



Valerio
Dominello &
Hillman, LLC

Update on Public Comment

MASC - September 6, 2024

Elizabeth B. Valerio

Elizabeth.Valerio@VDHBoston.com

Valerio Dominello & Hillman, LLC

Disclaimer:

The information in this presentation is provided for training and educational purposes only and should not be considered legal advice.

Topics



Public Comment during Open Meetings

Limitations on Public Comment during Open Meetings



Public Comment on:

School Committee and district social media accounts

School Committee member's personal social media accounts

Open Meeting Law – G.L. c. 30A § 20(g)

- “No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent. No person shall disrupt the proceedings of a meeting of a public body. If, after clear warning from the chair, a person continues to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize a constable or other officer to remove the person from the meeting.”
- The Law does not require that meetings include a “public comment” period – School Committees may, but are not required to, include public comment on the open session agenda. Public comment is one forum by which the School Committee may receive input on important school district matters from members of the public. The Committee should provide alternative ways for the public to comment such as by email or written correspondence.

What is “disruption” of a proceeding?



The statute does not specify what constitutes a “disruption”



Obvious example: when a member of the public forcefully grabs the microphone from another speaker or persists in yelling while another person is speaking so that the speaker cannot be heard.



Other actions that may be “disruptive”:

persisting in “holding court” after the chair states that the speaker’s time is up.



Note: Disruptions can occur at any time during a meeting, not just during the public comment portion of the meeting.

The *Barron* Case

SJC-13284

- The *Barron* case involves a select board's public comment during the open meeting.
- The Southborough Select Board's policy prohibiting disruption:

“All remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks. Inappropriate language and/or shouting will not be tolerated. Furthermore, no person may offer comment without permission of the Chair, and all persons shall, at the request of the Chair, be silent. No person shall disrupt the proceedings of a meeting.”

The *Barron* Case (continued)

- During the public comment portion of the meeting, the commenter began accusing the board of “*breaking the law*”. After the chair objected to the “*slander*” and indicated that he would end the public comment portion of the meeting, the commenter responded “***You need to stop being a Hitler. You’re a Hitler. I can say anything I want.***”
- The Chair ended the session, and the commenter brought a lawsuit.
- The relevant claim was brought under the Massachusetts Declaration of Rights, which includes a freedom of speech guarantee that is virtually identical to the First Amendment’s guarantee in the US Constitution.

The *Barron* Case (continued)

- A Superior Court judge ruled first that the session was a “**limited public forum**” because the board restricted it to town residents to address matters that were not on the board’s agenda.
- This means that the board’s policy needs only to be “reasonable” – in addition to the basic rule that it **must be neutral** as to the **viewpoints** of the speakers.
- The Superior Court then pointed out that if the prohibition on “rude, personal, or slanderous remarks” existed in isolation, it would be “close to” a violation. But because it was part of a policy that was focused on “disruption”, the court decided that the restriction was “reasonable” and “viewpoint-and-content neutral”, meaning that it could be enforced by the chair.
- The commenter filed an appeal to the Appeals Court and the Supreme Judicial Court on its own initiative took jurisdiction of the case.

The SJC Decision in *Barron*

- The SJC issued its decision on March 7, 2023
- The SJC found that that the Board’s policy violated the state’s Declaration of Rights – specifically the Board’s policy that:
 - “[a]ll remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks, Inappropriate language and/or shouting will not be tolerated”
- The SJC found that discourteous, rude, disrespectful, or personal speech about government officials and governmental actions is protected by Article 16 of the Declaration of Rights and therefore the prohibition is impermissible.
- The SJC applied a strict scrutiny standard because the policy targeted political speech.

The *Barron* Case (continued)



The SJC indicated that certain types of restrictions would comport with the Declaration of Rights including:



Reasonable, time, place and manner restrictions could include designating when and where a public comment session may occur, how long it might last, the time limits for each person speaking during the public comment session, and rules preventing speakers from disrupting others and removing those who do.



The SJC also observed that “in order to function efficiently, towns must be able to hold public meetings limited to a particular subject without violating Article 16, so long as the town provides other opportunities to exercise this right.”



The SJC did not address whether a constitutional policy could bar “slander” by speakers at a public comment session.

