# COMMONWEALTH of VIRGINIA

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April 15, 2016

The Honorable Richard L. (Rick) Morris
Member, House of Delegates
Post Office Box 128
Carrollton, Virginia 23314

Dear Delegate Morris:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia.*

**Issue Presented**

You ask whether certain rules of the Franklin City School Board restricting the speech of speakers at public meetings violate the free speech rights of speakers.

**Background**

The facts you present are as follows. The Franklin City School Board (the "Board") has adopted a regulation governing the conduct of public meetings entitled, "Public Participation at School Board Meetings." It provides a period at public meetings when citizen comment is permitted and includes a section entitled, "Rules for Citizens' Time at School Board Meetings" (the "Rules").[1] In relevant part, the Rules state,

> The School Board will not permit speakers to discuss specific personnel or student concerns during the public session, but may be invited to do so during "Closed Meeting." Names, titles, or positions which can identify specific individuals will not be allowed during the public session. Speakers having specific personnel[2] or student concerns may sign up to speak on these topics during "Closed Meeting." Only the speaker or representative of a group may be present during "Closed Meeting." Permission to speak before the School Board in "Closed Meeting" is at the discretion of the Franklin City School Board. . . . [Speakers] . . . may not engage in personal attacks against employees of the school system or other persons.

The School Board applies the Rules so as to prohibit speakers from either praising the performance of a student or a specific employee or expressing concerns or criticism about such persons during open meetings.

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[1] Franklin City School Board Regulation BDDH ("Rules for Citizens' Time at School Board Meetings") (rev. 8/29/99), http://www.fcpsva.org/pdf/PolicyManual/PolicyManual_SectionB_BoardApproved.pdf.

[2] The term "personnel" is not defined. Thus, it could reasonably be interpreted to include officials such as members of the School Board as well as salaried employees of the school division.

**Applicable Law and Discussion**

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[3] The Fourteenth Amendment makes these restraints applicable to state and local government, which would include public school systems.[4] Thus, when public comment is allowed, it must be allowed in a manner consistent with the First Amendment. There are three different types of public forums, subject to different constitutional requirements. At the two ends of the spectrum are a traditional public forum, with only minimal restrictions on speech allowed, and a nonpublic forum, with substantial restrictions on speech allowed.

Between a traditional public forum and a nonpublic forum is a middle ground commonly referred to as a limited public forum. As explained by the U.S. Supreme Court in *Christian Legal Society Chapter of the University of California v. Martinez*,[5] a limited public forum exists when the government limits the public expressive activity on what is otherwise nonpublic government property to certain kinds of speakers or the discussion of certain subjects.[6] The public comment period in a school board meeting has been repeatedly held to be a limited public forum.[7]

Accordingly, I conclude that the situation you have presented—a public meeting of a local school board with a period set aside for public comments—meets the Supreme Court's definition of a "limited public forum."

The fundamental constitutional requirements for a limited public forum are that any restrictions on speech must be reasonable in light of the purpose of the forum and must be viewpoint neutral.[8] A speech restriction must be narrowly tailored to serve a significant government interest and leave open ample channels of communication.[9] In addition, a permissible rule affecting speech must be applied consistently, regardless of the viewpoints of different speakers.[10]

Because the Rules do not differentiate between laudatory speech and criticism, they are content-neutral.[11] Thus, the remaining questions are whether the rules against discussing "specific personnel or student concerns" and identifying specific individuals by "names, titles, or positions," and the rule against "personal attacks," are reasonable.

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[3] U.S. CONST. amend. I.

[4] 2005 Op. Va. Att'y Gen. 27, 28.

[5] 561 U.S. 661 (2010).

[6] *Id.* at 679 n.11.

[7] *See* Fairchild v. Liberty Indep. Sch. Dist., 597 F.3d 747, 759 & n.42 (5th Cir. 2010).

[8] *Christian Legal Society*, 561 U.S. at 679 n.11.

[9] *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 818 (1985); Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983); City of Madison v. Wis. Emp'y Relations Comm'n, 429 U.S. 167, 178-79 (1976).

[10] *City of Madison*, 429 U.S. at 178-79.

[11] Baca v. Moreno Valley Unified Sch. Dist., 936 F. Supp. 719 (C.D. Cal. 1996), involved a policy regulating speech at school board meetings. In holding the policy to be in violation of the requirement of content neutrality, the court stated, at 730, "It is difficult to imagine a more content-based prohibition on speech than this policy, which allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter." *See also City of Madison*, 429 U.S. at 175-176 ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.").

