JANN-MICHAEL GREENBURG

Board Member
Scottsdale Unified School District Governing Board

February 4, 2019

Dr. John Kriekard
Superintendent
Scottsdale Unified School District No. 48
jkriekard@susd.org

VIA E-MAIL ONLY

Re: Governing Board Policy BEDH; public comments at regular board meetings; constitutionality

Dear Dr. Kriekard,

On January 30, 2019, I attended the Arizona School Boards Association ("ASBA") "BOLTS" training in Phoenix. Part of this training included an overview of open meeting laws. In response to a question, ASBA's general counsel, Mr. Chris Thomas, Esq., noted that public comment policies which included prohibitions on certain types of comments were likely unconstitutional. Having found Governing Board Policy BEDH (the "Policy") offensive in the past, I admittedly failed to see the significance of the language used from a legal perspective. I chose to review this matter personally prior to raising it with you to avoid adding unnecessary work for anyone, especially if the law did not support ASBA's short commentary.

The Policy makes clear that the Governing Board sees the viewpoints of citizens throughout the District as "vital to the efficient operation of the District." Permitting public comments during regular board meetings to enable the sharing of these views by members of the public not only fosters strong community engagement between the Governing Board and the public, but also enshrines the District's dedication to democracy, accountability, and transparency that lies at the heart of good governance.

Public speech in the educational context is also of particular concern, as the public entrusts us with the necessary job of educating children and the District plays a "critical role in the social, ethical, and civic development" of our students.[1] As Bertrand Russell writes, "Teachers are more than any other class the guardians of civilization."[2] It is no surprise then that at least on two separate occasions the Supreme Court noted that the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," or else run the risk that the very students we are teaching lose support for and faith in our very system of government and their purported freedoms.[3]

To this end, it is my position that the Policy's prohibition on criticism of members of the Governing Board and others is unconstitutional. Specifically, the Policy states that "personal attacks upon Board members, staff personnel, or other persons in attendance or absent by

[1] *Leventhal v. Vista Unified School District,* 973 F.Supp. 951, 960 (1997).
[2] B Russell, *Unpopular Essays*, at 117.
[3] *Shelton v. Tucker*, 81 S.Ct. 247, 251 (1960); *West Virginia Bd. of Educ. v. Barnette*, 63 S. Ct. 1178, 1185 (1943).

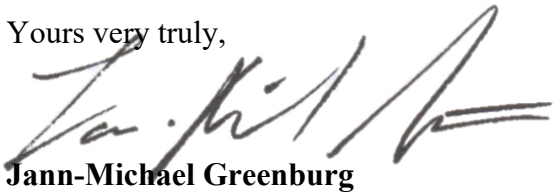
individuals who address the Board are not acceptable." This restriction is facially content based and does not meet the applicable strict scrutiny standard applied to such restrictions on free speech.[4] It therefore places an unconstitutional restriction on a speaker's First Amendment rights and has a "chilling effect" on the public's willingness to engage with the Board. Based on this conclusion, I am asking that the first two sentences of the offending provision (i.e., bullet point five of the Policy) be struck and should not be publicly repeated during regular board meetings until such time as the Policy is amended by the Governing Board to be compliant with the US Constitution.

Attached to this letter is my analysis supporting my legal conclusions. I believe this analysis to be robust and sound. Freedom of speech is a right that I strongly support and work hard to protect. I was fortunate to work with the University of Edinburgh's Freedom of Expression Law Clinic which provided free legal advice for foreign journalists imprisoned or otherwise harmed simply for attempting to report on matters of public concern or their own personal opinions without government censorship. While I do not condone speech that is defamatory (and, in any event, such speech is generally civilly actionable by the defamed), there are legitimate reasons for members of the public to criticize individual Governing Board members or others within our District – criticisms which might be tasteless yet clearly cover matters of public concern.

If after reviewing this matter you have any additional questions, comments, or concerns, please do not hesitate to contact me for further discussion.

Thank you very much for your time and consideration. As always, it is greatly appreciated.

Yours very truly,



Jann-Michael Greenburg
Member | SUSD Governing Board
jmgreenburg@susd.org

[4] See attached analysis to assess the legal basis for my conclusion.

