

**NASB/NCSA
STATE EDUCATION CONFERENCE 2009**

**CONTROLLING BOARD MEETINGS - RIGHTS AND
RESPONSIBILITIES**

Gregory H. Perry
Perry, Guthery, Haase & Gessford, P.C., L.L.O.
233 So. 13th, Suite 1400 Lincoln, NE 68508 (402) 476-9200
gperry@perrylawfirm.com

A. The Basics of Public Participation at Board Meetings

Attend

The public has “the right to attend . . . meetings of [the Board].”¹

Speak

The public has “the right to speak at meetings of public bodies.” The Board “may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.”²

The Board may not “require that the name of any member of the public be placed on the agenda prior to [a] meeting in order to speak about items on the agenda.”³

Record

The public has the right to use “a tape recorder, camera, video equipment, or any other means of pictorial or sonic reproduction or in writing” to record “any part of a meeting of a public body, except for closed sessions.”⁴

Self-Identification

Not to Attend Meeting. People cannot be required “to identify themselves as a condition for admission to the meeting.”⁵

Can Require for Speakers. However, the Board “may require any member of the public desiring to address the body to identify himself or herself.”⁶

Hear

“The [Board] shall, upon request, make a reasonable effort to accommodate the public's right to hear the discussion and testimony presented at the meeting.”⁷

¹ Neb. Rev. Stat. § 84-1412 (1).

² Neb. Rev. Stat. § 84-1412 (1) and (2).

³ Neb. Rev. Stat. § 84-1412 (3).

⁴ Neb. Rev. Stat. § 84-1412 (1).

⁵ Neb. Rev. Stat. § 84-1412 (3).

⁶ Neb. Rev. Stat. § 84-1412 (3).

⁷ Neb. Rev. Stat. § 84-1412 (7).

Access to Written Materials

“[The Board] shall make available at the meeting ... for examination and copying by members of the public, at least one copy of all reproducible written material to be discussed at an open meeting.”⁸

Orderly Conduct

Rules. The Board may “make and enforce reasonable rules and regulations regarding the conduct of persons attending, speaking at, videotaping, televising, photographing, broadcasting, or recording its meetings.”⁹

Removal. The chair has the authority to ensure that people conduct themselves in an orderly manner at the meeting.¹⁰ The chair may order the removal of those who are disorderly.¹¹



Parliamentary Procedure

Nebraska school boards customarily adopt the Robert’s Rules of Order to govern their meetings. “In the absence of any duly adopted rules of procedure or of sufficient statutory regulation, the generally accepted rules of parliamentary procedure control, and all who are entitled to take part are to be treated with fairness and good faith. If there is no specific, unambiguous statute or charter provision, resort may be had to Robert’s Rules of Order for light on relevant parliamentary usages of deliberative assemblies.”¹²

“The rules of parliamentary practice are merely procedural. They are not substantive and do not have the force of a public law. Parliamentary rules are merely in the nature of bylaws, prescribed for a deliberative body for the orderly and convenient conduct of its own proceedings, and the power that made them can unmake them or disregard

⁸ Neb. Rev. Stat. § 84-1412 (8).

⁹ Neb. Rev. Stat. § 84-1412 (1) and (2).

¹⁰ Neb. Rev. Stat. § 79-570: “If at any district meeting . . . any person conducts himself or herself in a disorderly manner and persists in such conduct after notice by the president or person presiding, the president or person presiding may order such person to withdraw from the meeting and, if the person refuses, may order any person or persons to take such person into custody until the meeting is adjourned.”

¹¹ “If at any district meeting . . . any person conducts himself or herself in a disorderly manner and persists in such conduct after notice by the president or person presiding, the president or person presiding may order such person to withdraw from the meeting and, if the person refuses, may order any person or persons to take such person into custody until the meeting is adjourned.” Neb. Rev. Stat. § 79-570.

“Any person who refuses to withdraw from such meeting on being so ordered as provided in section 79-570 or who willfully disturbs such meeting shall be guilty of a Class V misdemeanor.” Neb. Rev. Stat. § 79-571.

¹² 59 Am Jur 2d Parliamentary Law § 4.

them.”¹³ Such rules are “subject to revocation, modification, or waiver.”¹⁴ “[P]arliamentary rules, even when adopted as board policy, are intended merely to assist the board in the orderly conduct of its business, and cannot operate to invalidate otherwise lawful actions of a duly elected board.”¹⁵

B. First Amendment Right to Speak During Public Comment—Legal Framework

There are three types of forums that public schools may establish. The type of forum dictates the extent to which speech may be restricted:

- Public forums are those areas which traditionally have been devoted to assembly and public debate, such as public streets, sidewalks, and parks.
- Limited (or designated) public forums are those forums which the government has voluntarily opened for use by the public or certain speakers for expressive activity.
- Nonpublic forums are those which neither by tradition nor government action have become forums for public communication.

