



# Guidelines for Public Comment Sessions during School Board Meetings

The following guide is intended to provide school boards direction regarding public comment sessions during school board meetings. MSBA often receives questions about the rules that can be implemented during public comment sessions. We will first provide some legal background regarding this issue and then outline some restrictions that have been found by the courts to be legally permissible.

## What is a public comment session?

Public comment is a session during a school board meeting in which members of the public have the opportunity to come forward and address the school board.

There are different variations of public comment that are used across the state. Some school districts use a format in which members of the public must register in advance to speak. Other districts use an open format in which any member of the public can simply show up and participate in public comment.

## Is the school board legally required to hold a public comment session during board meetings?

No. Although many school boards choose to hold a public comment session, there is no legal requirement that a school board hold a public comment session during its meetings.

While school boards are not legally required to hold a public comment session during board meetings, it is important to be aware that there is a Missouri statute that provides a separate mechanism for a resident of the school district to address the school board. Under Section 162.058, RSMo., a resident may have an item placed on the school board meeting agenda for consideration. The district may require, however, that the resident first meet with the Superintendent or designee regarding the issue, and if the resident is not satisfied with the conclusion of that meeting or if the Superintendent or designee fail to meet with the resident, then the resident should have the opportunity to request that the issue be placed on the school board meeting agenda. If the resident fulfills the requirements set forth under Section 162.058 RSMo., then it is legally mandated that the resident be given the opportunity to address the school board regarding the agenda item.

## If the school board chooses to hold a public comment session, can the board place any rules or restrictions on the session?

Yes. There are certain rules and restrictions that the board can place on speakers during public comment. But districts need to be careful. As mentioned earlier, there is no First Amendment right for members of the public to speak at school board meetings. But if a district decides to add public comment to the meeting, the district opens up a window where some speech is protected.

In general, courts recognize that school boards cannot function effectively if their meetings are “free-for-alls” which lack a basic sense of order and decorum. On the other hand, it is important to be mindful that there are some restrictions that have been struck down by the courts for violating the First Amendment right to free speech. If the school board is considering implementing restrictions during public comment, it is important that they only use restrictions that have been found to be legally permissible.



## What kinds of restrictions on public comment have been upheld as legally permissible?

The most important thing to remember regarding restrictions on public comment is that any restriction the board implements must be viewpoint neutral. In other words, restrictions must be applied equally and consistently to all speakers regardless of their views. The following is a list of restrictions upheld by the courts as viewpoint neutral and therefore legally permissible:

1. Requirements that the public pre-register to speak in advance of the meeting has been upheld by the courts. See e.g., Ison v. Madison Local Sch. Dist. Bd. of Educ., 3 F.4th 887 (6th Cir. 2021). This pre-registration requirement usually requires a speaker to register a few days to a week in advance of the board meeting.
2. Reasonable restrictions on the length of time that each member of the public can speak have also been held to be permissible. See e.g., Wright v. Anthony, 733 F.2d 575 (8th Cir. 1984). School boards may cut off a speaker who has failed to abide by the allotted time limit. A time limit of three to five minutes is fairly common.
3. The board may also impose a rule that the speaker not veer off and discuss subjects that are irrelevant to school-related matters during public comment. See e.g., Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989).
4. The board may require that the speaker observe reasonable rules of decorum such as not using obscene language or shouting loudly during public comment. See e.g., Dyer v. Atlanta Indep. Sch. Sys., 426 F. Supp. 3d 1350 (N.D. Ga. 2019).
5. The board may also require that speech not be overly repetitious. See e.g., White v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990).
6. A rule that prohibits the naming and discussion of individual students and individual district employees during public comment has been upheld. The purpose of this rule is to protect the privacy rights of students and staff, and prevent public naming and shaming during public comment. See e.g., Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 760 (5th Cir. 2010), Cipolla-Dennis v. Cnty. of Tompkins, No. 21-712, 2022 WL 1237960, at \*2 n.2 (2d Cir. 2022), Pollak v. Wilson, No. 22-8017 (10th Cir. Dec. 27, 2022).
7. And finally, the United States District Court for the Eastern District of Missouri recently upheld a public comment meeting rule that prohibited audience applause on the basis that the rule was found to be viewpoint neutral and was applied universally during meetings. See e.g., Taylor v. St. Louis Cmty. College, No. 4: 18cv00272 SNLJ (E.D. Mo. Mar. 5, 2020).

## What types of restrictions on public comment have been struck down as violating the speaker's right to freedom of speech?

There are some restrictions on public comment that should be avoided as they have been held to violate the speaker's First Amendment right to freedom of speech. In general terms, school boards' should not impose any rule or restriction that could be construed as discriminatory based on the speaker's viewpoint. This is called "viewpoint discrimination" and it is highly disfavored by the courts. Speakers generally have the right to express their views freely, even if those views are unpopular, perceived as offensive, or are critical of the school district.



