



FIRE

Foundation for Individual
Rights and Expression

January 8, 2024

Mark A. Tabakin
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Sent via U.S. Mail and Electronic Mail (mtabakin@weiner.law)

Dear Mr. Tabakin:

FIRE is disappointed to have not received a response to our November 27 letter regarding the Teaneck Public Schools Board of Education's unconstitutional restriction of public comments at its October 18 meeting—and even more disappointed to learn it doubled down on that censorship by adopting vague and viewpoint-discriminatory public comment guidelines.¹

The new guidelines state that the Board president “may interrupt or terminate any individual’s speaking privilege if the speaker’s comments are excessively loud, profane, vulgar, inflammatory, threatening, abusive, or disparaging language or racial or ethnic slurs, disruptive, obscene, or otherwise in violation of applicable law.” As explained in our prior letter (enclosed), the Board may prohibit threats and disruptive conduct and encourage respectful discourse, but it cannot impose vague, overbroad, and easily abused restrictions on comments in the name of decorum—including undefined bans on “vulgar,” “inflammatory,” “abusive,” or “disparaging” language. As the Supreme Court has held, restricting “disparaging” speech impermissibly discriminates based on viewpoint.² Board members may personally consider some criticisms disparaging, inflammatory, or otherwise objectionable, but that alone does not strip them of constitutional protection.

The Board therefore must not delay amending its public comment policies and guidelines, which violate the First Amendment rights of Teaneck residents and needlessly expose the Board to liability. The Supreme Court has been clear that the “loss of First Amendment

¹ TEANECK PUB. SCHS., BOARD OF EDUCATION – PUBLIC COMMENT GUIDELINES (DISTRIBUTED), <https://filecabinet7.eschoolview.com/560703AE-3BF2-44D3-B5F9-CAE9D23F7E86/50bed7f8-8ddb-45e1-bd73-13c53cc9b98f.pdf>.

² *Matal v. Tam*, 582 U.S. 218, 243 (2017); see also *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019) (determination of whether something is “immoral” or “scandalous” is viewpoint-based because it “distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation”).

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”³ FIRE stands ready to assist the Board in remedying the unconstitutional defects in its current approach while helping to find constitutional ways to ensure its meetings proceed without disruption.

We respectfully request a substantive response no later than January 18, 2024.

Sincerely,



Aaron Terr
Director of Public Advocacy

Cc: Clara Williams, President, Teaneck Board of Education
Kassandra Reyes, Vice President, Teaneck Board of Education
Victoria Fisher, Trustee, Teaneck Board of Education
André D. Spencer, Ed.D., Superintendent of Schools

Encl.

³ *Elrod v. Burns*, 427 U.S. 347, 373 (1976).



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Mark A. Tabakin
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629 Parsippany Road
P.O. Box 0438
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Sent via U.S. Mail and Electronic Mail (mtabakin@weiner.law)

Dear Mr. Tabakin:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by the Teaneck Public Schools Board of Education's restriction of public comments about the superintendent's statement on Hamas's October 7 attack on Israel. The comments were relevant to matters before the Board and fully protected by the First Amendment. While the Board may prevent actual disruption and prohibit unprotected speech, it lacks authority to limit comments to what it subjectively considers respectful or appropriate. For that and the reasons that follow, FIRE calls on the Board to reform its policies and practices to comply with its constitutional obligations.

I. Board of Education Restricts Public Criticism of Superintendent's Statement on Hamas Attack

As required by New Jersey law, the Teaneck Board of Education sets aside a portion of each of its meetings for "public comment on any school or school district issue that a member of the public feels may be of concern to the residents of the school district."² District policy also permits the presiding officer to "[i]nterrupt and/or warn a participant when the statement, question, or inquiry is abusive, obscene, or may be defamatory," and to "[r]equest any person to leave the meeting when that person does not observe reasonable decorum."³

Following Hamas's October 7 attack on Israel, Superintendent André D. Spencer wrote students' families referring to "the latest incidents in the cycle of violence in the Middle East"

¹ You can learn more about FIRE's mission and activities at thefire.org. FIRE takes no position on the Israel-Gaza conflict or any other political or social question beyond the importance of freedom of expression and individual rights.

