

TEXAS PUBLIC COMMENT LAW

The strengthening of the public's right to criticize school boards.

WRITTEN BY MILES T. BRADSHAW

Introduction

Controversy in public schools is nothing new, but school board presidents and school district police officers are experiencing increasing numbers of situations as the court of public opinion boils over at school board meetings.¹ While it is no surprise that people who attend school board meetings could get emotional when discussing their children (as students), their jobs (as employees), or their taxes (as property owners), criticism at school board meetings is on the rise. This increase is attributable, at least in part, to House Bill 2840, commonly referred to as the “public comment” law.² In 2019, the statute was enacted as an addition to the Texas Open Meetings Act. It was considered the codification of what most school boards were already providing to the public. While most school board meetings had “public comment” or “open forum” periods at each regular meeting, those periods were not required by law and school boards had a great deal of discretion in setting up the rules of decorum. HB 2840 requires a public comment period with some conditions, and members of the public are now entitled to speak about agenda items at meetings of certain types of governmental bodies. Under the new law, “a governmental body may not prohibit public criticism of the governmental body, including criticism of any act, omission, policy, procedure, program, or service, except criticism otherwise prohibited by law.”³ In essence, the public has more access to public officials and their business, which some say is a good thing.⁴ Others believe that more access is not a good thing and has increased instances in which the public criticizes school board trustees and limited how school boards can run their meetings.⁵

The History of Public Speakers at School Board Meetings

Until recently, public comment at school board meetings was not required by law.⁶ In fact, I recall a time 30 years ago, as counsel for a school district, when I attended my first school board meeting. The board had what it called “open forum,” where citizens could speak on school matters for a few minutes each at public meetings. A key attribute of open forum at that time was that it was included *at the option of the school board* and subject to strict rules of decorum established by the school board. No law required open forum, and if speakers became unruly in the discretion of the presiding officer, they would often be shut down. In most cases, open forum speakers attended to express gratitude toward teachers and others, not to talk politics or debate the social issues of the day.

Fast forward to just about any school board meeting in the

2020s and one is likely to witness citizens showing up in costume, carrying props and signs, and flinging personal criticisms at individual board members and superintendents. Common topics might include the masking of children, critical race theory, or which books belong in school libraries—all debated while donning clothing with messages of self-promotion or politics. Some citizens will even take their show on the road and attend several different school districts’ board meetings even though they have no tangible stake in that school district (e.g., not a district parent, employee, vendor, or resident). Board meetings that were once filled with accolades to students, teachers, and parents are now filled with arguments that stir up legal hotbeds in our schools.

Texas Public Comment Law

Prior to HB 2840, a member of the public in Texas had *no statutory right* to participate in a school board meeting beyond notice and the right to observe via open meeting laws. The law is now codified as part of the Texas Open Meetings Act and protects the right of a “member of the public” to air their concerns at public governmental board meetings as long as those concerns are “regarding an item on the agenda for an open meeting.” The law allows the school board to adopt “reasonable rules,” including a time limit on speakers. However, the school board “may not prohibit public criticism of the governmental body.”⁷

Prior to the public comment law, in response to citizens pushing the envelope, some school districts simply eliminated public comment from board meetings and directed disgruntled citizens to the district’s grievance process—a more formal and slower process that could take months to ever reach the school board level and a public audience. It’s fair to assume that HB 2840 was in direct response to the elimination of open forum by some school boards. As a result, today “public comment” is a routine part of every school board meeting whether boards and school administrators like it or not.

Key Points of Public Comment

Key points of the public comment law are:

- Each member of the public must be allowed to address a posted agenda item either “before or during the body’s consideration of the item”
- The board may set “reasonable rules,” including a sign-up deadline for speakers
- The rules may limit the total time a citizen may address the body on a given item
- The rules may include the discretion to lower the allotted time per speaker as long as it was “reasonable”
- The time limit must be doubled (at least) for a speaker using a translator
- The board may not prohibit public criticism of the governmental body (unless otherwise prohibited by law)
- A board may always remove a person who “disrupts” a board meeting⁸

The result of the passage of HB 2840 is that the public has more opportunities to speak at a school board meeting and school boards have fewer options to curtail public comments. Boards have received some guidance from the attorney general

when he recently opined that “a rule capping the total amount of time a speaker has to address all agenda items is permissible if the rule is reasonable,” [and] its reasonableness will depend on “many factors including the number of agenda items and their complexity.”” In the question posed, there was one speaker who wanted three minutes on each of the 17 agenda items (totaling 51 minutes). The governing body wanted to limit that speaker to a total amount of time that would have been less than three minutes per item (e.g., one minute per item). The attorney general ruled that the governing body could set a “reasonable” cap on the “total time,” but stated that the amount that was reasonable depended on several factors such as “the number of agenda items and their complexity.”

