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MEMORANDUM

TO: SANTA FE PUBLIC SCHOOL BOARD

FROM: DANIEL YOHALEM AND SARAH WELSH,
NEW MEXICO FOUNDATION FOR OPEN GOVERNMENT

RE: Santa Fe School Board's Proposed Public Forum Policy

DATE: 10/3/2011

The Santa Fe School Board's proposed Limited Public Forum Policy contains impermissible content-based restrictions on speech that violate both the First and Fourteenth Amendments. The proposed policy would prohibit the expression of statements, concerns and opinions on the basis of their subject matter (*i.e.*, their content) about significant matters of public concern, including statements by the public about actions that concern them by a teacher, school principal or administrative staff and statements about any pending legal and administrative proceedings. It is the opinion of the New Mexico Foundation for Open Government that if the proposed policy is adopted, its restrictions will very likely be challenged in a costly lawsuit and, if challenged, they will fail under judicial constitutional review because they are illegally based on the content of the speech.



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Relevant First Amendment Law

The First Amendment protects our “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Additionally, under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, “government may not grant the use of a forum to people it finds acceptable, but deny use to those wishing to express less favored or more controversial views.” *Id.* Although freedom of speech in the United States is not absolute, “Content-based regulation[] [is] presumptively invalid.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).¹ In particular, the ability to question the fitness of community leaders, including key personnel in a school system, especially in a forum created specifically to foster discussion about a community's school system, is an important public interest. A policy that “deters individuals from speaking out on an issue of public importance violates the First Amendment.” *Moore v. Asbury Park Bd of Educ.*, 2005 WL 2033687, 11-13 (U.S. Dist Ct., D.N.J., 2005) (internal quotations and citations omitted).

¹ A narrow range of content-based proscriptions of speech are permissible, however, such as proscriptions aimed at obscenity, defamation, fighting words. *R.A.V.*, 505 U.S. at 382-83. Even then, such content-based regulations must “serve a compelling state interest and [be] narrowly drawn to achieve that end.” *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (internal quotations omitted).



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“Neither factual error nor defamatory content, nor a combination of the two, suffice[s] to remove the First Amendment shield from criticism of official conduct.” *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001). In *Bartnicki* someone critical of the local teacher’s union received illegally intercepted phone conversations between union representatives and the school board in the mail and then shared those taped conversations with both the school board and the media. While the law outlawing the interception and recording of phone conversations was a *content neutral* law of general applicability and could be enforced against the person who intercepted and taped the conversations, the Supreme Court held that it would violate the First Amendment rights of the innocent person, who neither intercepted the conversations nor obtained the recordings unlawfully, to prosecute him under the law for publishing (speaking publicly about) the conversations when he had exercised his freedom of expression by publishing truthful information that was of public concern. See *id.* at 535. “The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern.” *id.* The Supreme Court held that an individual’s right to engage in public debate about matters of public concern outweighed the state’s interest in protecting private communications. See *id.* at 534. *Bartnicki* demonstrates the high level of protection granted by the Constitution to an individual’s right to express him or herself in public debate about matters of public concern.



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In contrast to content-based limitations on speech, the courts have allowed the government to impose content-neutral regulation of the time, place and manner of speech. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The scrutiny that will be applied by the courts to time, place and manner restrictions depends on the nature of the forum. The Supreme Court categorizes forums as “public,” “designated or limited public,” or “nonpublic.” *Id.* “Public forums” are “places which by long tradition or by government fiat have been devoted to assembly and debate,” such as streets and parks. *Id.* A limited public forum is “public property which the state has opened for use by the public as a place for expressive activity.” *Id.*² Even viewpoint-neutral time, place and manner restrictions of speech in public and limited public forums must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Id.* See also *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 818 (1985). The regulation of speech is viewpoint-neutral if it is “justified without reference to the content of the regulated speech.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Application of First Amendment Law to the Proposed School Board Policy Limiting Public Comment

² Although not relevant to this analysis, a public forum or comment period during a school board meeting is clearly a “limited public forum.” See *Leventhal v. Vista Unified Sch. Dist.*, 973 F.Supp. 951, 957 (S.D.Ca.1997) (finding open school board meetings to be limited public fora); *Moore v. Asbury Park Bd of Educ.*, 2005 WL 2033687, 9 (D.N.J.,2005) (same).