² TEANECK PUB. SCHS. BD. OF EDUC., DISTRICT POLICY 0167 - PUBLIC PARTICIPATION IN BOARD MEETINGS, <https://bit.ly/3G93Xga> [<https://perma.cc/T9SU-J745>]; see also N.J. STAT. § 10:4-12(a).

³ *Id.*

and “recogniz[ing] the fear, grief, and pain that our community is experiencing.”⁴ The letter called for open dialogue to “gain a comprehensive understanding of the complex factors impacting our world” and offered counseling services for those affected by the events. It later became a subject of many public comments—supportive and critical—at the October 18, 2023, Board meeting.

The Board, however, repeatedly cut off commenters who described Hamas’s actions to underscore why they thought Superintendent Spencer should have issued a stronger statement condemning the attack:

- One commenter, referring to the statement, said, “You can condemn Hamas unequivocally and you can condemn those actions unequivocally without taking a side in the conflict or even touching the overall conflict, unless of course you’re trying to appease people who actually think that the raping and murdering and pillaging of the community is appropriate.”⁵ Board Vice President Victoria Fisher immediately interjected, “Excuse me we have an audience with children and students so I just ask that speakers be respectful of that audience. We’re aware of the news.”
- While criticizing the statement, a commenter asked rhetorically, “How would you feel if Indigenous people in our country came into your homes at 6 a.m., at 7 a.m., and pulled your kids out of their beds and then shot you in front of them?”⁶ Vice President Fisher interjected, “I’m going to remind you that there are students and children,” adding that “facts don’t need to be repeated, they’re on the record.”
- Vice President Fisher cut off another commenter who, objecting to the district taking a “neutral” stance on the attack, said, “Terrorism is not neutral. Beheading babies, tying them together, shooting them between their eyes, that’s not neutral. Raping women, that’s not neutral.”⁷
- A commenter objected to Superintendent Spencer’s reference to the “unfortunate situation in the Middle East” and said, “Missing the bus is an unfortunate situation. Hanging babies from a shower rod and shooting them between the eyes is not an unfortunate situation.”⁸ Vice President Fisher interrupted her and said, “There is no need to reiterate those details.” Board President Sebastian Rodriguez added, “Alright, we’re either going to follow the rules or we’re going to end this right now.”
- Another commenter, Keith Kaplan, called on the district to revise its statement and condemn Hamas.⁹ “This is the week to talk about the savagery, the inhumanity that was perpetrated by a terrorist group on innocent civilians who were butchered, who were raped, who were mutilated, who were beheaded, and worse,” Kaplan said before Vice

⁴ Letter from André D. Spencer, Superintendent of Schools, Teaneck Pub. Schs., to Teaneck families (undated), <https://bit.ly/3usJT6d> [<https://perma.cc/G9BJ-VNH6>].

⁵ Teaneck Board of Education, *October 18, 2023 Regular Public Meeting*, EDUVISION (Oct. 19, 2023), at 16:55, <https://bit.ly/3Rankfn>.

⁶ *Id.* at 50:16.

⁷ *Id.* at 54:35.

⁸ *Id.* at 1:21:57.

⁹ *Id.* at 1:49:57.

President Fisher cut him off for not following the “ground rules.” Kaplan continued, “Imagine for a moment these heinous acts were committed by any group in any other place. Raping, butchering, beheading, setting aflame some thousand people.” President Rodriguez interrupted again, but Kaplan went on, “Imagine any politician anywhere responding to those acts, those outrageous crimes, calling them incidents in a cycle of violence. You are noncommittal. It begs the question as to whether our schools operate in a value-free zone — a value-free zone where torture and rape are relative.” President Rodriguez told Kaplan, “You need to stop now,” and the Board cut his mic and had him removed from the lectern. Moments later, Vice President Fisher says, “Keep your politics out of it.”

President Rodriguez said the meeting was a “forum for decency” and directed commenters to not make “graphic comments.”¹⁰ Yet several commenters who supported Superintendent Spencer’s statement—or criticized it for not acknowledging the plight facing Palestinians—were free to make (or repeat others’) comments about murder, killing of children, rape, war, and genocide.

