

November 17, 2025

Board of Education
c/o Michael Tracy Jr.
Superintendent of Schools
Augusta School Department
40 Pierce Drive
Augusta, Maine 04330

Sent via U.S. Mail and Electronic Mail (michael.tracy@augustaschools.org)

Dear Augusta Board of Education:

Thank you for your willingness to work with the Foundation for Individual Rights and Expression (FIRE) on reforming Policy BEDH, which governs public participation at Board meetings. We have completed and enclosed a red-lined version of the policy. As you will see, we have retained most of the current policy's language. We believe the changes we recommend support our shared goal of protecting First Amendment rights while ensuring the Board can have efficient and well-ordered meetings.

Some of the changes we have proposed, and their rationales, are as follows:

1. **Remove language about Board meetings not being public forums** – By allowing public comment during Board meetings, Augusta has created, at a minimum, a limited public forum, notwithstanding any language to the contrary.¹
2. **Eliminate the ban on complaints concerning specific employees, or replace it with a non-binding request to use other channels** – This change aligns with the change discussed in point 10.
3. **Add language confirming the Chair will not restrict comments based on viewpoint**
– As in any forum, the government cannot “discriminate on the basis of viewpoint.”²

¹ See *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 893 (6th Cir. 2021) (treating school board meetings as limited public forums); see also *McBrairy v. Sch. Bd. of RSU22 (McBrairy I)*, 616 F. Supp. 3d 79, 92 (D. Me. July 20, 2022) (“[M]ost courts that have considered the issue have found that [school board meetings] fall in the limited public forum category.”).

² *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

This new language helps to ensure the Chair knows these guidelines cannot be used to justify censorship of disfavored viewpoints.

4. **Change “citizens” to “members of the public”** – This change avoids the implication that noncitizens—potentially even including the noncitizen parents of a child attending Augusta schools—are unwelcome to speak. Such a restriction, if enforced, would likely be unconstitutional as noncitizens have First Amendment rights and restricting anyone from speaking simply on account of citizenship status would be unreasonable. We thus use “members of the public,” which is the same language used elsewhere in the policy.
5. **Remove the Chair’s discretion to recognize other speakers** – If the Board accepts the “members of the public” change, this language would be superfluous. But regardless of that change, giving unbounded discretion to the Chair to decide who may speak is unconstitutional. Whatever rules Augusta has about who may speak, they must be clear.
6. **Eliminate the ban on employees discussing matters for which complaint and/or grievance procedures exist** – This rule seems to be a narrower version of that in current Section H, which we discuss in point 10. A narrow restriction on employees using board meetings as a forum to litigate personal employment grievances that do not touch on matters of public concern may be constitutionally acceptable, but to the extent this rule prohibits more, there is a risk it infringes on the rights of school employees to speak on matters of public concern by restricting faculty and staff from discussing topics that members of the general public can discuss.³ We recommend deleting this rule and relying on a general standard applicable to all speakers.
7. **Eliminate requirement for speakers to state their address** – Requiring speakers to state their addresses increases the risk they will face retaliation or harassment for their views. If addresses are necessary, allowing speakers to give them to the Board or a clerk beforehand will allow the Board to collect that information while still ensuring privacy.
8. **Require time limits on individual speakers to be uniform** – This change ensures the Chair’s discretion cannot give favored speakers more time, or disfavored speakers less.
9. **Delete the bar on gossip, defamatory comments, and abusive or vulgar language** – These restrictions are unconstitutional. What qualifies as “gossip,” “abusive,” or “vulgar” is undefined and unconstitutionally vague and/or viewpoint discriminatory.