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In our opinion Sections 3(b) and 3(c) of the Board’s proposed public forum policy clearly prohibit speech on the basis of the content of the speaker’s comments. Section 3(b) would prohibit comments from the public if they appear to the Board to be directed toward the conduct or performance of any public school employee (any employee other than the superintendent in version 1 of the policy.) But there are many legitimate public concerns that might be addressed about the conduct or performance of a teacher, principal or administrator that are legitimate matters to be heard during the public forum period. For example, a parent may express concerns about a principal taking time away from underfunded art and music programs by re-organizing the day for a school pep rally. Or a concerned citizen may express outrage about a literacy-outcomes report compiled by an administrative staff member. Both of these examples concern matters of public concern protected by the First Amendment. Moreover, this policy will likely be applied, as the unwritten policy has in the past, to comments that are critical of school employees, rather than to comments that praise employees’ conduct. But in either case, the Board cannot prohibit criticism of a public school employee’s actions because it does not like controversy or because it wants to protect employees from public criticism or because it wants to avoid anything that might be seen as petty or personal. In addition, permitting comments concerning the superintendent’s actions, while prohibiting any discussion of the conduct or performance of any other staff member, violates the Equal Protection clause. See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).



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Similarly, proposed Section 3(c) would impermissibly prohibit any discussion of any pending legal or school administrative proceeding.³ But the First Amendment and a more reasoned school board policy require the Board to allow a citizen to express concerns about such issues as the waste of limited financial resources by litigating, rather than settling, a lawsuit, or a parent to challenge the wisdom of a decision to re-hire a principal, teacher or administrative staff who was the subject of an internal investigation that was not yet resolved. Clearly, the Board does not have to follow these citizens' advice, indeed, it does not even have to respond to comments made in the public forum part of meetings, but the Board must and should want to hear what people have to say about pending lawsuits and administrative proceedings. Allowing public comment about these matters, even if they advocate a particular position, will not compromise the Board's status in the pending litigation or administrative proceeding.⁴

In analyzing similar attempts by school boards to limit speech during public comment periods, courts have struck down limitations like those in the proposed new policy as being

³ The proposed speech exclusions for statements that concern personnel and litigation appear to be trying to echo the exclusions found in the Open Meetings Act. See NMSA §10-15-1(H). However, this reference to the Open Meetings Act is entirely misplaced. The purpose of the Open Meetings Act exclusions is to permit public bodies to conduct some business concerning confidential and privileged information in private. The Open Meetings Act exclusions place no limit on what the participants in the open portion of a meeting can say, only on when a meeting occur without the public being present. Here, the School Board is not obligated to respond or take any action in response to comments made in the public forum. Consequently, the School Board's ability to conduct business involving confidential and privileged information in private is not jeopardized by permitting members of the public to say what they will on all matters of public concern during open meetings as required by the First Amendment.

⁴ In the rare situation when a person comments on a pending administrative proceeding and provides an opinion about the outcome or information that might be evidence, those comments can be made part of the administrative record and the participants in the proceeding can decide whether the decision-maker can or cannot consider what was said.



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impermissibly content-based, even though they tried to appear neutral. For example, courts have ruled that school districts that banned speech that was “personally directed” at school employees had violated the First Amendment because such a limitation was content-based. In *Moore v. Asbury Park Bd of Educ.*, 2005 WL 2033687, 11-13 (D.N.J., 2005), the court held that “the ‘personally directed’ provision of the Bylaw, on its face and as applied by the Board, contains content-based restrictions on speech. ... We find that these words have the effect of an impermissible viewpoint-based restraint and are unconstitutional.” In *Leventhal v. Vista Unified Sch. Dist.*, 973 F.Supp. 951, 957 (S.D.Cal. 1997), the court struck down a school board bylaw that permitted the board president to terminate a presenter's comments if the presenter, after a warning, persisted in making improper remarks, which included complaints against individual employees of the school district unless such employees consented to the remarks.

