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## How to Participate

- To close or reopen your panel.
- To download today's presentation or any additional documents. Use this to also submit text questions.
- Questions should be entered in chat.
- If time permits, we will have a brief Q&A session at the end of this presentation.
- Do not use raise hand or Q&A



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

- Traditionally, the “power” to create the opportunity for public comment had reserved to the public body/board.
- Under the First Amendment and RSA 91-A, a 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
- The primary purpose of school board meetings is to conduct the business of the board.
- Distinct from Annual or statutory “public hearings”, e.g.:
  - Budget
  - Unanticipated revenue
  - Capital or Expendable Trust Funds
  - Recording for teacher evaluations

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## **SB410 & First Amendment**

- Newly enacted RSA 189:74 (SB 410) requires 30 minutes of public comment at every SCHOOL OR SBOE (RSA 21-N:10-a) meeting other than emergency meetings under RSA 91-A:2, II, or a meeting called solely for purpose of addressing non-public issue (91-A:3)
- Whether by legal mandate or board choice, opportunity for public comment at board or other public body meetings creates a “forum” for speech, which in turn implicates First Amendment principles
- Boards can enact rules about public comment, but rules must adhere to First Amendment standards
- Board rules may include “time, place and manner” restrictions, as well as other parameters, provided that in all instances, the limitations are viewpoint neutral

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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
- The breadth of 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

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## First Amendment – Unprotected Speech.

- **Limited classes of unprotected speech:**
  - speech that incites **imminent** unlawful conduct;
  - speech threatening bodily harm or other "true" threats;
  - child pornography;
  - speech that violates intellectual property;
  - false advertising;
  - defamatory speech; and
  - **Obscenity - NOT MERE VULGARITY**

*“[W]hether the average person, applying contemporary community standards, would find the work appeals on the whole to prurient interests; describes sexual conduct in a patently offensive way; and lacks any serious literary, artistic, political or scientific value.” Miller v. California, 413 U.S. 15 (1973)*

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## **Time, Place and Manner Restrictions.**

- Such restrictions are permitted provided (a) they are viewpoint/content neutral, and (b) applied fairly.
  - Time: e.g.,
    - particular point(s) on the agenda
    - aggregate time limit
    - individual time limit
  - to have a fair method of selecting speakers.
- Place: e.g., stand at certain place or in line.
- Manner: the mode of communication (spoken, distributing pamphlets, etc).
- **RSA 189:74 bends or sets parameters for some of these.**

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## **First Amendment Grey Areas**

- Many 1<sup>st</sup> Amendment nuances have not been settled conclusively by U.S. Supreme Court.
- Traditionally accepted “norms” rejected by various lower courts – while upheld by others.
  - Complaints vs. accolades re individual employees or students.
  - Vulgar language.
    - As disruption
    - One person’s vulgarity is another’s idiolect
    - As political speech
  - Residents vs. public.

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## **SB410 / RSA 189:74**

- i. School boards shall provide the opportunity for the public to comment on school district matters at a meeting of the school board held under RSA 91-A:2. The public comment period shall be for no less than 30 minutes. School boards may request that persons register in advance of the meeting, but may not require pre-registration as a condition of participating in the public comment period. School boards may impose reasonable time limits for each speaker, provided such time limits are equal for all speakers. Nothing in this section shall restrict school boards from establishing other reasonable standards for the public comment period, provided such standards are imposed equally for all speakers. School boards may reasonably restrict public comments that disclose student personally-identifiable information, teacher personally-identifiable information, or other confidential or privileged information.
- ii. The requirement that a school board shall provide the opportunity for the public to comment on school district matters at a meeting of the school board shall not apply to emergency meetings under RSA 91-A:2, II.
- iii. The requirement that a school board shall provide the opportunity for the public to comment on school district matters at a meeting of the school board shall not apply when the sole purpose of the school board meeting is to enter non-public session under RSA 91-A:3.

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## **Questions from SB410 / RSA 189:74**

- How is 30 minutes calculated?
- Who is the public?
- Can board define scope of “school district matters”?
- What happens if public does not exhaust the time?
- Apply to committees?
- Allow remote comment?
- Allow written comment?
- What is personally-identifiable information?
- Pre-registration?

