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### **Public Meetings v. Meetings of the Public.**

- The primary purpose of school board meetings is to conduct the business of the board as it relates to school policies, programs, budget, and operations.
- A school board meeting\* is one that the public has a right to attend, rather than a meeting of the public where everyone might have the right to speak.
- This does not pertain to Annual or statutory “public hearings”, for instance:
  - Budget
  - Unanticipated revenue
  - Capital or Expendable Trust Funds
  - Recording for teacher evaluations

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## **Board Meetings are Not Meetings Requiring Public Speech.**

- The United States Supreme Court has recognized that nothing in the U.S. Constitution requires public bodies to allow members of the public to speak during meetings of that body.
- Likewise, neither the State's Constitution, nor the Right-to-Know Law, RSA 91-A, create a public right to speak during or at board meetings.
- As there is not legal mandate to do so, the "power" to create the opportunity for public comment is reserved to the school board.

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## **Allowing Public Comment & Creating a Public Forum.**

- An important facet of good governance is to provide the public the opportunity to give input relative to policy and operational decision making.
- Government ... should be open, accessible, accountable and responsive.

*Part I, Article 8 of the NH Constitution*

- Longstanding tradition within New Hampshire for school boards (and other public bodies) to allow some level of public comment at board "business" meetings.
- When a board allows time at its meetings for public comment, the board creates a "forum" for speech, which in turn implicates free speech considerations under the First Amendment.

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## 1<sup>st</sup> Amendment Forums.

- Federal appellate courts have delineated four general types of public forums, each requiring different analysis to determine the scope of the public’s right to speech, and the government’s ability to regulate it.
  - Open Public
  - Designated Public
  - Limited Public
  - Closed or Non-Public
- When a board allows for public comment at board meetings, the policy, rules and procedures it creates determine whether it is establishing a designated public forum, or a limited public forum.

## Board Meetings – Multiple Options.

- Allow public comment on **any matter**, including raising issues such as individual personnel or student matters (“designated public forum”).
- Limit public comment to **agenda items**, or according to some other viewpoint neutral standard (“limited public forum”).
  - Generally easier to defend permitting certain topics only rather than ruling out of order specific comments or topics.
- Do not allow public comment (“closed forum”).
- Combinations.

***NOTE: NHSBA’s sample policy BEDH includes two variations of #2.***

[\*BEDH 2018.docx\*](#)

## Regulating Public Comment Period. Time, Place and Manner.

- For each type of “public forum”, the government is permitted to:
    - enact and apply “reasonable regulations pertaining to time, place and manner”
- Provided that such regulations are**
- viewpoint neutral.
- Thus, once a board has determined to allow public comment, whether specific to agenda items or not, the board should then determine what rules or guidelines it will impose to regulate the public comment.

## First Amendment - Viewpoint Neutrality.

- “Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”\*
    - \*There are certain types of speech that are unprotected under the First Amendment: these include incitement to lawless action; blackmail, comments threatening bodily harm, fighting words, and obscenity (which does not include mere profanity).
- City of Madison Joint School Dist. No 8 v. Wisconsin Employment Relations Comm.*, 429 U.S. 167, 178-79 (1976)(Justice Brennan, concurring) (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).
- Viewpoint neutral: The regulations may not silence or impact one viewpoint any more than another viewpoint on the agenda topic.



**Public Comment Period  
Policy & Meeting Management  
Considerations**

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**Reasonable – Viewpoint Neutral  
Regulations Regarding Time, Place  
and Manner**

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**Time, Place and Manner Restrictions.**

- **Time:** e.g., at a particular point on the agenda. If the board uses the agenda limited model, it can choose to have comment on each item as it arises, or one set period at a designated place on the agenda. May set time periods, for individual speakers, and more generally, but would need to have a fair method of selecting speakers.
- **Place:** e.g., at a duly noticed and legally held public school board meeting; location within the school and must stand in line.
- **Manner:** the mode of communication (spoken, distributing pamphlets, etc).
- Such restrictions are permitted provided (a) they are viewpoint/content neutral, and (b) still allow ample alternative channels of communication.
- Who is the public? Safest is all. Strongly recommend all residents, registered voters, staff and other parents.

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## Regulations Found to Be Invalid.

- **Prohibition on “personal attacks.”** *Bach v. Sch. Bd. of the City of Virginia Beach*, 139 F. Supp. 2d 736 (E.D. Va. 2001).
- **Prohibition on criticism of school employees.** *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997); and *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719 (C.D. Cal. 1996).
- **Prohibition on dissident teachers addressing school board during public comment on collective bargaining issues.** *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*; 429 U.S. 167 (1976).

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## Regulations Found to Be Valid.

