

0167.3 **Public Participation at Board Meetings**

The Board of Education recognizes the value of public comment on educational issues and the importance of allowing members of the public to express themselves on District matters.

Adopted:
JUNE 28, 2018

BYLAWS

0160/Page 7 of 10

Any person or group wishing to place an item on the agenda shall register their intent with the-President no later than two (2) days prior to the meeting and include:

- a. name and address of the participant;
- b. group affiliation, if and when appropriate;
- c. topic to be addressed,

To permit fair and orderly public expression, the Board shall provide a period for public participation at every regular meeting of the Board and publish rules to govern such participation in Board meetings.

Items brought up during the regular meeting will be placed on the next regular meeting agenda. (Note: The intent of this policy is if visitors or members bring up a subject matter the Board will receive the matter but postpone action until the next regular meeting.)

The presiding officer of each Board meeting at which public participation is permitted shall administer the rules of the Board for its conduct.

The presiding officer shall be guided by the following rules:

- a. p u b l i c participation shall be permitted
- b. a s directed in the order of business
- c. a t the direction of the presiding officer

Anyone having a legitimate interest in the actions of the Board may participate during the public portion of the meeting.

Attendees must register their intention to participate in the public portion of the meeting upon their arrival at the meeting.

Participants must be recognized by the presiding officer, and will be requested to preface their comments by an announcement of their name, address, group affiliation, if and when appropriate.

Each statement made by a participant shall be limited to five (5) minutes duration.

No participant may speak more than once on the topic unless all others who wish to speak on that topic have been heard.

Participants shall direct all comments to the Board and not to other participants.

All statements shall be directed to the presiding officer. No person may address or question Board members individually.

The presiding officer may:

- a. interrupt, warn, or terminate a participants statement if it is too lengthy, personally directed, abusive, obscene, or irrelevant;
- b. request any individual to leave the meeting when that person does not observe reasonable decorum;
- c. request the assistance of law enforcement officers in the removal of a disorderly person when that person's conduct interferes with the orderly progress of the meeting;
- d. call for a recess or an adjournment to another time when the lack of public decorum so interferes with the orderly conduct of the meeting as to warrant such action;
- e. waive these rules - with the approval of the Board when necessary for the protection of privacy or the administration of the Board's business.

The portion of the meeting during which the participation of the public is invited shall be limited to thirty (30) minutes, however this may be extended at the discretion of the presiding officer.

Tape or video recordings are permitted, providing the person operating the recorder has contacted the President prior to the board meeting to review possible placement of the equipment, and agrees to abide by the following conditions:

- a. no obstructions are created between the board and the audience.
- b. no interviews are conducted in the meeting room while the Board is in session.
- c. No commentary, adjustment of equipment, or positioning of operators is made that would distract either the Board or members of the audience while the Board is in session.

MCLA 15.263(4)(5)(6), 380.1808

CHAPTER 5

REQUIREMENTS FOR OPEN MEETINGS

Section 3 of OMA contains the basic requirement that school board meetings must be open to the public. This section gives the public the right to attend public meetings so that they can be present to observe how a school board operates. Section 3 also gives school boards the authority to establish rules for public participation at public meetings.

In addition, Section 3 lists a number of boards and commissions that are exempt from OMA when they are deliberating on a case. The State Tenure Commission, for example, is exempt when hearing an appeal of a teacher tenure case but is not exempt when promulgating rules.

PUBLIC MEETINGS

All meetings of the board of education of a local or intermediate school district and the governing board of a public school academy must be open to the public, unless a specific exemption established by Section 8 of OMA permits a closed meeting. The open meeting requirement applies regardless of whether the meeting is posted as a regular or special meeting of the school board.

LIMITED PUBLIC FORUMS

Because OMA mandates that a person “shall be permitted to address a meeting” of a school board, the Michigan Legislature has characterized school board meetings as “limited public forums,” which are subject to First Amendment/free speech protections. This type of forum exists when the government opens up public property for use by the public as a place for expressive activity for use by certain speakers or for the *discussion of certain subjects*. According to the U.S. Supreme Court, if a limited public forum exists, reasonable, content-neutral time, place and manner regulations regulating speech are permissible, but they must be narrowly drawn or tailored to effectuate a compelling state interest, and they must provide ample alternative channels of communication. A regulation that restricts speech on the basis of the message will be strictly scrutinized by the courts and will almost always be found unconstitutional.

