

CURRIER & HUDSON

A PROFESSIONAL CORPORATION
POST OFFICE BOX 910329
SAN DIEGO, CALIFORNIA 92191
www.currierhudson.com

Review of the Ralph M. Brown Act

Presented by Kendall Swanson for the
Board of Trustees of the San Dieguito Union High School District
Special Board Meeting
March 31, 2023

*Designed to be augmented with oral remarks.

Open and Public

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.

- Government Code § 54950

The Brown Act is designed to ensure public access to local government.

Meetings

Definition of a Meeting:

“[A]ny congregation of a majority of the members of a legislative body at the same time and location, including teleconference...to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.”

Meetings

- ▶ All meeting *shall* be open and public, and all persons *shall* be permitted to attend any meeting, unless a closed session exception applies.
- ▶ Members of the public may attend without registering or providing their name.
- ▶ Any person attending may record and/or broadcast the meeting unless the Board makes a “reasonable finding” that the recording constitutes a persistent disruption.
- ▶ All action shall be taken publicly and no secret ballots are permitted.

Exception to Meetings Under the Brown Act

- ▶ Individual contacts or conversations between a member of a legislative body and any other person that do not otherwise violate the law.
- ▶ Conferences or similar gatherings.
- ▶ Community meetings or other legislative body meetings.
- ▶ Attendance of a majority of the members of a legislative body at a purely social or ceremonial occasion.
- ▶ Attendance “only as observers” at an open and noticed meeting of a standing committee of that body.

**** With all of the above exceptions, a majority of the Board may not discuss amongst themselves District business.***

Serial Meetings Prohibited

- ▶ A majority of the members of the Board “shall not, outside a meeting authorized by this chapter, use a series of communications *of any kind*, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.”
- ▶ Serial meetings occur when a majority of Board members have communicated about an issue, either directly or through an intermediary to discuss, deliberate, or take action.
- ▶ A collective concurrence is developed when members have either directly or indirectly heard each other's opinion on a topic to develop or begin to develop an agreement on a decision.

Serial Meetings and Electronic Communications

- ▶ The CA Attorney General opined that a majority of the board members of a local public agency may not use email to develop a collective concurrence as to action to be taken by the board without violating the Ralph M. Brown Act.
- ▶ Even if the emails are made public they would still be a violation of the Act because the board would be depriving the public of the deliberative process.
- ▶ The opinion also states, “The term ‘deliberation’ has been broadly construed to connote ‘not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.’ [Citation.]” (*Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 234.)

Social Media and the Brown Act

- ▶ In 2020, the Brown Act was amended to establish special rules regarding Board members communicating via social media.
- ▶ Board members are generally free to utilize social media, however, they may not communicate with one another on any social media platform regarding District business.
- ▶ Board members cannot respond, comment, like, or share another Board member's social media post concerning District business.
- ▶ These social media prohibitions apply to communications between even two board members. In the past, a Brown Act violation only occurred when a majority of the Board communicated. Now, there is a violation if simply one Board member responds to another on social media.

Meeting Agendas

▶ Requirements:

- Posting requirements - Agendas must be posted at least 72 hours before a regular meeting or 24 hours before a special meeting in a location freely accessible to the members of the public and there shall be a direct link to the agenda on the homepage of agency's homepage the agency's website.
- Content requirements - The agenda must contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session.
- Agendas must have enough information to enable members of the general public to determine the general nature of subject matter of each agenda item to be discussed.

Meeting Agendas

- ▶ The board may not discuss or take action on any item that is not properly agendized, except:
 - Board members or staff may **briefly** respond to statements made or questions posed by persons during public comment (*caution advised*);
 - Members may provide a reference to staff or other resources for factual information;
 - Members may request staff to report back to the body at a subsequent meeting concerning any matter;
 - The Board may take action to direct staff to place a matter of business on a future agenda; and/or
 - Emergency situation (*very rare, high standard*).

Meeting Agenda Materials

- ▶ Agenda Materials Distributed for Regular Meetings:
 - If a writing relates to an agenda item for open session of a regular meeting and is distributed to a majority of the Board **less than 72 hours prior to the meeting**, the writing shall be made available for public inspection at the time it is distributed to the Board.
 - Must be made available at the physical location identified in the agenda.