Take Aways from the *Barron* Decision

1. A speaker cannot be barred from engaging in disrespectful, rude or personal speech directed at public officials.
2. The committee cannot treat speakers differently from each other based on their views or how those views are expressed
3. The committee can impose reasonable time limits for the entire public comment portion of the open meeting. (The court did not prescribe amounts but an overall limit of 10-15 minutes for the public comment portion appears to be reasonable.)
4. The committee can impose a reasonable time limit for each speaker recognized during the public comment portion of the open meeting. (Three minutes per speaker appears to be reasonable.)

Take Aways from the *Barron* Decision (continued)

5. Speakers can be barred from engaging in dialogue with the committee
6. Speakers can be barred from interrupting or interfering with other speakers
7. Speakers can be barred from engaging in physical conduct
8. Speakers can be barred from engaging in speech that threatens violence or incites imminent unlawful conduct by others

Take Aways from the *Barron* Decision (continued)

9. The committee *should* be able to limit a public comment session to specified topics, such as matters that are within the body's jurisdiction or matters that are on the posted agenda.
10. The committee *may* be able to limit participation to residents, individuals attending the District's schools and their parents/guardians, and individuals working in the District's schools (Note – this was not addressed by the SJC.)
11. The committee may request that participants sign up in advance, so that the public comment session time limit can be applied and so that participants can be called upon in an orderly manner.

Take Aways from the *Barron* Decision (continued)

The SJC did not address whether a board/committee must include a public comment portion in its open session meetings.

However, so long as other means are available for the public to communicate their views to the body, such as by written correspondence, email, delivering written comments to the committee at its meetings, the committee should be able to decide not to include public comment in its public meetings or some of its public meetings.

Remember to check your committee policies, local charter, and by-laws to determine if public comment periods are required at your meetings.

Slander and the *Barron* Decision

The SJC chose not to decide whether a policy can bar speakers from engaging in “slander”.

- Slander is the act of making a false spoken statement damaging to a person’s reputation
- Statements about a *public official*, even if false, generally must be made with “actual malice” – that is, with knowledge of or reckless disregard of its falsity - to be considered slander outside of First Amendment protections

Obscene or Profane Language and The *Barron* Decision

The SJC did **not** address whether a policy barring the use of obscene or profane language is constitutional.

Remember

The committee cannot apply its rules based on the content or viewpoint of the comments.

The rules must be applied uniformly without regard to content or viewpoint. This includes all rules that are permitted under the *Barron* decision. For example, if the Committee bars dialogue during the public comment session between the Committee and speakers, that rule must be applied to all speakers.

Remember

To avoid potential violations of the open meeting law, consider barring dialogue during the public comment session between the Committee and speakers so that the Committee does not inadvertently engage in a dialogue/deliberation about a matter not listed on the agenda.

Do's of Managing Public Comment

Have a clear written policy setting time, place and manner restrictions

- Set time limits for individual speakers and for the public comment portion of the meeting and strictly adhere to the time limits without regard to the individual's viewpoint
- Only one speaker at a time, recognized by the chair
- May require speakers to sign up in advance but **not** requiring disclosure of the substance of their comments
- Limit comments to subjects within the Committee's jurisdiction, including items on the meeting agenda

Place reasonable restrictions on who can speak

- For example: Residents, families with children in the district, students in the district, employees in the district

Place limits on the speech only to the extent necessary to hold an orderly meeting

- May prohibit remarks about subjects that do not fall within the committee's jurisdiction

Prohibit obvious acts of disruption

Don'ts of Managing Public Comment

Do not limit any speaker based on the content or viewpoint of their speech

The focus should be on “disruption”. Some topics may be the subject of controversy in the district, such as changes in curriculum, the start of the school year, bus routes, library books, but just because it’s “controversial” does **not** make it “disruptive”.

Do not apply the rules inconsistently among speakers. If one speaker engages in conduct that causes the Chair to issue a warning or to cut the speaker off, any other speakers who engage in the same conduct must be treated in the same way.

Unlike baseball, the Open Meeting Law generally gives an individual only two strikes. If after clear warning by the Chair, a person continues to disrupt the proceedings, the Chair may order the person to withdraw from the meeting, and if the person does not withdraw, the Chair may authorize a constable or police officer to remove the person from the meeting.