The courts have nearly uniformly considered school board meetings to be a limited public forum. In a limited public forum, “[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”¹⁶

The United States Supreme Court first addressed the question of the application of the First Amendment to school board meetings in the *Madison* case.¹⁷ In this case, a school board had held a public meeting while collective bargaining negotiations were taking place. A teacher, who was not a member of the union, spoke to the Board on the subject of the union’s “fair share” clause proposal for the agreement whereby all teachers, whether or not they were union members, would pay union dues to defray the cost of collective-bargaining. Shortly thereafter, a collective-bargaining agreement was signed which did not include the “fair share” clause.

¹³ 59 Am Jur 2d Parliamentary Law § 1.

¹⁴ 59 Am Jur 2d Parliamentary Law § 1.

¹⁵ *State ex rel. Savarese v. Buckeye Local Sch. Dist. Bd. of Educ.*, 660 N.E.2d 463 (Ohio 1996). In this case, the school board voted to not issue a supplemental contract to a teacher for a high school girls basketball coach position. The teacher sued to force the school board to issue him a coaching contract. His claim was based in part on the fact that the school board had failed to follow Robert’s Rules of Order in its voting procedure. The court rejected the teacher’s claim.

¹⁶ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (U.S. 1983).

¹⁷ *Madison Sch. Dist. v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167 (1976).

4 Controlling Board Meetings

The union filed a complaint with the Wisconsin CIR alleging that the Board, by allowing the nonunion teacher to speak at its meeting, had engaged in negotiations with a member of a bargaining unit other than the exclusive collective bargaining representative in violation of a Wisconsin statute. Finding that the board was guilty of the prohibited practice, the Commission ordered that the board cease and desist from permitting employees, other than representatives of the union, to appear and speak at meetings of the board on matters subject to collective-bargaining between the board and the union.

The Supreme Court set aside the Commission's order, holding that it would be unconstitutional to only permit union representatives to speak at board meetings on the subject of collective-bargaining:

[T]he participation in public discussion of public business cannot be confined to one category of interested individuals. [(Footnote: "Plainly, public bodies may confine their meetings to specified subject matter.")]. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.

C. Application of the Legal Framework

1. Policy Prohibiting Making Complaints Against Employees—Held Unlawful¹⁸

The school board's policy on speaking during open session included the following provisions:

No oral or written presentation in open session shall include charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee. If an attempt is made to include charges or complaints against an employee in any way, the Board President will order the presentation stopped at once, and the Board meeting will continue in accordance with the established agenda. All charges or complaints against employees must be submitted to the Board under provisions of Board policy.

Any individual who violates this policy will be warned to discontinue his/her comments immediately. If the individual willfully interrupts the meeting by refusing to comply with the warning, the Board President may authorize the removal of the individual pursuant to [State law].

¹⁸ *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719 (C.D. Cal. 1996).

A parent, Victoria Baca, spoke at an open session about the Principal and the Superintendent. She complained that parents had brought numerous complaints to the administrators, but their complaints went unaddressed. As she spoke, she was informed that she was not to mention employees by name or position, and that if she again referred to the administrators by position, she would be removed from the meeting. Baca continued her remarks, apparently referring to the administrators as “child abusers and racists.” She was then physically removed by a sheriff’s deputy.

Baca sued, claiming the District and school officials had violated her First Amendment rights. The court held in her favour.

The school argued that Baca’s speech “regarding child abusers and racists” is not protected by the First Amendment because it is slanderous and that therefore the District had a right to prohibit these statements. The court rejected that argument “because neither the United States nor California constitution allows government to censor statements merely because they are false and/or defamatory.”

The court found the Board’s policy to be content-based discrimination. The policy “allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees’ conduct or performance).”

The District argued that it had compelling governmental interests in prohibiting complaints being made against employees during public comment at board meetings. The court rejected that argument. The “District’s interest in protecting its employees’ right of privacy is an interest it holds only as an employer, not as a government entity, e.g., a legislative body charged with permitting public comment at its meetings. Thus, its interest as an employer in protecting its employees’ right to privacy cannot be characterized as a compelling governmental interest.”

