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Austin, TX**Dealing with Rogue Board Members****Miles T. Bradshaw and  
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## **Roles and Responsibilities of Individual School Board Members**

Board members are elected to serve as trustees for their school districts. As such, they have the opportunity and responsibility to participate in matters of school business. See Tex. Educ. Code § 11.051(a) (“An independent school district is governed by a board of trustees who, as a body corporate, shall: (1) oversee the management of the district . . . .”)

Trustees, however, must operate as “a body corporate,” which means no single board member may act alone. Tex. Educ. Code § 11.051. So how do the roles and responsibilities of each individual trustee intersect with the role of the board as an entity?

### **The Limits of Free Speech**

Although board members and other public officials do not lose their free speech rights when they enter public office, the U.S. Supreme Court has acknowledged that restrictions on speech based upon the necessities of governmental functions do not violate the First Amendment. See *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684 (W.D. Tex. 2011) (concluding that the Texas Open Meetings Act’s requirement that open meetings take place in public was necessary to provide the governmental function of transparency and therefore did not violate the First Amendment). In other words, school board members have free speech rights, but when they are acting in their official capacity, those rights may be limited to serve the legitimate needs of the public.

On one hand, the government may not limit public officials’ capacity to discuss their views of local or national policy. The Supreme Court has observed that the interest of the public in hearing all sides of a matter of public concern would not be advanced by extending more free speech protection to citizen-critics than to public officials. Instead, the public benefits by knowing what governmental officials think so the public can judge whether the elected officials are truly the best people to represent them. *Bond v. Floyd*, 385 U.S. 116 (1966).

On the other hand, a board member’s personal right to free speech does not extend to using the advantage of public office to promote personal views. For example, when a judge who had been censured for holding a press conference in his courtroom to address allegations made by a litigant appealed the censure, the Fifth Circuit struck down the censure order “[t]o the extent that [it] censured [the Judge] for the content of his speech, shutting down all communication between the Judge and his constituents”; however, the Fifth Circuit held that the portion of the order that was directed at the judge’s “use of the trappings of judicial office to boost his

message, his decision to hold a press conference in his courtroom, and particularly stepping out from behind the bench, while wearing his judicial robe, to address the cameras” survived strict scrutiny. *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007). In other words, the judge had a right to speak out about the allegations, but not to use the courtroom as a platform.

In the same way, board members’ right to speak out and advocate regarding school business is not unlimited. Sometimes the limits come from legal requirements like the Texas Open Meetings Act (OMA) or prohibitions on the use of public funds for political advertising. Tex. Gov’t Code ch. 551; Tex. Elec. Code ch. 255. Other times these limits are self-imposed by a school board in the form of a local policy or board operating procedure adopted in the interest of best school district practices. See TASB Policy BE(LOCAL).

### **Board Meeting Attendance and Participation**

A school board member holds the rights and obligations of the office until he or she is replaced by a duly qualified successor. Tex. Const. art. XVI, § 17. The office changes hands only when another person has been elected (or, in the case of a board member’s resignation, appointed) to the office and taken the oath of office. In Texas, school board members are not subject to recall by the voters, nor may they be removed by an action of the rest of the school board. Tex. Civ. Prac. & Rem. Code §§ 66.001-.002 (providing for quo warranto action in district court); Tex. Local Gov’t Code § 87.015 (providing for removal by petition and trial).

Consequently, a qualified board member is entitled to take his or her seat at the board table and participate in deliberation and voting, unless there is a legal conflict of interest that prevents the board member’s participation.

### **Legal Conflicts of Interest**

In certain circumstances, a board member will be legally prohibited from participating in deliberation and voting on a matter about which the board member has a conflict of interest. Examples include the following:

- **Nepotism:** When an employee related to a board member is employed pursuant to the “continuous employment” exception, the board member may not participate in any deliberation or voting on the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change in status, compensation, or dismissal of the employee if that action applies only to the individual and is not taken regarding a bona fide class or category of employees. Tex. Gov’t Code § 573.062(b). See TASB Policy DBE(LEGAL).

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