PUBLIC PARTICIPATION AT OPEN MEETINGS

As a general rule, every school board must allow members of the public to attend all open meetings. Individuals also must be permitted to address the board during the open meeting.

Attendance. Any person—regardless of age, residency or affiliation—must be permitted to attend an open meeting.

A person cannot be excluded from a public meeting for failing to stand for the Pledge of Allegiance. Although individuals may be excluded for a breach of peace, not standing for the pledge cannot be considered disorderly conduct (1979 OAG 5614).

While boards of education may adopt rules governing the conduct of school board meetings, including rules for public participation for people who wish to address the board, the rules cannot place conditions on the right of a person to attend the meeting (1977 OAG 5183).

Addressing the Board. Every person attending an open meeting of a school board is entitled to address the board during the public participation portion of the meeting, as long as the person complies with reasonable rules adopted by the board. However, it is not entirely clear as to whether a school

board member has the right to address his or her own board during public participation. The Court of Appeals hasn't decided the issue, but commented that it has "significant reservations" as to whether Section 3 of OMA entitles a school board member to address the school board during the public comment segment of a meeting (see *Kim A. Higgs v Kimberly Houston-Philpot and Delta College Board of Trustees*, unpublished, No. 302767 (2012)).

Rules for Public Participation. A school board may establish public participation rules that assist in balancing the board's interest in conducting a meeting in an orderly manner with individuals' rights under the First Amendment. The rules must be reasonable, flexible and written in a way that encourages public participation. To be enforceable, the rules must be adopted by the board of education and recorded in the board minutes (1977 OAG 5183). The rules also should be printed and available at every open meeting, so that people attending the meeting and those desiring to address the board are informed about their responsibilities and the board's procedures.

A model set of rules is printed at the end of this chapter (page 33). A school board may adopt variations of this model to meet its particular needs, but the rules must satisfy certain standards, as prescribed by OMA and judicial interpretations of the statute. Key provisions relating to permissible and prohibited rules are listed below.

Rules; Permissible Components. Rules establishing conditions for public participation may include any of the following:

- **Time for Public Participation.** Rules may designate the place or time on the agenda when public participation may occur. A public body may determine through reasonable rules whether members of the public may address the board at the beginning, middle or end of the meeting (1980 OAG 5716). Thus, if a school board has public comment at the beginning of its meetings and a citizen arrives after the designated time, the board has the right to enforce its rule limiting public comment to the prescribed time and deny the late-arriving citizen the opportunity to address the board (*Lysogorski v Charter Township of Bridgeport*, 256 Mich App 297 (2003)).
- **Length of Individual Comment.** Rules may impose a time limit for individual speakers (1978 OAG 5332). Considering that public comment rules must be reasonable and encourage public participation, MASB advises that a time limit should be no less than three minutes.
- **Addressing the Chair.** School boards may establish a rule that requires commentary to be directed to the chair. This restricts commentators from inciting other meeting attendees to heckle or debate the commentary or otherwise disrupt the orderly progress of public participation without targeting the content of the comments or the speaker's viewpoint (*Holeton v City of Livonia*, 2019 Mich App Lexis 1722).
- **Identification of Speaker.** To facilitate an orderly meeting, rules may request that individuals identify themselves and to make it known ahead of time at the beginning of the meeting that they wish to address the school board. However, MASB advises that this rule should not be enforced to the point that it denies the right of a person to address the school board.
- **Designation of Spokesperson.** Rules may facilitate and encourage, but not require, the designation of a spokesperson or representatives selected by the group to speak for a large number of people having the same viewpoint on a particular topic (1978 OAG 5332).
- **Recording Equipment.** Rules may include reasonable limitations on the use of recording and broadcasting equipment, but the rules cannot prohibit such coverage. The right of a person to attend a public meeting includes the right to tape record, videotape, broadcast or livestream the proceedings. A person need not obtain prior approval from a school board to tape record, videotape, broadcast or livestream an open meeting. However, a board of education may establish reasonable regulations to minimize the possibility of disrupting the meeting (1988 OAG 6499).

- **Personal Attacks.** Under most circumstances, rules cannot restrict the content of a person's public speech. However, comments that constitutes a "personal attack" on an employee or board member totally unrelated to his or her duties may be prohibited. If the phrase "personal attack" refers to the manner in which an employee or school board member carries out his or her duties, the rule is invalid. If the phrase refers to conduct totally unrelated to the manner in which the employee or board member performs his or her duties, the rule is valid (1978 OAG 5332).

