

# PUBLIC PARTICIPATION AT BOARD MEETINGS

*Presentation by Grant Herndon  
August 1, 2014*

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*The First Amendment is often inconvenient.*

*— Anthony Kennedy, Associate Justice—United States Supreme Court*

Board meetings are gatherings of Constitutional significance! Boards and staff have the lofty duty of balancing the First Amendment rights of members of the public to express themselves on relevant topics with the need to conduct educational business efficiently.

Board meetings are often described as business meetings conducted in public. In addition to taking action on District business, governing board meetings afford Board and staff the opportunity to obtain important input from stakeholders who attend and participate. At the same time, it is important to maintain reasonable limits on the conduct and input of the public so that business can be conducted without significant disruption. The fact that a board meeting is held in public does not mean that it is a wide-open public form in which anyone can say anything at any time as if they were on a public sidewalk or in a public park.

The public has the right to participate in meetings of the governing board in several ways, including by

- suggesting agenda items,
- attending and observing the meeting,
- photographing or videotaping the proceedings,
- providing public comment, and
- access to documents

In this article, we will examine districts' rights and obligations concerning public participation, with emphasis on some particular challenges.

## **I. HOW DOES THE PUBLIC PARTICIPATE IN BOARD MEETINGS?**

### **A. Placing Matters on the Agenda**

While not required by the Brown Act, the Education Code gives members of the public the right to place matters directly related to school district business on the agenda of regular school

and community college district governing board meetings. Districts are required to adopt reasonable regulations to insure this is carried out.<sup>1</sup>

Reasonable restrictions can be imposed to allow Boards and staff to assemble the agenda for posting in a timely manner. For example, it is permissible to require that requests for agenda items are submitted a specified number of days in advance of the meeting. The agenda items must be “directly related” to school business.

Most boards have adopted policies requiring that agenda requests be made at least one week before the meeting date, with supporting documentation or information. The Board President and Superintendent decide whether the request is within the Board’s subject matter jurisdiction, and whether the request may be merely a request for information or an issue already addressed in Board policy or regulation. (See CSBA Board Bylaw 9322, copy attached.)

*Members of the public have the right to place matters on the agenda for regular Board meetings. The items must be directly related to school business.*

The subject matter jurisdiction of the Board is broad, but the law does not require that every request for an agenda item automatically be placed on the agenda. The courts have held that a Board’s duty in this area is “mixed with discretionary power” and the requirement that requested agenda items be “directly related to school district business” means the district has to exercise *some* judgement in deciding which proposed items meet the standard. The California Court of Appeal upheld the discretionary decision of the San Jose Unified School District Board of Trustees to refuse placement of a requested item on its agenda based on the Board’s assertion that the item was not within its jurisdiction. A parent requested an agenda item proposing that a “Rainbow Day” student event be renamed “all inclusive anti-bullying day,” and the Board declined, stating that it did not direct specific activities at individual schools.<sup>2</sup>

The failure to allow placement of a requested agenda item has also been attacked as a denial of free speech rights. In *Caldwell v. Roseville Joint Union High School District*, the plaintiff alleged that the school district refused on 12 occasions to specifically agendaize the adoption of his alternative curriculum on evolution based on an intent to discriminate against his viewpoint and/or religious beliefs. In denying the school district’s motion to dismiss this claim, the court acknowledged that “the public’s right to speak at open school board meetings includes the right to place school matters on the agenda of those meetings.”<sup>3</sup>

While a member of the public can request that an item be placed on the agenda and can address that item when it is called, the law does not impose on the Board a duty to act on the item.

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<sup>1</sup> See Education Code section 35145.5 (K-12) and 72121.5 (community college districts) - copy attached.

<sup>2</sup> *Mooney v. Garcia* (2012) 207 Cal.App.4th 229.

<sup>3</sup> *Caldwell v. Roseville Joint Union High School District, supra*, (E.D. Cal. 2005) 2005 U.S. Dist. LEXIS 24923, citing *Leventhal v. Vista unified School District* (S.D. Cal. 1997) 973 F.Supp.951.

Districts are not required to accommodate requests from the public for agenda items for special meetings.<sup>4</sup>

## **B. Attending the Meeting**

All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.<sup>5</sup>

Members of the public are entitled to notice of the time and place of the meeting via an agenda posted as required by law. This now includes the right to access the agenda on line if the district maintains an Internet website. Those with disabilities are entitled to copies of the agenda and agenda packet in appropriate alternative formats.<sup>6</sup>

The public is entitled to attend the meeting and observe the open session portion of the meeting. Attendees cannot be required to register or sign in or fill out a questionnaire as a condition of attendance.<sup>7</sup> If a district does post an attendance list or questionnaire or similar document near the entrance of the meeting room, or circulates it during the meeting, it must clearly state that signing in or registering or completing the document is voluntary and that anyone may attend the meeting whether or not the document is completed or signed.

Meetings must be held in locations which are accessible to people with disabilities. A meeting cannot be held in a facility that prohibits admission based on ancestry or other protected characteristics. Meetings cannot be held in a facility which requires a payment or purchase for the public to be present.<sup>8</sup>

## **C. Photography and Videotaping**

The Brown Act allows members of the public to photograph or record open sessions of public Board meetings. This has been interpreted to permit live television broadcasting of Board meetings.

Reasonable restrictions to ensure the orderly conduct of the meeting and to prevent disruption are permissible. For example, some districts establish a media area where videocameras and related equipment must be set up to avoid obstruction of the view of the

*Members of the public are entitled to videotape board meetings, provided they observe any reasonable limitations in District regulations designed to maintain order and avoid disruption.*

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<sup>4</sup> *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781.

<sup>5</sup> Brown Act, Government Code section 54953, copy attached.

<sup>6</sup> Brown Act, Government Code section 54954.1, copy attached.

<sup>7</sup> Brown Act, Government Code section 54954.3, copy attached.

<sup>8</sup> Brown Act, Government Code section 54961, copy attached.

Board and the Board's view of the public. The Board can halt or limit the recording if it makes a reasonable finding that the recording cannot continue without “noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.”

#### **D. Public Comment**

States have varying practices regarding public comment at governing board meetings.<sup>9</sup> In California, the right of the public to comment at the meetings of school boards and other local government bodies is spelled out in statute:

Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body.<sup>10</sup>

Members of the public thus have the right to comment on agenda items as they are taken up. Districts typically also provide a separate comment period for discussion of issues within the Board’s jurisdiction which are not on the agenda.

An opportunity for public comment must be provided at special meetings as well, although only with respect to “any item that has been described in the notice for the meeting.”<sup>11</sup>

The right of public comment emanates from the First Amendment to the United States Constitution, but it is not without limits, as discussed in the next section.<sup>12</sup>

## **II. FIRST AMENDMENT RIGHTS**

### **A. Nature of the Forum**

The courts analyze restrictions on speech under a “forum analysis.” In a traditional public forum, such as a park or other place where people assemble to debate issues, protections for free speech are the most powerful. Government restrictions on free speech are analyzed under a “strict scrutiny” standard and must be narrowly tailored to serve a compelling government interest. Even in a traditional public forum, government can regulate the “time, place and

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<sup>9</sup> Some states do not have a statutory mandate for public comment. Others have varying practices. For example, North Carolina requires a board of education to provide a public comment period at least once a month at a regular meeting. N.C. Gen. Stat. Section 115C-51.

<sup>10</sup> Very similar language is contained in Education Code section 35145.5 (K-12) and 72121.5 (community college districts).

<sup>11</sup> Brown Act, Government Code section 54954.3

<sup>12</sup> Copies of the First Amendment as well as Article II, Section 1 of the California Constitution are attached.

manner” of speech so long as the regulation is “content-neutral,” narrowly tailored to achieve a significant government interest, and leaves open ample channels of communication.<sup>13</sup>

At the other end of the spectrum is a non-public forum – a public place not traditionally used for public communication such as an airport terminal. The standards for restricting speech in a nonpublic forum are lower and easier to satisfy than in a traditional public forum.