The court recognized that the Board has an interest in regulating its own meetings: “Such regulation of conduct, e.g., by setting time limits and providing that speakers who actually disrupt a meeting may be removed, without focusing on the content of speech, is reasonable. But the policy here, which focuses on content and not only conduct, is not narrowly drawn so as to achieve District’s purported compelling interest without impinging upon the public’s First Amendment rights, which rights include the right to be passionate and even uninformed in the expression of one’s views.”

The District further argued that complaints against employees could be prohibited because an alternate channel of communication was available via the District’s complaint

6 Controlling Board Meetings

policies. The Court disagreed: “An otherwise invalid restriction on protected activity is not saved by the availability of other means of expression.” Further, “an alternative channel of communication is not sufficiently equivalent to the proscribed forum if forcing the speaker to resort to it is more likely to have a chilling effect on speech.”

Query: Would it be permissible to require patrons to first use a complaint mechanism, and allow patrons to present the complaint at a Board meeting after the complaint mechanism has been completed?

2. Policy Prohibiting Making Complaints Against Employees—Held Unlawful¹⁹

Nancy Leventhal spoke during public comment at two school board meetings. She expressed concerns that the Superintendent had a social relationship with a female Board member. She also expressed concerns over the Superintendent’s fiscal administration and his supervisory skills. She questioned whether the Board had adequately investigated the Superintendent before hiring him and asserted that his two prior school districts had bought out his contracts due to budget problems that he had caused.

Leventhal was interrupted at each of her presentations in accordance with a Board policy which stated: “complaints against an individual employee will not be heard at open Board meetings unless the individual employee consents.” When cutting Leventhal off at the second meeting, the Board President stated: “If that’s an abridgment of First Amendment rights, then I’ll wait for a court of law to tell me that.”

The court did tell her that. “Debate over public issues, including the qualifications and performance of public officials (such as a school superintendent), lies at the heart of the First Amendment.” The Board’s policy did not allow such debate to occur. Further, the policy was determined to be a “form of viewpoint discrimination, unfairly permitting one-sided debate at Board meetings.” Board members could criticize employees, but the public was limited to speech praising employees.

A caveat was given: “[T]he Court does not pass on the District’s ability to limit the forum for complaints for actual disciplinary action against teachers, custodians, cafeteria workers and other non-policymaking employees of the District alleging specific violations of the law or District policies and regulations. Whether the District may require such a complaint to be raised in closed session is not before the Court. The Bylaw at issue here . . . proscribes public criticism of all employees, including the Superintendent and other District employees who, at the public’s expense and with the public’s trust, create and execute policies ranging from public expenditures to everyday student affairs. . . .

¹⁹ *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997).

Thus, the Court need not decide whether the District can create very narrow Bylaws relating to such complaints for disciplinary action. Moreover, the Court does not pass on the District's ability to protect its students' right to privacy."

A final issue in the case involved a provision in the Board policy that required requests be made prior to the meeting to be placed on the agenda. The provision stated that such requests would be granted or denied based on the Superintendent's determination of "whether the specific matter is directly related to the business of the district or is appropriate for an open Board meeting." The court held this provision to be lawful: "While mindful of the dangers of prior restraints, the Court recognizes that the Board must have some authority to set its agenda or it would be unable to conduct its business." Further, if a person's request to be on the agenda was denied, he or she could still raise their concerns during public comment.

The court also remarked on the fact that Board members do not have to respond to comments made by the public, and in particular "may choose not to respond to protect lawyer-client privileged communications or bargaining positions."

3. Prohibiting Speech by Non-Residents Teachers or by Teachers on Subjects Covered by Employee Grievance Procedures²⁰

The Board's policy provided: "Every agenda shall provide an item for visitor recognition for residents of the Princeton School District. * Employees shall utilize the grievance procedure and consultation procedure when applicable." Public comment at Board meetings had become so disorderly to the point that the Board was considering having the sheriff's deputy present to maintain order.

Several teachers filed this lawsuit claiming that the Board policy violated the First Amendment. The court viewed the claim as a labor relations dispute: "the heart of this dispute is a matter of labor relations: non-resident teachers are not allowed to address the Board on any matters, and resident teachers may not address the Board on matters pertaining to terms and conditions of employment or violations of Board policy."

The following three questions were identified by the court:

- (1) whether . . . the Board may refuse to recognize non-resident teachers during the visitor recognition period;

²⁰ *Princeton Educ. Ass'n v. Princeton Bd. of Educ.*, 480 F. Supp. 962 (D.C. Ohio 1979) , *aff'd*, 620 F. 2d 107 (5th Cir. 1980).

8 Controlling Board Meetings

(2) whether . . . the Board may selectively exclude from public comment during the visitor recognition period matters pertaining to labor relations; and

(3) whether . . . the Board may restrain teachers from commenting on matters subject to the grievance and consultation procedures, while allowing other Princeton residents to address the Board on such matters.

