



Policy Advisor

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CONSTITUTIONAL CONSIDERATIONS FOR PUBLIC PARTICIPATION POLICY

Allowing members of the public to speak at school board meetings is at the forefront of many school board members' considerations to the extent it has not been in a long time, not only in Indiana but also in many other states in the country.

Under Indiana's Open Door Law, it is clear members of the public only have the right to attend, observe, and record school board meetings; they do not have the right to address the board or individual board members, nor engage in disruptive behavior during the school board meeting.

Given the law, it is up to a school board to determine whether or not members of the public will speak at its meetings. This is accomplished through a school board-adopted public participation policy.

While the school board has a wide berth of discretion as to the provisions of its public participation policy, there are a few parameters it must keep in mind when considering the policy. There are constitutional issues and rights to be considered, namely the First Amendment Free Speech rights of individuals. A recent case is illustrative of this point.

The case is out of Ohio and involves a school board's policy on public participation and how it was applied by the board against citizens addressing the board at one of its meetings. The policy required individuals who wanted to speak during the public comments portion of the school board agenda to fill out a form

at least two business days before the day of the meeting, and the form had to be filled out in person during the business hours of the school district's central office. The board required this process in order to "conduct its meetings in a productive and efficient manner that assures that the regular agenda of the Board is completed in a reasonable period of time" and for a "fair and adequate opportunity for the input to be considered." The school board set up this process to address problems it experienced in that past wherein individuals would sign up to speak but would not attend the meeting. The policy also stated the circumstances the presiding officer had the authority to address during the public comment portion of the agenda. The particular circumstance at issue in this case was the presiding officer could "interrupt, warn, or terminate a participant's statement when the statement is too lengthy, personally directed, abusive, off-topic, antagonistic, obscene, or irrelevant."

The case involved four persons who wanted to address the board after a school shooting occurred, and the board was considering allowing certain employees to be armed while at school. Three of the four persons did not fill out the required form, believing the fourth person who did sign the form also signed them up to speak at the meeting. During the meeting, the person who did sign up spoke at the meeting with a prepared speech in which his remarks were directed at the board members. He did not curse or use obscene language, but he did use the word

“threatening” about the board’s actions and accused the board members of pushing their pro-gun agenda. The board president interrupted him and asked him not to use the word “threatening,” and another board member told him to stop putting words in board members’ mouths and stating things that are not facts. Eventually, the presiding officer had the person removed. The court viewed a video of the patron’s speech and stated the person was calm throughout the speech and did not speak more than the allotted three minutes set out in the public participation policy. The other three patrons who are the Plaintiffs in the case were denied the opportunity to speak as they did not fill out a form.

All four patrons sued the school board claiming the policy violated the First Amendment Free Speech Clause and that the Board violated the patron’s Free Speech rights when board members interrupted him and removed him from the meeting.

The court found the policy did violate the First Amendment, as its provisions contained impermissible viewpoint discrimination. Moreover, as applied to the patron, the Board violated his Free Speech rights by interrupting him and removing him from the meeting. The court also found the preregistration requirement did not violate the Free Speech Clause. The court’s reasonings for its ruling are explained below.

VIEWPOINT DISCRIMINATION

The court reviewed the content of the policy particularly focusing on the provision mentioned above and especially on the following words: personally directed, abusive, and antagonistic. While the policy itself did not define these words, the court

looked to the dictionary definitions, finding abusive to mean harsh, insulting, hostile to one’s feelings; antagonistic to mean showing dislike or opposition; and personally directed to mean either harassing or abusive statements towards a particular person. The court found these words implied the board could stop a person from speaking when the person began to speak in opposition to the board’s actions or expressed dislike of the board’s actions or a particular board member.

