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LOCAL SCHOOL BOARD MEETINGS: LIMITING PUBLIC COMMENT**Overview**

As the Tenth Amendment to the United States Constitution succinctly states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The silence of the United States Constitution itself, coupled with the language of the Tenth Amendment, “bestowed upon state government the legal responsibility for the establishment of public school systems.” Vacca and Bosher (2008) As one school law expert has summarized, “[s]chool districts and their governing bodies, typically named school boards or boards of education, are governmental agencies created by state instrumentalities through which their legislatures carry out the state constitutional mandate to provide for a system of public education.” Russo (2004)

While public education is a state function, the day-to-day operation of the public schools is a local matter. As a general rule, one common feature among the different state systems involves vesting legal authority to operate, maintain, and control local public school systems in local governmental bodies. In Virginia, for example, “The supervision of the schools in each school division shall be vested in a school board....” Constitution of Virginia, Art. VIII, Sec 7 (1971)

Local School Boards

Local school boards are the policy-makers for local school districts. A school board’s legal authority to make policy flows from the state’s constitution and legislatively enacted statutes. Once the board has enacted a policy it must be followed by that board. To put it another way, the board can neither ignore nor violate its own policy. Moreover, when a board adopts rules of procedure they are binding as well. Vacca and Bosher (2008)

While local school boards have considerable discretion in conducting board business, all official school board actions and decisions must be (1) grounded in state law; and (2) officially approved by the board itself. Barbour v. Hanover School District No. 28 (Colo. App. 2006) Moreover, the official authority each board member possesses vests in the board itself (as a corporate body) and not to the board member. All official business of a local school board must be conducted by a quorum (majority of members) of the board in a previously

announced (including date, time, and place) public meeting. “When a quorum is present, a majority vote is usually sufficient except for special, designated situations, such as dismissal of professional personnel.” Vacca and Boshier (2008)

Local School Board Meetings. As stated above, local school board meetings must be open to the public. However, exceptions exist to the open public meeting requirement, and one must look to state law to see for what purposes such closed meetings are legally acceptable. For example, courts have consistently upheld school boards holding closed or executive sessions for purposes of discussing *personnel matters*. However, the final decision on any matter discussed in a closed session must be finalized and voted upon in an open public session. Collinsville Community Unit School Dist. No. 10 v. White (Ill. App. 1972)

Public Comment Sessions. As a part of holding an open public meeting, school boards typically allow time on the official agenda for public commentary. It is during that time when citizens of the community are permitted to speak and comment on the business before the school board—including the airing of complaints. Bach v. School Board (E.D. Va. 2001) However, school boards do not lose their legal prerogative to set and control the meeting agenda, and boards are not powerless to keep order during meetings—sometimes calling for the removal of anyone who becomes disruptive and/or engages in speaking on subjects that are not at that time relevant and are not before the board for official action. While courts have upheld policies restricting private citizens from airing complaints during official open comment sessions, school boards must be careful not to violate a speaker’s freedom of speech. Leventhal v Vista U.S.D. (S.D. Cal 1997)

Recent Case Law

Recently, I came across a Texas case decided by the United States Court of Appeals for the Fifth Circuit involving a challenge to a local school board’s open comment session which was part of its official board meeting. In Fairfield v. Liberty I.S.D. (5th Cir. 2010), a discharged former teacher’s aide (hereafter referred to as Fairfield) alleged that the procedures followed during a school board (hereafter referred to as the Board) meeting prevented her from disclosing the name of a particular teacher—with whom she had served as an aide. In essence Fairfield claimed that she had trouble with that teacher and needed to disclose her name as part of telling her side of the story. The Board disagreed. Ultimately, Fairfield was fired.

Facts: The day after being fired Fairfield submitted a post-termination grievance. In her grievance she claimed that she had been the victim of retaliation. More specifically, she claimed that she was fired because she accused a particular teacher of such things as “overdosing children with prescription medicine, lifting a severely handicapped student by the hair and belt loops, and shopping for her wedding on school time.” School officials claimed that Fairfield was fired “for creating a classroom environment not conducive to learning.”