School board meetings fall somewhere in the middle on this spectrum. The case law has evolved over the years in this area, and the courts have been less than clear as to the precise standard that applies to school and community college district board meetings. Board meetings have been characterized as a “designated public forum” (public property not traditionally open which government as opened for use by the public for speech and expressive activity) or a “limited public forum.” A limited public forum is open to the public in general, but is limited to comments related to the entity’s subject matter.<sup>14</sup>

The standards applied to these kinds of forums include a “strict scrutiny” approach applied to traditional public forum, and a more relaxed analysis of whether the restrictions on speech are reasonable in light of the forum’s purpose and do not discriminate on the basis of the speaker’s point of view. Federal courts with jurisdiction over California have applied the more stringent “strict scrutiny” standards.<sup>15</sup>

## **B. Time, Place and Manner Restrictions**

The Brown Act specifically allows districts to adopt reasonable regulations relating to public comment, including limitations on “the total amount of time allocated for public testimony on particular issues and for each individual speaker.”<sup>16</sup>

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<sup>13</sup> *Perry Educ. Ass’n v. Perry Local Educators Ass’n* (1983) 460 U.S. 37.

<sup>14</sup> *See, e.g., Leventhal v. Vista Unified School District* (S.D. Cal. 1997) 973 F.Supp. 951. In that case, a board bylaw allowed the Board to terminate a presenter’s address if the presenter “persists, after a warning, to engage in improper conduct or remarks” and limited the speaker’s right to present complaints or charges against district employees. The plaintiffs attempted to address the Board concerning an alleged relationship between a Board member and the superintendent which they felt might compromise the Board member’s ability to participate in contract negotiations and performance evaluations. The Court found that an open school board meeting is a “limited public forum,” although it applied the legal standard generally associated with a “designated public forum.” The court held that the board bylaw’s restrictions on criticism of District employees was a content-based regulation which was not narrowly tailored to advance a compelling state interest. The Court specifically declined to address whether districts could protect students’ rights to privacy.

<sup>15</sup> *Caldwell v. Roseville Joint Union High School District, supra*, 2005 U.S. Dist. LEXIS 24923; *Baca v. Moreno Valley Unified School District* (C.D. Cal. 1996) 936 F.Supp. 719; *Kindt v. Santa Monica Rent Control Board* (9<sup>th</sup> Cir. 1995) 67 F.3d 266.

<sup>16</sup> Brown Act, Government Code section 54954.3

Even in the absence of this authority in statute, time limits as short as two minutes on public comment have been held to be constitutional in many jurisdictions around the country.<sup>17</sup> In California, the typical minimum is three minutes, which was approved by the federal Court of Appeals having jurisdiction over California.<sup>18</sup> Limits on the overall time allotted for a particular topic are also common, typically 20 minutes.<sup>19</sup>

It is also common for districts to use “speaker cards” so the Board can organize the time allotted for public comment. Speakers typically state their name and the topic on which they wish to speak.<sup>20</sup>

Restrictions which focus on the content of speech are likely to be subject to challenge, unless, as discussed above, the restriction is narrowly tailored to further an important government interest. The York City School District in Pennsylvania is defending a lawsuit over the Board’s restriction of public comment concerning a decision not to renew a charter school, citing pending litigation.<sup>21</sup>

## **C. Criticism of District Board Members and Employees**

### **1. Can members of the public criticize board members in open session?**

I’m not going to allow this to turn into a situation where members of the public engage board members in personal attacks . . . If that’s an abridgement of First Amendment rights, then I’ll wait for a court of law to tell me that.

~~Board member in *Leventhal v. Vista Unified School District*

In *Leventhal v. Vista Unified School District*, the court did just that!<sup>22</sup> In that case, the school board used a board bylaw to shut down a speaker who criticized both an elected board member and an employee, namely a trustee alleged to have been involved in a relationship with the superintendent which the speaker felt would compromise the Board member’s ability to evaluate the Superintendent and negotiate his compensation. The court was not sympathetic and held the bylaw to be unconstitutional to the extent it limited the content of speech relating to criticism of officials and employees.

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<sup>17</sup> *Collison v. Gott* (4<sup>th</sup> Cir. 1994) 895 F.2d 994

<sup>18</sup> *Kindt v. Santa Monica Rent Control Board* (9<sup>th</sup> Cir. 1995) 67 F.3d 266.

<sup>19</sup> For K-12 districts, the limitations are set out in CSBA Board Bylaw 9323, copy attached.

<sup>20</sup> Many districts also require the address of the speaker. There is no known authority to require an address; this condition would likely not withstand judicial scrutiny. In addition, while the Board needs to be able to identify speakers in some way to organize the meeting, it may be risky for a Board to refuse to recognize a speaker who does not wish to provide his or her name.

<sup>21</sup> NSBA, Recent Developments in School Law, citing the *York Daily Record* 3/25/14.

<sup>22</sup> *Leventhal v. Vista Unified School District*, *supra*, 973 F.Supp. 951.

There is currently no basis in law to discuss complaints against Board members in closed session. The Brown Act addresses such public criticism as follows:

The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.<sup>23</sup>

It is clear that districts cannot censor the content of public speech criticizing its elected officials, with the possible exception of speech which has no relation to District business or the trustee's qualifications for office. A speaker can be held to appropriate time, place and manner restrictions, and beyond that Board members must endure the public criticism.

## **2. What about criticism of employees in open session?**

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Debate over public issues, including the qualifications and performance of public officials (such as a school superintendent), lies at the heart of the First Amendment.<sup>24</sup>

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It is often difficult for board members and administrators to endure public criticism of employees, particularly when the comments appear to be unfair or without foundation. However, as pointed out in the *Leventhal* case, when restrictions on such speech appear to be content-related, districts are subject to a heavy burden to justify the restrictions.<sup>25</sup>

In *Baca v. Moreno Valley Unified School District*, another case involving a California school district, a parent addressing the school board spoke about complaints brought to a principal and the superintendent which she said went unaddressed, and apparently referred to the administrators as "child abusers and racists."<sup>26</sup> The Board President warned her that she could not mention the employees by position or name, and when she continued, she was physically removed from the meeting. (Other speakers mentioning employees by name were not removed.)

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<sup>23</sup> Brown Act, Government Code section 54954.3, copy attached. Note that prior to a 1975 amendment, the "personnel exception" to the Brown Act allowed discussions of both employees and officers in closed session.

<sup>24</sup> *Leventhal v. Vista Unified School District*, *supra*, at p. 958.

<sup>25</sup> The *Leventhal* court did distinguish between the complaints at issue in the case, consisting of verbal statements about policy-making employees, and speech involving complaints against non-policymaking employees alleging specific violations of law or policy. The court declined to address the latter.

<sup>26</sup> *Baca v. Moreno Valley Unified School District* (C.D. Cal. 1996) 936 F.Supp. 719. The court said, "It is difficult to imagine a more content-based prohibition on speech than this policy, which allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)."

The parent sought an injunction to prevent the District from enforcing its board policy which prohibited open session discussion regarding charges or complaints against employees. The Court noted that the California Constitution provides an even broader guarantee of free speech than the First Amendment to the United States Constitution<sup>27</sup> and held that the District could not prohibit citizens from speaking even if the speech may be defamatory. The court held that the District's policy prohibiting only speech critical of employees was a content-based regulation which was not justified by the District's interest in protecting employee privacy or in regulating its Board meetings.

The California Attorney General issued a 2007 opinion concluding that an administrative employee could not be prohibited from addressing the governing board regarding the proposed demotion of the employee from assistant principal to a teaching position, and could not be prevented from attending the Board meeting. The Attorney General noted that the matter was within the Board's subject matter jurisdiction and subject to public comment before or during the Board's consideration of the agenda item, and that the staffing of key administrative positions within a school district is of significant public interest.<sup>28</sup>

Some commentators state that the test is whether the criticism pertains to job performance.<sup>29</sup> This would suggest that some statements made regarding employees could be censored. See discussion below, "So what can be done when criticism gets out of hand?"

### **3. Can members of the public be required to present complaints in a closed session?**

In the *Baca v. Moreno Valley* opinion discussed above, the court asserts that presenting a comment in a closed session meeting or on a grievance form is not a reasonable alternative to a criticism of employees in open session because it does not reach the same audience.<sup>30</sup>

However, the Board can offer a closed session discussion to discuss the speaker's complaint against an employee, and this is sometimes a valuable option to avoid embarrassment to the employee, and this option may also be preferred by the speaker. When considering whether to allow this, keep in mind that many district complaint policies permit a complainant unsatisfied with the disposition of a complaint to appeal it to the Board, such that it may be important not to bring the complaint before the Board at an

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<sup>27</sup> See California Constitution, Article I. Section 2, and United States Constitution, First Amendment, copies attached.