Meeting Agenda Materials - New Exception

- ▶ Agenda materials may now be provided to the Board less than 72 hours before a public meeting, even when the location where the physical copies of the materials for public inspection is closed (after hours and weekends/holidays) if all of the following conditions are met:
 - Agenda includes an executive summary and staff recommendation, if available, related to the agenda item.
 - The materials are immediately posted on the Board website.
 - The agenda states the website where the additional materials are posted.
 - The materials are available for public inspection at the start of the next business day, which cannot be less than 24 hours before the meeting.

Meeting Agenda Materials

- ▶ **Timing Requirements for Writings Distributed During the Meeting**
 - If prepared by the District or a member of the Board, the materials shall be made available for inspection **at the meeting**.
 - If prepared by “some other person,” the materials shall be made available **after the meeting**.

Quorum Requirements for Board Meetings

- ▶ Must have a quorum (3 Board members) to conduct meeting.
- ▶ Lawful meetings are held in-person or via teleconference.
- ▶ Teleconferencing under the Brown Act:
 - Traditional teleconferencing.
 - AB 361 teleconferencing.
 - AB 2449 teleconferencing.

Traditional Teleconferencing

▶ Traditional Teleconferencing Rules:

- ▶ Teleconference location must be physically accessible to the public
- ▶ Teleconference location address must be included on the agenda
- ▶ Agenda must be posted at each teleconference location
- ▶ Public comment must be permitted at each teleconference location
- ▶ Quorum of members must be within the body's jurisdictional boundaries

Teleconferencing Under AB 361

- ▶ Applies during a declared state of emergency and one of the following:
 - State or local officials have required or recommended measures to promote social distancing
 - Meeting is held for the purposes of voting on whether meeting in-person was an imminent health or safety risk
 - Meeting is held after a vote has determined that meeting in-person presents an imminent health or safety risk
- ▶ Requirements to conduct meeting under AB 361 rules:
 - Provide notice as to how public can access the meeting and comment during the meeting
 - If there is a technical disruption, cease official action until the public can access the meeting
 - Provide the public a way to address the body in real-time during the meeting

Teleconferencing Under AB 2449

- ▶ New Amendment to Government Code section 54953 - Effective January 1, 2023. Provides hybrid model of physical and remote attendance for members of legislative bodies when either “just cause” or “emergency circumstance” exists.
- ▶ At least a majority of the Board must be physically present at a single location within boundaries of the District.
- ▶ Before any action is taken during the meeting, the member must publicly disclose whether any other individuals 18 years of age or older are present in the room at the remote location with the member, and the general nature of the member’s relationship with any such individuals.
- ▶ A member participating from a remote location **must** participate through **both** audio and visual technology.
- ▶ A member’s remote participation cannot be for more than three consecutive months or 20 percent of the regular meetings for the local agency within a calendar year.

Teleconferencing Under AB 2449

- ▶ Requirements for AB 2449 Teleconferencing:
 - Must broadcast the meeting (two-way telephonic system and livestream);
 - Offer remote public comment;
 - Ensure that if a disruption to the online meeting occurs, the Board takes no further action on agenda items until public access is restored; and
 - Avoid requiring public comments to be submitted in advance, and provide a real-time option for the public to address the body at the meeting.
- ▶ All of the above shall be specified on the agenda.

Teleconferencing Under AB 2449

▶ Qualifying Reason - “Just Cause”

- ▶ Just cause is providing childcare or caregiving to a family member, having a contagious illness, physical or mental disability need, or traveling for official legislative business.
- ▶ Member must: (1) notify the local agency’s legislative body at the earliest opportunity of their need for such participation, and (2) provide a general description of the circumstances justifying their virtual attendance.
- ▶ Notification may occur as late as the start of a regular meeting. The Board **does not** need to take action to allow its member to attend the meeting virtually under such circumstances.
- ▶ A member is limited to two virtual attendances based on “just cause” per calendar year.

Teleconferencing Under AB 2449

- ▶ Qualifying Reason - “Emergency Circumstance”
 - ▶ Emergency circumstance is a physical or family emergency that prevents the member from attending the meeting.
 - ▶ Member must make a request to the Board to allow the member to meet remotely and must provide a general description of the circumstance justifying such attendance. Request must be made “as soon as possible,” and member shall make a separate request for each meeting in which they seek to participate remotely.
 - ▶ If the request does not allow sufficient time to be placed on the agenda as a proposed action item, then the Board may take action at the beginning of the meeting.

