is specifically noticed for the board to sit in its review capacity over a student or employee discipline matter or an employee grievance, the board is not required to negotiate or respond specifically to a complaint or public comment. However, the board can use information gleaned during public comment as an opportunity to "stop, look, listen" and perhaps mitigate or stave off future problems altogether.

III. The “Limited Public Forum”

A board meeting is in public, except for closed sessions for limited reasons specified in the law, but the public has no particular right to speak at that meeting. Once a time for public comment has been established, at least that portion of the board meeting has become a “limited public forum,” meaning that any limitations on comments must be reasonable. A limited public forum exists on 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*, 561 U.S. ____ (2010).

A. Subject Matter

School-Related. Boards may limit the topic of public comments to matters that are school-related. It is also reasonable for the board to have citizens sign up and indicate the school-related subject on which comments will be made. For example, a citizen speaking on the fairness of a city ordinance would not be speaking on something the board can address, and so that topic can be prohibited. Certain subject matters are also not appropriate for public comment because other laws or board policy provide a different venue for hearing those issues. An example might be an employee’s work-related grievance.

Personnel Issues. Over the years, many federal courts have considered the acceptable boundaries of a school board’s authority to limit public participation at its meetings. The United States Court of Appeals for the Tenth Circuit, which has jurisdiction over New Mexico, has addressed this issue once. *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999). In its 1999 *Mesa* decision, the Tenth Circuit reviewed a claim from a former county commissioner that the county commission violated his First Amendment free speech rights when it refused to let him speak during the public comment period about a county manager the commission had just fired. In that case, the county commission allowed public comment on other topics, but had a policy that prohibited public comment on personnel and litigation matters. The Court observed that the county commission designated its meetings as limited (or designated) public forums when it opened them to public comment. Therefore, any restrictions on speech in this limited public forum had to be “content-neutral time, place and manner restrictions...narrowly drawn to achieve a significant public interest.” The Court concluded that the commission certainly could some personnel and litigation matters in closed session, as allowed by the Open Meetings Act, but ruled that the performance of public employees was also a matter of public concern and so the public had a constitutional right to present its views on personnel at board meetings.

While an employee or citizen with a specific complaint may be directed to air his or her individual complaint through the employee grievance policy, rather than use the public comment time for the purpose of having the board address the complaint, the individual should still be permitted to speak as long as they comply with the public comment rules. The Fifth Circuit U.S. Court of Appeals (which does not include New Mexico) said that a rule directing those citizens with specific personnel complaints to a grievance process would not be an improper limitation on free speech rights *if* the District has in place alternate administrative channels for a speaker to express his or her concerns. *Fairchild*

v. Liberty Indep. Sch. Dist., 597 F.3d 747 (5th Cir. 2010). If no such grievance procedures are provided, however, then such topics would not be off limits during the public comment period.

But Be Careful. If the board has consistently permitted comments on issues that could be viewed as personnel issues in the past, in the absence of clear advance notice, it must be careful not to subsequently or randomly prohibit future comments about personnel issues.

B. Time Limits

Individual Speakers and Total Time. It is reasonable to have time limits on public comments in order to allow as many citizens to speak as possible. This does not mean that everyone must be allowed to speak, or that repetitive comments cannot be limited at the same board meeting. For example, if the board designates 30 minutes at regularly scheduled board meetings for public comments and provides each speaker with five minutes, then six speakers would be the maximum number of citizens able to speak at that meeting (if they all took their entire five minutes each). Also, some policies allow a group of citizens sharing the same perspective to designate spokespersons to comment on their behalf in order to allow a variety of opinions to be heard on a topic and to avoid repetition.

Enforcement. If the speaker unreasonably exceeds the time limit, the President should advise the speaker that time is up, ask him or her to step down, if necessary, and ultimately stop the speaker. If the speaker continues, the President can warn the speaker and in extreme situations as a last resort, have the speaker escorted out.

C. Repeat Speakers

Generally, if a citizen wishes to come to multiple board meetings, sign up, follow the rules, and then speak on the same topic in the time frame allowed by the board, the citizen should be allowed to speak. There are limited circumstances when a repeat speaker could be prohibited, however.

Prohibiting Repeat Speakers. The frequency with which a specific topic is discussed may be limited by board procedures, such as in a situation in which a decision has already been made and the same topic continues to be discussed during public comment, meeting after meeting.