The court answered each question with a No: “the Board may not open its doors to public participation and comment which is not confined to particular subjects, and then exclude comment on matters of labor relations and refuse to recognize non-resident teachers.” The court recognized that “that public airing of labor relations matters would be attended by argument and disruptive behaviour.” However, the only options available to address this concern, said the court, were to “impose strict, content neutral rules of conduct, and eject unruly participants,” or “confine public participation and comment to matters on the agenda, or to particular, specified subjects,” or to “dispense[] altogether with the visitor recognition portion of its meetings.”

4. Board Policy Prohibiting Attacks on Others—Held Unlawful²¹

David Bach spoke at a school board meeting during public comment. He expressed concerns with the qualifications, performance and conduct of certain named school officials, whom he alleged had a conflict of interest. He was allowed to finish his speech, being interrupted only when his time had expired.

Bach nonetheless filed a lawsuit, claiming that the following portion of the Board policy on addressing the Board violated the First Amendment:

2. Avoid references, statements, or conduct reasonably likely to result in disruption or undue delay in the orderly transaction of the business scheduled for consideration by the Board. This provision means and includes, but is not limited to, attacks or accusations regarding the honesty, character, integrity or other like personal attributes of any identified individual or group. Such comments are prohibited because, by virtue of their personal nature, character and/or manner of presentation, they would fairly call for an immediate response by the person or group so identified, thus delaying or disrupting consideration of agenda items scheduled for consideration by the Board.

The court held that this provision “is unconstitutional as a prior restraint upon speech in a limited public forum.” The problem with the provision, said the court, is that it is content-based. People would be able to “proffer laudatory praises of the school officials,” but would not be permitted to criticize school officials.

²¹ *Bach v. School Bd. of City of Virginia Beach*, 139 F. Supp. 2d 738 (E. D. Va. 2001).

5. Speech About Affair Between Police Chief and Wife of Union Head—Fair Game²²

The Police Chief had had an affair with the wife of a police officer. That police officer was also the head of the union. Pastor Mary Gault and Robert Mitchell went to a city council meeting and spoke during public comment. They spoke at length about problems about the police department, but were ruled out of order when they attempted to talk about the affair.

The court recognized that “motive in commenting on this affair could be an insensitive, mean spirited, personal attack designed to embarrass [the Police Chief] and that public discussion of the affair can only add to the embarrassment of” the families involved. Nonetheless, the court ruled that the affair was a matter of public concern, given the potential for the affair, upon having been discovered, to cause dissension within the police force. It was therefore determined that the city council had violated Gault and Mitchell’s First Amendment rights.

6. Speech About Adultery by Member of Mayor’s Council—Was Off Topic²³

The city council had a policy providing that “[a]ny person making personal, rude or slanderous remarks, or who becomes boisterous, while addressing the Council shall be requested to leave the meeting and may be at once barred by the presiding officer from further audience before the Council.” The policy was applied to C.E. Scroggins, who appeared at the public comment section of a council meeting to inform everyone of an adulterous relationship between his wife and Pastor Cecil Washington. Scroggins had become outraged when he learned that Pastor Washington had been appointed to the Mayor’s Commission on Families.

Scroggins began his comments: “Mr. Mayor. In the sweet Name of Jesus I cannot understand why you would appoint Cecil Washington to the Commission on the Status of Families in light of you and the public knowing what he has done to my family and others.” After making accusations of forgery against Washington, Scroggins was warned that if he continued with his personal attack, he would be cut off and asked to leave. Scroggins continued: “He’s a shady shepherd and a pig. Period.” The Mayor then had the Police Chief escort Scroggins and his family from the room.

²² *Gault v. City of Battle Creek*, 73 F. Supp. 2d 811 (W.D. Mich. 1999).

²³ *Scroggins v. City of Topeka*, 2 F. Supp. 2d 1362 (D. Kan. 1998).

The court held that Scroggins' First Amendment rights had not been violated because the appointment of Washington to the Commission was not a current issue before the city council. Scroggins' speech was thus determined to be a personal attack, rather than a "sincere debate of a public issue." The Council's action was content neutral because its "prohibition on personal attacks is not based on the Council's disagreement with any particular message, is unrelated to any particular viewpoint being expressed, and serves purposes unrelated to the particular content of the speech. The Council's rule prohibits personal attacks on anyone, not just City employees or other City officials." Further, the action in terminating Scroggins' comments "served [the] Council's significant governmental interests in limiting speakers to relevant topics and in preventing disruption of Council meetings."