Constitutional Analysis of Policy BEDH

1. Regular governing board meetings having an open public comments section are "limited public forums"

The First Amendment is applied to state and local governments by virtue of the equal protection clause of the Fourteenth Amendment.[5] The level of free speech protections afforded to speakers depends on the forum in which the speech is occurring. The Supreme Court has found that "public property which the State has opened for use by the public as a place for expressive activity […] even if it was not required to create the forum in the first place" is a limited public forum.[6]

Under Arizona law, a public body "may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions."[7] The governing board of a school district is a "public body."[8] The Governing Board voluntarily makes an open call to the public during its regular board meetings, which are public meetings.[9] The Policy allows each speaker three (3) minutes to speak on any topic and is therefore a "wide open" public comment section (even if limited to matters within the Board's jurisdiction). Because the Governing Board does not need to permit public comment at its meetings but chooses to do so, the Board's regular public meetings at which these public comment sections are held are limited public forums.[10]

2. The Policy imposes a "facially content based" restriction on free speech rights

Restrictions on free speech in a limited public forum, such as the Policy's, are subject to the same level of scrutiny as traditional public forums.[11] Consequently, restrictions that are content based must meet the strict scrutiny standard to survive a constitutional challenge.

The Supreme Court states that

> [t]he crucial first step in the content-neutrality analysis [requires] determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in regulated speech.[12]

---

[5] *Reed v. Town of Gilbert, Ariz.,* 135 S.Ct. 2218, 2226.
[6] *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 105 S.Ct. 3439, 3449-50 (1985).
[7] A.R.S. § 38-431.01(H).
[8] A.R.S. § 38-431(5) and (6).
[9] A.R.S. § 48-431(4)(a); Policy.
[10] *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167 (1976); *Perry,* 460 U.S. 37 at 45, 46 n. 7; *Cornelius,* 105 S.Ct. 3439 (1985); *Bach v. School Bd. Of the City of Virginia Beach*, 139 F.Supp. 2d 738, 741 (E.D. Va. 2001); *Leventhal,* 973 F.Supp. 951 at 957.
[11] *Perry,* 460 U.S. 37 at 45.
[12] *Reed*, 135 S.Ct. 2218 at 2228.

The Policy's restriction on "personal attacks" against "Board Members, staff personnel, or other persons in attendance or absent" (the "Protected Class") is facially content based.[13] Whether a comment is "not acceptable" is determined specifically by the content of that speech. That is, the prohibition "[finds acceptable] expression of two points of view (laudatory and neutral) while [finding unacceptable] a different point of view (negatively critical) on a particular subject matter."[14] As a perfect illustration of this concept, the court in *Draego* noted that

> [t]o know whether the rule applies, a speaker and the [Governing Board] must assess whether speech has an 'attack[ing]' character […] The flipside of this evaluation is statements that (to use some common antonyms) portray the [Protected Class] as 'likeable, respectable, or sensible,' or subjects it to 'adoration, praise, esteem, and adulation' are permissible.[15]

Members of the public may be found to be in violation of the Policy when they criticize the Protected Class for any number of reasons, including but not limited to perceived incompetency, poor job performance, or conduct unbecoming. All such criticism might reasonably be viewed by a member of the Protected Class as a "personal attack," yet is nonetheless legitimate, protected speech of public concern that falls well within the boundaries of the District's jurisdiction. Indeed, "[d]ebate over public issues, including the qualifications and performance of public officials (such as a school superintendent), lies at the heart of the First Amendment."[16]

On the other hand, nothing prohibits members of the public from praising members of the Protected Class. Thus, a speaker is free to praise any member of the Protected Class, but a later speaker wishing to criticize a member of the Protected Class may be found to be in violation of the Policy and stopped from speaking. This raises the issue of the Policy not only being content based, but also viewpoint based (an "egregious form of content discrimination,")[17], fostering discrimination between different speakers which is even more fatal to the constitutionality of the Policy's current wording. Indeed, "[t]his system engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and, ultimately, dynamic political change."[18] Ultimately, the provision clearly "deters individuals from speaking out on an issue of public importance [and therefore] violates the First Amendment."[19]

