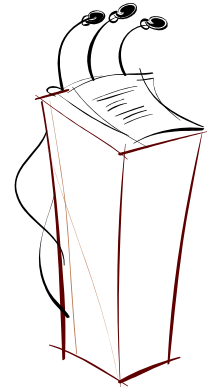


WASB Webinar Series



WISCONSIN
ASSOCIATION OF
SCHOOL BOARDS

Public Participation During School Board Meetings



October 23, 2019

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Public Participation – Legal Background

- Some state and federal laws require the school board to hold “public hearings” or seek other public input prior to taking certain actions or adopting certain policies. Examples:
 - Annual budget hearing. §65.90(4)
 - Hearings on borrowing resolutions. §67.05(6a)(a)2.b
 - Hearings on school district requests for a waiver of rules or statutory requirements from DPI. §118.38(1)(b)
 - Hearings regarding the establishment of a charter school. §§118.40(2) and 118.40(2m)
- For purposes of this presentation, discussion will assume that the public participation is not part of a “public hearing” and no other similar requirement for public participation applies



Public Participation – Legal Background

- No statutory requirement for school districts to include a period of public participation during regular or special board meetings or committee meetings.
 - Most school boards find that it is important to both allow and limit periods of public comment at board meetings.
 - Although a school board has no legal obligation to regularly include a period of public comment on its meeting agenda, if a school board chooses to allow members of the public an opportunity to address the board at a meeting, the period of public comment must be included on the meeting notice. See *Wis. Stat. § 19.84(2)*.
- In some cases, school board policy may specify that the school board will hold a “public hearing” before the board takes certain actions (e.g., changing school attendance boundaries).



Public Participation – Board Response

- During a period of public participation, the school board may receive information from the public and may briefly discuss any matter raised by the public.
- If a member of the public raises a subject that does not appear on the meeting notice, it is advisable to limit the discussion of that subject and to defer any extensive deliberation to a later meeting for which more specific notice can be given.
- In addition, the school board may not take formal action on a subject raised in the public comment period, unless that subject is also identified in the meeting notice.

See *Wis. Stat.* § 19.83(2); [OML Compliance Guide](#) at p. 22.



Key Policy Considerations

- It is almost always helpful to have (and follow!) a formal board policy regarding periods of public comment.
- The law provides a lot of flexibility to school boards in structuring public comment periods, but boards must be very cautious about content-based and viewpoint-based restrictions.
- The meetings at which a period of public comment will be offered (e.g., regular meetings, special meetings, committee meetings, etc.)
- Whether comments can be on any topic/issue, or whether the period of public comment will be confined, e.g., to noticed agenda topics
- The total amount of meeting time that will be allocated to public comment



Key Policy Considerations

- The placement of the public comment period on the agenda (e.g., at the beginning of the meeting, at the end of the meeting, etc.)
- The length of time each person will be permitted to speak
- *The “class” of eligible speakers (e.g., school district residents and taxpayers)*
- Pre-comment speaker “registration” requirements
- The ability to make exceptions to the “normal” procedures
- Other “content-neutral” limitations (e.g., prohibiting repetitive appearances, and comments that are obscene, threatening, or that would constitute harassment)



Limitations on Discretion

- A period of public comment is a type of “designated forum” for speech that, generally speaking, has a substantial degree of protection under the First Amendment—including a requirement of “viewpoint neutrality”
 - Any content-based exclusion of speech in a designated forum must serve a compelling government interest and be narrowly drawn to achieve that end.
 - The government may enforce reasonable “time, place and manner” restrictions, provided they are content-neutral, narrowly tailored to serve a significant government interest, and leave ample alternative channels for communication.
- Very complex issues can arise when:
 1. A speaker presents a complaint dealing with the alleged conduct of individual students or individual staff members; or
 2. A district employee decides to speak to the school board during a public comment period.



Limitations on Discretion

- An individual may not be prohibited from speaking during a public comment session at a public meeting based on his/her earlier “offensive” or “threatening” statements to a municipal employee in an entirely different setting. Surita v. Hyde, 665 F.3d 860 (7th Cir. 2011)
- A school board may not exclude teachers who choose not to join a bargaining unit from speaking to the board on matters that are legitimate subjects of collective bargaining. City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm’n, 429 U.S. 167 (1976).



The Role of the Presiding Officer

- Many districts start the period of public comment by having the presiding officer deliver a standard “speech” that (1) identifies procedures; and (2) reminds speakers that they are not immune from legal consequences related to the content of their speech.
- The presiding officer of the meeting must be willing to assert a strong presence, consistently enforce the “rules,” and exercise patience.
- The presiding officer needs to consistently enforce any established limitations on speaker time or content.
- The presiding officer may interject during a speaker’s comments and attempt to redirect a complaint/issue to an established procedure.
- The presiding officer may interrupt, and potentially cut off, a speaker whose speech is, e.g., threatening, obscene, or unduly disruptive/disorderly (make sure board policy prohibits such conduct).
- The presiding officer may help direct the nature of the board’s response, if any, to a speaker’s comments.