<sup>28</sup> 90 Opinions of the California Attorney General 47 (2007).

<sup>29</sup> League of Cities of California, *Open & Public IV: A Guide to the Ralph M. Brown Act*, 2<sup>nd</sup> ed. Revised, July 2010, p. 30.

<sup>30</sup> Courts in other states have upheld the use of grievance procedures as a reasonable alternative means for addressing a complaint about an employee. *Fairchild v. Liberty Independent School District* (5<sup>th</sup> Cir. 2010) 597 F.3d 747.

earlier stage, to help insure impartiality when the matter does reach the Board. In addition, the Board discussion of the complaint or charge may be subject to the Brown Act provision requiring 24 hours' advance notice to the affected employee and the right of the employee to move the discussion into open session.<sup>31</sup>

#### **4. So what can be done when criticism gets out of hand?**

While the Board's hands are largely tied with respect to criticism of its own ranks and of employees, the following thoughts should be kept in mind:

- If the speech has absolutely no relation to District business, Board jurisdiction or the person's qualifications for office, the Board can halt the speech. Example: "The middle school principal is a Muslim, and those people are here to take over the country by force." It is hard to see how this speech relates to District business or the performance or even the character of an employee.
- If the Board is considering halting the speech, the Board President should first offer the speaker an opportunity to demonstrate how the statements relate to matters within the Board's jurisdiction. Board minutes should document that the speech was curtailed because it appeared to have no relation to the subject matter jurisdiction of the District, and no reasonable justification was offered by the speaker. While the restriction does address the content of the speech, in this situation the Board President's actions "served the function of confining the discussion to the purpose of the meeting . . . speech at a citizen's forum may be limited according to its germaneness to the purpose of the meeting."<sup>32</sup>
- Given the potential for a First Amendment challenge, Boards should proceed with caution in deciding whether to curtail a citizen's speech and err on the side of permitting the speech if there is room for doubt.
- The Board can inform the speaker that it has procedures for handling complaints against employees that it is required by law to follow, and request that the person follow those procedures so that the Board can properly evaluate the complaint.<sup>33</sup>

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<sup>31</sup> Brown Act, Government Code section 54957, copy attached.

<sup>32</sup> *Eichenlaub v. Township of Indiana, supra*, 385 F.3d 274; *see also*, 78 Opinions of the California Attorney General 224 (1995) (" . . . the Legislature may properly limit the matters to be addressed by the public to those topics "within the subject matter jurisdiction of the legislative body," as it has done in [Government Code] section 54954.3.")

<sup>33</sup> The suggestion that the speaker refrain from addressing the issue publicly should not cross the line into coercion. *See, Baca v. Moreno Valley Unified School District, supra, citing American Communications Association v. Douds* (1950) 339 U.S. 382 ("indirect discouragements are fully capable of a coercive effect on speech.")

For K-12 districts, Board Bylaw 9323 contains the following optional procedure to be used in this circumstance:

“Whenever a member of the public initiates specific complaints or charges against an employee, the Board president shall inform the complainant that in order to protect the employee's right to adequate notice before a hearing of such complaints and charges, and also to preserve the ability of the Board to legally consider the complaints or charges in any subsequent evaluation of the employee, it is the policy of the Board to hear such complaints or charges in closed session unless otherwise requested by the employee pursuant to Government Code section 54957. The Board president shall also encourage the complainant to file a complaint using the appropriate district complaint procedure. “

- If the speech appears to be false and maligns the character of the employee such that it may be defamatory, the Board President may remind the speaker that he or she may be legally responsible for statements made to employees. However, the determination of whether speech is defamatory is susceptible to many mis-steps for a Board President, and such speech should not be halted unless some other basis for doing so exists (e.g., evidence of disruption, lack of any conceivable link to school business, etc.) In addition, it must be noted that the law broadly protects speech at official proceedings such as board meetings – even the speech of a “malignant slanderer” – unless the speech has no relation to the subject matter of the meeting.<sup>34</sup>

In light of the federal cases cited above, if the person proceeds despite the admonishment to criticize the Board or staff, the speech should be permitted, subject to applicable time limitations. However, if the speech become disruptive such that the purpose of the meeting cannot be accomplished, see the discussion in the following section.

### **III. TOOLS FOR DEALING WITH DISRUPTION AND REPETITION**

#### **A. Disruption**

There are times when a controversial issue attracts a large crowd to a Board meeting, and the crowd may get out of hand. People begin talking out of turn, roaming around the room, interrupting Board members or speakers, becoming argumentative and refusing to abide by directions of the Board President. The Board can impose reasonable restrictions to preserve the

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<sup>34</sup> Civil Code section 47 creates a privilege for speech made in official proceedings authorized by law, as part of a public policy intended to foster citizens' access to official bodies to defend their rights without fear of being harassed by actions for defamation. *Frisk v. Merrihew* (1974) 42 Cal.App.3d 319 (derogatory comments about an employee may not be protected where the employee's competence and qualifications were not before the Board).

“civility and decorum necessary to further the forum’s purpose of conducting public business” and to maximize citizen participation in the discussion.<sup>35</sup>

In planning for the meeting, it is important for the Board to consider whether to move the meeting to a setting that will accommodate the crowd, and to consider whether security personnel may be desirable.

The Brown Act addresses disruption. If the conduct of those present at the meeting truly interrupts the orderly conduct of the meeting, the Board President should request the offending citizens to take their seats and settle down. If they persist, the Board can order the disruptors to leave the meeting and can have them removed by law enforcement. If order cannot be restored by removal of the disruptors, the Board can order the room cleared. The meeting then continues, addressing only agenda items. Members of the media who were not part of the disturbance must be permitted to attend the continued session.<sup>36</sup> As discussed above, consistency in addressing disruption is key, and the authority to limit discussion or remove a speaker should not be used to stifle a particular viewpoint on a legitimate topic of discussion.

Certain kinds of speech can be presumed disruptive and can be restricted. This includes obscenity, which is not constitutionally protected speech. **CAUTION:** obscenity has been narrowly defined by the courts under a fairly complex legal standard and it may be difficult for many Board Presidents to make this determination without some prior training.<sup>37</sup>

Mere profanity, while deeply offensive to many board members, normally does not rise to the level of obscenity.<sup>38</sup> The board can admonish the speaker and request that he or she clean up his language, but the removal of such a speaker may provide grounds for a legal challenge. In addition, it is important to look at other aspects of the speaker’s conduct and demeanor besides the language used, such as whether the speaker was threatening or disruptive in some other way.

Fighting words (words whose mere utterance entails a call to violence) are another form of speech that may be considered disruptive.

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<sup>35</sup> See, *Steinberg v. Chesterfield County Planing Commission* (4th Cir. 2008) 527 F.3d 377.

<sup>36</sup> Brown Act Government Code section 54957.9, copy attached.

<sup>37</sup> Obscenity has been defined as speech which the average person using contemporary community standards would find appeals to the prurient interest, depicts sexual conduct in a patently offensive way, lacks serious literary, political, artistic or scientific value. *Miller v. California* (1973) 413 U.S. 15.

<sup>38</sup> See, *Cohen v. California* (1971) 403 U.S. 15 (Appellant’s wearing of a t-shirt in a courthouse with the message “F\*\* the Draft” was “not an obscenity case . . . such expression must be, in some significant way, erotic.”)

## B. Repetition

Repetition can be harder to deal with. Members of the public who have an issue with the District may come to a series of meetings to voice the same concerns, time and time again. In some cases, the repetitive comments absorb precious time and can be considered disruptive.

There is support in the case law for dealing with repetitious comments, as a means of maintaining order at the meeting. In one case, the plaintiff claimed that in three separate meetings, he was ruled out of order when he attempted to speak on relevant topics before the City Council and was removed from the meeting on one occasion.<sup>39</sup> The court dismissed the plaintiff's request to invalidate the city ordinance on public comment and his claim for damages with the following commentary:

A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extending discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.

The court recognized the difficulty for the moderator, since "the point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable."

However, the Brown Act does not specifically permit a board to limit the number of times a citizen can address it on a particular matter. The Act does say that a Board is not required to permit a member of the public to address the board on an item already considered by a committee composed exclusively of members of the Board at a public meeting, unless the Board determines the matter has been substantially changed since the committee heard the item.<sup>40</sup> An argument can be made that the Legislature knew how to limit repetitive public comment when it did so in the case of comments originally aired before a Board committee, and its failure to enact a rule allowing the Board to limit comments previously brought to the full Board means that it is not lawful for the Board to do so.

