

Open Meeting Law and Public Comment

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Elizabeth B. Valerio, Esq.

Disclaimer:

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

Topics



M.G.L. chapter 30A, sections 18 – 25



Existing Guidance



Pending Caselaw



Managing Public Comment



Censuring Elected Officials



Hypothetical Q&A

Open Meeting Law, Public Comment and the *Spaulding* decision

Open Meeting Law & Public Comment

The Law does not require a “public comment” period at a public meeting. – this is voluntary and is provided as a way for the School Committee to receive input on important school district matters from members of the public.

Mass. General Laws chapter 30A, section 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.”

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” include “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.

Spaulding v. Town of Natick School Committee

MCV2018-01115 (Nov. 21, 2018)

- Until now committees had no concrete guidance other than the non-binding 2019 Superior Court decision in *Spaulding v. Town of Natick School Committee* that was settled and did not go beyond the preliminary injunction stage
- Applying First Amendment rules, the court in *Spaulding* decided that the school committee’s public comment period was a “designated public forum”, meaning the committee could manage public participation at its meetings so long as it used rules that were “narrowly tailored”.
- The court agreed that the committee could limit remarks to subjects that are within its jurisdiction.

Spaulding v. Town of Natick School Committee

- The court also ruled that the committee’s policy requiring that comments be “objective” was not narrowly tailored and was, therefore, invalid
- Committee could bar comments that are “defamatory” only if those comments involve speech that has “*already been adjudicated defamatory*”
- Committee could bar “improper and abusive” remarks only if the remarks involved “*threats, fighting words, or obscene content*”
- Because *Spaulding* was settled before it proceeded to a final decision and was never decided by an appellate court, it is **non-binding guidance**.

Pending SJC Case: the *Barron* case

Barron v. Board of Selectmen of Southborough

SJC-13284

- The topic we are discussing is timely – a case is pending in the Massachusetts Supreme Judicial Court that should decide in a binding decision how and when the chair may control public comment during a committee's open meetings
- The *Barron* case involves a select board's public comment during the open meeting.
- The Southborough Select Board applied its 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.”

Barron v. Board of Selectmen of Southborough

- 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 for our discussion is brought under the Massachusetts Declaration of Rights, which includes a freedom of speech guarantee that is virtually identical to the First Amendment’s guarantee.

Barron v. Board of Selectmen of Southborough

- 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.

Where is *Barron* going?

- The commenter appealed to the Massachusetts Appeals Court and the Supreme Judicial Court on its own initiative took jurisdiction of the case.
- VDH filed a “friend of the court”/amicus brief on behalf of MASC, urging the court to affirm the Superior Court’s decision noting that school committees need the ability to control conduct and enforce civility during their public comment sessions*

***Remember: The committee cannot apply rules based on the content or viewpoint of the comments. The rules must be applied uniformly without regard to content or viewpoint.**

What are the implications of *Barron*?

- Until the *Barron* case is decided by the SJC, the scope of public comment restrictions will remain uncertain. It seems clear that committees **may limit participation to residents and families with children in the district's schools.**
- **Reasonable time limits** for an individual speaker, such as 3 minutes, appear to be lawful. The same applies to **limiting the public comment period itself.** For example, the public comment period could be limited to 10-15 minutes.
- It also seems reasonable to have participants **register in advance**, so that the session time limit can be applied and so that participants can be called upon in an orderly manner.
- **Yelling, obscenity, threats, refusing to yield when time is up, personal attacks, etc. appear to be lawful grounds for ending a speaker's participation** but those – and possibly more - are the areas in which we hope for guidance from the SJC in the *Barron* decision.

A note about slander

- Slander is the act of making a false spoken statement damaging to a person's reputation
- While *Barron* will hopefully better define the scope of restrictions a public body can put on speech during the public comment portion of its meeting, a speaker may still face liability from *private individuals* disparaged by the speech
- Remember that statements about a *public official*, even if false, generally must be made with “actual malice” – that is, with knowledge of the falsity of the statement or reckless disregard of its falsity - to be considered slander outside of First Amendment protections

Managing Public Comment

Caution:

The following guidance should be seen as interim until we have the Supreme Judicial Court's decision in the *Barron* case

Do's for Managing Public Comment

Written Policy:

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
- 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

Reasonable Restrictions:

Place reasonable restrictions on who can speak

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

Limits:

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

- May prohibit remarks about any subjects or individuals which do not fall within the committee's jurisdiction
- May prohibit obvious acts of disruption

Don'ts for Managing Public Comment

CONTENT:

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

DISRUPTION:

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, but just because it's controversial does not make it a “disruption”. The manner in which the commenter articulates the speech or the commenter's conduct should be the focus – not the commenter's viewpoint.

CONSISTENT ENFORCEMENT:

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.

CLEAR WARNING:

Unlike baseball, the Open Meeting Law generally gives a speaker only one clear warning or strike. If the Chair issues a warning and the speaker persists, the Chair may require and enforce an end to the speaker's time.