Example: Meetings That Go On Too Long

The Best School Committee meetings usually start at 7:00 p.m. and have been lasting until after midnight because the public comment portion of the meeting which has been placed as one of the first items on the agenda has been hours long at each session. This has resulted in the Committee not starting its business until 10:00 p.m. or later. Committee members are tired by the time they get to the Committee's business and often much of the business requiring deliberation and votes is delayed to future meetings because members need to leave before the business is completed resulting in the quorum being lost.

What are some options that the School Committee can take to address this?

Example: Meetings That Go On Too Long



The Committee may:



Limit the amount of time on the agenda for public comment.



Limit the amount of time each recognized speaker has to make comments.



Adopt a policy that restricts comments to items within the Committee's jurisdiction or to matters listed on the Committee's posted agenda.



Restrict participation to individuals who reside in the municipality/municipalities, work for the District, or whose children attend the District's schools.



Schedule a separate meeting for public comments on matters about which there may be lots of interest in public comment.

Example: Lawrence Loud's Interruptions

The Best School Committee has a policy that permits members of the public to speak for 3 minutes during the portion of the Committee's open meeting set aside for public comment. Individuals wishing to be recognized sign up to speak. The Chair has always called them in order on the list. On September 5th, Chair Empire got to the public comment portion of the agenda and called the first three speakers in order. The Chair inadvertently skipped the fourth speaker and recognized the fifth speaker. As the fifth speaker began to make his comments, the fourth speaker, Lawrence Loud, interrupted him and demanded to be heard next.

What should the Chair do?

Example: Lawrence Loud's Interruptions

Remind the public that only one person has the floor – permission to speak at any given time.

The Chair may issue a warning and request that he be silent while the fifth speaker begins to make comments.

Example: Lawrence Loud's Interruptions

After the Chair directed Mr. Loud to be silent, Mr. Loud went to the microphone and grabbed it from the speaker whom the Chair had recognized to speak.

What actions should the Chair take?

Example: Lawrence Loud's Interruptions

The Chair may order the fourth speaker to withdraw from the meeting.

If the fourth speaker refuses to withdraw, the Chair may authorize a constable or police officer to remove the person from the meeting.

Example: Lawrence Loud's Interruptions

What if Chair Empire didn't inadvertently skip Mr. Loud, but did so intentionally and at multiple meetings because Mr. Loud had been critical in the local newspaper and on social media about the Committee's school redistricting plans?

What are the issues with Chair Empire skipping Mr. Loud?

Example: Lawrence Loud's Interruptions

Unlike the prior hypotheticals involving the fourth speaker, in this case the Chair is engaging in impermissible viewpoint or content discrimination.

Remember: the committee cannot apply its rules based on the content or viewpoint of the comments.

Example: Fran Fire

During public comment at the Best School Committee meeting on August 14th, Fran Fire was recognized to speak by the Chair. Fran started off by saying the following:

“ You don’t know what you’re doing; you’re failing our kids and you don’t care. It’s as if our schools are on fire and you are taking your time calling the fire department. I pay taxes here so you all work for me! You should all be impeached but until then I know where each of you lives and don’t be surprised if you wake up one morning and find your house on fire! You all better watch your backs when you leave tonight!”

Fran was about to continue speaking as her 3 minutes were not yet up, when Chair Empire took action.

What can Chair Empire do?

Example: Fran Fire

The Chair Empire may issue a warning that threats of violence are not permissible and that further threats will result in the Chair asking that the speaker be withdrawn from the meeting.

Remember: True threats are not protected by the First Amendment Words that literally threaten but have an expressive purpose such as political hyperbole are distinct from “true threats,” which are intended to place the target of the threat in fear, whether the threat is veiled or explicit.

Example: Confidential Student Information

Penny Parent has a 9-year old daughter with an IEP in the District's elementary school. She has been very unhappy with the District's Director for Student Services and with the IEP process that didn't agree to provide an outside placement for her daughter.

The Good Public School Committee has no policy on public comment and at its meeting on August 14th, Penny Parent was recognized by the Chair to speak during public comment.