When courts in other states have upheld a public agency's action to cut off repetitious speech, it was often in the context of other factors, such as excessive duration of the comments, or the repetitious nature of comments not related to an agenda topic.<sup>41</sup>

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<sup>39</sup> *White v. City of Norwalk* (9<sup>th</sup> Cir. 1990) 900 F.2d 1421; *See also, Kindt v. Santa Monica Rent Control Board, supra*, 67 F.3d 266 ("While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious").

<sup>40</sup> Brown Act, Government Code, section 54954.3, copy attached.

<sup>41</sup> Allison Brown Schaefer, 2010 NSBA School Law Practice Seminar, *Public Comment at Board Meeting: Democracy at its Best and Worst*.

In a case before the New Jersey Supreme Court, the parent of a student in the school's basketball program had addressed the Board on eight separate occasions regarding inappropriate language used by the coach, met with school officials and wrote letters of complaint.<sup>42</sup> When he came before the Board for the ninth time, the Board President announced that the session was not intended for discussion of personnel or to make allegations concerning staff. After speaking for about 30 seconds, the parent was gavelled down. Other speakers were allowed to exceed the five-minute time limit. He brought suit alleging violation of his First Amendment rights and was awarded \$100,000 in damages.

The New Jersey Supreme Court found that under the circumstances in the case, it was reasonable for the jury to conclude that the restriction on speech was not imposed so much to maintain order and cut down on repetitive remarks as to prevent the parent's viewpoint from being heard. The court also noted the inconsistency in applying time, place and manner restrictions to other speakers.

At least one court upheld restrictions on a plaintiff's speech where the record showed he was "repetitive and truculent" and repeatedly interrupted the meeting chair. The court found the restrictions to be reasonable, content-neutral time, place and matter restrictions, stating, "Indeed, for the presiding officer to allow a speaker to try to hijack the proceedings, or to filibuster them, would impinge on the First Amendment rights of other would-be participants."<sup>43</sup>

Mindful of the legal risks, a board considering restricting a member from the public from addressing it repeatedly should not do so until the person has had several (more than two) opportunities to address the Board on the issue. The Board should ascertain whether the speaker has any new material to add. Finally, the Board should ensure that it enforces such standards uniformly and not as a means to censure the content of speech with which it does not agree. The safest course is to allow the speech, imposing the time limitations allowed in board policy.

#### **IV. TIPS FOR WIELDING THE GAVEL**

It is important to remember that school and community college district boards are often the institutions of government to which citizens have the most direct access. They can exercise their First Amendment rights in the most direct way by participating in board meetings.

Much can be done to impact the state of mind of those who seek to attend and participate in meetings, which in turn may impact their decision to challenge the actions, decisions or procedures used by the agency. Many citizens may have little experience interacting with government. They may come to the meeting only when they perceive some sort of problem or negative experience. They may be disenchanting with government in general and lack appropriate

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<sup>42</sup> *Besler v. Board of Education of West Windsor-Plainsboro Regional School District* (N.J. 2010) 993 A.2d 805.

<sup>43</sup> *Eichenlaub v. Township of Indiana Bd. of Supervisors* (3d Cir. 2004) 385 F.3d 274.

decorum. Speakers may engage in dramatic and disparaging displays, thinking this will draw more attention to their issue.

It is important for Boards to adhere to protocols and time limits firmly, but showing courtesy to speakers. If the Board decides to waive the time limits for one person, it should be consistent in its treatment of other speakers. Speakers should be acknowledged with eye contact, actively listened to, and thanked for their comments.<sup>44</sup> Citizens should have access to documents relevant to the issues being discussed and should know where to access District agendas and minutes.

It is helpful for members of the public to understand the rules of public comment. Many Board Presidents read the rules before public comment begins, and districts often have a detailed section in the agenda explaining how the process works, how to approach the Board to make comments, the use of speaker cards, and other rules. Schools Legal Service has sample materials for this purpose. Some districts use public comment cards for members of the public who wish to make the board aware of a concern but do not wish to speak. Of course, this means that some process needs to be in place to follow up on the comments if necessary.

## **V. ACCESS TO DOCUMENTS**

Another tool for participation in Board meetings is the right to access documents. Members of the public are entitled to request copies of agendas and agenda packets. Standing requests are valid for up to one year. The District must mail the documents to the requestor once they have been distributed to at least a Board majority.<sup>45</sup>

As noted above, the public can also access agendas electronically if the district maintains an Internet website. While not required to do so, most districts also post their minutes on line, and many also post the open session agenda packets.

A special rule now addresses last minute documents furnished to Board members. Any document relating to an agenda item provided to the Board within 72 hours of a regular Board meeting must be made available for public inspection at a location designated in the agenda, once the document has been provided to at least a Board majority.<sup>46</sup>

Documents distributed during a meeting that are not confidential must be made available for public inspection at the meeting if prepared by the district or a Board member. If they were prepared by some other person, they can be furnished after the meeting.

## **VI. WHAT LIES AHEAD?**

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<sup>44</sup> See, John Stephens and A. Fleming Bell II, *Public Comment at Meetings of Local Government Boards Part One: Guidelines for Good Practices*.

<sup>45</sup> Brown Act, Government Code section 54954.1, copy attached.

<sup>46</sup> Brown Act, Government Code section 54957.5, copy attached.

With the exception of the requirement to post agendas electronically, the Brown Act currently does not require local agencies to facilitate communication by members of the public using technology. Some commentators take the position that a request to show videos or a PowerPoint presentation during public comment probably must be accommodated subject to time limits and provided there is no obligation for the agency to furnish the necessary equipment.<sup>47</sup>

Board members are often equipped with District-furnished laptops or tablets which they use at Board meetings to access Board packets and other information. It is likely only a matter of time until the Brown Act recognizes new ways for the public to participate in Board meetings using emerging technologies.

One commentator wrote in 2006,

. . . the scope of the Brown Act should also include online public testimony, use of the Internet to post agenda items and recordation of meetings' minutes [already a reality], and even expanding to webcasting meetings and allowing online submission of public testimony. A remaining question within this analysis is how much information governments would be compelled to post online and whether citizens could impose an affirmative obligation on government to keep pace with technology.<sup>48</sup>

## VII. CONCLUSION

In the end, implementation of the Brown Act must ensure full participation of the public and preserve the integrity of the decision-making process, yet not stifle government officials and impede the effective and natural operation of government.<sup>49</sup>

As we have seen, the right of the public to participate in Board meetings is built into the Brown Act and First Amendment law in a number of ways.

Boards do best when they understand the process well enough to embrace the role of the public while enforcing limits when necessary to ensure an orderly business meeting.

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<sup>47</sup> League of Cities of California, *Open & Public IV: A Guide to the Ralph M. Brown Act*, 2010, p. 30.

<sup>48</sup> Stacy D. Schesser, *California Law Review*, "COMMENT: A New Domain for Public Speech: Opening Public Spaces Online" 2006.

<sup>49</sup> *Id.*, p. 5.

## EXCERPTS FROM CONSTITUTIONS AND STATUTES

### **First Amendment to the U.S. Constitution:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

### **California Constitution, Article I, Section 2:**

(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

## EDUCATION CODE

**35145.5:** 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. Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the governing board on any item of interest to the public, before or during the governing board's consideration of the item, that is within the subject matter jurisdiction of the governing board. 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.

This subdivision shall not preclude the taking of testimony at regular meetings on matters not on the agenda which any member of the public may wish to bring before the board, provided that, except as authorized by Section 54954.2 of the Government Code, no action is taken by the board on those matters at the same meeting at which the testimony is taken. Nothing in this paragraph shall be deemed to limit further discussion on the same subject matter at a subsequent meeting.

**72121.5:** It is the intent of the Legislature that members of the public be able to place matters directly related to community college district business on the agenda of community college district governing board meetings, and that members of the public be able to address the board regarding items on the agenda as such items are taken up. Governing boards shall adopt reasonable regulations to insure that this intent is carried out. Such regulations may specify reasonable procedures to insure the proper functioning of governing board meetings.

This subdivision shall not preclude the taking of testimony at regularly scheduled meetings on matters not on the agenda which any member of the public may wish to bring before the board, provided that no action is taken by the board on such matters at the same meeting at which such testimony is taken. Nothing in this paragraph shall be deemed to limit further discussion on the same subject matter at a subsequent meeting.