On November 15, the Weiner Law Group sent Kaplan a letter on behalf of the Board claiming his conduct at the October 18 meeting was “disruptive and crossed the boundaries of constructive dialogue.”¹¹ The letter said the Board “may prohibit profane or abusive language having no other purpose than to be threatening” and “will not allow any speaker to commandeer public participation for personal and/or private grievances that have no nexus to the school community.” The letter further said public participation at meetings “must be done in a manner that respects the rights and perspectives of others” and threatened to remove and/or ban Kaplan from future meetings if he violated the Board’s “decorum guidelines.”

II. The Teaneck Board of Education’s Restrictions on Public Comment Violate the First Amendment

The First Amendment protects Teaneck parents and citizens when they speak during public comment periods at Board meetings.¹² A Board meeting is, at a minimum, a limited public forum, which means the Board may restrict the content of commenters’ speech only when those restrictions are viewpoint-neutral *and* reasonable in light of the forum’s purpose.¹³ For example, the Board has the authority to cap the amount of time reserved for each public comment and to limit public comment to “any school or school district issue that a member of the public feels may be of concern to the residents of the school district.” But by enforcing

¹⁰ *Id.* at 1:26:08, 2:30:50.

¹¹ Letter from Mark A. Tabakin, Member of the Firm, Weiner Law Group LLP, to Keith Kaplan (Nov. 16, 2023) (on file with author).

¹² *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Emp. Rel. Comm’n*, 429 U.S. 167, 174–76 (1976) (recognizing public’s right to speak at school board meetings “when the board sits in public meetings to conduct public business and hear the views of citizens”).

¹³ See *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); *Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 280 (3d Cir. 2004). Whatever type of public forum is created by the Board’s public comment periods, it is well-established viewpoint discrimination is impermissible in *any* forum. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 60–62 (1983).

vague “decorum” rules, the Board inhibits the “free flow of ideas and opinions on matters of public interest and concern” that lies at “the heart of the First Amendment,”¹⁴ and in doing so exceeds constitutional limits on the Board’s authority.

A. *The Board’s regulation of public comments at the October 18 Board meeting was arbitrary and viewpoint discriminatory.*

The threat to free speech posed by the Board’s vague and overbroad policies was on full display at the October 18 meeting, where the enforcement of its rules varied based on the speaker’s views. Such viewpoint discrimination is an “egregious” form of censorship, and the “government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”¹⁵ Moreover, “allowing a viewpoint to be offered on some occasions without interruption does not prove the policy viewpoint neutral. Indeed, selective enforcement of a policy only when a presiding officer is feeling provoked does not help to support the policy’s constitutionality.”¹⁶

At the October 18 meeting, the Board repeatedly cut off speakers who described Hamas’s actions to support their arguments that Superintendent Spencer’s statement about the attack was inadequate. The Board purported to appeal to decorum and “decency” and the presence of children in disallowing “graphic comments,” but permitted similar comments from those who supported the superintendent or spoke from pro-Palestinian perspectives.

For example, the Board cut off a commenter who referred to Hamas’s “raping and murdering and pillaging,” but allowed another commenter to say: “These people talking about raping and piling bodies on top of each other, that happened in the Holocaust. And if they’re having PTSD for what they’re doing to the Muslim community in Palestine, that’s something they need to seek mental health counseling for.”¹⁷ The Board also interrupted a commenter who rhetorically asked how others would feel if “Indigenous people in our country . . . pulled your kids out of their beds and then shot you in front of them.” And yet, another commenter freely opined that Israel’s “dehumanizing and genocidal actions” and the “propaganda surrounding them have spread all the way to us, where kids are stabbed 26 times just for being Palestinian, where women are run over just for wearing a hijab.”¹⁸ The Board also repeatedly told speakers discussing the Hamas attack to refrain from repeating details “on the record” or mentioned by others, but permitted other speakers to repeat previous statements on subjects such as the killing of a woman wearing hijab and Israel cutting off food, water, and electricity to Gaza.¹⁹

¹⁴ *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 50 (1988).

¹⁵ *Rosenberger*, 515 U.S. at 829.

¹⁶ *Marshall v. Amuso*, 571 F. Supp. 3d 412, 423 (E.D. Pa. 2021).

¹⁷ *October 18, 2023 Regular Public Meeting*, *supra* note 5, at 33:17.