Ms. Parent asked the Committee to set up a Task Force to report to the Committee on special education in the District. She explained that she had personal knowledge that the current system wasn't working. She identified her daughter Suzy by name, listed all of her disabilities; described in detail episodes of Suzy's repeated dysregulation at home and in school; read her IEP and recited her grades from her report card to the Committee. She then pleaded with the Committee to review how the District is addressing the needs of students with disabilities and again asked the Committee to set up a Task Force to report to the Committee on special education in the District.

Could the Chair stop Mr. Parent from disclosing confidential student information about Mr. Parent's daughter?

Example: Dan Disrupter

The Best Public School Committee started its open session meeting at the posted time of 6:00 p.m. The first item on the agenda after approval of minutes was public comment which by policy is not to exceed 15-minutes. Public Comment started at 6:20 p.m. but there were only two persons who were present to speak. When they completed their statements and no one else asked to speak, Chair Empire ended the public comment section and moved to the next item on the agenda at 6:26 p.m. Dan Disrupter arrived at the meeting at 6:30 p.m. and noticed that the Committee was on the next agenda item after public comment. He shouted at the Chair saying: “***Public Comment isn’t over. I want to speak now! You have to let me speak! I have a right to be heard!***”

What should Chair Empire do?

Example: Dan Disrupter

Chair Empire can direct Dan Disrupter that he has not been recognized by the Chair and, therefore, does not have the floor to speak.

Dan Disrupter does not have a “right” to speak, if Disrupter continues to be disruptive, the Chair could call for a recess to provide time for Disrupter to calm down and then resume the meeting, starting with the next item on the agenda.

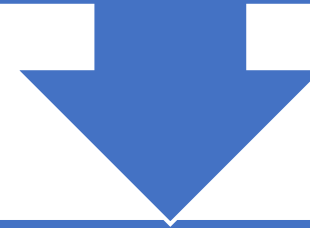
Example: BAT Demonstration

The Best School Committee and the Best Association of Teachers (BAT) have been engaged in negotiations for a new contract. BAT wants more money than the Committee has offered. BAT directed its members to storm the Committee meeting with their signs and chant “Fair Contract Now”. At the Best Committee meeting on Thursday, 200 BAT members carrying large signs marched into the meeting that was already underway, interrupted the superintendent’s report, and chanted “Fair Contract Now”.

What can Chair Empire do?

Example: BAT Demonstration

1. The Chair should give a clear warning to cease the disruption.



2. If the disruption continues the Chair may:

Call for a recess

Have the individuals
withdrawn from the
meeting

Adjourn the meeting

Example: Paul's Pizzeria

Paul has been working for years on his recipe for the perfect pizza and opened his own pizza shop down the street from Best High School. He is excited to let the community know about his menu and pricing but after paying rent, leasing pizza ovens and paying for employees, he has no budget for marketing. At the Best School Committee meeting on Thursday evening, Paul signs up for public comment. When Chair Empire recognizes him to speak, Paul introduces himself and then starts reading from his menu including the descriptions of his amazing pizzas and the prices. (Paul has practiced so that he can get through the menu in just under 3 minutes.) The Committee has a public comment policy that limits comments to matters within the Committee's jurisdiction.

What should Chair Empire do?

Example: Paul's Pizzeria

The Chair may direct Paul that comments are to be limited to matters within the Committee's jurisdiction.

If Paul continues, the Chair may bar Paul from continuing to speak.

Sample Draft Policy

A School Committee meeting is a meeting of a government body at which members of the body deliberate over public business. We welcome the attendance of members of the public to view your School Committee as it conducts its regular business meeting.

Massachusetts General Laws Chapter 30A Section 20(g) governs public participation at open meetings covering all public bodies. Section 20(g) provides that:

No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent. No person shall disrupt the proceedings of a meeting of a public body. If, after clear warning from the chair, a person continues to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize a constable or other officer to remove the person from the meeting.

The School Committee believes that the school district community should have an opportunity to comment to the Committee on issues that affect the school district and are within the scope of the Committee's responsibilities. Therefore, the Committee invites correspondence by letter or email to <INSERT ADDRESSES> and may also set aside a period of time at some of the regular Committee open meetings to hear from the public. This is the “public comment period”.