There are no clear guidelines establishing when legitimate commentary crosses the line into “gossip.” Speech regulations must “provide explicit standards for those who apply them” to prevent “arbitrary and discriminatory enforcement.”⁴ 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

³ See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

moderator's own beliefs shaping his or her 'views on what counts' as a policy violation."⁵ The ban on "gossip" fails this test because its enforcement turns on officials' subjective and unpredictable judgments. Moreover, topics that might be labelled as "gossip" can still relate to matters of public concern.⁶

The ban on "abusive" language is likewise unconstitutionally vague. And to the extent "abusive" means to reach harsh or offensive criticism, it is viewpoint discriminatory as well—and therefore unconstitutional—because "[g]iving offense is a viewpoint."⁷ As one court has noted, a restriction on verbal "abuse" is "plainly" "impermissible viewpoint discrimination" in "prohibit[ing] speech purely because it disparages or offends."⁸

Banning "vulgar" language presents the same problems. Even if limited to swear words, a blanket ban is unconstitutional, as illustrated by *Cohen v. California*, in which the Supreme Court protected the right to wear a jacket with the words "Fuck the Draft" inside a courthouse where children were present.⁹ As the Court noted, speech involves not only "precise, detached explication" of ideas but also "inexpressible emotions," such that "words are often chosen as much for their emotive as their cognitive force."¹⁰ And apart from emotional embellishment, swear words may be required for comprehensible discussion about the words themselves, as may happen if a parent wishes, for example, to complain about language in a library or curricular book.¹¹

And while defamation is not constitutionally protected, whether a statement defames is a complex legal determination which requires adjudication by a court—it is not one for school board officials to make on an *ad hoc* basis in their own discretion.

10. **Eliminate the ban on complaints or allegations concerning specific employees, or replace it with a non-binding request to use other channels** – As previously noted, the government cannot "discriminate on the basis of viewpoint" in any forum.¹² And, in a limited public forum, even viewpoint-neutral restriction on speech "must be

⁵ *Marshall v. Amuso*, 571 F. Supp. 3d 412, 425–26 (E.D. Pa. 2021) (quoting *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 21–22 (2018)). 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." *Id.* (quoting *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002)).

⁶ See, e.g., *Gault v. City of Battle Creek*, 73 F. Supp. 2d 811, 815 (W.D. Mich. 1999) (concluding that an affair involving police chief "is a matter of public concern, and that the restriction by the Commission of Plaintiffs' attempt to raise [the] issue at public comment" violated the First Amendment).

⁷ *Matal v. Tam*, 582 U.S. 218, 243 (2017).

⁸ *Ison*, F.4th at 894; see also *Moms for Liberty – Brevard County v. Brevard County Public Schools*, 118 F.4th 1324 (11th Cir. 2024) (school board's enforcement of restrictions on "abusive," "personally directed," and "obscene" public comments violated the First Amendment).

⁹ 403 U.S. 15 (1971).

¹⁰ *Id.* at 26.

¹¹ See, e.g., *Mama Bears of Forsyth Cnty. v. McCall*, 642 F. Supp. 3d 1338, 1344–47, 1355, 1357 (N.D. Ga. 2022) (noting courts have generally held outright bans on profanity are unconstitutional and holding that plaintiffs were likely to succeed in their facial challenge to such a ban)

¹² *Good News Club*, 533 U.S. at 106.

‘reasonable in light of the purpose served by the forum.’”¹³ A ban on “complaints or allegations” or discussion of “personal matters” violates both these requirements.

We acknowledge a federal district court in Maine declined to preliminarily enjoin a similar restriction in *McBrairy v. Miller (McBrairy II)*,¹⁴ but that decision was vacated.¹⁵ Although the same court later declined to preliminarily enjoin a modified version of the policy, which still restricted discussion of “personnel matters” without specifically targeting “complaints,” there was no full adjudication on the merits,¹⁶ and, importantly, the “decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.”¹⁷

The judge’s non-precedential decisions are not persuasive. The reasoning in *McBrairy II* is directly at odds with Supreme Court precedent barring viewpoint discrimination. And even a facially viewpoint-neutral prohibition on discussion of district staff is likely to fail First Amendment scrutiny. More persuasive—and thus more likely to be adopted by the U.S. Court of Appeals for the First Circuit were it to address the issue—is the Wyoming district court’s reasoning in *Pollak v. Wilson*.¹⁸ That court held that, even if some restrictions on matters pertaining to the employment of a district staff member may be permissible, a “prohibition on mentioning any individual staffer’s name, for any reason” is unreasonable because “[s]uch a broad rule does not serve the purpose of the Board meeting and it leaves open the possibility of arbitrary enforcement.”¹⁹ Speakers must be free to “criticize officials while discussing school policy.”²⁰

As another federal appeals court has noted, the “performance of public employees . . . can be [an] important matter[] of public concern.”²¹ That is especially the case regarding how children are educated. Replacing the ban with a request that speakers use other channels would not materially hinder the Board’s interest in

¹³ *Id.* (quoting *Cornelius v. NAACP Legal Def. & Ed. Fund., Inc.*, 473 U.S. 788, 806 (1985)).