## BROWN ACT EXCERPTS Government Code

**54953:** (a) All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.

(b) (1) Notwithstanding any other provision of law, the legislative body of a local agency may use teleconferencing for the benefit of the public and the legislative body of a local agency in connection with any meeting or proceeding authorized by law. The teleconferenced meeting or proceeding shall comply with all requirements of this chapter and all otherwise applicable provisions of law relating to a specific type of meeting or proceeding.

(2) Teleconferencing, as authorized by this section, may be used for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body. All votes taken during a teleconferenced meeting shall be by rollcall.

(3) If the legislative body of a local agency elects to use teleconferencing, it shall post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body of a local agency. Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public. During the teleconference, at least a quorum of the members of the legislative body shall participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction, except as provided in subdivision (d). The agenda shall provide an opportunity for members of the public to address the legislative body directly pursuant to Section 54954.3 at each teleconference location.

(4) For the purposes of this section, "teleconference" means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both. Nothing in this section shall prohibit a local agency from providing the public with additional teleconference locations.

(c) (1) No legislative body shall take action by secret ballot, whether preliminary or final.

(2) The legislative body of a local agency shall publicly report any action taken and the vote or abstention on that action of each member present for the action.

(d) (1) Notwithstanding the provisions relating to a quorum in paragraph (3) of subdivision (b), when a health authority conducts a teleconference meeting, members who are outside the jurisdiction of the authority may be counted toward the establishment of a quorum when participating in the teleconference if at least 50 percent of the number of members that would establish a quorum are present within the boundaries of the territory over which the authority exercises jurisdiction, and the health authority provides a teleconference number, and associated access codes, if any, that allows any person to call in to participate in the meeting and that number and access codes are identified in the notice and agenda of the meeting.

(2) Nothing in this subdivision shall be construed as discouraging health authority members from regularly meeting at a common physical site within the jurisdiction of the authority or from using teleconference locations within or near the jurisdiction of the authority. A teleconference meeting for which a quorum is established pursuant to this subdivision shall be subject to all other requirements of this section.

(3) For purposes of this subdivision, a health authority means any entity created pursuant to Sections 14018.7, 14087.31, 14087.35, 14087.36, 14087.38, and 14087.9605 of the Welfare and Institutions Code, any joint powers authority created pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 for the purpose of contracting pursuant to Section 14087.3 of the Welfare and Institutions Code, and any advisory committee to a county sponsored health plan licensed pursuant to Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code if the advisory committee has 12 or more members.

(4) This subdivision shall remain in effect only until January 1, 2018.

**54953.3:** A member of the public shall not be required, as a condition to attendance at a meeting of a legislative body of a local agency, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.

If an attendance list, register, questionnaire, or other

**54953.5:** (a) Any person attending an open and public meeting of a legislative body of a local agency shall have the right to record the proceedings with an audio or video recorder or a still or motion picture camera in the absence of a reasonable finding by the legislative body of the local agency that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.

**54954.1:** Any person may request that a copy of the agenda, or a copy of all the documents constituting the agenda packet, of any meeting of a legislative body be mailed to that person. If requested, the agenda and documents in the agenda packet shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. Upon receipt of the written request, the legislative body or its designee shall cause the requested materials to be mailed at the time the agenda is posted pursuant to Section 54954.2 and 54956 or upon distribution to all, or a majority of all, of the

**54954.3:** (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a

similar document is posted at or near the entrance to the room where the meeting is to be held, or is circulated to the persons present during the meeting, it shall state clearly that the signing, registering, or completion of the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers, or completes the document.

(b) Any audio or video recording of an open and public meeting made for whatever purpose by or at the direction of the local agency shall be subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), but, notwithstanding Section 34090, may be erased or destroyed 30 days after the recording. Any inspection of an audio or video recording shall be provided without charge on equipment made available by the local agency.

members of a legislative body, whichever occurs first. Any request for mailed copies of agendas or agenda packets shall be valid for the calendar year in which it is filed, and must be renewed following January 1 of each year. The legislative body may establish a fee for mailing the agenda or agenda packet, which fee shall not exceed the cost of providing the service. Failure of the requesting person to receive the agenda or agenda packet pursuant to this section shall not constitute grounds for invalidation of the actions of the legislative body taken at the meeting for which the agenda or agenda packet was not received.

committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body. Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of that item.

(b) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.

**54957.** (a) This chapter shall not be construed to prevent the legislative body of a local agency from holding closed sessions with the Governor, Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager, on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or public facilities.

(b) (1) Subject to paragraph (2), this chapter shall not be construed to prevent the legislative body of a local agency from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.

(2) As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather

**54957.5:** (a) Notwithstanding Section 6255 or any other law, agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be made available upon request without delay. However, this section shall not include any writing exempt from public disclosure under Section 6253.5, 6254, 6254.3, 6254.7, 6254.15, 6254.16, 6254.22, or 6254.26.

(b) (1) If a writing that is a public record under subdivision (a), and that relates to an agenda item for an

(c) The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void.

(3) The legislative body also may exclude from the public or closed meeting, during the examination of a witness, any or all other witnesses in the matter being investigated by the legislative body.

(4) For the purposes of this subdivision, the term "employee" shall include an officer or an independent contractor who functions as an officer or an employee but shall not include any elected official, member of a legislative body or other independent contractors. This subdivision shall not limit local officials' ability to hold closed session meetings pursuant to Sections 1461, 32106, and 32155 of the Health and Safety Code or Sections 37606 and 37624.3 of the Government Code. Closed sessions held pursuant to this subdivision shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline

open session of a regular meeting of the legislative body of a local agency, is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection pursuant to paragraph (2) at the time the writing is distributed to all, or a majority of all, of the members of the body.

(2) A local agency shall make any writing described in paragraph (1) available for public inspection at a public office or location that the agency shall designate for this purpose. Each local agency shall list the address of this office or location on the agendas for all meetings of the legislative body of that agency. The local agency also may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming

meeting.

(3) This subdivision shall become operative on July 1, 2008.

(c) Writings that are public records under subdivision (a) and that are distributed during a public meeting shall be made available for public inspection at the meeting if prepared by the local agency or a member of its legislative body, or after the meeting if prepared by some other person. These writings shall be made available in appropriate alternative formats upon request by a person with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof.

(d) This chapter shall not be construed to prevent the

**54957.9:** In the event that any meeting is willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting, the members of the legislative body conducting the meeting may order the meeting room cleared and continue in session. Only matters appearing on the agenda may be considered in such a session. Representatives of the

**54961:** (a) No legislative body of a local agency shall conduct any meeting in any facility that prohibits the admittance of any person, or persons, on the basis of ancestry or any characteristic listed or defined in Section 11135, or which is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase. This section shall

legislative body of a local agency from charging a fee or deposit for a copy of a public record pursuant to Section 6253, except that a surcharge shall not be imposed on persons with disabilities in violation of Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof.

(e) This section shall not be construed to limit or delay the public's right to inspect or obtain a copy of any record required to be disclosed under the requirements of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1). This chapter shall not be construed to require a legislative body of a local agency to place any paid advertisement or any other paid notice in any publication.

press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the legislative body from establishing a procedure for readmitting an individual or individuals not responsible for willfully disturbing the orderly conduct of the meeting.

apply to every local agency as defined in Section 54951.

(b) No notice, agenda, announcement, or report required under this chapter need identify any victim or alleged victim of tortious sexual conduct or child abuse unless the identity of the person has been publicly disclosed.