A rule that prohibits personally abusive attacks during public comment is a reasonable time, place and manner restriction as long as it is content-neutral and narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communications. The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation, and it does not burden substantially more speech than is necessary to further the government's interests. It is universally recognized by courts that the government has a significant interest in the orderly and efficient conduct of meetings of public bodies, so a rule prohibiting personal attacks furthers the interest of running a meeting without disruption by ensuring that speakers focus only on public issues and not personal disputes. However, a school board must still be careful in applying such a rule. If it is invoked and it is not serving the interest of ensuring order and it's burdening more speech than is necessary to prevent disruption, a board could be committing a First Amendment violation (see *Timmon v Wood*, 316 Fed Appx 364, 2007 WL 6123146 (CA 6 2007)).

- **Repetitive Comments.** The Sixth Circuit Court of Appeals case, *Lowery v Jefferson County Board of Education*, 586 F3d 427 (CA 6 2009), provides some limited authority to school boards to restrict repetitive comments. The case arose after the parents of two football players were denied the opportunity to speak for a second time regarding a coach's decision to dismiss their sons from the football team. In restricting the parents' comments, the board relied on a policy that prohibited "frivolous, repetitive or harassing" presentations during public comment.

The court upheld the policy and concluded that it was content-neutral and served the significant government interest of conducting an orderly and productive meeting. The facts of this case are based on the Tennessee Open Meetings Act, so the application of its ruling may be limited in Michigan courts. However, the case appears to suggest that school boards may establish content-neutral rules that restrict repetitive comments in order to better facilitate efficient and orderly board meetings.

Rules; Prohibited Components. Rules for public participation cannot include any of the following:

- **Residency.** Rules cannot limit the right to address the meeting to residents of the school district. A rule excluding nonresidents is invalid (1978 OAG 5332).
- **Complaints.** *Can a school board adopt a rule that prohibits citizens from publicly criticizing or making complaints against school employees by name during public comment?* No, if the complaint relates to the manner in which an employee carries out his or her public duties. First of all, such a rule is content based because it allows citizens to make positive or neutral comments about employees, but it prohibits a negative viewpoint from being expressed. Further, while a school district could arguably have a *significant* interest in protecting the privacy and due process rights of its employees, this interest falls well short of the compelling interest threshold that is needed to sustain a content-based restriction on protected speech (see *Gault v Battle Creek*, 73 F Supp 2d 811 (WD Mich, 1999)). Thus, citizens should be given a full opportunity to make complaints on matters of public concern in accordance with time limits set by the board even though the allegations concern a subject that is being considered or might be considered in a closed session. Rules may still encourage citizens to process complaints through proper personnel and administrative channels before requesting board consideration.
- **Denial of Right to Speak.** Rules cannot be written or enforced in a way that completely denies the

right of a person to address the meeting. If a rule limiting public participation to a specific time-frame is applied so that some people are denied their opportunity to speak, the rule violates OMA (1978 OAG 5332). (Because of this prohibition, it is advisable for the rules to include a provision for extending the time limit or a procedure permitting the board president to shorten the usual time limit for individuals, or some combination of both, when necessary to accommodate all speakers.)

- **Speaker's Affiliation.** Rules cannot be written or enforced in a way that denies an individual the right to address a meeting of the board on the sole grounds that the individual is a representative of an organization of school district employees (1977 OAG 5218). The authority of a school board to hold a closed session to discuss collective bargaining agreements may not serve as the basis for denying a staff member the right to address the school board (1978 OAG 5332).
- **Subject Matter.** Rules cannot limit the topics members of the public may discuss in the course of addressing the board, but rules may require that the topics be related to business within the jurisdiction of the school board (1977 OAG 5218). Thus, a rule that limits public comment to only agenda items violates OMA.

DISORDERLY CONDUCT

If, during a meeting, a citizen engages in "disorderly conduct" or acts in a manner resulting in a "breach of the peace," a school board may take steps to control the behavior or even remove the individual from the meeting. OMA qualifies a citizen's right to attend a public meeting by allowing exclusion for "a breach of the peace actually committed at the meeting" (see 1977 OAG 5183). The Revised School Code also permits the board president to order the removal of a citizen who, after notice from the president, persists to behave in a "disorderly manner" (MCL 380.1808). This provision also empowers the president to "order a law enforcement officer or other person to take the disorderly person into custody until the meeting is adjourned" if the person refuses to withdraw from the meeting. Further, the Michigan Penal Code states that a person is guilty of a misdemeanor if he or she "makes or excites any disturbance or contention in any . . . public meeting where citizens are peaceably and lawfully assembled" (MCL 750.170).