¹⁴ See *McBrairy v. Miller (McBrairy II)*, 2023 U.S. Dist. LEXIS 72379 (D. Me. Apr. 26, 2023) (denying a preliminary injunction against a rule stating “No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system or against particular students. Personnel [as opposed to “personal,” as in Augusta’s policy] matters or complaints concerning student or staff issues will not be considered in a public meeting but will be referred through established policies and procedures.”).

¹⁵ *McBrairy v. Miller*, 93 F.4th 513, 521 (1st Cir. 2024). The decision was vacated on standing grounds.

¹⁶ *McBrairy v. Miller (McBrairy III)*, 2024 U.S. Dist. LEXIS 87231 (D. Me. May 15, 2024) (denying preliminary injunction against policy saying “Discussion of personnel matters is not permitted during the public comment period due to the privacy, confidentiality and due process rights of school unit employees. For purposes of this policy, ‘discussion of a personnel matter’ means any discussion, whether positive or negative, of job performance or conduct of a school unit or employee.”).

¹⁷ *Camreta v. Greene*, 563 U.S. 692, 709 (2011).

¹⁸ No. 22-CV-49-ABJ, 2024 WL 5164934, 2024 U.S. Dist. LEXIS 229713 (D. Wyo. Oct. 25, 2024).

¹⁹ *Id.* at *9.

²⁰ *Id.* at *10.

²¹ *Mesa v. White*, 197 F.3d 1041, 1046 (10th Cir. 1999).

protecting the privacy of teachers and other school employees—an interest we acknowledge. We do not suggest the Board should have to *comment* publicly on private personnel matters—but “they can just sit and listen,” without commenting.²²

If the Board nevertheless decides to retain some sort of restriction on such speech, we strongly encourage the district to narrow the rule so it targets only narrowly defined confidentiality concerns while still preserving open discussion on matters of public concern. For instance, the policy could prohibit speakers from disclosing specific confidential personnel information—such as non-public details from an employee’s personnel file—while still generally allowing discussion of the decisions of district officials and employees. This approach would protect legitimate privacy interests without suppressing protected speech.

Further restrictions on discussion of government officials’ or employees’ performance of their official duties—a topic of utmost public concern—leaves the policy highly vulnerable to a constitutional challenge. If Augusta Schools nevertheless declines to repeal the ban, it should, at minimum, narrow its scope to lessen the infringement on protected speech. For example, the policy could make clear it applies only to internal HR-related “personnel matters,” such as disputes over pay, promotion, or discipline that do not relate more broadly to school district business.

Notably, two of the cases *McBrairy* cited in upholding a restriction on discussion of personnel matters were directly about individualized employee complaints.²³ For example, the Fifth Circuit in *Fairchild v. Liberty Independent School District* rejected a facial challenge to a narrowly construed school board rule barring public comment on “individualized personnel matters” that were separately adjudicated through internal grievance procedures.²⁴ The plaintiff, a discharged employee, did not attempt to tie her remarks to school board business. Rather, she “wanted the Board to hold her post-termination grievance hearing in public.”²⁵ In other words, the plaintiff sought to have the board resolve the “merits of an extant dispute,” but the Fifth Circuit held the board could reasonably choose not to “open the comment session of its agenda to create a dispute resolution forum, anticipating that issues that do arise can be channeled into and heard at one of the Board’s robust grievance processes.”²⁶ And, as mentioned, one of the other cases *McBrairy* relied on ultimately made clear that a “prohibition on mentioning any individual staffer’s name, for any reason, is not” constitutional.²⁷

²² *Id.*

²³ *Prestopnik v. Whelan*, 83 Fed. Appx. 363, 364–65 (2nd Cir. 2003) (involving a tenure dispute); *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 751 (5th Cir. 2010) (involving a fired teacher the court described as wanting “to hold her post-termination grievance hearing in public”) (*id.* at 762).