Having reviewed at random several regular board meetings (August 12, 2014; December 15, 2015; May 10, 2016; September 13, 2016; January 17, 2017; May 9, 2017; November 14,

---

[13] *Leventhal*, 973 F.Supp. 951 at 957.
[14] *Baca v. Moreno Valley Unified School Dist.,* 936 F.Supp. 719, 730 (C.D.Cal. 1996); *Cent. Radio Co. Inc. v. City of Norfolk,* 811 F.3d 625, 633 (4th Cir. 2016) quoting *Reed,* 135 S.Ct. 2218 at 2227; *Draego v. City of Charlottesville*, Case No. 3:16-cv-00057 (W.D. Va. 2016) at 27, 28.
[15] *Draego,* at 27, 28.
[16] *Leventhal*, 973 F.Supp. 951 at 958; *Schneck v. Pro-Choice Network*, 117 S.Ct. 855, 858 (1997); *New York Times v. Sullivan*, 84 S.Ct. 710 (1964).
[17] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S.Ct. 2510, 2516 (1995).
[18] *Leventhal*, 973 F.Supp. 951 at 960; *Baca,* 936 F.Supp. 719 at 730; *Bach*, 139 F.Supp. 2d 738 at 742.
[19] *Bach*, 139 F.Supp. 2d 738 at 742 citing *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967-68 (1984).

2017), it appears that the Board president began verbally issuing this warning[20] to the public on December 12, 2017. This coincides with a period of time in which the Board and administration (members of the Protected Class) came under increasing criticism and scrutiny. The decision to implement such language within the Policy or to deliberately draw the public's attention to it at that time is suspect and appears to have been an attempt to intimidate members of the public, despite the fact that their statements or comments, while perhaps factually inaccurate, harsh, or not in good taste, concerned legitimate matters of public interest.

3. Facially content based restrictions on free speech must meet the strict scrutiny standard

On this basis, the District would have to meet the strict scrutiny standard. Strict scrutiny requires the government to show that the regulation is necessary to serve a compelling state interest and is narrowly drawn to serve that end.[21] Strict scrutiny is a heavy burden carried by the District. I can find no compelling state interest for prohibiting criticisms (i.e., "attacks") against members of the Protected Class, especially when they relate to matters of legitimate public concern well within the Governing Board's jurisdiction (e.g., the competency of a Board member). Similar provisions were held to be unconstitutional in the past.[22]

Additionally, the "caution" concerning the presentation of "unjustly unfavorable impressions" of the Protected Class appears to conflate speech which is truly defamatory and actionable with an idiosyncratic meaning of defamation which raises "concerns about vagueness, overbreadth, excessive discretion, and arbitrary enforcement."[23] Indeed, "unjustly unfavorable impression" is not the test for defamation in the State of Arizona. While not directly phrased as a prohibition as "personal attacks" are, the concern is that, read as a whole, the Policy might be read in that light by members of the public or Governing Board and deter them from speaking. Moreover, statements that are defamatory as defined by state law are generally actionable regardless of whether the Policy reiterates that to the public.

Overall, there are significant concerns with the language contained within the Policy and not just for the reasons identified herein (e.g., there are concerns about the degree of discretion afforded to the Governing Board in enforcing the Policy and the vagueness and overbreadth of the terms used). The offending provisions of the Policy ought to be struck. The Policy ought to be redrafted to contain more formality concerning the process involved in enforcing policies and specifically target content neutral behavior which might actually be disruptive to the operation and decorum of regular board meetings, such as (perhaps) a prohibition on "yelling" or "screaming."

[20] On August 12, 2014 and September 13, 2016 the Board president asked the public to "curb […] comments so that they are not defamatory or disrespectful," which will not be addressed here.
[21] *Perry,* 460 U.S. 37 at 45*; Carey v. Brown*, 447 U.S. 455, 447 U.S. 461 (1980).
[22] See, e.g., *Leventhal*, 973 F.Supp. 951; *Baca*, 936 F.Supp. 719; *Draego*; *Bach*, 139 F.Supp. 2d 738.
[23] *Draego*, at 15 n. 9.