



## Can they do that? Political activity at school and board meetings

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As the COVID-19 pandemic lingers on, school boards across Ohio have experienced increased attendance at board meetings and related political activity. Additionally, Election Day is coming up on November 2, 2021, so districts are grappling with all sorts of questions related to what political activity is permissible on campus and what rules apply to students, staff and community members in general. It may not be surprising to learn that the legal rules in this area are complex and depend on who is involved. This article provides a brief, general overview of some facets of political activity on school property and at school events.

### School employees and campaign activity

Public school employees have First Amendment rights to engage in campaign activity on their own time as private individuals. They do not have the same freedom to engage in campaign activity at school.

Ohio law prohibits public boards of education from compensating any employee for “time spent on any activity to influence the outcome of an election” regarding a candidate for public office or the passage of a levy or bond issue or other ballot issue.<sup>1</sup> It is not always easy to determine what constitutes activity to influence the outcome of an election, but that would certainly include handing out campaign flyers that advocate for or against a candidate or ballot issue, urging colleagues to vote for a candidate or issue, and preparing campaign mailings. Accordingly, public school employees cannot engage in such campaign activity on paid time, including paid time after the school day (e.g., while working as a coach or club advisor). Board policy may also restrict political activity such as distribution of campaign literature. If so, that policy must be enforced even-handedly.

It is not yet clear whether the wearing of campaign buttons during instructional time constitutes prohibited campaign activity under Ohio law, but it may be prohibited under board policy. Boards of education have the authority to ban attire containing political messages during the school day, without regard to the content of the message being conveyed. This type of viewpoint-neutral regulation has been held not to violate the First Amendment.<sup>2</sup>

What if a board member running for re-election wants to solicit campaign contributions from employees on school grounds during the school day? Ohio law prohibits solicitations of contributions from a public employee while the public employee is performing official duties or in areas of a public building where official business is transacted or conducted.<sup>3</sup>

#### Student political activity

What if students want to wear campaign buttons to school or what if they organize a walk out or other protest regarding their district's mask policy? The law governing political speech by students is more expansive than the law governing school staff and it often, but not always, permits students to engage in such speech.

The general rule established by the United States Supreme Court dates back to the *Tinker* case in which the court overturned a school regulation banning the wearing of a black armband in protest of the Vietnam War.<sup>4</sup> The Supreme Court held that a school's regulation of any form of speech or expressive conduct violates the First Amendment unless the school reasonably believes that the speech will "substantially and materially interfere" with schoolwork or discipline. A school cannot prohibit student speech merely to avoid controversy or the expression of an unpopular viewpoint.

Notwithstanding the general rule, schools can prohibit speech that is vulgar, lewd, indecent or plainly offensive.<sup>5</sup> Boards of education may also adopt reasonable, viewpoint-neutral dress code regulations. For example, some boards have banned all attire containing any type of message, regardless of the message. Otherwise, however, it is generally permissible for students to come to school wearing campaign buttons or t-shirts.

Are students permitted to engage in walk outs or other protests? It depends. As far as the First Amendment is concerned, schools are generally permitted to enforce reasonable, content-neutral time, place and manner restrictions on speech, and under a number of state laws, schools are also required to enforce compulsory attendance for most young people of school age. Hence, a student walk out—depending on the extent to which students plan to actually leave school property—would likely violate these laws, not to mention a number of related board policies. However, if students planned on a *Tinker*-style garment-based protest or something less obviously disruptive, those closer calls would need to be analyzed on a case-by-case basis.

#### Community member participation at board meetings

The rules for public participation at school board meetings is somewhat similar—but not exactly the same—as the rules for student political speech. School board meetings are generally considered to be a "limited public forum" under the First Amendment.<sup>6</sup> That designation means that the school board can enforce restrictions on the time, place and manner of speech permitted at those meetings. For example, a board could limit each speaker to a specific length of time, and it can require speakers to pre-register. However, a board cannot prohibit speech that simply disagrees with board action or speech that offends board members. While a board is not required to tolerate outright vulgar speech, it must allow speech even when it is somewhat antagonistic. Hence, if a speaker intends to voice strong concern over a district's quarantine decisions or any other recent controversy in the community, they cannot be prevented from speaking for that reason alone. Boards cannot invite civic engagement only when it agrees with them.

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<sup>1</sup> R.C. 9.03; R.C. 3315.07; 1991 Op. Att'y Gen. No. 1991-064.

<sup>2</sup> *Weingarten v. Bd. of Educ.*, 680 F. Supp. 2d 595 (S.D.N.Y. 2010)

<sup>3</sup> R.C. 3517.092.

<sup>4</sup> Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

<sup>5</sup> Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).

<sup>6</sup> Ison v. Madison Local Sch. Dist. Bd. of Educ., 3 F.4<sup>th</sup> 887, 892-93 (6th Cir. 2021).

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