7. Different Process for Employees and Students to Get on the Agenda—Upheld²⁴

To appear before the Board of Regents, employees and students were required to make their request to the President of the institution they attended. Members of the public, on the other hand, could make their request directly to the Chancellor. The court held that the different procedures for employees and students versus others did not violate the Equal Protection Clause. Having employees and students make their request to the presidents served a legitimate interest in allowing the presidents to be informed of the concerns of his or her employees and students.

The court also determined that the existence of a procedure to request to address the Board did not violate the First Amendment. A selective process for being permitted to address the Board was reasonable because the Board "should not be burdened to the extent that all who wish to address the Board must be afforded that right at the risk of order and efficiency." The selective process in question was lawful because the selection decisions were not based on the content of the speech.

8. No Constitutional Right to Have an Attorney Speak on Employee's Behalf²⁵

Jan Prestopnik was employed as a teacher. She was denied tenure. Her attorney asked to discuss the tenure issue at a board meeting. The District's attorney informed her attorney that he would not be permitted to raise the issue at the board meeting and that he should instead be invited to address the Board in writing on behalf of Prestopnik.

²⁴ *Dayan v. Board of Regents*, 491 F. Supp. 138 (M.D. Ga. 1979), *aff'd*, 620 F.2d 107 (5th Cir. 1980).

²⁵ *Prestopnik v. Whelan*, 253 F. Supp. 2d 369 (N.D.N.Y. 2003).

Prestopnik then sued, claiming that her First Amendment rights were violated because her attorney was not permitted to address the Board on her behalf. The court rejected her claim:

Considerations of agency and constitutional law compel the conclusion that there is no First Amendment right to appear through an agent (including a licensed attorney) at a regularly scheduled, non-adversarial Board meeting at which no action was going to be taken with respect to plaintiff's property rights. [Prestopnik] provides no support for the proposition that First Amendment rights can be exercised vicariously. To the contrary, courts have held that constitutional rights are personal in nature and cannot be delegated or exercised vicariously.

9. Board Member Spoke Twice—His Microphone was then Turned Off in Accordance with Robert's Rules of Order—But Real Motive Unclear²⁶

The township board was considering a \$5.5 million federal grant for sewer plant improvement projects. Donald Mobley was a member of the board. Mobley spoke twice during discussions on a motion to approve the grant application. When Mobley attempted to speak a third time on the motion, the chairperson, Linda Tarlini, told Mobley that he was not allowed to speak more than twice on the same subject pursuant to Robert's Rules of Order. Their exchange went as follows:

Mobley: Well, to the chair.

Tarlini: Excuse me, Mr. Mobley. In the Robert's Rules of Order, each Council person is allowed to speak twice on the same subject.

Mobley: That's not true.

Tarlini: It is true. Mobley: Russ [(the board attorney)], can you give me an opinion on that, please?

Tarlini: Mr. Mobley. Mr. Mobley, I have the floor at the moment. I'll tell you what it says.

Mobley: Dictatorship all over again. [applause in the background]

Tarlini: Mr. Mobley, I'm reading from the Robert's Rules of Order.

Mobley: It's amazing, Linda. When you want to speak, you always had your opportunity to speak . . .

Tarlini then turned off Mobley's microphone. Tarlini asserts that Mobley's microphone was "turned off solely because he attempted to speak for a third time regarding the same motion," in violation of Robert's Rules, and after explicitly seeking confirmation from the Solicitor."

²⁶ *Mobley v. Tarlini*, 2009 U.S. Dist. LEXIS 60993 (E.D. Pa. July 15, 2009).

12 Controlling Board Meetings

In Mobley's ensuing lawsuit against Tarlini, the court ruled that the "mere use of procedural rules at the Council meeting is permissible under the First Amendment" as an appropriate time, place, and manner restriction.

Nonetheless, the court refused to dismiss Mobley's case because there was evidence of a history of animosity and political rivalry between Mobley and Tarlini. As such, Tarlini may have been motivated by viewpoint based discrimination, rather than simply enforcing Robert's Rules.

10. Board Member's Removal for Loud Speech—But Others Were Loud Also— So Motive Unclear²⁷

Board member Ronald Vacca aggressively challenged the Superintendent regarding the allocation of \$151,000 for the purpose of filling seven vacant teaching positions. David Barletta was acting Chairperson. Barletta took exception to the tone used by Vacca in addressing the Superintendent. He attempted to restore order to the meeting by banging his gavel several times and by issuing the following warnings: "I'm not going to continue on with this screaming debate." "You want to discuss it, discuss it. You want to start yelling, I won't put up with it."