Two recent cases are helpful in providing examples of impermissible viewpoint discrimination. The United States Court of Appeals for the Sixth Circuit recently found that a school board policy that prohibited speech during public comment that the board president found “antagonistic, abusive or personally-directed” violated the speaker’s First Amendment right to freedom of speech. Ison v. Madison Local Sch. Dist. Bd. of Educ., 3 F.4th 887, 893 (6th Cir. 2021). In analyzing the board policy, the Court closely examined the words “antagonistic”, “abusive” and “personally-directed” and found that these terms were over-broad and could be used to prohibit speech simply because the speech disparaged or offended other meeting attendees or board members. This was considered by the Court to constitute impermissible viewpoint discrimination.

Separately, in a recent 2022 case, the United States District Court for the Eastern District of Missouri ruled against the Francis Howell School District by granting a preliminary injunction after a group of citizens brought suit against the district for instituting a rule that prohibited the group from mentioning their organization, “Francis Howell Families” during their public comment remarks. Brooks v. Francis Howell School Dist., 599 F. Supp. 3d 795 (E.D. Mo. 2022). “Francis Howell Families” had been publicly critical of the actions of the school board, and individual members of the organization would routinely mention their affiliation with the group during public comment. The board warned the speakers in advance that if they mentioned their organization during public comment, they would not be allowed to participate in the future as it was a violation of the district’s advertising policy. The Court pointed out, however, that other speakers during public comment had made reference to other organizations, and they were not similarly penalized by the board. The Court felt that evidence existed that the speakers who belonged to “Francis Howell Families” were being targeted based on their negative view of the school board.

These cases illustrate the point that districts should be careful to make sure that they are not using policies that could be perceived as putting citizens or groups that are critical of the school district at a disadvantage. In addition, school boards’ must also not selectively enforce restrictions, but rather should ensure that the same rules and restrictions apply to all speakers. To avoid any appearance of viewpoint discrimination, it is recommended that restrictions are focused on objective, plainly viewpoint-neutral rules such as the restrictions listed above in section four.

### **Are there any other legal issues that are important for the board to be aware of regarding public comment?**

Yes. As mentioned earlier, federal appellate courts have upheld school board policies that prohibit the naming and discussion of individual students and individual staff members during public comment. It should be emphasized however that this rule must be applied evenly, without viewpoint discrimination. This means that both positive and negative comments regarding individual students and staff are prohibited.

Courts have found that schools have a legitimate interest in protecting the privacy of individual students and staff members during public comment. Utilizing this type of rule could prevent public targeting and shaming of students and staff, but it is difficult to apply. Most board presidents do not want to shut down a speaker for making positive comments about identifiable students or staff, but that may be necessary to apply the rule evenly. Furthermore, if such a restriction is adopted, the district should provide an alternative process for the public to raise complaints regarding individual school staff members if they are prohibited from doing so during public comment.



## **How does the Missouri Open Meetings & Records Act (Sunshine Law) impact public comment?**

One other important law that school boards' should be mindful of when conducting public comment is the Missouri Sunshine Law. Under Section 610.020 RSMo., school boards are required to publicly post a tentative meeting agenda prior to their meetings so that the public can be informed in advance about what topics the board plans to discuss. This can become problematic however if school districts use an "open format" for public comment in which members of the public are allowed to speak on topics which are not included in the meeting agenda. To address this, MSBA recommends that school boards' avoid an open format and instead require that speakers restrict their comments to issues that are on the meeting agenda. However if school districts decide to use an open format, it is recommended that board members simply listen but not discuss or respond to issues raised during public comment that are not included in the agenda. This will help ensure that school boards avoid any potential violations of the Sunshine Law. If school boards want to consider an issue not included in the agenda, they can always have it added to the agenda for a future meeting.

## **Are there any other legal issues that are important for the board to be aware of regarding public comment?**

It is also important to keep in mind that if the board is seeking to place restrictions on public comment, it is best practice for the board to leave open alternative channels of communication for members of the public. For example, allowing the public to contact school board members with comments through e-mail communication and/or direct mail is strongly recommended. The case law indicates that allowing for alternative channels for communication is an important part of the analysis in determining whether restrictions during public comment are constitutionally permissible. Simply allowing the public to submit comments by e-mail, phone and traditional mail is recommended.

In summary, the school board has the power to decide if it wants to hold a public comment session. If the board decides to hold a public comment session, following these recommendations should help ensure that public comment is an orderly and productive exercise in which the public has the opportunity to express their views, and a speaker's First Amendment right to freedom of speech is protected.