Here, the proposed Limited Public Forum Policy is written in terms of *content-based* prohibitions on speech and is unconstitutional on its face. “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, the City of Chicago outlawed all peaceful picketing outside of schools, except for picketing concerning labor disputes. The Court held that it was a violation of both the First and Fourteenth Amendments to permit peaceful labor-related picketing and prohibit all other peaceful non-labor-related picketing. See *id.* at 97. The Court went on to hold that the City’s interest in preventing disruption of the school could be furthered without resort to such



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broad restrictions on the content of speech. See *id.* at 100-101. “[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.* at 101, *citing Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969).

Presumably, the School Board mistakenly believes that the limitations on speech contained in Section 3 of the policy would promote certain school board interests, such as protecting or respecting the privacy of school district employees and preventing the possibility of any disruption of school board meetings. But these interests are not sufficient to justify the extreme restrictions on protected speech contained within the proposed policy. See *Bartnicki*, discussed above. As explained above, the Board does not have to respond to any comments and the Board need not (and should not) disclose any confidential employee information that are not public records under the New Mexico Inspection of Records Act, NMSA 1978, §§ 14-2-1 to -12 (2009).

Lastly, the School Board already has a civility policy which clearly defines the level of disruption that will not be tolerated in open meetings and what actions the board can take to enforce the policy.⁵ See Santa Fe Board of Education Policy 161 & AR 161. Courts have upheld such reasonable limitations on the manner of public comment:

⁵ In addition, Section 5 offers the School Board both too much discretion and too few procedural safeguards for members of the public, who are asked to stop speaking. See *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). Reasonable time, place and manner restrictions on protected speech must provide the individual responsible for enforcing the limitations with clear guidelines so that the restrictions (for example, on how long one can speak) are not enforced in a manner that results in



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We want to emphasize that a school board could confine public comment “to the subject at hand” and forbid “disruptive,” “irrelevant or repetitious” speech. *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir.1990) (internal quotations omitted). *White* also noted that “speaking too long,” being repetitious, and discussing irrelevancies could “interfere with the rights of other speakers.” *Id.* at 1426. Narrowly tailored regulation of speech at City Council meetings not only ensures that the council may effectively conduct its business in public, it preserves the First Amendment rights of everyone in attendance.

Timmon v. Jeffries, 2009 WL 270043, 3 (W.D.Mich., 2009).

Obviously, though, it is not necessary to restrict the content of any member of the public’s comments in order to maintain order and, more importantly, such restrictions would not be legal.

As the New Mexico Foundation for Open Government and others have previously explained, the Santa Fe School Board is currently unconstitutionally limiting free speech during its public forums as a matter of unwritten practice. Its recent conduct barring public comment criticizing the administration’s report about student literacy was an unconstitutional content-based limitation on speech. It cannot now cure the defects of its unconstitutional practice by adopting these proposed unconstitutional limitations on speech as its official policy. In light of the severe restrictions on protected First Amendment speech contemplated by the proposed policy, the School Board would be better served by simply enforcing the civility policy already in effect and remembering that the Board is not required to respond or take any action in response to public comments made by concerned citizens during this portion of its open

impermissible viewpoint discrimination. See *id.* at 324. Not only does the proposed policy contain no guidance beyond the 3-minute limit on individual public comments, but Section 5 of the policy contains no clear timeframe or other guidelines for when and how the review of, response to, and any appeal of written comments submitted by members of the public who are asked to stop is to be conducted.



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meetings. The public comment period is simply an opportunity for parents, teachers, and other concerned citizens to voice their opinions and concerns. Having opened the floor to public comments, the School Board cannot restrict an individual's expression on matters of public concern solely because of its message, its ideas, its subject matter, or its content without violating the First Amendment, no matter how well-intentioned the Board's purpose may be.

Please feel free to contact us if you would like to discuss our opinion on this matter further.