Barletta's warnings went unheeded. Barletta responded by informing Vacca that if he did not stop he was "going to have an early night," to which Vacca replied "I know . . . go ahead."

At that point Barletta called a five minute recess and requested that the Assistant Superintendent have Vacca removed. After five minutes, the recess ended, Barletta, Vacca and Gibson returned, and discussion resumed. Very shortly thereafter, however, police officers arrived and, amidst protests, physically dragged the still seated Vacca from the room. Vacca was then handcuffed and removed to the local police station where he was detained for a period of approximately 45 minutes. The meeting was adjourned for lack of a quorum.

Vacca sued Barletta, claiming a violation of his First Amendment rights. The court refused to dismiss Vacca's claim because there was a question as to Barletta's motive for removing Vacca. At prior meetings, there had been "heated" exchanges, but no Board members had been rejected. At this meeting, the Superintendent had been equally vocal, but was not removed. Further, there was evidence that Barletta's motive was to suppress Vacca's criticism of the monies allocated to the teacher vacancies, as "Barletta stated that

²⁷ *Vacca v. Barletta*, 933 F.2d 31 (1st Cir. 1991).

he would not countenance such ‘accusations’ and took exception to Vacca’s use of the words ‘boondoggling’ and ‘snowing.’”

11. Repetitive Speech²⁸

Walter White was speaking on agenda items at a City Council meeting. He was interrupted by a council member and told to stop speaking. When White continued to speak, the Mayor had him escorted from the room. The same thing occurred at a later meeting. James Griffin had also attended a meeting, been interrupted and told he was speaking out of order, and was escorted out of the room.

The City Council’s ordinance prohibited speech which “disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.” The City Council took the position that White and Griffin had been removed from the meetings because they had become repetitive and off-topic. The court held removal from a meeting for these reasons are permissible under the First Amendment.

The court explained:

[I]n dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand. While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious.

...

[T]he nature of a Council meeting means that a speaker can become “disruptive” in ways that would not meet the test of actual breach of the peace, or of “fighting words” likely to provoke immediate combat. A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.

Of course the point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable. The role of a moderator involves a great deal of discretion. Undoubtedly, abuses can occur, as when a moderator rules speech out of order simply because he disagrees with it, or because it employs words he does not like. But no such abuses are written into Norwalk’s ordinance, as the City and we interpret it. Speakers are subject to restriction only when their speech “disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.”

²⁸ *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990).

14 Controlling Board Meetings

12. Speech About Son's Dismissal from Football Team—Again, Repetitious²⁹

Michael Kelley spoke at a board meeting in November about his son's dismissal from the varsity football team. The Board apparently did not satisfy Kelley or other parents whose sons had been dismissed from the team.

The Board's policy required that a request to be placed on the agenda be made 5 days before the meeting. Kelley asked to be placed on the agenda for the December meeting. The Director of Schools refused the request based on the Board policy that appearances before the Board are not allowed if "frivolous, repetitive, or harassing in nature." Kelley and the group of football parents attended the December meeting, but did not speak to the Board, even though the Board has in the past frequently permitted people who are not on the agenda to speak to the Board at the end of the meetings. Kelley and the parents then sued, claiming a violation of their First Amendment rights.

The court held that the provision in the Board policy requiring a request to be on the agenda be made 5-days prior to the meeting was not unlawful: "The court finds, as a matter of law, that the requirement that plaintiffs request permission to be placed on the agenda for the school board meeting does not constitute a prior restraint."

The court then held that the refusal to put Kelley on the December meeting agenda was not unlawful. Kelley had not specifically told the Director of Schools that he intended to speak about the Football team dismissals. However, from prior events it was evident that that was Kelley's intended topic of discussion. Since the parents had previously addressed that issue at a Board meeting and nothing had changed since, "the Board's decision not to place [Kelley and the other parents] on the December agenda served the Board's significant governmental interests in limiting speakers to relevant topics and in preventing disruption of Board meetings."

Kelley had also argued that the Board had to first let him speak, and terminate his remarks only if his speech became repetitious, frivolous or harassing. The court rejected "the proposition that the Board must always wait until the speaker actually utters infringing words before it can enforce its rules. Such an approach seems unreasonable when the Board essentially knows what the speaker intends to say and the Board is enforcing restrictions based on relevancy."

To close the case out, the court found that the claims made "were without foundation and were filed to harass and embarrass the defendants." On that basis, the court ordered Kelley and the other parents to pay the Board attorneys fees and costs of \$87,216.49.