## **Board Bylaw**

### **Agenda/Meeting Materials**

#### **BB 9322 Board Bylaws**

##### Agenda Content

\*\*\*Note: Government Code 54954.2 requires Governing Board meeting agendas to briefly describe each item to be discussed, including closed session items, and states that a brief general description of an item generally need not exceed 20 words. For information regarding the different types of meetings and meeting location requirements, see BB 9320 - Meetings and Notices. For agenda requirements regarding closed session agenda items, see BB 9321 - Closed Session Purposes and Agendas.\*\*\*

Governing Board meeting agendas shall state the meeting time and place and shall briefly describe each business item to be transacted or discussed, including items to be discussed in closed session. (Government Code 54954.2)

(cf. 9320 - Meetings and Notices)

(cf. 9321- Closed Session Purposes and Agendas)

The agenda shall provide members of the public the opportunity to address the Board on any agenda item before or during the Board's consideration of the item. The agenda shall also provide members of the public an opportunity to testify at regular meetings on matters which are not on the agenda but which are within the subject matter jurisdiction of the Board. (Education Code 35145.5; Government Code 54954.3)

(cf. 9323 - Meeting Conduct)

\*\*\*Note: Pursuant to Government Code 54957.5, when agenda materials are distributed to the Board less than 72 hours before a meeting, the agenda must include the address of the location where the public can inspect those agenda materials. Also see section below entitled "Agenda Dissemination to Members of the Public."\*\*\*

Each meeting agenda shall list the address designated by the Superintendent or designee for public inspection of agenda documents that have been distributed to the Board less than 72 hours before the meeting. (Government Code 54957.5)

\*\*\*Note: Government Code 54954.2 requires that the agenda include information regarding how, when, and to whom a request for a disability-related accommodation or modification may be made. See BB 9320 - Meetings and Notices. The following paragraph should be modified to reflect district practice as to when and to whom such a request should be made.\*\*\*

The agenda shall specify that an individual should contact the Superintendent or designee if he/she requires disability-related accommodations or modifications, including auxiliary aids and services, in order to participate in the Board meeting. (Government Code 54954.2)

#### Agenda Preparation

\*\*\*Note: Education Code 35145.5 mandates that the Board adopt reasonable regulations to ensure that members of the public can place matters directly related to school district business on Board meeting agendas. In *Mooney v. Garcia*, a California appeals court reaffirmed boards' discretion in determining what agenda items are related to school district matters.\*\*\*

\*\*\*Note: The following section, including the timelines, should be revised to reflect district practice. Districts are free to establish their own timelines for placing an item on the agenda, taking into account staff time and resources, as long as the established timeline is a reasonable one. In *Caldwell v. Roseville Joint Union High School District*, a federal district court upheld a district bylaw requiring members of the public to submit a written request in order to place items on a meeting agenda. The plaintiff had alleged that his First Amendment rights were violated when the district did not place his item on the agenda in response to his oral request because the district disagreed with his religious beliefs. However, the court held that the district's bylaw requiring that requests first be made in writing was content-neutral and thus a reasonable restriction.\*\*\*

The Board president and the Superintendent, as secretary to the Board, shall work together to develop the agenda for each regular and special meeting. Each agenda shall reflect the district's vision and goals and the Board's focus on student learning.

(cf. 0000 - Vision)

(cf. 0200 - Goals for the School District)

(cf. 9121 - President)

(cf. 9122 - Secretary)

Any Board member or member of the public may request that a matter within the jurisdiction of the Board be placed on the agenda of a regular meeting. The request shall be submitted in writing to the Superintendent or designee with supporting documents and information, if any, at least one week before the scheduled meeting date. Items submitted less than a week before the scheduled meeting date may be postponed to a later meeting in order to allow sufficient time for consideration and research of the issue.

The Board president and Superintendent shall decide whether a request is within the subject matter jurisdiction of the Board. Items not within the subject matter jurisdiction of the Board may not be placed on the agenda. In addition, before placing the item on the agenda, the Board president and Superintendent shall determine if the item is merely a request for information or whether the issue is covered by an existing policy or administrative regulation.

The Board president and Superintendent shall decide whether an agenda item is appropriate for discussion in open or closed session, and whether the item should be an action item subject to Board

vote, an information item that does not require immediate action, or a consent item that is routine in nature and for which no discussion is anticipated.

Any Board action that involves borrowing \$100,000 or more shall be discussed, considered, and deliberated upon as a separate item of business on the meeting agenda. (Government Code 53635.7)

(cf. 9323.2 - Actions by the Board)

All public communications with the Board are subject to requirements of relevant Board policies and administrative regulations.

- (cf. 1312.1 - Complaints Concerning District Employees)
- (cf. 1312.2 - Complaints Concerning Instructional Materials)
- (cf. 1312.3 - Uniform Complaint Procedures)
- (cf. 1312.4 - Williams Uniform Complaint Procedures)
- (cf. 3320 - Claims and Actions Against the District)
- (cf. 5144.1 - Suspension and Expulsion/Due Process)

#### Consent Agenda/Calendar

\*\*\*Note: The following optional section is for boards that use the consent agenda or calendar to take action on matters of a routine nature for which discussion may not be necessary. It is important for such boards to limit the use of the consent agenda to noncontroversial matters and to establish rules that help ensure that any use of the consent agenda does not reduce transparency in the board's conduct of district business or result in violation of the open meeting laws. In addition, boards should be aware that, by law, certain items may not be placed on the consent agenda. For example, pursuant to Government Code 54960.2, as added by SB 1003 (Ch. 732, Statutes of 2012), a board's decision to approve or rescind its unconditional commitment to refrain from taking certain actions in violation of the Brown Act must be made as a separate item and not on the consent agenda. See BB 9323.2 - Actions by the Board.\*\*\*

In order to promote efficient meetings, the Board may bundle a number of items and act upon them together by a single vote through the use of a consent agenda. Consent agenda items shall be items of a routine nature and items for which Board discussion is not anticipated and for which the Superintendent recommends approval.

When any Board member requests the removal of an item from the consent agenda, the item shall be removed and given individual consideration for action as a regular agenda item.

The agenda shall provide an opportunity for members of the public to comment on any consent agenda item that has not been previously considered. However, the agenda need not provide an opportunity for public comment when the consent agenda item has previously been considered at an open meeting of a committee comprised exclusively of all the Board members provided that members of the public were afforded an opportunity to comment on the item at that meeting, unless

the item has been substantially changed since the committee considered it. (Government Code 54954.3)

#### Agenda Dissemination to Board Members

\*\*\*Note: The following section is optional and should be modified to reflect district practice. Pursuant to Government Code 6252.7, when the Board, in the conduct of its duties, is authorized by law to access any writing of the district, including agenda and supporting documents, the district is prohibited from discriminating between or among Board members as to when and which records will be made available.\*\*\*

\*\*\*Note: CSBA's Agenda Online, an electronic board meeting agenda service for use by districts and county offices of education, allows development of and access to Board meeting agendas, supporting documents, and minutes from any computer that has Internet access. Further information can be found on CSBA's web site.\*\*\*

At least three days before each regular meeting, each Board member shall be provided a copy of the agenda and agenda packet, including the Superintendent or designee's report; minutes to be approved; copies of communications; reports from committees, staff, citizens, and others; and other available documents pertinent to the meeting.

When special meetings are called, the Superintendent or designee shall make every effort to distribute the agenda and supporting materials to Board members as soon as possible before the meeting.

Board members shall review agenda materials before each meeting. Individual members may confer directly with the Superintendent or designee to ask questions and/or request additional information on agenda items. However, a majority of Board members shall not directly or through intermediaries or electronic means discuss, deliberate, or take action on any matter within the subject matter jurisdiction of the Board.

(cf. 9012 - Board Member Electronic Communications)

#### Agenda Dissemination to Members of the Public

The Superintendent or designee shall mail a copy of the agenda or a copy of all the documents constituting the agenda packet to any person who requests the items. The materials shall be mailed at the time the agenda is posted or upon distribution of the agenda to a majority of the Board, whichever occurs first. (Government Code 54954.1)

\*\*\*Note: Government Code 54957.5 requires that when agenda materials are distributed to the Board less than 72 hours before a regular meeting, the district must also make the documents available for public inspection, as specified below. However, only those documents that are "public records" under the Public Records Act and which relate to an agenda item scheduled for the open session portion of a regular meeting need to be made available for inspection.\*\*\*

If a document which relates to an open session agenda item of a regular Board meeting is distributed to the Board less than 72 hours prior to a meeting, the Superintendent or designee shall make the document available for public inspection at a designated location at the same time the document is distributed to all or a majority of the Board, provided the document is a public record under the Public Records Act. The Superintendent or designee may also post the document on the district's web site in a position and manner that makes it clear that the document relates to an agenda item for an upcoming meeting. (Government Code 54957.5)

(cf. 1113 - District and School Web Sites)  
(cf. 1340 - Access to District Records)

Any document prepared by the district or Board and distributed during a public meeting shall be made available for public inspection at the meeting. Any document prepared by another person shall be made available for public inspection after the meeting. These requirements shall not apply to a document that is exempt from public disclosure under the Public Records Act. (Government Code 54957.5)