²⁴ 597 F.3d 747 (5th Cir. 2010).

²⁵ *Id.* at 762.

²⁶ *Id.* at 760.

²⁷ *Pollak*, 2024 U.S. Dist. LEXIS 229713, at *9.

The rules should also make clear that speakers are free to discuss the performance of Board members or employees in a policy-making role. Such a clarification would ensure members of the public could, for example, criticize how Board members—elected officials—voted on given issues. With the current policy, it is not clear that is the case, especially as on at least one occasion, a member of the public was told he could not criticize Board members.²⁸ **That is wholly out of step with the First Amendment.**

Further, we strongly urge you to ensure any restriction is clearly viewpoint neutral. Although the *McBrairy* court upheld a nearly identical rule, it did so by interpreting the rule against “complaints or negative comments” as reaching “*all* matters relating to school personnel, regardless of whether they are complimentary or critical.”²⁹ In doing so, the court conceded the personnel-matter rule, which was nearly identical to Augusta’s, “is not a model of clarity.”³⁰ Augusta should make the rule clear so its survival does not hinge on a limiting construction that battles the text’s plain meaning.

Finally, beyond the text itself being viewpoint-neutral, enforcement must be as well. Failing to enforce a facially neutral rule in a viewpoint-neutral way can give rise to a successful as-applied challenge.³¹ In such a case, an offending government official could even lose qualified immunity and face personally liability for violating constitutional rights.³² **Augusta Schools must not treat criticism more harshly than praise.**³³

11. **Delete the “privacy rights of others” provision** – To the extent this is meant to cover things that a personnel-matter rule could not, it is vague and leaves too much discretion to the Chair. To the extent it does overlap, it is repetitive and unnecessary.

If you have questions or concerns, we would be more than happy to discuss them with you. We hope to find a resolution that protects First Amendment rights while also ensuring the Board can run efficient, well-ordered meetings. Thank you again for your willingness to work with us.

²⁸ Augusta School Department, *Augusta School Board Meeting 04/09/2025*, VIMEO, at 46:21, <https://vimeo.com/showcase/augustaschoolboard?video=1069039362> (speaker interrupted and told “negative comments will not be allowed” after saying “shame on the one Board member that voted ‘no’” on a Title IX issue).

²⁹ *McBrairy II*, at *13 (emphasis in the original).

³⁰ *Id.* at *14.

³¹ See, e.g., *Pollak*, at *39 (Board Chair “explicitly state[d] positive comments violate the Personnel Policy” but “her ... enforcing the Policy against [Plaintiff’s] negative comment but not against other speakers’ positive comments constitute[d] viewpoint discrimination” in “violation of [Plaintiff’s] First Amendment Rights.”).

³² *Id.* at *39–40 (Qualified immunity “shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law ... In this case, the law was clearly established. ‘It is axiomatic that the government may not regulate speech based on ... the message it conveys.’ Enforcing a policy against one individual because his comments were ‘critical’ but not enforcing it against others whose viewpoints were positive constitutes viewpoint discrimination, which is a violation of the First Amendment.”) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 8919, 828 (1995)).

³³ For instance, by allowing a speaker to thank Board members who voted one way but not allowing a speaker to shame a Board member who voted the other way, as during the April 9, 2025 Augusta School Board meeting (*see supra* note 19).

Sincerely,

A handwritten signature in black ink that reads "M. Brennen VanderVeen". The signature is fluid and cursive, with "M. Brennen" on the top line and "VanderVeen" on the bottom line.

M. Brennen VanderVeen
Program Counsel, Public Advocacy

Encl.

PUBLIC PARTICIPATION AT BOARD MEETINGS

Board meetings are conducted for the purpose of carrying on the official business of the school system. All meetings of the Augusta Board of Education are open to the public. The public is cordially invited to attend and participate in Board meetings as provided in this policy. Board meetings will be conducted in person unless the Board calls a remote meeting per policy BED. This policy applies only to meetings of the full Board, not to meetings of Board subcommittees.