Public Comment Period Should Not Be First Avenue for Conflict Resolution

- A public comment period is not the only way, or typically the “best” way, to (1) obtain broad input on an important question; or (2) have fact-specific issues/complaints brought to the District’s attention.
- Establish a district-wide culture of **responsiveness**
- School board members need to be prepared to help individuals (1) find the right channel for their issue, and (2) understand the limitations that prevent the board from investigating and resolving many fact-specific complaints.
- The school board should be open to receiving written correspondence that can be routed for a proper response.



Public Comment Period Should Not Be First Avenue for Conflict Resolution

- In some cases, school officials should be willing to encourage an individual to file a formal complaint or grievance.
- When complaints involve allegations of misconduct, incompetence, etc. by individual employees or students, a closed session meeting can sometimes be an appropriate “channel”. However, agreeing to meet with a complaining party in closed session has its own disadvantages.
- In some situations, individuals will insist on approaching the school board directly.



Addressing Complaints That Implicate Individual Employees or Students

- **Approach #1:**
Limiting public comment to noticed agenda topics will inherently limit the issues that can be brought to board meetings as complaints.
- **Approach #2:**
Make sincere efforts to redirect such complaints, but ultimately let the individual present his/her comments, perhaps with a follow-up “disclaimer” by the presiding officer.



Addressing Complaints That Implicate Individual Employees or Students

- **Approach #3:**

Take a calculated legal risk that potentially tests the limits of constitutional law, e.g., *Fairchild v. Liberty Independent Sch. Dist.*, 597 F.3d 747 (5th Cir. 2010); *but see*, e.g., *Mesa v. White*, 197 F. 3d 1041 (10th Cir. 1999); *Bach v. School Bd. of the City of Virginia Beach*, 139 F. Supp. 2d 738 (E.D. Va. 2001) (citing additional cases)

See also, *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)



Addressing Employees Who Speak During a Public Comment Period

- The right/ability to “enter the forum” and speak may be different from a guarantee that there will be no employment-related consequences
- Sometimes the law will protect both the right to speak and insulate the employee from job-related consequences
 - Speech as a private citizen on an issue of “public concern” that is also within the scope of the forum created by the school board
 - Speech that constitutes protected “concerted activity” under labor law

The Wisconsin Employment Relations Commission (WERC) will determine what constitutes concerted activity by examining the context of the situation and whether the behavior involves purely individual or collective concerns.

When employees express work-related concerns on behalf of others, with or without a union, that behavior is classic concerted activity.



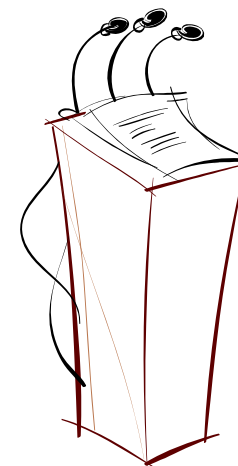
Addressing Employees Who Speak During a Public Comment Period

- Sometimes, employment-related consequences may follow from an employee's decision to address the school board
 - Statements made with knowledge of, or reckless indifference to, their falsity; or statements that violate the law
 - Speech of a "policymaking official"
 - Statements "pursuant to an employee's official job duties"



Public Participation - Q & A

- What if a member of the community calls the District office ahead of the board meeting and tells the staff that he intends to present PowerPoint™ slides in connection with his comments to the Board and the room will need to be set up accordingly? Do you have to allow that?
- What should the presiding officer do if the meeting notice included no period of public comment, but, when a particular agenda topic is reached during the meeting, a member of the community stands up and says, “I would like to make a comment on this topic”?



Public Participation - Q & A

- Should the minutes of the meeting attempt to capture the substance of public comments, the identities of speakers, etc.?
- If Speaker A wishes to “donate” all or a portion of his/her entire allotted speaking time to Speaker B, can he/she do this?
- Can a speaker claim a First Amendment violation when the members of the school board pay close attention to other speakers, but then “humiliate” him/her by paying “no attention whatsoever”?



... considerations for a policy?



Conclusion: Policy Development Considerations

- See slides 5 and 6, above, “areas of board discretion”
- Clear statements of the authority of the presiding officer to enforce the policy and to prevent improper disruption of the meeting by, e.g., interrupting a speaker, potentially cutting off a speaker, or summoning law enforcement if needed.
- Statements of the purpose of receiving public comments and the purpose of placing limits on the public comment period; do some “channeling.”
- Where comments are not confined to agenda topics, include a statement that comments must, at a minimum, address topics that are within the legitimate jurisdiction of the school board.
- Policy addressing public hearings as distinct from public comment periods.
- Policy addressing expectations for school district employees in terms of district-related communications and complaints.



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