\*\*\*Note: Pursuant to Government Code 54954.1, upon request, the agenda and supporting documentation must be made available in appropriate alternative formats to persons with a disability, as required under the Americans with Disabilities Act (42 USC 12132). Examples of alternative formats, also referred to as "auxiliary aids and services," are listed in 28 CFR 36.303 and include audio recordings or Braille materials.\*\*\*

Upon request, the Superintendent or designee shall make the agenda, agenda packet, and/or any writings distributed at the meeting available in appropriate alternative formats to persons with a disability, as required by the Americans with Disabilities Act. (Government Code 54954.1)

Any request for mailed copies of agendas or agenda packets shall be in writing and shall be valid for the calendar year in which it is filed. Written requests must be renewed following January 1 of each year. (Government Code 54954.1)

\*\*\*Note: The following optional paragraph is for use by districts that charge a fee for mailing the agenda or agenda packet. Government Code 54954.1 authorizes districts to charge a fee for mailing the agenda or agenda packet as long as the fee does not exceed the cost of providing the service. Pursuant to Government Code 54957.5, a surcharge may not be imposed for providing the agenda and other public record documents in alternative formats to persons with disabilities.\*\*\*

Persons requesting mailing of the agenda or agenda packet shall pay an annual fee, as determined by the Superintendent or designee, not to exceed the cost of providing the service.

Legal Reference:  
EDUCATION CODE  
35144 Special meetings

35145 Public meetings  
35145.5 Right of public to place matters on agenda  
GOVERNMENT CODE  
6250-6270 Public Records Act  
53635.7 Separate item of business  
54954.1 Mailed agenda of meeting  
54954.2 Agenda posting requirements; board actions  
54954.3 Opportunity for public to address legislative body  
54954.5 Closed session item descriptions  
54956.5 Emergency meetings  
54957.5 Public records  
54960.2 Challenging board actions; cease and desist  
UNITED STATES CODE, TITLE 42  
12101-12213 Americans with Disabilities Act  
CODE OF FEDERAL REGULATIONS, TITLE 28  
35.160 Effective communications  
36.303 Auxiliary aids and services  
COURT DECISIONS  
Mooney v. Garcia, (2012) 207 Cal.App.4th 229  
Caldwell v. Roseville Joint Union High School District, 2007 U.S. Dist. LEXIS 66318

Management Resources:

CSBA PUBLICATIONS

Call to Order: A Blueprint for Great Board Meetings, 2010

The Brown Act: School Boards and Open Meeting Laws, rev. 2009

ATTORNEY GENERAL PUBLICATIONS

The Brown Act: Open Meetings for Legislative Bodies, rev. 2003

WEB SITES

CSBA, Agenda Online: <http://www.csba.org>

California Attorney General's Office: <http://www.oag.ca.gov>

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## **Board Bylaw**

### **Meeting Conduct**

#### **BB 9323 Board Bylaws**

\*\*\*Note: Education Code 35010 mandates the Board to "prescribe and enforce" rules for its own governance. These rules must not be inconsistent with law or with regulations prescribed by the State Board of Education. The following bylaw provides suggested rules and procedures for meeting conduct and reflects provisions of law as applicable.\*\*\*

#### Meeting Procedures

All Governing Board meetings shall begin on time and shall be guided by an agenda prepared in accordance with Board bylaws and posted and distributed in accordance the Ralph M. Brown Act (open meeting requirements) and other applicable laws.

(cf. 9322 - Agenda/Meeting Materials)

\*\*\*Note: The law does not specify that a particular set of procedures must govern Board meetings. Although Robert's Rules of Order can serve as a useful guide, the Board may adopt any procedure that allows for the efficient and consistent conduct of meetings. \*\*\*

The Board president shall conduct Board meetings in accordance with Board bylaws and procedures that enable the Board to efficiently consider issues and carry out the will of the majority.

(cf. 9121 - President)

\*\*\*Note: The following optional paragraph limits the length of Board meetings and should be revised to reflect district practice. \*\*\*

The Board believes that late night meetings deter public participation, can affect the Board's decision-making ability, and can be a burden to staff. Regular Board meetings shall be adjourned at 10:30 p.m. unless extended to a specific time determined by a majority of the Board. The meeting shall be extended no more than once and subsequently may be adjourned to a later date.

(cf. 9320 - Meetings and Notices)

\*\*\*Note: In *Rubin v. City of Burbank*, an appellate court held that inclusion of "sectarian prayer" at city council meetings, which communicated a preference for a particular religious faith and advanced one faith over another, was unconstitutional by directing the prayer "in the name of Jesus." The court held that it would be constitutional to require the city to advise those people conducting the prayer of this limitation. This opinion is consistent with an unpublished 9th circuit federal court

opinion which stated that an invocation "in the name of Jesus" was unconstitutional in that it displayed allegiance to a particular faith. \*\*\*

\*\*\*Note: Some general guidelines for invocations can be found in an Attorney General's opinion (76 Ops.Cal.Atty.Gen. 281 (1993)) which stated that a county board of supervisors could open its sessions with an invocation when the invocation is (1) not required by law as a condition to the official proceedings, (2) not part of the deliberative agenda, (3) not offered, supervised, or approved as to content by a public officer, (4) not officially limited to a particular religion, (5) not disparaging of others, and (6) not directed towards proselytizing. However, because this is an unsettled area of law that is subject to frequent litigation, it is strongly recommended that districts consult legal counsel if they wish to open meetings with an invocation. Note that a different legal analysis applies to student-led or student-initiated prayer; see BP 5127 - Graduation Ceremonies and Activities.\*\*\*

### Quorum and Abstentions

The Board shall act by majority vote of all of the membership constituting the Board. (Education Code 35164)

(cf. 9323.2 - Actions by the Board)

\*\*\*Note: According to an Attorney General opinion (61 Ops.Cal.Atty.Gen. 243 (1978)), members of a public body have a duty to vote on issues before them so that the public is represented and receives the services which the public body was created to provide. Issues arise when a motion is tied and one Board member has abstained. The general parliamentary rule is that an abstention is counted as agreeing with the action taken by the majority of those who vote, whether affirmatively or negatively (66 Ops.Cal.Atty.Gen. 336 (1983)). However, a stronger argument could be made that that parliamentary rule is in conflict with Education Code 35164 which requires a majority vote of all of the membership of the Board in order for the Board to act (i.e., a majority of all of the membership of the Board must vote affirmatively in order to approve any action). In 55 Ops.Cal.Atty.Gen. 26 (1972), the Attorney General opined that, when a statutory requirement exists that requires an affirmative action of at least a majority of the members of the Board, the general rule that members not voting were deemed to have agreed with the action taken by the majority of those that voted is not applicable. \*\*\*

\*\*\*Note: The following optional paragraph is consistent with CSBA's opinion that a majority of the Board must vote affirmatively for a motion to carry, but the law is not settled and contrary legal opinions may exist. It is strongly recommended that the district consult with legal counsel and modify the following optional paragraph to ensure consistency with district practice. \*\*\*

The Board believes that when no conflict of interest requires abstention, its members have a duty to vote on issues before them. When a member abstains, his/her abstention shall not be counted for purposes of determining whether a majority of the membership of the Board has taken action.

(cf. 9270 - Conflict of Interest)

\*\*\*Note: The following paragraph applies only to districts with seven member Boards and should be deleted by districts with three or five member Boards.\*\*\*

If a Board consists of seven members and not more than two vacancies occur on the Board, the vacant position(s) shall not be counted for purposes of determining how many members of the Board constitute a majority. In addition, if a vacancy exists on the Board, whenever any provisions of the Education Code require unanimous action of all or a specific number of the members, the vacant position(s) shall not be counted for purposes of determining the total membership constituting the Board. (Education Code 35165)

## Public Participation

\*\*\*Note: Pursuant to Government Code 54953.3, a member of the public cannot be required to register his/her name, complete a questionnaire, or provide other information as a condition of attending a Board meeting. If an attendance list or similar document is posted near the entrance or circulated during the meeting, it must clearly state that signing or completing the document is voluntary.\*\*\*

Members of the public are encouraged to attend Board meetings and to address the Board concerning any item on the agenda or within the Board's jurisdiction. So as not to inhibit public participation, persons attending Board meetings shall not be requested to sign in, complete a questionnaire, or otherwise provide their name or other information as a condition of attending the meeting.