None of these statutes, however, include definitions for the terms that permit removal. Thus, the determination of whether someone's conduct amounts to "breaching the peace," being "disorderly" or making a "disturbance" will likely be based upon the president's viewpoint, which should be objective rather than subjective. A president who has "thin skin" or heightened sensitivities about keeping an orderly meeting may be too quick in ordering an agitator's removal from a meeting, which could result in a violation of OMA.

The courts have provided some guidance on defining the terms. In 1884, in *Davis v Burgess*, 54 Mich 514 (1884), the Michigan Supreme Court set forth a commonly accepted definition for a "breach of the peace" that is still applied today:

Now what is understood by a 'breach of the peace?' By 'peace,' as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in a political society, and any intentional violation of that right is 'a breach of the peace.' It is the offense of disturbing the public peace, or violation of public order or public decorum.

This definition permits removal of someone who speaks out of turn at a meeting and refuses to follow the public comment rules established by the board, because such actions violate the public order or public decorum of the meeting.

Regulating Profanity. While helpful, the *Davis* definition is also subject to interpretation and it still requires consideration of First Amendment principles to determine whether specific speech is pro-

ted. For example, based on the definition alone, it is unclear whether using profanity during public comment amounts to a “breach of the peace.” Therefore, it is necessary to look at the context in which the profanity is used to determine whether it might receive protection from the First Amendment. If profanity amounts to “fighting words,” the actions of the speaker would not constitute free speech and his or her removal from the meeting for a “breach of the peace” could be justified under the definition. In *Chaplinsky v New Hampshire*, 315 US 568 (1942), the U.S. Supreme Court recognized that “fighting words”—those by which their very utterance inflict injury or tend to incite immediate breach of the peace—are among the certain well-defined and narrowly limited classes of speech that may be prohibited and even punished by the government.

Today, *Chaplinsky* still remains viable for the principle that the government may forbid “personally abusive epithets which, when addressed to the ordinary citizen are, as a matter of common knowledge, inherently likely to provoke a violent reaction” (*Cohen v California*, 403 US 15 (1971)). However, the Supreme Court has declined to uphold any convictions for fighting words since *Chaplinsky*. The U.S. Court of Appeals for the Sixth Circuit has also declined to extend the “fighting words” designation to profanity that was used by a citizen at a Michigan township board meeting. In *Leonard v Robinson*, 477 F3d 347 (CA 6 2007), a speaker was arrested for uttering the phrase “G___ D___” while addressing a township board. The Court found that using the phrase “G___ D___” was not, as a matter of law, likely to cause a fight, and “prohibiting [the speaker] from coupling an expletive to his political speech is clearly unconstitutional.”

Thus, despite the fact that profanity may be offensive, it is protected by the First Amendment. In making a determination to rule a speaker out of order and demand his or her removal from a meeting, the decision should not be based solely upon whether the speaker’s words are profane or vulgar. A “breach of the peace” or “disorderly conduct” results from a speaker creating an actual, immediate threat to public safety, peace or order, not merely from the content of his or her words.

RECESS

The Court of Appeals has ruled that a public body does not violate OMA when, because of disruptions by several people that prevent the public body from conducting business, it obtains a temporary restraining order allowing it to move to another location while excluding members of the disruptive group and posting people at the regular meeting place to direct the general public to the new location (*Regents of University of Michigan v Washtenaw Co Coalition Against Apartheid*, 97 Mich App 532 (1980)).

Likewise, the Attorney General has ruled that if a public body, which is meeting in closed session, recesses its meeting and moves to another location in order to end a disruption, the public body must take reasonable steps to inform the public as to when and where the meeting will reconvene. If the meeting is reconvened within less than 36 hours, less than 18 hours’ notice of the new time and place is sufficient (1986 OAG 6358).

CANCELLING A REGULAR MEETING

OMA does not include any procedures or guidelines for cancelling a regular meeting. As explained in Chapter 3, OMA requires a school board to adopt a schedule of regular meetings, which must be posted within 10 days after the board’s first meeting in a new calendar or fiscal year and, if there is a “change” in that schedule, a school board must post public notice of the new dates, times and places of the regular meetings “within three days after the meeting at which the change is made” (MCL 15.265(2)-(3)).

If changing the regular meeting schedule requires a vote by a school board at an open meeting, does that mean cancelling a regular meeting requires a board vote as well? Not necessarily. First of all, there