Although Board meetings are not public forums, tThe Board will provide appropriate opportunities at its meetings for members of the public to express opinions and concerns related to the matters concerning education and the Augusta Board of Education schools. The intent is to allow a fair and adequate opportunity for the public to be heard while ensuring that the time allowed for public discussion does not interfere with the fulfillment of the scheduled agenda.

The Board will designate a portion of its agenda as an opportunity for public participation. During the time allotted for public participation, members of the public may speak on any subject directly related to the operations of the schools. The Board will generally not address individual personnel matters or comments concerning specific employees or students during public meetings. Therefore, the Board encourages speakers to raise such matters through alternative channels, as outlined in policy KE., except for personal matters or complaints concerning specific employees or students, which shall be addressed through established policies and procedures.

Members of the public may address the Board within the guidelines provided in this policy. The Chair shall be responsible for maintaining proper order and compliance with these guidelines. In no circumstance will any person's commentary be restricted simply on account of the viewpoint expressed.

The following guidelines shall apply to public participation at Board meetings.

- A. Citizens and Members of the public, including employees of the school unit, are welcome to participate as provided in this policy. Others may be recognized to speak at the Chair's discretion. Individual employees and/or

~~employee groups will not be permitted to discuss matters for which complaint or grievance procedures are provided.~~ Those addressing the Board need to state their names and address for the record.

- B. The Chair may limit the time allotted for comments on a particular topic as well as the time each individual may speak. Time limits on individual speakers shall be uniform.
- C. In the event of a sizable audience, the Chair may require persons interested in speaking to sign up so they may be called on in a fair and efficient manner.
- D. During the time set aside for public participation, the Chair will be responsible for recognizing all speakers, who must identify themselves as they begin talking.
- E. ~~Speakers are not permitted to share gossip, make defamatory comments, or use abusive or vulgar language.~~
- F.E. All speakers are to address the Chair and direct questions or comments to particular Board members or the Superintendent only with approval of the Chair. Requests for information or concerns that require further research may be referred to the Superintendent to be addressed at a later time.
- G.F. Members of the Board and the Superintendent may ask questions of any person who addresses the Board but are expected to refrain from arguing or debating issues. Questions must be addressed through the Chair.
- H.G. ~~No complaints or allegations will be allowed at Board meetings concerning any person employed by the school system or against particular students. Personal matters or complaints concerning student or staff issues will not be considered in a public meeting but will be referred through established policies and procedures. The Board will generally not address individual personnel matters or comments concerning specific employees or students~~

during public meetings. Therefore, the Board encourages speakers to raise such matters through alternative channels, as outlined in policy KE.

I.H. In order to make efficient use of meeting time, the Board discourages duplication or repetition of comments to the Board. The Board requests that groups or organizations be represented by designated spokespersons.

J.I. The Chair has the authority to stop any presentation that violates these guidelines ~~or the privacy rights of others~~.

K.J. Persons who disrupt the meeting may be asked to leave, and the Chair may request law enforcement assistance as necessary to restore order.

An agenda shall be published in advance of each meeting in accordance with Board policy. The agenda for remote meetings will include information on how the public is able to participate during the times noted on the agenda for public participation. Members of the public who need accommodations should contact the board chair. Copies will be posted and/or available prior to regular meetings, on the school unit's website. Anyone desiring additional information about an agenda item or a hard copy of the agenda should direct such inquiries to the Office of the Superintendent.

Opportunity for public participation at Board subcommittee meetings is not required but may be permitted at the discretion of the subcommittee.

Legal Reference: 1 MRSA § 401 et seq.
20 MRSA §1001(20)

Cross Reference: BEC – Executive Session
BED – Remote Participation in School Board Meetings
BEDA – Notification of Board Meetings
BEDB – Agenda
BEDD – Rules of Order
KE – Public Concerns and Complaints

Adopted: March 13, 1989

Revised: July 10, 2002; October 12, 2011; April 8, 2020, April 13, 2022, **March 6, 2023**