- *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990); **permissible to prohibit citizen speech that is irrelevant or repetitious.**
  - **Also permissible to limit public comment to only those topics on the agenda**
- *Lowery v. Jefferson County Bd. of Educ.*, 586 F.3d 427 (6th Cir. 2009); upholding school board policy prohibiting speech when it is **“repetitive, harassing or frivolous”**.
- *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989); valid ejection of speaker from city commission meeting based on **“off-topic, disruptive and antagonistic speech”**.
- *Wright v. Anthony*, 733 F.2d 575, 576 (8th Cir. 1984); **upholding five-minute limit** for speech at public hearing.
- *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007); **three minute time limit** to speak at public comment portion of city council meeting.

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## Regulating Public Comment Period. Policy Considerations and Suggestions.

- Include language **restricting complaints about** individuals. (Except perhaps superintendent.)
  - Include language indicating the channels through which complaints should be made (NHSBA sample policies KE, and KEB).
  - The chair should be prepared to try to deflect such complaints by redirecting through those policies and should be prepared to reference privacy and procedural considerations.
  - Assuming a member of the public voices complaints about individuals, privacy laws/rules limiting the board are not implicated unless the board, itself responds. Liability? Due Process?

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## Regulating Public Comment Period. Policy Considerations and Suggestions.

- If comment is limited to agenda items, provide a means for members of the public to **request** items to be included on the agenda. (See NHSBA policy BEDB.)
  - Persons wishing to present longer than X minutes, specifically encouraged to contact Superintendent to request agenda time.
  - Board/board chair may or may not take up the item.
- Extreme repetition can be deemed “disruptive”, more by subsequent speakers rather than single.
- Include provisions **DISCOURAGING** repetitive comments, whether by the same or other speakers:
  - ask to simply indicate support of prior speaker, or
  - state support or opposition of matter under consideration.

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## Regulating Public Comment Period. Policy Considerations and Suggestions.

- Describe *desired* standards of discourse. E.g., “All speakers are to conduct themselves in a civil manner. Libelous, defamatory or violent statements will be considered out of order.”
  - Other than clearly unprotected speech (fighting words, incitement to lawless action, truly obscene speech), implementation of the desired standards may wander into “viewpoint discrimination”.
  - ***Discourage don’t prohibit!***
  - First Amendment disfavors “prior restraint”.
  - Punish not prevent.
  - One person’s decorum is another person’s First Amendment right.

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## Regulating Public Comment Period. Meeting Management Suggestions.

- Make the public comment policy readily available.
- Set a specific place on the agenda.
- Summarize key points of policy at the outset of public comment.
- Explain purpose of board business meeting and public comment is for input.
- Repeat pertinent rules as necessary – generic warning.
- Set a time limit for each speaker.
- Establish a NEUTRAL – but established - method for speakers to participate (sign-up, first come first serve, line at mic, etc.).

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## **Public Comment, not Debate.**

- Remind meeting that members of the board are without authority to act independently as individuals in official matters. *Either the board has already discussed and acted, or it should be taken up – if at all – according to the agenda policy.*
- Indicate board will not respond substantively to questions or comments but may ask clarifying questions. (If using a time restraint, a board could allow for extra time if the board used an inordinate amount with questions).
- While this guideline need not totally prohibit responses, the board should defer discussion on most matters until after the superintendent/board have had a chance to gather necessary information and or to the point in the meeting for Board deliberation.
- Boards should be disciplined in limiting the comment period to just that - time for the public to offer input.

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## **Regulating Public Comment Period.** **Practice Tips.**

- Focus on the issue, not the person, and not the emotion.
- Active listening but deferred address.
  - Demonstrate listening using nonverbal cues understanding- not necessarily agreement - nodding, eye contact, leaning forward.
  - Brief verbal affirmations from Chair, “yes, we understand your point”, “thank you.”
  - Chair may paraphrase to show understanding of comment.
  - Chair may ask clarifying question, or ask if board members need to ask clarifying question.
- Demonstrate listening by reference during board deliberation.

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## **Regulating Public Comment Period.** **Policy Considerations and Suggestions.**

### **Alternatives to Live Comment**

- Remote comment? Boards may determine how and whether to allow remote public comment, but must be mindful of both the access (e.g., ADA, and technological) issues.
  - Real time close captioning is likely required.
  - May indicate that remote is “extra”, can’t guarantee continuation of comment if technology issues. 91-A access is live and in person.
- Written comment? Different than emails to board/board members.
  - Comment rules could specify such things as word limits, whether read into record, or attached to minutes, or simply summarized.

## **Public Forums – The Other Kind.**

- For important or emotional topics – where you are likely to draw many speakers consider a separate or special “public forum”.
- Essentially a board meeting comprised solely of a public comment period.
- You can use the same basic rules as for your typical public comment period, with modifications to fit the purpose.
  - Establish an agenda topic (e.g., a forum on a transgender policy, is not an opportunity to talk about the benefits of an artificial turf for the football field);
  - Expand the individual time limits;
  - Set a total time for the forum;
  - Determine how it will be moderated/facilitated.