²⁹ *Lowery v. Jefferson County Bd. of Educ.*, 522 F. Supp. 2d 983 (E. D. Tenn. 2007).

13. Demonstrative Speech—Making a Point by Dumping Trash³⁰

A school board meeting was held in the multipurpose room. That room was used during the day as the school's cafeteria, as a student assembly room and for an after-school childcare program. Meals were cooked in the kitchen adjacent to the multipurpose room.

David McMahan brought five 13-gallon bags of trash to the meeting room and placed them in the back of the room before the meeting began. "He had been collecting the garbage over several weeks. During the public comment period, McMahan addressed the board. He spoke about seismic retrofitting and traffic improvements related to the building of a new middle school. McMahan then told the board he wanted to discuss trash. He said, 'Excuse me one moment while I bring up some trash.' He went to the back of the room and retrieved two or three bags, gloves and a plastic tarp. As McMahan opened the tarp, board president Alan Riffer asked, 'What is your intent, because this period is matters to address the Board, and we need to have some limit on--and so that we can move on to the rest of the agenda.' McMahan replied, 'My intent is to talk about public safety as related to trash. And to underscore my point' McMahan then spread the tarp on the floor and untied the bags. Craig Boyan, principal of Cornell School, was seated in the front row of the audience. Rising from his chair, Boyan called out to McMahan, 'Excuse me, kids are in this room tomorrow, and I hope you're not planning on emptying trash out here on the floor.' McMahan replied, 'I certainly am,' to which Boyan responded, 'Well I hope you're prepared to clean it up.'" A board member told McMahan "This is an inappropriate activity to do in a school room."

The meeting was then adjourned and the board members left the room. Police were summoned and arrested McMahan while he was still at the microphone, dumping trash. He was arrested for willfully disturbing a public meeting and subsequently convicted of the crime. The court rejected McMahan's claims that the school officials had violated his free speech rights by calling the police. In particular, the court ruled that there was no need for McMahan to be given further warnings that he was subject to being removed if he did not cease his garbage dumping, as some things are just "obvious."

³⁰ *McMahan v. Albany Unified Sch. Dist.*, 129 Cal. Rptr. 2d 184 (Ct. App. 2002).

14. Demonstrative Speech—Toy Gun and Pocketknife³¹

“During the Board meeting, a participant voiced opposition to the Board’s recently adopted dress code for students aimed at school safety. [Tamara Nuding] then addressed the Board by standing up and asking if what she wore was appropriate under the dress code. After receiving acknowledgment that what she wore was appropriate, she reached into her blouse, removed a black and silver wooden toy gun, and placed it on a table. [Nuding] also retrieved a two-to-three-inch pocket knife from her pocket and placed it on the table next to the gun. . . . Following the demonstration, the Board temporarily recessed so members could attend a sports banquet. Later, the meeting resumed without incident.”

The exact particulars of what Nuding said during her demonstration are in conflict. Nuding said she stated: “If this [gun] would have been real, I could have shot any of you within the past hour.” Others at the board meeting, however, believed the toy gun was real, and said that Nuding had “waved the gun in the air” and they did not learn it was a toy until after Nuding laid it on the table.

Nuding later explained at a court hearing that her demonstration was made to show the Board that what students wore to school was not a safety issue. She believed her demonstration was necessary because “the Board does not listen to her.”

At its next meeting, the Board voted to ban Nuding from attending all school events and extracurricular activities for the remainder of the year. Nuding then sued, claiming that the ban was imposed in violation of her First Amendment rights.

The court rejected Nuding’s claims, holding that the Board’s policy of prohibiting conduct that is disruptive to school activities or impedes or disrupts the participation of others in school activities was “content neutral.”

15. Board Members are Not Obligated to Pay Attention³²

A frequent speaker at school board meetings “claimed that his constitutional rights were violated because ‘no one was paying attention and they were laughing and joking while I was talking which was humiliating.’” The court (without comment) rejected the claim that people have a constitutional right to have school boards pay attention to them.

³¹ *Nuding v. Board of Educ.*, 730 N.E.2d 96 (Ill. App. 2000).

³² *Featherstone v. Columbus City School*, 92 Fed. Appx. 279 (6th Cir. 2004).

D. The Effect of Stay Away Letters on Attendance at Board Meetings

Schools frequently issue “stay away” letters to patrons who have engaged in disruptive behavior, or who present a risk to children because of their registered sex offender status.³³ A Pennsylvania case,³⁴ serves as a cautionary reminder to include a provision in the stay away letter that allows the banned person to be on school grounds for certain activities, such as board meetings, on request provided safety arrangements can be made.