The school district’s relevant policies required employees to follow a three-tiered grievance process in which at *Level II* the board for the first time directly hears and deliberates on the matter. Another policy stated that the Board will hear the employee’s concern in a closed session, unless the target of the concern demands a public hearing. It should be pointed out that the Texas Open Meetings Act, Sec.551.02, reads in relevant part that “This chapter does not require a school board to conduct an open meeting to deliberate in a case...in which a complaint or charge brought against an employee of the school district by another employee and the complaint or charge directly results in a need for a hearing.”

At *Level I* of the board's grievance process Fairchild, a teacher aide, alleged that she was terminated for trying to "blow the whistle" on a classroom teacher. In Fairchild's view, the teacher should have been fired because "she posed a danger to the children..." The board denied her grievance. Fairchild next progressed by taking her complaint on two parallel tracks. First, Fairfield requested a *Level II* hearing and a *Level III* final hearing. Second, she also reported the teacher to Child Protective Services and initiated a petition among parents calling for the school board to "be more forthcoming with information regarding special needs children," and that employees who share information about an endangered child not be retaliated against.

On August 16, 2005, at an official school board meeting, Fairfield was scheduled to speak during the public comment part of the meeting—to present her petition. Fairfield had to sign a statement acknowledging that "[a]ny issues pertaining to...specific district employees...may necessitate a closed session." And, that the public comment period "is not intended for the presentation of complaints." However, the statement went on to say that the Board "will only consider complaints that remain unresolved after they have been addressed through proper administrative channels and when they have been placed on the agenda." Additionally, the Board had an enforcement rule that clearly stated it would not tolerate disruption of its meetings.

Subsequently, the Board decided to hold a *Level III* grievance hearing, because Fairfield's complaint involved another school district employee. She wanted an open session to air the board's decision on the *Level III* hearing. The Board told her that she would have a public hearing but that if the discussion in the hearing moved to employee-on-employee concerns the hearing would immediately be closed. Ultimately Fairchild presented her petition during the open comment session of the meeting—not mentioning the teacher by name. She later had a *Level III* hearing in closed session. The Board denied the relief sought by Fairfield.

Federal District Court Action. Fairfield filed suit in a federal district court in which she alleged that: (1) school officials had misinterpreted the Texas Open Meetings Act by not giving her an open public hearing, (2) the Act, as applied in her situation, was unconstitutional, (3) the school district retaliated against her for trying to "blow the whistle" on a teacher, (4) the board's public comment rule did not allow parents to complain, (5) the board's meeting policies, as applied to her grievance, violate the First Amendment, and (6) individual administrators and teachers had deprived her of her First Amendment rights and should be held liable under 42 U.S.C. 1983.

The district court granted summary judgment on all claims to school officials. Fairfield next took her case to the United States Court of Appeals for the Fifth Circuit.

Fifth Circuit Decision and Rationale. The only issue remaining on appeal involved the challenge to the public comment session of the board meeting, as applied to Fairfield's grievance hearing. The Fifth Circuit held that Fairfield had standing to bring a First Amendment facial challenge to the board's public comment policy. The Court also held that Fairfield had satisfactorily shown that a constitutional interest was, in fact, involved in her situation. As such, said the Court, the merits of the facial attack on the board's public comment rules must be considered.

The Court next focused on the injunction sought by Fairfield—to prevent school officials from enforcing Board policies relevant to her complaint. In an effort to determine whether a "substantial amount of constitutionally protected conduct" was involved in the public comment session, the Court relied on Grayned v. City of Rockford (1972) and other cases on point. The Court also considered in detail the Board president's testimony regarding the Board's intent to listen and allow the public to voice concerns and complaints without naming employees or students, and that all "personnel matters" would be discussed by the Board in closed session. Giving a limited construction to the Board's policy, the Court concluded that during the public comment period

Fairfield did complain in detail, without interruption or interference. And, that this was noncompliance with Board policy—i.e., that complaints and concerns are heard during the public session, but that the session not is used for resolution of personal issues with employees.