In order to conduct district business in an orderly and efficient manner, the Board requires that public presentations to the Board comply with the following procedures:

\*\*\*Note: Education Code 35145.5 mandates the Board to adopt regulations which ensure that the public can address the Board regarding agenda items, as specified below. \*\*\*

1. The Board shall give members of the public an opportunity to address the Board on any item of interest to the public that is within the subject matter jurisdiction of the Board, either before or during the Board's consideration of the item. (Education Code 35145.5, Government Code 54954.3)
2. At a time so designated on the agenda at a regular meeting, members of the public may bring before the Board matters that are not listed on the agenda. The Board shall take no action or discussion on any item not appearing on the posted agenda, except as authorized by law. (Education Code 35145.5, Government Code 54954.2)
3. Without taking action, Board members or district staff members may briefly respond to statements made or questions posed by the public about items not appearing on the agenda. Additionally, on their own initiative or in response to questions posed by the public, a Board or staff member may ask a question for clarification, make a brief announcement, or make a brief report on his/her own activities. (Government Code 54954.2)

Furthermore, the Board or a Board member may provide a reference to staff or other resources for factual information, ask staff to report back to the Board at a subsequent meeting concerning any matter, or take action directing staff to place a matter of business on a future agenda. (Government Code 54954.2)

4. The Board need not allow the public to speak on any item that has already been considered by a committee composed exclusively of Board members at a public meeting where the public had the opportunity to address the committee on that item. However, if the Board determines that the item has been substantially changed since the committee heard the item, the Board shall provide an opportunity for the public to speak. (Government Code 54954.3)

(cf. 9130 - Board Committees)

5. A person wishing to be heard by the Board shall first be recognized by the president and shall then proceed to comment as briefly as the subject permits.

\*\*\*Note: Government Code 54954.3 authorizes regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker. The following paragraph should be revised to reflect district practice.\*\*\*

Individual speakers shall be allowed three minutes to address the Board on each agenda or nonagenda item. The Board shall limit the total time for public input on each item to 20 minutes. With Board consent, the president may increase or decrease the time allowed for public presentation, depending on the topic and the number of persons wishing to be heard. The president may take a poll of speakers for or against a particular issue and may ask that additional persons speak only if they have something new to add.

6. The Board president may rule on the appropriateness of a topic. If the topic would be more suitably addressed at a later time, the president may indicate the time and place when it should be presented.

The Board shall not prohibit public criticism of its policies, procedures, programs, services, acts, or omissions. (Government Code 54954.3) In addition, the Board may not prohibit public criticism of district employees.

\*\*\*Note: The following optional paragraph addresses the issue of specific charges or complaints against district employees in open Board meetings. The Board president must first determine that the speech in question is a specific complaint or charge against a specific employee or employees before invoking the following provision. General criticisms of the district and its employees, no matter how harsh, may not be prohibited. Board members and staff may briefly respond to the concerns raised by the complainant at the meeting.\*\*\*

\*\*\*Note: In *Baca v. Moreno Valley Unified School District*, a federal district court issued a preliminary injunction against the district prohibiting it from enforcing its policy barring criticism of employees at public Board meetings. The court found that the district's policy violated the

plaintiff's First Amendment rights by restricting the content of her speech. The court further noted that the district could not legally prevent a person from speaking in open session, even if the speech was clearly defamatory. Districts should note that this decision does not apply to any district other than the Moreno Valley Unified School District at this time. However, a different federal court has also reached the same result in a case involving the Vista Unified School District. Districts should be very cautious in implementing this policy and be guided by the advice of their legal counsel.\*\*\*

\*\*\*Note: For a district to be safe from litigation, the only option is for the Board to place no content restriction on public comments during the Board meeting. This option, however, would permit accusations to be made against an employee without notice or opportunity for employee response.\*\*\*

Whenever a member of the public initiates specific complaints or charges against an employee, the Board president shall inform the complainant that in order to protect the employee's right to adequate notice before a hearing of such complaints and charges, and also to preserve the ability of the Board to legally consider the complaints or charges in any subsequent evaluation of the employee, it is the policy of the Board to hear such complaints or charges in closed session unless otherwise requested by the employee pursuant to Government Code 54957. The Board president shall also encourage the complainant to file a complaint using the appropriate district complaint procedure.

(cf. 1312.1 - Complaints Concerning District Employees)

(cf. 9321 - Closed Session Purposes and Agendas)

\*\*\*Note: As provided in item #7 below, Government Code 54957.9 authorizes the Board to remove persons who willfully disrupt or disturb a meeting. Examples of disruptive conduct might include conduct that is extremely loud, disturbing, or creates a health or safety risk. In *McMahon v. Albany Unified School District*, a court held that a speaker's constitutional rights were not violated when he was removed from a Board meeting after dumping a substantial amount of garbage on the floor of the meeting room. The speaker had come to the Board meeting to complain about high school students littering, but did not stop dumping garbage when admonished by the Board president. Because he was not removed based on the content of his speech, a court upheld his conviction for a willful disruption of a public meeting. \*\*\*

7. The Board president shall not permit any disturbance or willful interruption of Board meetings. Persistent disruption by an individual or group shall be grounds for the president to terminate the privilege of addressing the Board.

The Board may remove disruptive individuals and order the room cleared if necessary. In this case, members of the media not participating in the disturbance shall be allowed to remain, and individuals not participating in such disturbances may be allowed to remain at the discretion of the Board. When the room is ordered cleared due to a disturbance, further Board proceedings shall concern only matters appearing on the agenda. (Government Code 54957.9)

When such disruptive conduct occurs, the Superintendent or designee shall contact local law enforcement.

## Recording by the Public

\*\*\*Note: Government Code 54953.5 provides that any person attending an open meeting may record it with an audio or video tape recorder or a still or movie camera unless the Board makes a reasonable finding that the recording cannot continue without noise, illumination, or obstruction of view which would persistently disrupt the meeting. Government Code 54953.6 requires a similar finding before the Board can prohibit or restrict a broadcast of its meetings.\*\*\*

The Superintendent or designee shall designate locations from which members of the public may broadcast, photograph, or tape record open meetings without causing a distraction.

(cf. 9324 - Board Minutes and Recordings)

If the Board finds that noise, illumination, or obstruction of view related to these activities would persistently disrupt the proceedings, these activities shall be discontinued or restricted as determined by the Board. (Government Code 54953.5, 54953.6)

### Legal Reference:

#### EDUCATION CODE

5095 Powers of remaining board members and new appointees

32210 Willful disturbance of public school or meeting a misdemeanor

35010 Prescription and enforcement of rules

35145.5 Agenda; public participation; regulations

35163 Official actions, minutes and journal

35164 Vote requirements

35165 Effect of vacancies upon majority and unanimous votes by seven member board

#### GOVERNMENT CODE

54953.5 Audio or video tape recording of proceedings

54953.6 Broadcasting of proceedings

54954.2 Agenda; posting; action on other matters

54954.3 Opportunity for public to address legislative body; regulations

54957 Closed sessions

54957.9 Disorderly conduct of general public during meeting; clearing of room

#### PENAL CODE

403 Disruption of assembly or meeting

#### COURT DECISIONS

McMahon v. Albany Unified School District, (2002) 104 Cal.App.4th 1275

Rubin v. City of Burbank, (2002) 101 Cal.App.4th 1194

Baca v. Moreno Valley Unified School District, (1996) 936 F.Supp. 719

#### ATTORNEY GENERAL OPINIONS

76 Ops.Cal.Atty.Gen. 281 (1993)

66 Ops.Cal.Atty.Gen. 336 (1983)

63 Ops.Cal.Atty.Gen. 215 (1980)

61 Ops.Cal.Atty.Gen. 243, 253 (1978)  
55 Ops.Cal.Atty.Gen. 26 (1972)  
59 Ops.Cal.Atty.Gen. 532 (1976)

Management Resources:

CSBA PUBLICATIONS

The Brown Act: School Boards and Open Meeting Laws, rev. 2005

Board Presidents' Handbook, rev. 2002

Maximizing School Board Governance: Boardsmanship

ATTORNEY GENERAL PUBLICATIONS

The Brown Act: Open Meetings for Legislative Bodies, 2003

WEB SITES

CSBA: <http://www.csba.org>

California Attorney General's Office: <http://www.caag.state.ca.us>

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