



By First Class Mail & Email

December 6, 2017

Members of the Board of Education
Shawnee Mission School District
8200 W. 71st Street
Overland Park, KS 66204

Re: New Restrictions on the Rights of Speakers During Open Forum

Dear Board Members:

In a letter dated May 30, 2017, I expressed the American Civil Liberties Union of Kansas's strong objections to the Shawnee Mission Board of Education's unconstitutional guidelines for people who speak during the Open Forum part of school board meetings. Neither the board nor its lawyers ever responded to that letter. I will not repeat the concerns set forth in my earlier letter, but I will renew the ACLU's objections to the board's Open Forum guidelines referenced in my earlier letter because, according to the agenda, those guidelines were still in use during the board's most recent regular meeting held on Monday, November 27, 2017.

In this letter, I want to express the ACLU's serious concerns about the changes the board made to its Open Forum guidelines when, during the regular meeting held on November 27, 2017, the board adopted a "Manual of Procedures for Board of Education Members" (hereafter "Board Manual"). Section 11.0 of the new Board Manual purports to regulate the behavior of Open Forum speakers and to restrict the subjects on which speakers can express themselves. In pertinent part, Section 11.0 provides:

The board welcomes and appreciates public interest in the Shawnee Mission School District. Open forum remarks are expected to be presented in a constructive and positive manner. The following behavior is expected from those who address the board of education.

- When called, proceed to the podium, state your name and address and the group or organization you represent, if any.
- Be civil and respectful.
- The following items are inappropriate for open forum:
 - o complaints against individual board members and/or individual employees.
 - o Private data relating to a student.

Such comments should be submitted in writing to the superintendent and/or board president.

- Time for comments is determined by the board president, based on the number of speakers. Time for each speaker is usually limited to three (3) minutes.

Section 11.0 of the Board Manual modifies and expands upon the guidelines the board has applied to the Open Forum portion of regular monthly board meetings for the past several years. But, as described below, these revised guidelines continue to violate the Speech Clause of the First Amendment.

By adopting Board Policy BCBI the school board has intentionally opened its regular monthly meetings for public comment. Thus, it has created a designated public forum to which the First Amendment applies. *See, e.g., City of Madison, Jt. Sch. Dist. No. 8 v. Wisc. Emp. Rel. Comm.*, 429 U.S. 167, 426 (1976) (teacher had right to speak at public meeting where school board had “opened [the] forum for direct citizen involvement”); *Mesa v. White*, 197 F.3d 1041, 1046 (10th Cir. 1999) (county “commission’s intentional practice and tradition of allowing public comment at the meetings” created a designated public forum); *Scroggins v. City of Topeka*, 2 F. Supp. 2d 1362, 1370 (D. Kan. 1998) (public comment portion of city council meeting was a designated public forum); *Farnsworth v. City of Mulvane*, 660 F. Supp. 2d 1217, 1225 (D. Kan. 2009) (same).

Because the school board has opened its regular monthly meetings for public comment, “it is bound by the same [First Amendment] standards as apply in a traditional public forum.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983). “[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), quoting from *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Where government regulates speech based on content, the regulation is subject to strict scrutiny so that, in order “to enforce a content-based exclusion [the government] must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Ed. Assn.*, 460 U.S. at 45.

Section 11.0 of the Board Manual provides that “complaints against individual board members and/or individual employees” “are inappropriate for open forum” and must “be submitted in writing to the superintendent and/or board president.” This restriction violates the Speech Clause of the First Amendment, which gives the people the right to express “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964). The right to criticize the stewardship of governmental bodies is not limited to criticism of elected officials; it also extends to criticism of public servants and employees. *See, e.g., Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 958 (S.D. Cal. 1997) (“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.”).

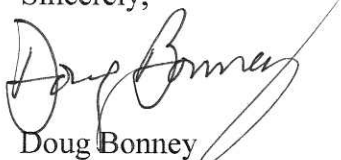
By labeling “complaints against individual board members and/or individual employees” as “inappropriate for open forum” and by requiring people to communicate such complaints in writing rather than orally, Section 11.0 constitutes unconstitutional content discrimination because it completely bars a particular subject (“complaints against individual board members and/or individual employees”) from discussion during the public participation portion of the board’s regular meetings. *See Boos v. Barry*, 485 U.S. 312, 319 (1988) (statute banning picketing near a foreign embassy was content-based because “[o]ne category of speech has been completely prohibited”). Because the ban on “complaints against individual board members and/or individual employees” does not serve a compelling governmental interest and is not narrowly tailored, it is unconstitutional.

In addition, Section 11.0 is constitutionally problematic because it does not set clear standards for school board presidents to follow in distinguishing between permitted and prohibited complaints. This problem was shown in clear relief by something that board president Craig Denny recently told a reporter for *The Kansas City Star* (Dec. 1, 2017, p. 12A). When asked how a patron would “know whether their complaint will be considered constructive criticism or a personal attack,” president Denny answered “I guess they should ask when they are up there [at the podium].” Such a quixotic and ill-defined guideline violates the First Amendment because it gives the enforcement authority unfettered discretion to decide what speech is permissible and what speech is banned and fails to give the public required notice of what the rules are. *City of Lakewood v. Cleveland Plain Dealer Pub. Co.*, 486 U.S. 750, 772 (1988).

Finally, the recent article published by *The Kansas City Star* suggests that the school board members who drafted the new Board Manual are hostile to receiving public comments. For instance, board president Craig Denny told the reporter that he does not “know if (complaining) is inappropriate. It’s just not quite the best way to go about it.” Board members Cindy Neighbor and Patty Mach expressed similar reservations about the propriety of public criticism and the way people express those criticisms. The First Amendment endows the people with the freedom to express themselves in the manner that they deem best, and it prohibits elected officials from dictating to the public the subjects on which they may speak and the contents of such speech.

For these reasons, I strongly urge the board to delete the parts of Section 11.0 of the Board Manual that designate “complaints against individual board members and/or individual employees” as “inappropriate for open forum” and that require such complaints to “be submitted in writing to the superintendent and/or board president.”

Sincerely,



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