Sample Draft Policy *continued*

The public comment period is available to all residents of the Town and to all students/families of students enrolled in the schools of the district and to all employees in the District.

The public comment period is determined by the Chair but generally occurs at the beginning of the Committee's meeting. The public comment period shall be for a maximum of 15 minutes unless the Chair in the Chair's discretion determines that a longer period is appropriate, subject to the number and anticipated length of other items on the Committee's agenda. Each speaker shall be limited to a maximum of 3 minutes. Any person who is unable to speak because of these limitations or who wishes to speak longer than the time allotted shall be able to submit their comments in writing to a location on the Committee's website.

Persons who wish to speak may register in advance on the Committee's website by providing their name, address, and the subject of their comments (but not the content or views to be expressed). Persons who are called on to speak shall state their name and address before making their comments. The public comment period is not an opportunity to engage in dialogue or debate with other persons, whether those persons are Committee members, district employees, other speakers, or anyone else who is present.

Sample Draft Policy *continued*

The public comment period shall be limited to subjects that are on the Committee’s agenda or within the Committee’s authority. The authority of the Committee primarily concerns the review and approval of the school district's budget, contracts entered into by the Committee, the performance of the Superintendent, the general operations of the district, and the educational goals and policies of the district. Comments about individual employees (other than those who are hired or evaluated by the Committee) or about individual students are barred.

Conduct and speech during the public comment period which disrupts the orderly process of the meeting will not be tolerated. This includes refusal to yield the floor when a speaker’s time limit has expired; the making of direct threats to or against any person; *use of profanity or obscenity**; initiation of physical contact against any person; use of comments that are recognized by law as “hate speech”; conduct and comments made while another person has the floor to make comments; and comments that constitute the incitement of imminent violence or unlawful conduct. Comments will be directed to the Chair. Violation of these rules will be enforced by the Chair as authorized in the Open Meeting Law. No speaker will be prevented from speaking based on the content or viewpoint of their comments so long as their comments are made in a manner that complies with these rules.

** Note – the Court did not address the use of profanity or obscenities so you may not want to include this in the policy.]*

SOME ADDITIONAL NOTES

Committees are not required to have a public comment session at each meeting.

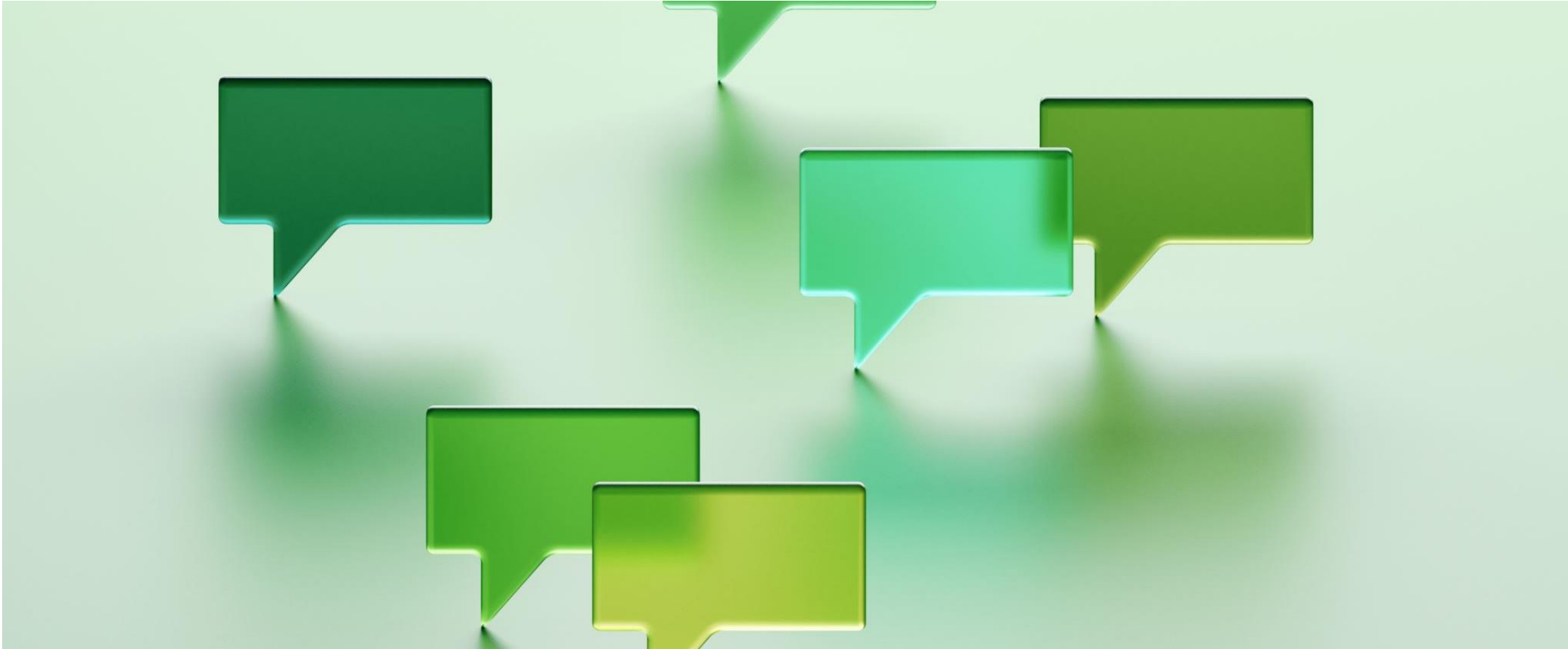
Consider the length of the public comment session and the placement on the agenda