With the passage of the public comment law, most school districts have adjusted by providing two separate periods of public input—one for the mandatory “public comment” period (regarding agenda items only), and a second period similar to the old optional “open forum” period (practically any topic). Usually, the public comment period occurs at the beginning of the meeting and the open forum period happens at the end of the meeting. In addition, the rules set by boards often allow the chair to change the order of items for consideration, such as when several speakers appear for an item otherwise listed near the end of the agenda. Already lawsuits are being filed claiming that boards and board presidents are not applying the rules evenly and thereby are engaging in viewpoint discrimination.

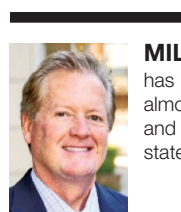
Conclusion

Before the creation of the “public comment” law, school boards held the upper hand in controlling public speakers. If matters became too political or personal, the board could simply eliminate public comment from the agenda. While speakers still had certain free speech and equal protection rights *if allowed to speak*, they had no statutory right to speak in the first place. Additionally, presiding officers had little risk in shutting down unruly speakers who violated the rules of decorum—after all, those were the rules, and the board made the rules. Times have changed with the passage of HB 2840, which has led to an increase in public participation at local school board meetings. Presiding officers of public meetings must tread lightly when trying to control unruly speakers, or else risk legal action from the public under the Open Meetings Act or other laws. Since the public comment law specifically prohibits the school board from prohibiting public criticism of

the board, it could be difficult to comfortably enforce rules of decorum for fear of chilling a speaker’s right to be critical. While the statute allows school boards to adopt “reasonable rules,” the scope of those rules has yet to be tested in the courts. Times have certainly changed with the passage of HB 2840. **TBJ**

NOTES

1. See, e.g., William Joy, *Our kids are watching: How school board meetings became the frontline for political battles in Texas and beyond*, WFAA-Dallas (February 23, 2022), <https://www.wfaa.com/article/news/local/how-school-board-meetings-became-the-frontline-for-political-battles-in-texas-and-beyond/287-923385c3-92a4-4349-bdbc-d1c083b4b77b>; see also *Hostile school board meetings lead to unprecedented number of members to quit*, YouTube, KARE 11, <https://www.youtube.com/watch?v=mZaWE8tkTg0>; In Minnesota, 64 school board members quit from August 2020 to August 2021, where only 15 quit the year before.
2. Act of 2019, 86th Leg., R.S., Ch. 861 (H.B. 2840) (D-Canales).
3. Texas Open Meetings Act, Chapter 551, Texas Government Code §551.001 et seq. (the public comment law at section 551.007 applies to all Texas governmental bodies that are subject to the Open Meetings Act).
4. Dave Lieber, *A cool new Texas law you never heard of means they can't shut you up at government meetings anymore*, The Dallas Morning News (October 4, 2019), <https://www.dallasnews.com/news/watchdog/2019/10/04/cool-new-texas-law-never-heard-means-cant-shut-government-meetings-anymore/>.
5. Michael J. Dillon, *School board president sued, accused of 'tyranny' for silencing and ejecting parents from meetings*, The Lion (May 23, 2022), <https://readlion.com/2022/05/23/school-board-president-sued-accused-of-tyranny-for-silencing-and-ejecting-parents-from-meetings/>; two public speakers sued the board president and the school police officers that removed them from the meeting via Section 1983 claims of excessive force and equal protection.
6. Texas Attorney General Opinion No. JC-0169 (2000) (citing *Charlestown Homeowners Ass'n v. LaCoke*, 507 S.W.2d 876, 883 (Tex. Civ. App. 1974, writ ref'd n.r.e.)).
7. Texas Open Meetings Act, Chapter 551, Texas Government Code §551.007.
8. Texas Penal Code §42.05 (it is a crime to disrupt a lawful public meeting; *Morehead v. State*, 807 S.W.2d 577 (Tex. Crim. App. 1991)).
9. Tex. Atty. Gen. Op. KP-0300 (April 22, 2020).



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