¹⁸ *Id.* at 46:58.

¹⁹ At 1:41:14, a commenter said: “Israel is preparing its ground invasion of Gaza and indiscriminately bombing Palestinians killing thousands including many children. . . . Will you call this ‘human rights’ when they’re cutting all the water and the basic necessity [of] the Palestinians? . . . I’m not going to say and repeat like everyone else the mother that witnessed her 6 years old being killed in front of her, the college student who was in critical condition in St. Joseph But the woman that had to die simply by walking on the sidewalk

The Board’s selective enforcement of its rules appeared to favor or disfavor certain views. Even if its actions were not motivated by speakers’ views, they were arbitrary and untethered from clear, objective, and sufficiently precise standards, as discussed below. The Board should have allowed *all* the above comments without interruption. Teaneck citizens “must be able to provide their feedback and critiques, even if some people, Board members included, find that distasteful, irritating, or unfair.”²⁰

B. *The Board’s restrictions on public comment are overbroad.*

The Board’s restrictions on public comment are unconstitutionally overbroad and unreasonable in light of the forum’s purpose of allowing “public comment on any school or school district issue that a member of the public feels may be of concern to the residents of the school district.”²¹ A regulation is overbroad if it “prohibits a substantial amount of protected speech . . . not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.”²² Recently, in *Marshall v. Amuso*, a federal court in Pennsylvania blocked enforcement of a school board’s bans on “abusive” and “inappropriate” public comments in part because the bans reached protected speech relevant to board business.²³

Likewise, the Teaneck Board of Education’s prohibitions on “abusive” and “graphic” comments and those that fail to “observe reasonable decorum” or “respect” others’ perspectives are both overbroad and unreasonable because they prohibit a vast amount of protected speech, including the October 18 comments about Superintendent Spencer’s letter. Those comments were pertinent to school district matters—the very speech for which the public comment period is intended to provide a forum. *Some* speech that the Board deems inappropriate or a breach of decorum could be subject to prohibition, but only if it actually disrupts the meeting (such as by exceeding the time limit for comments) or falls into one of the few, narrowly defined categories of expression that receive no First Amendment protection, like true threats.²⁴ But no comment within the prescribed time limits at the October 18 meeting constituted a true threat or was otherwise unprotected.

because she had a hijab on, she’s Muslim.” At 2:42:27, a speaker commented, “After the people of Gaza have been cut off from food, water, and electricity in violation of international law, Teaneck speaks now and is quick to introduce a resolution that further dehumanizes the Palestinians.” And another commenter echoed these sentiments at 2:53:28: “What’s happened to the Palestinian people is genocide. We need to call it what it is. To deny people food, water, electricity, is to condemn them to death. To bomb their hospitals.”

²⁰ *Mama Bears of Forsyth Cnty. v. McCall*, 642 F. Supp. 3d 1338, 1350 (N.D. Ga. 2022).

²¹ DISTRICT POLICY 0167 - PUBLIC PARTICIPATION IN BOARD MEETINGS, *supra* note 2.

²² *United States v. Williams*, 553 U.S. 285, 292 (2008).

²³ 571 F. Supp. 3d 412, 425–26 (E.D. Pa. 2021) (noting the Supreme Court, in *Gooding v. Wilson*, 405 U.S. 518 (1972), has found the term “abusive” overbroad in other contexts, reaching speech outside the “fighting words” category of unprotected speech); *see also Ison v. Madison Loc. Sch. Dist. Bd. of Educ.*, 3 F.4th 887 (6th Cir. 2021) (invalidating as unconstitutional a school board’s restrictions on “abusive,” “personally directed,” and “antagonistic” comments).

²⁴ *See United States v. Alvarez*, 567 U.S. 709, 717 (2012). A “true threat” is a statement through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003).

The presence of minors at the Board’s meetings does not justify censorship of public comments. The First Amendment does not allow the government to limit discourse among adults “to that which would be suitable for a sandbox.”²⁵ The Supreme Court has firmly rejected the idea that the government has a “free-floating power to restrict the ideas to which children may be exposed.”²⁶ Just as the government may not childproof public libraries because both adults and children use them,²⁷ neither may it limit comments at school board meetings simply because children are present. As the *Marshall* court stated, “However laudable the desire to be conscientious when it comes to adult behavior as may be witnessed by children, the School Board cannot hide behind the possible presence of children to justify an unconstitutional policy.”²⁸ Such restrictions are not only inherently vague and subjective, but also hinder speakers’ ability to address sensitive topics and to communicate their points in the manner they deem most effective.