Anticipate disruptions and be prepared

Always apply restrictions on public comment uniformly and without regard to viewpoint

Review and revise the Committee's policy to be in compliance with the SJC *Barron* decision

Public Comment on District Social Media



Uses for District Social Media

Posting	Posting District announcements and information about upcoming events
Sharing	Sharing resources and links for students and families
Connecting	Connecting with the community
Keeping	Keeping your operations transparent
Posting	Posting photos of events
Receiving	Receiving feedback

Public Forums

- Open Public Forum
 - **Traditional public forums** are those place that have traditionally been devoted to assembly and debate, such as parks and sidewalks.
 - **Designated public** forums are spaces which have not traditionally been regarded as a public forum, but which the government has intentionally opened up for that purpose.
 - **Standard:** Reasonable time, place, and manner restrictions on speech
- Limited Public Forum
 - **Limited Public Forums** are government created forums that are **limited** to use by **certain groups** or dedicated solely to the discussion of **certain topics**.
 - **Standard:** restrictions may be based on subject matter if they are viewpoint neutral and reasonable in light of the purpose served by the forums.

First Amendment



Social media websites and applications provide the public with the opportunity to make their own posts or comment on others – this creates a First Amendment issue.



Without explicit limitations on use, social media accounts that permit public comment could constitute open public forums.

To avoid creating an open forum some public entities disable commenting so communication to the public is one-way. (*push out*)



Alternatively, some municipalities permit comments but ensure the account is designated as a “limited public forum.”

Limited Public Forum

To establish a limited public forum, the Terms of Use must clearly and explicitly reserve the right to remove comments:

- That are off-topic*;
- That include obscenity, fighting words, true threats, commercial promotions or advertisements;
- That are harassing or discriminatory on the basis of race, creed, color, national origin, religion, age, gender, or sexual orientation or any other protected class; or
- That encourage illegal activity.

*Be sure to define “off-topic” in a manner that is reasonable in light of the purpose of the forum.

People for the Ethical Treatment of Animals v. Tabak, 109 F.4th 627 (D.C. Cir. 2024)



On July 30, 2024, the U.S. Court of Appeals for the District of Columbia issued a decision holding that the National Institute of Health’s (“NIH”) **implementation** of a social media policy prohibiting “off-topic” comments was **unconstitutional** under the First Amendment.



The NIH is a federal agency, which maintains Facebook and Instagram pages for the purpose of communicating and interacting with citizens about agency-related work.

People for the Ethical Treatment of Animals v. Tabak, 109 F.4th 627 (D.C. Cir. 2024)

Comments to the social media pages were governed by comment guidelines authored by NIH and enforced through default filters on the platforms and customizable keyword filters.