William Henley, along with three other young men, two of whom were then high school students, proceeded upon what the court described as “a bizarre night escapade of senseless wreckage upon, and damage to, Amish farm wagons and growing crops, and the slaughter of at least two sheep by knifing or being run over by the truck used by the raiding party. The carcass of one slain sheep, with its throat slit, was dumped on the grounds of the Octorara Area High School where it would be in plain view of students entering the school.” Henley referred to the events as a “prank” for which all the participants had “a good laugh.” He pled guilty to the crime of disorderly conduct.

The Principal and Vice-Principal discovered the mutilated sheep carcass on school grounds. They immediately removed the carcass and began an investigation to find out who was responsible for the incident. They determined that Henley was one of the culprits.³⁵ The administrators mailed a letter to Henley which read:

Dear Mr. Henley:

This is to advise you that you are no longer permitted on the school grounds of Octorara Area School District, effective December 18, 1985. This decision was made jointly by Dr. Cooper and me and is directly related to your involvement with depositing a sheep on school property the evening of November 24, 1985.

Should you enter school property, you will be considered trespassing and reported to the police.

A copy of the letter was sent to the Chief of Police, who posted the letters on a bulletin board in the police office.

³³ The fact that schools have a right to issue stay away letters has been confirmed in numerous cases. In a recent Virginia case, a registered sex offender was prohibited by state statute from being on school grounds. The statute provided a mechanism for sex offenders to get an exception to that limitation. “John Doe” petitioned a court to allow him to be on school grounds. The court granted John Doe’s request. A local school district intervened, claiming that school districts, not the courts, have the constitutional authority to decide who may be on school grounds. On appeal, the court agreed with the school district’s argument.

³⁴ *Henley v. Octorara Area School District*, 701 F. Supp. 545 (E.D. Pa. 1988).

³⁵ Henley’s claim that the investigation itself was wrongful was rejected by the court: “[The administrators] not only had the right to conduct such an investigation but I believe that it was their duty to do so given that they are responsible for the welfare of students entrusted to their care.”

The court rejected Henley's claim that this letter violated his constitutional rights, stating:

Mr. Henley's right to come onto public school property would, of course, be no greater than that of the public generally. The school authorities could impose reasonable restrictions upon members of the public who were not students from coming onto the school grounds. The only apparent constitutional claim that could be asserted would be lack of equal protection by reason of Mr. Henley being denied a privilege that applied to members of the general public.

The equal protection clause of the Constitution does not preclude public school authorities from making reasonable classifications and enforcing reasonable conditions to privileges to come onto or use public school property. Reasonable classifications that do not infringe on other recognized rights such as freedom of speech and are not invidious classifications such as those based on race, political views, or religious affiliations, are constitutionally permissible.

In this case, the school authorities had the right to exclude Mr. Henley and Mr. Thompson from coming onto the school property, considering that these men had engaged in criminal activities involving school students including a criminal conspiracy with Octorara Area High School students. Certainly the classification excluding Mr. Henley and Mr. Thompson had a rational basis and was reasonable. The right to come onto the school property was not such a right as to require any sort of a due process hearing before making the classification that excluded Mr. Henley.

[Henley] was banned from school district property and as a result he complains that he could not attend athletic events at Octorara Area High School. This private interest is relatively small. The ban letter was issued only after [the administration] investigated the sheep incident and after [Henley's] father attempted to explain to [the Principal] his son's position. Imposing any greater procedural or administrative burdens on the defendants before banning a non-student would be fiscally and administratively burdensome. Also, it would undermine the ability of school officials to take prompt action to protect the student body from harmful and disruptive behavior by non-students. See *Grayned v. Rockford*, 408 U.S. 104 (1972) (there exists a compelling interest in having an undisrupted school session conducive to student learning); cf. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (special needs of the school environment recognized by the Court); see *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (The system of public education in this Nation relies necessarily upon the judgment of school administrators and school board members.)

The court also addressed the question of whether Henley's rights were violated because the ban letter made him unable to attend school board meetings:

Mr. Henley . . . suggests that because the school board holds its meetings at the high school, he would be prohibited by the ban from attending school board meetings where other members of the public could attend. There is no evidence that he ever sought to attend such a meeting and was excluded or precluded from attending. There is no evidence that the school board would interpret the ban as applying to school board meetings. Also, the school principal, who issued the letter that put the ban into effect, obviously could not and did not affect in any way who, among the public, could attend school board meetings. There is no evidence that the school board played any part in issuing the letter that prohibited Mr. Henley from coming onto school property. I conclude that the letter prohibiting Mr. Henley from coming onto school property did not violate any constitutional rights of the plaintiff.