Caution! At least one state supreme court in another jurisdiction was not sympathetic to a board that tried to limit speakers from repeatedly speaking at board meetings in a situation where the board decision had not been made. The school board had been sued by a parent after the chair refused to allow the parent to present a budgetary complaint that had already been presented at eight earlier board meetings. *Bressler v. Bd. of Educ.*, 201 N.J. 544 (N.J. 2010), quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). In that case, the New Jersey Supreme Court ruled it was improper to prevent the parent from speaking simply because he had presented before on the same issue. This type of improper restriction is different, however, from the board directing a complaining

employee, parent or member of the public to administrative grievance procedures. Those comments may be denied on the grounds of being duplicative or repetitive, since there are other more appropriate processes for addressing those concerns.

The budget process is a prime example of situation in which some citizens may want to return to multiple board meetings to offer input regarding their budgetary concerns. The wisest approach is let him or her speak.

D. Conduct of Speakers

Some Criticism to be Expected. Public comment at governmental meetings has been described as “democracy at its best and at its worst.” At its best, it is civilized democracy in action, providing a mechanism for elected officials to hear citizens speak on issues that affect schools. At its worst, it can be difficult to hear those whose messages, and the manner of presentation may be unpleasant. The board should listen and not over-react when someone disagrees with a decision, even if the person is passionate about his or her view.

Personal Attacks. Though criticism is inevitable during public comments, the board President may caution and not allow speakers to personally attack members of the board, the administration, or others attending the meeting. There is no specific court decision regarding this issue from New Mexico, but a federal appeals court elsewhere has concluded that a content-neutral limited public forum policy that prohibits personal attacks is not on its face unconstitutional as long as it is used to serve the legitimate public interest of maintaining decorum and order. *Steinburg v. Chesterfield County Planning Comm’n*, 527 F.3d 377 (4th Cir. 2008).

Other Uncivil Conduct. It is reasonable to require that speakers refrain from yelling, using obscenity, and engaging in other uncivil conduct during the board meeting. However, the board President should refrain from being too quick to have someone removed unless the conduct is disruptive to the meeting, is imminently threatening, or otherwise prevents the meeting from proceeding in an orderly fashion. *Collison v. Gott*, 895 F.2d 994 (4th Cir. 1990). A spectator may be prevented from boisterously commenting upon the deliberations, repeatedly interrupting the Chair, and similar behaviors, as long as the restriction on his or her comments is not based on disapproval of the viewpoint being expressed. *Collison v. Gott*, 895 F.2d 994 (4th Cir. 1990); *Eichebnlaub v. Township*, 385 F. 3d 274 (3d Cir. 2004). As one federal court put it: “Public meetings inevitably attract a goodly number of garrulous people. Many of them are crucial to robust debate. At times, however, even the champions of democracy need to be ruled out of order on the merciful march to adjournment.” *Collison v. Gott*, 895 F.2d 994 (4th Cir. 1990).

IV. What’s the Process?

District policy may provide for public comment time at called meetings at any time during the meeting.

A. Before the Meeting

A sign-up process before the meeting begins is advisable. The sign-up sheet can include the name of the speaker and the topic to be addressed. It is advisable to have copies of the board rules and policies regarding conduct of the public comment time, such as limitations on time, topics, and others.

B. Board President's Statement

Basic Rules. The board President should state the basic rules at the beginning of open forum, such as time limits, the need for civility, and others so the public knows what is expected and an orderly meeting can be conducted. The board President's statement may also include a comment that if there is an issue that is proper for the District's grievance/complaint policies, he may refer the speaker to one of those policies.

Names? For some districts, there has been a tradition of telling speakers that they are not allowed to mention names in their remarks and/or not allowed to criticize individuals. With the development of the law in recent years regarding free speech issues, these rules have no legal basis. In fact, if a name is allowed to be mentioned to praise a job well done, it would be difficult to legally justify omitting a name for purposes of criticism.

Distancing the Board. For boards who are concerned by criticism leveled at groups or individuals, the board President's statement at the beginning of the meeting may include a disclaimer and/or warning to make sure the public understands that the statements made during public comment time are the opinions of the speaker and not necessarily that of the board members or staff. The President's statement could also include a warning that individuals can be liable for their own statements, depending on the nature of the comments.

These handout materials were prepared by attorneys at the law firm of Walsh, Anderson, Brown, Gallegos, and Green, P. C., and are intended to be used for general training and discussion purposes. Nothing in these materials should be considered specific legal advice. For legal advice on a particular issue, an attorney should be consulted directly.

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