At this point in the Fifth Circuit’s rationale the Court engaged in a detailed analysis to determine the type of forum the public comment session fit. Differentiating between: (1) traditional and designated public forums; (2) limited forums; and (3) nonpublic forums, the Court characterized the public comment session in this case as “existing at the line between designated and limited public forums.” In reaching this conclusion the Court cited several United States Supreme Court public education-related decisions such as Perry Education Association v. Perry Local Educators (1983), Rosenberger v. Rector & Visitors of the University of Virginia (1995), and Good News Club v. Milford Central School (2001). The Court held that the Board’s public comment session in the Fairfield case was a “limited public forum;” and, the purpose of the session was to allow speech on a specific subject. The Board policy excluded from public discourse certain topics, including individualized personnel matters which it channeled into “more effective dispute resolution arenas....”

In the Court’s view the policies involved in the case are both viewpoint-neutral and reasonable in light of the public comment forum’s purpose. Further more, said the Court, “[t]he Board has a legitimate interest, if not a state-law duty, to protect student and teacher privacy and to avoid naming or shaming as potential frustration of its conduct of business.” To accomplish this end the public comment session rules were not “impermissibly vague or facially overbroad.”

Turning last to Fairfield’s request that her post-termination grievance hearing be public the Court resorted to the same issue analysis and concluded that her grievance hearing was a limited public forum. The Court opined that such hearings are not intended as “a soap box.” In this case Fairfield sought to complain about another employee. A grievance hearing is a forum for an employee (Fairfield), with counsel, to present witnesses and documents regarding her own case and not a place to seek the dismissal of another employee.

The Fifth Circuit held that the Board’s actions regarding Fairfield’s termination appeal did not violate the First Amendment. The district court decision was affirmed.

Policy Implications

The Fifth Circuit’s rationale in deciding the Fairfield case is most informative. First, the Court makes it clear that local boards of education possess considerable discretion both in making policies and in implementing rules and procedures regarding official meetings of the Board. Second, that while the official business of the Board is the public’s business, it nonetheless can restrict public input, including that of school system employees, by limiting the scope and details of public comment during open public meetings of the Board; and, it is permissible for the Board to move into closed (executive) session to discuss certain matters such as those dealing with individual employees. Third, absent a clear violation of statutory (federal or state), or constitutional (federal or state) law, or its own policies and procedures, courts will neither interfere with nor overturn the official actions and decisions of a local board of education.

During these times of severe budgetary issues (e.g., reductions in staff, elimination of programs from the curriculum, salary cuts) providing opportunities for members of the community, including employees, parents, and students, to have input in local school board deliberations is a very important part of conducting school system business. At the same time, however, the Board cannot effectively do its work and reach reasoned

decisions if the public commentary portion of Board meetings sets a tone of incivility and disorder. Thus, policies dealing with *public commentary* during official meetings of the Board must make it very clear that:

- The Board encourages, welcomes, and will make opportunities for public comment on matters coming before the Board.
- All comments made during the public commentary portion of Board meetings will be limited to specific items included in the official meeting agenda.
- Individuals wishing to speak during the public comment portion of Board meetings must, prior to the Board meeting, have his/her name placed on an official list of speakers kept by the Clerk of the Board.
- Persons whose names do not appear on the approved list kept by the Clerk of the Board will not be permitted to speak.
- Speakers whose names appear on the list kept by the Clerk of the Board will be called in order and given a specific time limit within which to make their comments to the Board.
- Inappropriate comments, name-calling, profanity, the venting of personal issues, or other disruptive behaviors will not be tolerated.
- Civility will be insisted upon and enforced during all Board meetings.
- Any individual or group of individuals whose comments and/or physical behaviors are deemed disruptive of Board business, and/or who engages in speaking on subjects not at the time relevant to matters before the Board, will be removed from the Board chamber and escorted off school system property.

The reader must keep in mind that the discussion in this commentary deals with public comment portions of official school board meetings and not public hearings held by a local school board.

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Note: The views expressed in this commentary are those of the author.