Public Participation: Public Comment

- ▶ Every Board meeting must provide the opportunity for members of the public to directly address the board
 - Regular meetings - any agenda item *and* any matter within the subject matter jurisdiction of the Board.
 - Special meetings - any agenda item.
- ▶ Must occur before or during the Board's consideration of an agenda item
- ▶ The Board may adopt "reasonable regulations" implementing public comment. For example, amount of time per speaker and/or per agenda item
- ▶ Reasonable regulations must be content neutral
- ▶ Cannot prohibit public criticism of the District, its employees/officers, its policies, procedures, programs, services, acts/omissions, etc.

Public Participation: Agenda Items

- ▶ The Education Code affords members of the public *additional rights* with respect to public participation at school board meetings:

“It is the intent of the Legislature that members of the public be able to place matters directly related to school district business on the agenda of school district governing board meetings...

Governing boards shall adopt reasonable regulations to insure that this intent is carried out. The regulations may specify reasonable procedures to insure the proper functioning of governing board meetings.”

Closed Session

- ▶ Absent express authority in the Brown Act, all District business must be conducted in open session.
- ▶ Common closed sessions authorizations:
 - Personnel matters, such as employment/appointment, evaluations, complaints/charges, and discipline;
 - Student discipline matters;
 - Conference with labor negotiators;
 - Conference with legal counsel regarding existing or anticipated litigation;
 - Real property negotiations.
- ▶ Closed session attendees: Only persons who have an “official or essential” role may attend closed session. “Official” role if they are authorized by statute to attend. “Essential” role if their presence is “essential” to the agency’s ability to conduct closed session business.

Closed Session

- ▶ **Agenda Requirement**: Before meeting in closed session, the District must list and describe any closed-session items on the public meeting agenda.
- ▶ **Oral Announcement at Meeting**: Before going into closed session, the Board must announce in open session the closed session items to be discussed.
- ▶ **Report Out**: After the closed session, the board must reconvene in open session and report certain actions taken in closed session. Not all action taken must be reported out.

Closed Session Confidentiality

- ▶ It is the “clear intent” of the law to keep all closed sessions strictly confidential.
- ▶ The disclosure of information acquired during closed session is prohibited under the law:

A person may not disclose confidential information that has been acquired by being present in a closed session...to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information.

- ▶ “Confidential Information” means “a communication made in closed session that is specifically related to the basis for [the closed session].”

Closed Session Confidentiality

- ▶ Violations of closed session confidentiality may be addressed in the following ways:
 - Court injunction, a violation of which would be punishable by contempt of court (fine of up to \$1,000 or imprisonment not exceeding 5 days);
 - Disciplinary action against employee; or
 - Referral of Board member to grand jury (potential accusation of willful or corrupt misconduct which can result in removal from office).
- ▶ Breach of confidential closed session information is considered a breach of legal and ethical responsibilities since the information undermines the position of the Board.

Penalty for Unlawful Meetings

Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor.

Remedies for Brown Act Violations

- ▶ Remedies are available to the district attorney or “any interested person.”
- ▶ Various forms of legal actions to:
 - Stop or prevent violations or threatened violations
 - Address ongoing actions or threatened future actions
 - Address past actions
 - Determine whether any rule of the Board unlawfully penalizes or discourages the expression of a Board member
 - Compel the audio recording of closed sessions

Remedies for Brown Act Violations

- ▶ Another remedy gives rise to a civil action to “null and void” certain actions taken by the Board in violation of the Brown Act:
 - Only available for certain types of violations
 - Must first issue a demand to cure and correct (within 30-90 days, depending upon violation)
 - Board given 30 days to “cure and correct”
 - In the event the Board takes action to “cure and correct,” any lawsuit regarding the violation will be dismissed by the court
 - No viable action if Board was in “substantial compliance” with the law

Remedies for Brown Act Violations

- ▶ A successful plaintiff in a Brown Act action will be awarded costs and attorney fees unless special circumstances exist - narrowly construed
- ▶ A successful defendant may only be awarded attorney fees in the action was “clearly frivolous and totally lacking in merit”



Questions?

Thank you!!!