Exercise # 1

The 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?

Exercise #1 continued

- Can the Committee limit the amount of time on the agenda for public comment?
- Can the Committee limit the amount of time each recognized speaker has to make comments?
- Can the Committee restrict the comments to items within the Committee's jurisdiction?
- Can the Committee restrict the comments to items related to matters listed on the Committee's posted agenda?
- Can the Committee restrict participation to individuals who reside in the municipality or whose children attend the District's schools?
- Can the Committee schedule a separate meeting for public comments on matters about which there may be lots of interest in public comment?

Exercise #2

Mr. 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 November 2nd, 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, Mr. Loud, interrupted him and demanded to be heard next.

What should the Chair do?

Exercise #2 (continued)

After the Chair directs 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?

Exercise #2 (continued)

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?

Exercise #3

Paula Public & Let's Get Personal

During public comment at the Best School Committee meeting on July 14th, Paula Public was recognized to speak by the Chair. Paula Public 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!”

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

What can Chair Empire do?

Exercise #4

Slandering the Superintendent

During the Good School Committee's public comment section at its November 2nd meeting, Ned Neighbor, was recognized to speak by the Chair. Ned lives next door to the school superintendent and the superintendent's twin 21-year old sons. Ned has been in a dispute with the superintendent over a fence bordering their property. Ned made the following statement during public comment:

“I live next door to the superintendent, and you should know who you hired to lead our schools. Every Saturday evening she's in her backyard with a bunch of teenagers doing who knows what including campfires with much more than smores, I can tell you. The teenagers are playing loud music and dancing around for hours. I grew up in the 70s and I know the smell of pot even with a campfire burning. These kids look high or drunk, and the superintendent is providing the alcohol or marijuana. I see the superintendent on Friday nights drinking on her back deck until all hours of the night and don't get me started on the loud afternoon parties with people coming and going. The superintendent should be fired; let her go somewhere else! We need a superintendent who will be a proper role model for our students. She can't control her own teenage children; how can she educate ours!”

What should the Chair do after Ned finishes his comments?

Exercise # 5

Confidential Student Information

Peter Parent has a 15-year old daughter with an IEP in the District's high school. He's been very unhappy with the District's Assistant Superintendent for Student Services and with the IEP process that didn't agree to provide an outside placement for his daughter.

The Good Public School Committee has no policy on public comment and at its meeting on November 2nd, Mr. Parent was recognized by the Chair to speak during public comment.

Mr. Parent asked the Committee to set up a Task Force to report to the Committee on special education in the District. He explained that he had personal knowledge that the current system wasn't working. He identified his daughter Suzy by name, he listed all of her disabilities; he described in detail episodes of Suzy's repeated dysregulation at home and in school; and he read her IEP and from her report card to the Committee. He 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 his daughter?

SOME ADDITIONAL NOTES

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

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

Anticipate disruptions and be prepared

Always apply restrictions on public comment without regard to viewpoint

Review and revise the Committee's policy following the SJC *Barron* decision

Censuring Elected Officials: *Houston Community College System*

Houston Community College System v. Wilson

142 S. Ct. 1253 (2022)

- This past March, the U.S. Supreme Court heard a case dealing with the First Amendment rights of an elected official facing censure.
- Wilson, an elected member of the Board of Trustees of the Houston Community College System, engaged in an escalating series of disputes with the Board, culminating in the Board's adoption of a public resolution censuring him. The resolution imposed certain penalties that limited his eligibility to run for reelection and his ability to access Board funds.
- Wilson brought suit alleging, among other things, that the Board violated the First Amendment.

Houston Community College System v. Wilson

- Supreme Court applied its established tests in these types of First Amendment cases:
 - Wilson must prove that the Board took “adverse action” in response to speech
 - Wilson must show that the adverse action was “material”
 - Examples of material adverse action: arrest, prosecution, dismissal from employment, etc.
 - Examples of immaterial adverse action: a mere frown from a supervisor
- The Supreme Court considered three important factors
 - (1) long-accepted history of elected bodies censuring their members
 - (2) elected representatives are expected to shoulder a degree of criticism about their public service
 - (3) Board’s censuring is itself a form of protected speech that concerns the conduct of a public official

Houston Community College System v. Wilson

- The Supreme court held that Wilson does not prevail on his First Amendment claim
- Limited scope of the holding: The Court did NOT rule that verbal reprimands or censures can NEVER give rise to a First Amendment retaliation claim.
- Whether the plaintiff is a student, employee, licensee, or private individual may change the analysis.
- This holding is limited to a public body's **speech** – such as reprimands or censure – and does not address punishments or sanctions, such as fines or expulsion.

Hypothetical Questions and Answers



Elizabeth B. Valerio, Esq.
Elizabeth.Valerio@VDHBoston.com

Valerio Dominello & Hillman, LLC
One University Avenue, Suite 300B
Westwood, MA 02090
(617) 862-2005

VDHBoston.com