Limiting a speaker’s comment simply because a different speaker referred to the same facts is also unreasonable. Some speakers may need to refer to facts mentioned by another speaker to present their own arguments intelligibly. A speaker may wish to express agreement with and reinforce others’ points by restating key facts. When multiple speakers make similar arguments and emphasize the same facts, they communicate a message that is stronger than that delivered by any one of them alone. Restricting this practice undermines the public comment period’s purpose of soliciting and gauging community sentiment.

C. The Board’s decorum rules are unconstitutionally vague.

Even setting aside the Board policies’ overbreadth and viewpoint-discriminatory enforcement, they are unconstitutionally vague because people “of common intelligence must necessarily guess at [their] meaning.”²⁹ Regulations must “provide explicit standards for those who apply them” to prevent “arbitrary and discriminatory enforcement.”³⁰ Even in a limited public forum, where “some degree of discretion in how to apply a given policy is necessary, ‘that discretion must be guided by objective, workable standards’ to avoid the moderator’s own beliefs shaping his or her ‘views on what counts’ as a policy violation.”³¹ This “need for specificity is especially important where . . . the regulation at issue is a content-based regulation of speech” as vagueness has an “obvious chilling effect on free speech.”³²

The *Marshall* court blocked enforcement of a school board’s prohibitions on “abusive” and “inappropriate” comments on overbreadth *and* vagueness grounds, holding these terms are

²⁵ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983).

²⁶ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794 (2011) (law restricting sale or rental of violent video games to minors violated First Amendment); *see also Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975) (“Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”).

²⁷ *See, e.g., Mainstream Loudoun v. Bd. of Trustees of Loudoun*, 24 F. Supp. 2d 552 (E.D. Va. 1998).

²⁸ 571 F. Supp. 3d at 425.

²⁹ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

³⁰ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

³¹ *Marshall*, 571 F. Supp. 3d at 424 (quoting *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018)).

³² *Id.* (quoting *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002)).

“irreparably clothed in subjectivity” because their interpretation varies from “speaker to speaker, and listener to listener.”³³ The court noted the absence of “guidance or other interpretive tools to assist in properly applying” the policies.³⁴ The nebulous policy language enabled board members’ personal sentiments about a speaker’s views to shape enforcement.

For the same reasons, the Teaneck Board of Education’s vague “reasonable decorum” requirement and bans on “abusive” and “graphic” comments cannot stand. Nor may the Board limit comments to those it deems sufficiently “constructive,” respectful of the “perspectives of others,” or appropriate for children. These determinations are also “irreparably clothed in subjectivity,” creating an unacceptable risk of arbitrary and viewpoint-discriminatory enforcement—a risk that materialized at the October 18 Board meeting.

III. Conclusion

Public comment periods offer the citizenry opportunities to share candid feedback directly with their elected representatives. The First Amendment protects this vital democratic function, restraining school boards, city councils, and other government assemblies from censoring comments they do not want to hear. While the Teaneck Board of Education is authorized to stop disruptive conduct—such as speakers going over time or persistently speaking on issues wholly unrelated to the school district—it cannot lawfully stretch the meaning of “disruptive” to censor or remove speakers based on subjective judgments that their remarks are inappropriate or disrespectful.

FIRE therefore calls on the Teaneck Board of Education to bring its public comment policies in line with the First Amendment, and to ensure constituents are free to comment at Board meetings without facing unconstitutional censorship. FIRE would be pleased to work with the Board to ensure its policies and practices meet these criteria.

We respectfully request a substantive response to this letter no later than December 11, 2023.

Sincerely,



Aaron Terr
Director of Public Advocacy

Cc: Sebastian Rodriguez, President, Teaneck Board of Education
Victoria Fisher, Vice President, Teaneck Board of Education
André D. Spencer, Ed.D., Superintendent of Schools

³³ *Id.*

³⁴ *Id.*