The court stated a board can restrict the subject matter or topic a patron may address at a board meeting through its policy or procedures, but the policy must be viewpoint neutral. In other words, the board could not only allow the person to speak if they agree with the board’s actions or position on the subject matter. To allow such would deny a person his Free Speech rights when speaking to a governmental entity. The purpose of the Free Speech Clause is to allow citizens to speak about their opinions on public matters whether they agree with the governmental entity’s policies or not. The government is not allowed to restrict the speech of citizens to the viewpoint of the government when it permits the citizens to speak in its forum, the court ruled.

Based upon the above, the court ruled the policy as written violated the First Amendment, as the language allowed the board to stop persons from speaking when the speech was in opposition to the board or board members personally. In addition, the court found the policy as applied in this case violated the Free Speech rights of the patron as he was interrupted when he began to state he was opposed to the board’s plan and accused the board of making threats.



PREREGISTRATION REQUIREMENTS

The plaintiffs argued that preregistration requirements violated their Free Speech rights by limiting their ability to speak at any board meeting, especially if a person worked during the day, as the person would have to take time off to go the central office of the school district and preregister. This requirement was more burdensome to persons who worked during the day, as the policy required each individual who wanted to speak to sign up themselves; no one else could sign up for them to speak.

The court found this was not a Free Speech issue, as it did not address the content or the viewpoint of the patron's speech. These requirements applied to any person who wished to speak at school board meetings regardless of their viewpoint. The court ruled these requirements were reasonable time, place, and manner requirements. Under the First Amendment, governmental entities could impose reasonable time, place, and manner restrictions on citizens' speech if they have a significant governmental interest for requiring the time, place, or manner restriction. In this case, the court found the school board wanted to be sure its business was conducted in an efficient manner and that patrons who want to speak to the board are not denied the opportunity. In the recent past, the board would have citizens register and then not attend the meeting. The preregistration requirements better ensured the persons who wanted to speak would be allowed to do so, the court ruled.

With respect to the argument that patrons who worked during the day were overly burdened, the court ruled that while the preregistration requirement did effectively restrict them from speaking at school board meetings, there were other opportunities to communicate with the board members, such as writing or sending an email, talking to them at school events, or calling them. The court pointed out that school board members had email addresses that were listed on the school district's website; so the preregistration requirements did not completely restrict the communication avenues available to working patrons. (The case is Ison v. Madison Local School District Board of Education, 3 F.4th 887 (6th Cir. 2021).)

PUBLIC PARTICIPATION POLICY CONSIDERATIONS

Given the case law and the provisions of the Open Door Law, school boards should review their current policy or procedure for



public participation at board meetings and be sure the provisions are viewpoint neutral. School boards have flexibility in other areas and should keep in mind that they can restrict public comments to agenda items only or to specific agenda items; they may have a separate agenda item for public comments usually at the beginning or the end of the agenda; and the policy may restrict the amount of time each person may speak (generally the period of time allowed for each person is three to five minutes). If a board chooses to do a general public comment agenda item, it would typically be for subjects other than the designated agenda items. An important parameter to include is that the person will address the board and not an individual board member, and that individual board members will not respond to comments or answer questions posed to them or the board. The policy or procedures should also include a provision that the board president will monitor the public comments and will enforce the policy and/or parameters adopted by the board. The policy and/or procedures should be published whenever the board posts the notice of its board meetings.

The Indiana Public Access Counselor has also weighed in on the issue of public participation at school board meetings in an informal opinion. The opinion addresses the various provisions of a public participation policy and provides insights on addressing patrons who may not act in a civil manner at a board meeting. The informal opinion was issued in October and may be found at <https://www.in.gov/pac/files/informal/21-INF-8-1.pdf>.

While worth reading in full, the informal advisory opinion confirms that “a public comment forum during a meeting is a privilege and a courtesy extended by a governing body to the public.” In addition, “reasonable rules, restrictions, and regulations can be placed on commenting, if the forum is opened. It is up to each governing body to set those policies and enforce them as objectively as possible. They can include viewpoint neutral rules regarding time limits, keeping comments relevant to agenda and pending business items, and prohibition on malicious re-marks. These types of measures should pass scrutiny so long as they are enforced consistently.” 🗨️

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