First Amendment rights of speakers at school board meetings

By the New York State
ASSOCIATION OF SCHOOL ATTORNEYS

School board meetings often incorporate a public comment period which provides the community with an opportunity to ask questions about the agenda, voice opinions on school operations, and call issues to the attention of the board. In many cases, this is a positive opportunity for the board to engage the community. But at any given board meeting, comments by members of the public can morph into personal attacks on school board members, administrators or staff, and parents may make statements or ask questions that violate the privacy of students.

When this occurs, it places the chair of the meeting – usually the school board president – in the difficult position of trying to maintain decorum and confine discussions to appropriate topics while respecting the First Amendment rights of members of the public. While no board policy can fully relieve this tension, your school board can articulate its expectations and give the board president clear guidelines to follow.

Limits on free speech

While an individual's right to freedom of speech is derived from the U.S. Constitution and the New York State Constitution, not all types of speech are protected. A public entity such as a school district lawfully may curtail certain types of speech, such as that which provokes "imminent lawless action," "fighting words" (which the U.S. Supreme Court has defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"), true threats, obscenities, child pornography, false statements of fact, libel and/or slander, and intentional infliction of emotional distress.

In addition, the U.S. Family Educational Rights and Privacy Act (FERPA) and other federal and state laws provide certain privacy protections for students. Coupled with the common law duty to protect minors, it is incumbent on school boards to try to prevent comments at meetings that violate students' privacy. However, an individual student's parent or guardian generally can speak freely about their student in a school context without violating FERPA or state law.

In rare cases, school board presidents have demanded individuals not speak or had them removed by security personnel or police because of their speech at board meetings. When this occurs, the individual can sue the school district and claim his or her First Amendment rights have been violated.

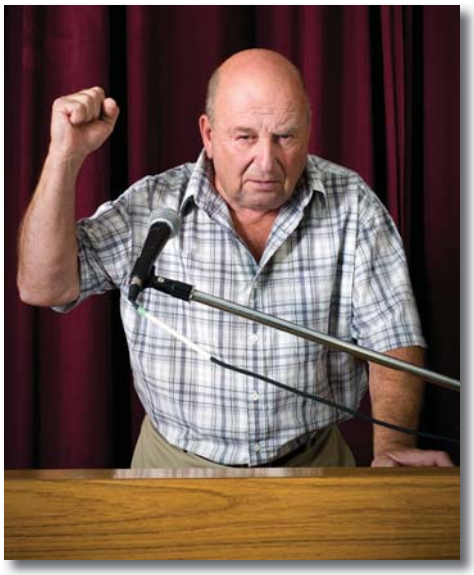
Silencing a member of the public, no matter how justified in the minds of school officials, can lead to years of litigation. For instance, a federal judge ruled in June that there were enough legal questions to warrant a trial on whether the Middletown, N.Y., school board and superintendent improperly restricted free speech of a non-district resident at a 2010 school board meeting (*Hoefer v. Bd. of Educ. of the Enlarged City Sch. Dist. of Middletown, S.D.N.Y. 2017*).

Notably, the speaker who was silenced in the *Hoefer* case was not a school district resident. The commissioner of education has held that boards may be permitted to limit speakers to district residents (*Appeal of Martin, 1992*). However, the state Committee on Open Government and the U.S. District Court for the Southern District of New York have taken the opposite view. Thus, the law remains unsettled in this area.

Generally, courts have held that content restrictions on speech at school board meetings are impermissible, particularly if only certain views are regulated. In other words, a board's policy and practices regarding public speech must be content-neutral and not restrict speech based on a particular viewpoint. For instance, if the board president permits speakers to praise a given teacher but suppresses a speaker who criticizes the same teacher, a court could view that as not being content-neutral.

Board presidents should be very cautious about preventing individuals from speaking, even if they think the speech sounds slanderous, constitutes "fighting words" or otherwise is an unprotected form of speech. The reason is simple: a court might not agree, and that would expose the district to liability.

NYSASA
New York State Association of School Attorneys



"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the government for a redress of grievances."

– First Amendment to the U.S. Constitution

"Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

– N.Y. Constitution, Article I, Section 8

Setting expectations for comment periods

It is worth noting that, although school board meetings must be open to the public under the Open Meetings Law, there is no requirement to allow members of the public to speak. Technically, school boards have the option of not allowing any public comment at board meetings. However, such an action is likely to frustrate members of the public and is not recommended by NYSSBA's Department of Legal and Policy Services.

There are several ways a board can address public comments involving district staff and/or students. The recommended actions below place a focus on the time, place and manner of speech as opposed to its content.

1. Boards may limit the time allocated to each speaker. If so, time limitations should be identified at the commencement of the meeting and applied uniformly. For example, a board may indicate that the public comment period will be limited to 30 minutes with three minutes per speaker.

2. The school board can adopt a statement to be read or distributed in written form either at the beginning of each meeting or at the commencement of the public comment portion of the meeting. This statement should urge members of the public to refrain from making any comments about school employees or students because such comments may be an invasion of privacy and may subject the speaker to potential defamation claims. However, there is a risk that, if challenged, these statements could be viewed by the courts as a restriction of speech.

3. The school board can agree that members will not respond to comments by members of the public that violate their guidelines.

4. While a member of the public is speaking, the board president can caution that individual that if he or she continues to comment about an employee, such speech may subject them to potential defamation claims, and remind the speaker that the board will not respond.

5. If statements made during the public comment period effectively preclude the board from conducting its business in an efficient and reasonable time frame (e.g., a member of public refuses to step away from the microphone), the board may adjourn the meeting.

While members of the public have First Amendment rights to criticize and condemn, board members and school district administrators should hold themselves to a higher standard. It does not behoove public officials to comment negatively about students or school district employees in public. Doing so could violate federal and state laws that protect the privacy interests of students and staff, potentially result in defamation claims, and expose the district to greater liability.

Members of the New York State Association of School Attorneys represent school boards and school districts. This article was written by John H. Gross and Rose A. Nankervis of Ingerman Smith, LLP; Laura Granelli of Jaspan Schlesinger, LLP; and Eugene Barnosky of Lamb & Barnosky, LLP.


Gross


Nankervis


Granelli


Barnosky