LEGAL EXPLAINER #2

UNDERSTANDING FIRST AMENDMENT RIGHTS FOR PARENTS

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Overview

The First Amendment guarantees the right to free speech, among other rights.* In the context of public schools, the First Amendment protects not only students but also parents in advocating for their children's education. This right is further supported by the Supreme Court's recognition in *Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary* that parents have the constitutional right to direct the upbringing and education of their children. 268 U.S. 510, 534–35 (1925).† Together, the First Amendment and *Pierce* create a powerful framework for parents to advocate for their children's best interests in the educational system when both speaking at school board meetings and otherwise raising concerns about curricula and other school-related matters.

Parent Rights When Speaking at School Board Meetings

Government meetings (including school board meetings) are generally subject to state law transparency requirements that require meetings to be open and accessible to the public. While the specifics vary by state, many states have laws similar to Wisconsin's Open Meetings Law, which mandates that government meetings be "publicly held in places reasonably accessible to members of the public." Wis. Stat. § 19.81(2). These laws typically apply to both in-person and virtual meetings. However, most states (including

* "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

† (unanimously holding that a law requiring children to attend public school violated the" fundamental liberty" of parents to "direct the upbringing and education of [their] children).

Wisconsin) allow closed sessions for certain topics, including hiring and disciplinary matters or litigation, as specified by statute (e.g., Wis. Stat. § 19.85(1)).

Additionally, school board meetings, like other government meetings, are designated public forums because they are places that "the government opens up for use by the public for expressive activity." *See Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011); *see also White v. City of Norwalk*, 900 F.2d 1421, 1425 ("City Council meetings like Norwalk's, where the public is afforded the opportunity to address the Council, are the focus of highly important individual and governmental interests… [S]uch meetings, once opened, have been regarded as public forums, albeit limited ones.").

Because school board meetings are limited purpose public forums, free speech rights when speaking at them are robust. School boards do not have to allow public comment at their meetings, but if they do, they cannot discriminate based on viewpoint.* For example, school boards may not engage in the following speech restrictions:

- **School boards cannot restrict speech solely because it is offensive.** Viewpoint discrimination is always unconstitutional† and "[g]iving offense is a viewpoint," *Matal v. Tam*, 582 U.S. 218, 239 (2017). That does not mean, for example, that school boards must allow comments that are obscene, but they cannot prohibit parents from speaking on one side of an issue (because the board deems that side to be "offensive") and permit parents to speak on the other side of the same issue.
- **School boards cannot prohibit parents from criticizing school officials.** Doing so would also be impermissible viewpoint-discrimination and unconstitutional; just because the official or the board may find it offensive does not mean they can prohibit it. If parents are permitted to praise school officials, they must also be allowed to criticize them.
- **School boards should consider abandoning policies that restrict speech solely because it is off the agenda.** While banning public comments not related to specific agenda items may be permissible, it could prevent parents from discussing other issues relevant to the school district. Depending on the facts of the particular situation, it could potentially also constitute a content-based restriction, and "the government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (citing *Rosenberger*, 515 U.S. 819 (1995)). School boards must be very careful as to how they interpret and enforce such restrictions.

Accordingly, parents have strong free speech rights when speaking at school board meetings, and attempts at restricting those rights may violate the First Amendment.

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* Even though a school board has some leeway to regulate speech during a public forum (for instance, speech that is wholly irrelevant to district matters), it may not engage in viewpoint discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

† *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 ("[v]iewpoint discrimination is [ ] an egregious form of content discrimination"); *Matal v. Tam*, 582 U.S. 218, 243 (2017) (holding that even in cases "allow[ing]" "some content—and speaker—based restrictions . . . 'viewpoint discrimination' is forbidden"); *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11–12 (holding that regulations on speech cannot "suppress expression merely because public officials oppose the speakers view"); *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.").

Parent Rights When Raising Concerns About Curricula and Other School-related Matters

Under the First Amendment, parents are free to raise concerns about curricula and any other school-related matters. Regardless of how parents choose to raise their concerns, they are still protected by the First Amendment. This can include spreading the word online or discussing the issues with other parents. It can also include demanding to inspect curricula or other documents through their rights under the PPRA or a public records request. Additionally, as discussed above, parents are free to raise concerns about curricula or any other school-related matters to their children's teachers, to school administrators, and at school board meetings.

For more information about open records requests and public meetings, see WILL's Citizen's Guide to Open Government.

What if my First Amendment rights are violated?

If you feel that your First Amendment rights have been violated, you can initiate a lawsuit. Under 42 U.S.C. § 1983, you can sue any state or local officials, including the local school board, for violating your constitutional rights, if the official or board was acting in its official capacity or "under color of state law."

WILL is a legal resource for parents, students, and school districts. If you believe your rights have been violated, you can contact us at www.will-law.org/contact-a-lawyer. Depending on your situation, we may be able to help further.

This document is part of the WILL Parental Rights Toolkit. Explore the full toolkit at: ***www.will-law.org/parenttoolkit***