



NDSBA
NORTH DAKOTA SCHOOL
BOARDS ASSOCIATION

P.O. Box 7128
Bismarck ND 58507-7128
1-800-932-8791 • (701)255-4127
www.ndsba.org

SB 2180

**Testimony of KrisAn Norby-Jahner
Senate State and Local Government
January 24, 2025**

Chair Roers and members of the Senate State and Local Government Committee, for the record my name is KrisAnn Norby-Jahner. I am in-house legal counsel for the North Dakota School Boards Association. The NDSBA represents all 168 North Dakota public school districts and their boards. I am here today in opposition to SB 2180.

This Bill would require public entities, which includes school districts, to allow the opportunity for individuals in attendance at board meetings “to provide public comment,” without “approval by the public entity” and without any rules governing the public comment period other than time limits per speaker. This proposed law is too broad and would create a nearly unlimited open public forum allowing for public comment at any time, on any topic, and in any manner.

Public board meetings are not “public meetings,” but rather they are “meetings held in public.” When a school board holds a meeting, its purpose is to conduct the business of the board as it relates to school policies, programs, budget, and operations. The purpose of open meetings law is to give members of the public access to the meetings of a governing board of a public entity, but that access does not give members of the public the right to participate or speak at the public meeting. *See, e.g.*, Attorney General Opinions – N.D.A.G. 2003-O-07; N.D.A.G. 99-O-07; N.D.A.G. 98-F-11. In the 1980s, the U.S. Supreme Court began using a categorical approach known as the “public forum doctrine” to analyze restrictions on private speech and other forms of expression on governmental property. Federal courts have delineated four general types of public forums, each requiring a different analysis to determine the scope of the public’s right to speech and the governmental body’s ability to regulate that speech: (1) traditional public/ open forum; (2) nonpublic/ closed forum; (3) designated public forum; (4) limited public forum. When a school board chooses to allow public comment at board meetings, then the policy, rules, and procedures the board creates determines what kind of forum it is establishing, most typically a “designated” or “limited” public forum in order to maintain the efficient and orderly operation of the board meeting.

Once a school board allows public comment and creates a designated or limited public forum, it is already limited in its ability to restrict public speech. Legally, in these types of forums that public boards create, restrictions on public comment must be reasonable in light of the forum's purpose and must be viewpoint neutral – i.e., the school board cannot discriminate or censor the speech on the basis of the speaker's point of view. Public bodies, including school boards, should maintain the ability to *choose* whether and at what times public comment periods during board meetings should be allowed. This allows for a careful balance between public comment periods and periods reserved to accomplish the board's primary purpose in conducting necessary public business. SB 2180 would require public bodies to include public comment periods at every board meeting on any topic without restriction, thus creating an open public forum, leaving boards little to no ability to control their boardrooms and to ensure public business is effectively conducted and accomplished.

The majority of school boards with which the NDSBA works already handle public comment periods appropriately at the local level under carefully-drafted policies that set the rules and limitations on the public forums the boards are creating. If this Committee were to issue a do-pass recommendation, we would respectfully request amendments to ensure that an entirely open public forum is not inadvertently created in our public boardrooms across the state. We would request that a meeting of a public entity “may” (not “must”) include an opportunity for a public comment period and “may” develop a policy with rules and regulations, including, but not limited to the following: (a) public entity controls the types of meetings at which public comments will be allowed, including regular versus special meetings; (b) public comments may be limited to agenda items only; (c) no individual public commenter may speak more than once; (d) public comment periods may be limited by time as an agenda item; (e) public comments may be limited by time per speaker; (f) topics for comment may be limited when the topic is prohibited from discussion in open meeting is prohibited from being brought before the public body, or is governed by another policy that dictates an alternative procedure for bringing the topic before the public body; and (g) undue interruption or other interference with the orderly conduct of board business may be prohibited, including, but not limited to, defamatory, abusive, harassing, or unlawful public comments. These types of rules are best left to local control under a policy that will ensure the public forum created in the board room remains a limited and not entirely open public forum.

There a number of circumstances whereby public comments may even be unlawful, which furthers the need to allow public bodies the ability to put proper restrictions and rules in place. For example, student educational records are protected under the Family Educational Rights and Privacy Act (FERPA) and cannot be discussed in open meetings, nor can FERPA-protected records typically be disclosed to school board members. Personnel complaints against certified employees in a school district (e.g., teachers and administrators) cannot

be brought before a school board in an open meeting in the event that the school board needs to sit in an impartial, unbiased capacity in a future contract nonrenewal or discharge hearing occurring in executive session where that employee has to be provided due process and an opportunity to a fair an impartial hearing.

Based on the foregoing reasons, the NDSBA asks this Committee to issue a do not pass recommendation on SB 2180. Thank you for your time.