## Dealing with Meeting Disruptions

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### **Out of Order Speakers & Disruptive Attendees**

- Assuming a board has adopted reasonable meeting rules, including those which pertain to public comment, and administers them EVEN-HANDIDLY, what can or should a board do when a speaker (or even a board member) is disruptive?
- Under both the U.S. Constitution, and New Hampshire law, persons who actively disrupt a public meeting and/or continually refuse to follow reasonable meeting rules may lose their right to attend the meeting. (I.e., ordered to leave.)
- If the order to leave is made by a law enforcement officer, then further refusal may lead to criminal charges. See RSA 642:2 (Disorderly Conduct).

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## Out of Order Speakers & Disruptive Attendees

- Under RSA 642:2 of the New Hampshire Criminal Code:  
a person is guilty of disorderly conduct if:
  - III. He purposefully causes a breach of the peace, *public inconvenience, annoyance* or alarm, or recklessly creates a risk thereof, by:
    - (b) Disrupting the orderly conduct of business in any public government facility.
    - (c) Disrupting any lawful assembly or meeting of persons without lawful authority.

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## Out of Order Speakers & Disruptive Attendees

- Disruptions must be actual, not constructive, technical or anticipatory (i.e., a perception comments could cause a disruption after the fact).
- Examples of actual disruptions:
  - Refusal to stay on agenda items **if the published rules** limit public comment to agenda items;
  - Refusal of a speaker to cease talking after time has expired;
  - Speaking without being recognized by the Chair; and
  - Shouting and yelling while others are speaking.

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## **Out of Order Speakers & Disruptive Attendees**

- Passive “interruptions” generally do not constitute “disruptions”:
  - will not support a disorderly conduct charge;
  - may constitute First Amendment or free speech violation; and
  - may constitute violation of open meeting requirements.
- Passive interruption examples:
  - eye rolling;
  - stray or minor utterances;
  - symbolic gestures;
  - tee shirts with provocative messages;
- Signs, like video/sound recording might be disruptive depending on how they are held, etc.

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## **Out of Order Speakers & Disruptive Attendees**

- In *State v. Comely*, 130 N.H. 688 (1988), the New Hampshire Supreme Court upheld a disorderly conduct conviction after the defendant had caused a 1-1½ minute delay to the opening of the gubernatorial inauguration by walking down the aisle and shouting remarks about the Seabrook nuclear facility as guests were being introduced.
- In *State v. Dominic*, 117 N.H. 573 (1977), the Supreme court ruled that a town selectman could be found guilty for refusing an order of a police officer to leave a select board’s meeting after the defendant had “continually interrupted” another board member, argued with the chairperson concerning the chair’s rulings, and ignored the chair’s efforts to regain order.
- In an unpublished order dated May 2, 2019, the N.H. Supreme Court affirmed the convictions for disorderly conduct and resisting detention of a member of the public after he repeatedly refused to comply with a select board’s public comment rules. See *State v. Jeffrey Clay, Case No. 2018-0184 (N.H. S.Ct.)*.

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## Out of Order Speakers & Disruptive Attendees

### PROCEED CAREFULLY

- Keeping in mind the substantial personal right we have to free speech, as well as the **complexity of the intersection** between that right and the public body's right to conduct its meetings and business in order, a decision to exclude a person from a meeting should be taken and carried out with due care.
- Discuss process with officer or Chief before the meeting.
- An order to leave should apply only to that meeting unless the body has obtained an injunction or other judicial order with respect to future meetings.

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## Out of Order Speakers & Disruptive Attendees

- Steps to take before exclusion:
  - Provide copies of the public comment rules at each meeting (back of the agenda, stack at the door);
  - Summarize the rules prior to public comment period;
  - Apply the rules equally, with only minor variance;
  - **Strike 1:** Provide clear warnings and instructions (not mere polite requests) before taking formal action;
  - **Strike 2:** If disruptions persist, call a recess and try to talk with the person – preferably with officer assistance;
  - Before ordering exclusion, call for police presence;
  - **Strike 3:** Provide one last chance with the officer present;
  - **Strike 4. *Clearly*** order the person to leave, and ask the officer's assistance to effect that order. **Officer should see at least two warnings.**

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## General Tips Regarding The Public at Meetings

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### Public Meeting Decorum

- **Respect and Decorum Starts with the Board.**
- While emphasis is put on managing the public at meetings, it is just as important (if not more so!) for board members to model civility.
- The chair or rules of order should engage every member. Implement a rule of circling with some thought toward rotation.
- Listen to each other.
- Don't have side conversations with your neighbor.
- Don't interrupt or talk over one another. **Remember the minute taker.**

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### **Public Meeting Decorum**

- Treat one another courteously. Even if you don't like each other or each other's views.
- Resist getting defensive.
- Separate the person from the problem/issue.
- If someone is challenging your opinion or view, remember that this is the process. It does not need to be personal, and it takes two people to have an argument. Don't argue back.
- Board members ran with the common objective of serving the public and public education system – they just have differing views.
- Collective decisions are generally better when differing views have been vetted and considered.

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