**1. Identifying specific personnel**

The interest of a school division in the privacy of school employees has been held to be an insufficient basis for barring public comment on individual employees. In *Baca v. Moreno Valley Unified School District*,[12] a federal district court held that the school district's "interest as an employer in protecting its employees' right of privacy cannot be characterized as a compelling government interest," and,

> When a school board holds open sessions of its meetings and is addressed by members of the public . . . it is not functioning as an employer, but as a legislative body. . . . [O]ne aspect of the legislative body's function is to listen to public testimony, including public criticism of those persons implementing the policies . . . . The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system . . . . [The school district's interest in employee privacy] must give way to the more fundamental constitutional right of freedom of expression.[13]

There was a similar holding in *Leventhal v. Vista Unified School District*,[14] where another federal district court held that "[d]ebate over public issues, including the qualifications and performance of public officials . . . lies at the heart of the First Amendment."[15]

As to requiring such discussions to take place only in closed meetings, the *Baca* court observed, "[t]he open session of a school board meeting is a legally proper place for citizens to voice their complaints about a school district's employees. The policy [of requiring those complaints to be made only during closed meetings] is an invalid restriction on speech at [open] meetings, and *the fact that plaintiff and others critical of District employees may speak in closed sessions, in public, or even on the schoolhouse steps, does not validate the otherwise invalid policy.*"[16] I note that for the School Board, even holding a closed session is discretionary and not required, and if a closed session is held, a citizen may speak only in the discretion of the School Board. For those reasons, I conclude that allowing discussion of individual school employees only during closed session does not meet the constitutional standard of "leaving open ample channels of communication."[17]

For the reasons set forth in *Baca* and *Leventhal*, I conclude that the School Board may not constitutionally bar speakers from discussing personnel issues or identifying individual school employees or officials during public session.

The same principles apply to the Rules' prohibition on identifying individual students by name, albeit with a different conclusion: there is a significant government interest in protecting the privacy of individual students in certain circumstances, as evidenced by state and federal student privacy laws.[18]

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[12] 936 F. Supp 719 (C.D. Cal. 1996).

[13] *Id.* at 732 n.13, 732.

[14] 973 F. Supp. 951 (S.D. Cal. 1997).

[15] *Id.* at 958.

[16] *Baca*, 936 F. Supp. at 736 (emphasis added).

[17] *See supra*, note 9 and accompanying text.

[18] *See* The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, which protects the confidentiality of education records, only permitting the release of personally identifiable information with the

Further, depending on context, certain comments about particular individual students may not fall within the proper scope of a school board meeting. Because there is such a wide range of possible comments about individual students, I can express no overall opinion on the constitutionality of such a restriction.[19] The constitutionality of barring speakers from identifying individual students would be governed by the specific facts of the situation. Attorneys General consistently have declined to render official opinions on specific factual matters.[20]

**2. "Personal attacks"**

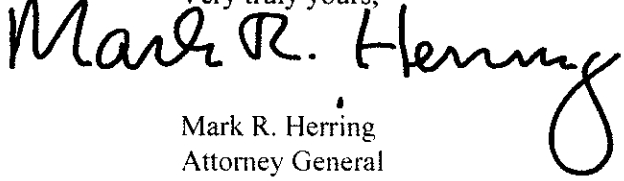
A prohibition on "personal attacks" was held *not* to be content-neutral, and therefore constitutionally impermissible. As the U.S. District Court for the Eastern District of Virginia observed in *Bach v. School Board of the City of Virginia Beach*,[21] "[C]itizens may see no distinction between stating, 'the principal is a liar' and 'the principal lied to us about spending the money.' According to the [School Board's] interpretation, the latter would be acceptable but the former forbidden . . . ."[22] In accordance with that federal judicial precedent, I conclude that barring "personal attacks" is not constitutionally permissible.

**Conclusion**

Freedom of speech is essential to the maintenance of a free society. For the reasons stated, it is my opinion that (1) the blanket prohibitions in the Rules against speech on "specific personnel or student concerns" and speech identifying school officials or employees may not constitutionally be applied so as to bar speakers from discussing specific school employees or officials during open meetings, and (2) the prohibition against all "personal attacks" is not constitutionally permissible. The constitutionality of restrictions against identifying individual students would be determined by the particular circumstances involved.[23]

With kindest regards, I am

Very truly yours,



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consent of the students or in certain isolated instances. 20 U.S.C. § 1232g(b)(1) & (2). *See also, e.g.*, VA. CODE ANN. § 22.1-287 (2011), which establishes, with some exceptions, that "[n]o teacher, principal or employee of any public school nor any school board member shall permit access to any records concerning any particular pupil enrolled in the school in any class to any person except under judicial process."

[19] There may be situations where it would not be improper to identify a student by name, such as a parent expressing gratitude to the school board for school programs or activities that were beneficial to the parent's son or daughter.

[20] 2009 Op. Va. Att'y Gen. 80, 81.

[21] 139 F. Supp. 2d. 738, 743 (E.D. Va. 2001).

[22] *Id.* at 743.

[23] I address only the constitutionality of the Rules and general principles governing their application, not whether they have been legally applied in any particular situation.