The keyword filters filtered out comments with words related to animal testing, including:

- PETA
- PETA Latino
- Animal(s)
- Mouse
- Chimpanzee(s)
- Cruel
- Cruelty

Due to these keyword filters, comments posted by PETA and two animal rights advocates were filtered out and not viewable to the public.

People for the Ethical Treatment of Animals v. Tabak, 109 F.4th 627 (D.C. Cir. 2024)



In light of the NIH comment guidelines, the comment threads were held to be a **limited public forum**.



However, the Court ruled that the use of keyword filters violated the First Amendment because they were not reasonable in light of the purpose of the forum: *to communicate and interact with citizens*.



The Court reasoned that the NIH failed to articulate a standard for distinguishing “off-topic” from “on-topic” and that by considering words related to animal testing as categorically “off-topic” was unreasonable because a significant portion of NIH’s posts were about research conducted on animals.



Further, the Court noted the keyword filters were unreasonable because they were **inflexible** and did not account for the **context in which the comments were made**.

Take Aways from the *PETA* case:

Implementation of a prohibition against “off-topic” comments must be enforced pursuant to a workable standard that ensures that:

- Implementation is viewpoint neutral; and
- Flexible to consider the context in which comments are made

Avoid categorical bans on certain topics.

When using keyword filters frequently review the terms that are being used. Avoid keyword filters that would tend to skew the viewpoint of comments that are deemed “on-topic.”

When using keyword filters, review comments that are being filtered out to ensure the filters are not capturing comments that are “on-topic”

First Amendment



If your District has social media accounts, consult your District's legal counsel **before** deleting any user's post or comment from that account and seek guidance.



Violation of the First Amendment could occur if...

Only off-topic posts are removed when they are negative;
Posts are removed based on their content, instead of the explicit (narrow) grounds for removal stated in your policy;
Posts are removed because of viewpoint.



This must be done consistently.

First Amendment and Committee Member's Social Media Accounts



Review terms and use of platform or host.



Be cautious if you are going to respond individually.



Be cautious if you are going to block others from your own social media accounts.

Example: Profiteer Patty

- Best Public School District maintains a Facebook page for the purpose of communicating District updates to students, parents, and members of the school community.
- In addition to Facebook's terms of use, Best Public School also maintains a publicly available guideline that prohibits “off-topic” comments, obscenity, advertising, harassment, and threats.
- In February, Best Public School District posts an alert to the Facebook page that school will be closed due to a snow storm.
- Local business woman, Profiteer Patty, comments on the District's post advertising that her restaurant will still be open for delivery at discounted prices.

Can the District Hide Patty's Post?

Example: Profiteer Patty Cont'd

Yes, because Patty's comment would be considered an advertisement, which is prohibited by the District's viewpoint neutral and reasonable policy.

Reminder: Open Meeting Law



Communications among members of a public body such as a school committee, even on social media, are subject to the Open Meeting Law, M.G.L. c. 30A, §§18-25.



Postings and comments on social media may be “deliberations” under the law. (See OML 2013-27; OML 2022-27; 2018-145)

Reminder - Public Records Law Applies to Social Media Posts



Communications made on social media accounts need to be archived – The District needs to have a system for retaining information appearing on the District’s social media accounts if the information could be viewed as public records. (See M.G.L. c. 4 §7(26); M.G.L. c. 66 §10)



Any electronic communication created or received by a public employee/official in his or her capacity as such is subject to retention and possibly disclosure, in whole or in redacted part, under the public records law.

Public Records and Personal Accounts



Your personal communications on a school committee issued computer or laptop may be subject to a public records request or subpoena.



Content on personal accounts, computers, phones, and other devices may become subject to public records law if it is found that your communications were part of your official functions as a school committee member.



Linking your personal accounts to your school committee accounts increases these risks.



If you link your school committee accounts to your personal accounts, ensure that you have a method and manner of retaining content if it could be considered official work and a public record.

Blocking Constituents on Private Accounts

Government officials, such as school committee members, should proceed with caution when blocking constituents on personal social media accounts.

In March, the United States Supreme issued a decision in *Lindke v. Freed*, in which it set forth a two-part test to determine whether a government official is acting in their official capacity when engaging in social media.