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## Public Comment: Policy and Practice Considerations

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### Public Comment – Policy/Practice Considerations

- Describe *desired* standards of discourse. E.g., “All speakers are to conduct themselves in a civil manner.”
- First Amendment **STRONGLY disfavors** “prior restraint” and **prohibits** content bias or discrimination in public comment
  - Be very mindful of prohibitions based upon content
  - Extreme repetition can be deemed “disruptive”; implementation must be equitable; good place for gentle reminders.
- 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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### Public Comment – Policy/Practice Considerations

- Provide for public to **request** items to be included on the agenda (See NHSBA policy BEDB)
  - Persons wishing to present longer than X minutes, should contact Superintendent to request agenda time
- Establish a NEUTRAL – method for speakers to participate (sign-up, first come first serve, line at mic, etc.)
  - Can't require sign-up, but can use it to prioritize
- Need to determine how Board will calculate/run the 30 minutes
  - Can be flexible as long as opportunity for 30 minutes is clearly provided in agenda/notice, and reflected in minutes

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### Public Comment – Policy/Practice Considerations

- Include language **restricting comments** with “personally identifiable information” (“PII”) of students and staff. (*See RSA 189:65, VII & VII-a, for possible definition.*)
  - Include language indicating the channels for complaints about personnel/students (KEB, JICK, AC, GBK or CBA's).
  - The chair should be prepared to try to deflect such complaints.
  - Language from NHSBA sample BEDH: *“... consistent with RSA 189:74, I, and in the interest of protecting personally identifiable information (“PII”) as well as other confidential information, comments (including complaints) regarding individual students, volunteers, or employees (other than the Superintendent) should be directed to the Superintendent or otherwise as provided under the complaint/grievance resolution processes set forth in School Board policies {\*\*}KE and/or {\*\*}KEB. “*
  - Board is not violating privacy if public discloses, but continuation reduces the shield and may impact due process.

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### **Alternatives to Live Public Comment**

- 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
- Remote comment? Boards may determine how and whether to allow remote public comment
  - Must be mindful of both the 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
  - May prioritize live over remote
  - 91-A access is live and in person

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### **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.

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## **Public Comment & Meeting Management Tips**

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### **Public Comment - Meeting Management Tips**

- Make the public comment policy readily available
- Set a specific place on the agenda
- Summarize key points of policy at start of public comment
- Repeat pertinent rules as necessary – generic & specific warnings
- Anticipate “hot button” issues and prepare accordingly
- Focus on the issue, not the person, and not the emotion
- Much safer to wait out the time than to try to control/limit prohibited content.
- Discourage don't overreact – rabble “rousers” need reaction and resulting sound-bites & press to be successful

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## Public Comment - Meeting Management Tips

- Administer public comment rules consistently
- Active listening but deferred response
  - 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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## Public Meeting Decorum

- **Respect and Decorum Starts with the Board**
- While emphasis is put on managing the public at meetings, it is more important for board members to model civility -
  - for public tone
  - but more for effective board work
- 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 run 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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### **Meeting Disruptions**

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### Meeting Disruptions

- Under 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*
- Disruptions must be actual, e.g. -
  - Speaking without being recognized by the Chair;
  - Refusal to stay on agenda items during public comment **if the published rules** limit public comment to agenda items;
  - Refusal of a speaker to cease talking after time has expired;
  - Shouting while others are speaking

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### Meeting Disruptions

#### PROCEED CAUTIOUSLY

- A decision to exclude a person from a meeting should be taken and carried out with due care, and only after other efforts have failed.
- 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
  - Provide clear warnings and instructions (not mere polite requests) before taking formal action
  - If disruptions persist, call a recess and try to talk with the person

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## Meeting Disruptions

### ➤ *Steps before exclusion continued...*

- Call for police presence;
  - Provide one last chance with the officer present (best if officer sees two)
  - **Clearly** order the person to leave and ask the officer's assistance to enforce that order
- An order to leave may only apply to that meeting unless have obtained injunction or other judicial order with respect to future meetings
- Trespass letters should include meeting exceptions

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## Public Comment: Various Court Decisions

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### **Regulations Found to Be Invalid**

- **Prohibition of “vulgar” or “offensive” speech** - *McBreairty v. School Board of RSA22*, Do. # 1:22-cv000206-NT, Order (U.S. Dist. Ct., D.Me., July 20, 2022)
- **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/Actions Found to Be Valid**

- **Permissible to prohibit citizen speech that is irrelevant or repetitious** - *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990)
- **Upholding school board policy prohibiting speech when it is “repetitive, harassing or frivolous”** - *Lowery v. Jefferson County Bd. of Educ.*, 586 F.3d 427 (6th Cir. 2009)
- **Valid ejection of speaker from city commission meeting based on “off-topic, disruptive and antagonistic speech”** - *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989)
- **Upholding three minute time limit** - *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007)
- **Upheld removal after use of vulgar language based upon disruption, not viewpoint** - *Dyer v. Atlanta Indep. School System*, Do. # 1:18-cv-03284-TCB (11<sup>th</sup> Cir., 3/22/2021)

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## N.H. Meeting Disruption Cases

- *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
- *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
- *State v. Jeffrey Clay*, Case No. 2018-0184 (N.H. S.Ct.), a 2019 unpublished order, the N.H. Supreme Court affirmed 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

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