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Public Comment at Open Meetings A Brief Current Overview

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The designated period for public comment during a school board meeting harbors the potential for content ranging from criticism to compliments, entertainment to enlightenment. The public's right to comment at an open meeting is now clearly required by statute at any meeting, and while not exhaustive, this summary is an effort to survey the landscape of law impacting how school boards must accommodate the Open Meetings Act requirement of permitting public comment.

1. Open Meetings Act In General.

No discussion of the public comment period is possible without first considering the overall premise of open meetings, as governed by the Texas Open Meetings Act (the "OMA").ⁱ In what is perhaps one of the most useful government publications of all time, the Texas Attorney General's Open Meetings Handbook is the go-to resource and starting point for most OMA questions.ⁱⁱ Any attorney advising governmental clients on conducting their meetings should have a copy handy.

A full discussion of the Open Meetings Act is well beyond the scope of this topic, but recognize that a "meeting" occurs essentially any time a quorum of the governing body (e.g., the school board) is gathered at a called time and place and at which the members "receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control."ⁱⁱⁱ A meeting also

occurs any time there is "a deliberation between a quorum of a governmental body, or between a quorum...and another person, during public business or public policy over which the body has supervision or control is discussed or considered or during which the governmental body takes formal action."^{iv} For OMA purposes, "open" means open to the general public; there is no qualification that it be for taxpayers, residents, etc.

2. Public Comment is Mandatory.

In 2019, the Texas Legislature amended the OMA, including some provisions which impacted the right of the public to comment at open meetings.

Specifically, the OMA now requires that a school board "shall allow each member of the public who desires to address the body regarding an item on an agenda...to address the body regarding the item at the meeting before or during the body's consideration of the item."^v This deviates from prior versions of the OMA in a couple of important ways.

First, taken together with the definition of "meeting," it is clear that a public comment period is mandatory at each and every meeting of the school board. (Previously, some boards held "workshops" or "planning meetings" that did not necessarily include action items for vote, and public comments were not heard at these meetings. This is no longer permitted.) The public has a right to be heard at any and every meeting of the board.

Additionally, the requirement that "each member of the public" is entitled to be

heard has impacted how school boards conduct public comment. For example, prior to the amendments, a school board could require a group of five or more persons wishing to be heard on the same topic to appoint a speaker to comment on their collective behalf. This is no longer available to the board. It now must hear from as many such individuals as may wish to speak, even if they are all addressing the same topic or agenda item. Although this is hardly new – becoming effective on September 1, 2019 – it still feels new to some school boards. This is due, at least in part, to the impact of the COVID-19 pandemic that arose just months after the new law became effective. Many districts had an extended period of remote / virtual school board meetings – itself a major dispensation in the OMA – and public engagement during these meetings was often very low. Combined with technology challenges, the reality is that many meetings probably just failed to “get it right” for a long time. Now, as things move more toward normalcy – at least to the extent that there is any normalcy at a school board meeting – districts and their boards must pay more attention to these technical matters to avoid OMA violations.

Now that public comment is recognized as being mandatory at every board meeting, a corollary is that it must also be a posted agenda item for each board meeting. The law requires the board to hear public comments prior to or during a discussion of any time, before action is taken.^{vi} From a practical perspective, by far the best option is consolidating all public comments near the beginning of the meeting, before any action items (and in reality, even before any consent agenda items). Permitting public comments during or prior to each individual agenda item is slow, tedious, and breaks up the flow of momentum in any

meeting. Also, Texas school trustees are unpaid, and most of them would like to get home to their families at a reasonable hour. Grouping all public comments together at the beginning of a meeting will expedite moving through them and then picking up with the remainder of the meeting, including those votes and actions by the board.

Another important change to the OMA is that the public comment period can no longer be limited to a specific, set period of time (e.g., 30 minutes).^{vii} The board must permit everyone who desires to speak the opportunity to do so, and must permit each of them a reasonable time to address the board. The board still has some discretion over what constitutes a reasonable time, which may shift depending on circumstances.^{viii} For example, if only two individuals wish to address the board, allowing each of them five minutes to speak is certainly reasonable. At the other end of the spectrum, some meetings may draw as many as 100 or more individuals desiring to be heard, requiring the board to compress the limit of time that each individual can speak – perhaps to as little as one minute apiece. Without such discretion, in the latter example, a default 5-minute per-speaker limit could result in more than *six hours* of public comment time, not counting the time lost between speakers, etc. One could reasonably expect the resignation of trustees before such a meeting was adjourned! The key point is that while the board cannot regulate the total time for receiving public comments, it may reasonably restrict the amount of time allotted to each individual speaker.

3. Items Which May Not (and Which May) Be Restricted.

Both the OMA and associated regulations and case law provide a list of items which governing bodies like school

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