Differentiating Threats from Criticism

- Under M.G.L. c. 275, § § 2-4, it is illegal to threaten to commit a crime.
- If an individual posts a concerning comment to social media, it is important to consider whether the comment is a **threat** or mere **criticism**. Consider the following when making a distinction:
 - Does the employee or official have a reasonable fear of serious bodily injury or death?
 - Does the employee or official have a reasonable basis to fear this person?
 - Are others in fear of this person?
 - Access to weapons
 - Escalating rhetoric
 - Propensity for violence

Differentiating Threats from Criticism

Additionally consider the following strategies when responding to the post.

- Preserve the objectionable content through a screen shot.
- Contact the social media platform to report the content if it is abusive, harmful, or violates community standards.
- Engage in public discussion of the problem.

If the post constitutes a **threat** contact local police or involve the District Attorney's Office.

Example: Danny Danger

- Sally Sunshine is a member of the Sunnydale School Committee. She maintains an official X account, which is designated as “official.” The X page does not include any comment guidelines or restrictions.
- Danny Danger the parent of a former student at Sunnydale High School. Recently, Danny has been posting comments to Sunshine’s X posts, stating that the School has never done enough to address bullying.
- Sunshine noted these posts but did not report them.
- Recently the nature of Danger’s comments has changed; he is now commenting with photographs of guns he has purchased, with messages such as “we would be better off without the current School Committee, they do nothing.”

What Should Sunshine Do?

Example: Danny Danger Continued

Sunshine should:

- Preserve the objectionable content through a screen shot.
- Contact the social media platform to report the content if it is abusive, harmful, or violates community standards.
- Contact local law enforcement to inform them of the threat.

Lindke v. Freed, 601 U.S. 187 (2024)

- In *Lindke*, a city manager, James Freed, had his Facebook page public. He primarily posted about his personal life but he also posted information related to his job, such as soliciting feedback from the public on issues of public concern.
- When Freed posted about COVID-19, a constituent commented on his post expressing displeasure with the city's approach to the pandemic.
- Freed blocked the constituent and deleted his comments.
- The constituent sued Freed under 42 U.S.C. § 1983, alleging that Freed violated his First Amendment Rights.
- In *Lindke*, the Supreme Court explained that private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights; therefore, categorizing conduct requires careful analysis.

Lindke v. Freed, 601 U.S. 187 (2024)

- The Supreme Court set forth a two-part test for when a public official's social-media activity constitutes state action:
 - **First:** The official must have actual authority to speak on the State's behalf on a particular matter.
 - **Second:** For social media activity to constitute state action, the official must not only have state authority – he must also purport to use it when making the relevant posts.
- The Court remanded the case to the Sixth Circuit for further proceedings. On August 21, 2024, the Sixth Circuit remanded the matter to the District Court to develop the factual record.

Take aways from *Lindke v. Freed*

If operating a personal page, include statements, such as:

- A disclaimer that “**This is the personal page of <Name>.**”
- A disclaimer that “**The views expressed on this page are strictly my own.**”

Example: Blocked

- Ross Geller is a member of the Best School Committee. Ross maintains personal Facebook and Twitter accounts, which he occasionally uses to communicate about school district business and news and inviting constituents to provide feedback.
- Julie and Charlie are parents of school district students. They believe that their concerns over race relations in the school district are going unheard despite their regular attendance at school committee meetings.
- Julie and Charlie decide to turn to social media and begin posting hundreds of repetitive comments on Ross's Facebook and Twitter pages voicing their concerns.
- Ross blocks Julie and Charlie from his personal Facebook and Twitter accounts.

What are the issues with Ross blocking Charlie and Julie from his account?

Example: Blocked

Here, Ross' posts on his personal accounts have blurred personal use with official school committee business thereby implicating First Amendment issues. He has mixed a personal account with matters that fall within his role as a member of the school committee.

Note: The hypothetical in this example is similar to the facts of O'Conner-Ratcliff v. Garnier, which the Supreme Court remanded to the Ninth Circuit to apply the approach in Lindke. A determination has not yet been made in that case.

Example: Blocked

Best practice:

Avoid mixing personal
with official posts on
personal accounts



Hypothetical Questions & Answers

Elizabeth B. Valerio, Esq.

Elizabeth.Valerio@VDHBoston.com

(617) 862-2005