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Revised March 31, 2020

UPDATED GUIDANCE GOVERNOR OFFERS ADDITIONAL BROWN ACT FLEXIBILITY FOR REMOTE BOARD MEETINGS/ RULES FOR EMERGENCY MEETINGS

This follows recent guidance from our office on general Brown Act requirements for board members to participate in meetings via teleconference or video conference (March 11, 2020) and our initial March 13 guidance on videoconference flexibility under the Governor's Executive Order N-25-20 which has been superseded by Executive Order N-29-20 issued on March 17, 2020. **This Update replaces our March 13 guidance and reflects the requirements of the March 17 Executive Order N-29-20.**

The superseded Executive Order allowed for a temporary relaxation of many requirements that normally come with a board meeting via audio/videoconference while still requiring districts to have at least one publicly accessible physical location from which members of the public can observe and comment at public meetings. The March 17 Executive Order N-29-20 removes that requirement and permits a district to permit participation through telephonic or electronic means in lieu of physical presence.

The Governor still urges using sound discretion and making reasonable efforts to adhere as closely as possible to the normal requirements of the Brown Act.

In unusual circumstances, which could include school closures due to public health and safety issues and other COVID-19-related issues, boards can also conduct "emergency meetings" without the usual notice requirements.

1. Teleconference Flexibility: To address boards' needs to conduct remote meetings and implement "social distancing measures" in response to COVID-19 concerns, the flexibility initially granted by the Governor was further relaxed in the March 17 Executive Order N-29-20 (copy attached). **This flexibility remains in effect during the period state or local public health officials have imposed or recommended social distancing measures, which according to the State Public Health Officer is now "until further notice."**¹

¹ Executive Order N-29-20 established that the Brown Act flexibility will be in effect "only during the period in which state or local public health officials have imposed or recommended social distancing measures. Executive Order N-33-20 and the quoted Order of the State Public Health Officer indicate that period will now be "until further notice." The March 17 Executive Order N-29-20 provides that the flexibility will be in effect "only during the period in which state or local public officials impose or recommend measures to promote social distancing measures." Currently, the principal state government-recommended measures for social distancing can be found in policy guidance issued by the California Department of Public Health, presently in effect until March 31, 2020. That guidance can be located using the following link: https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/Gathering_Guidance_03.11.20.pdf

- General Posting Requirements Remain. The general meeting agenda notice posting requirements remain in force (such as the requirement to physically post the agenda at a location accessible to the public and to post on the District’s website if it has one), as well as the timing requirements (posting at least 72 hours in advance for a regular meeting and 24 hours in advance for a special meeting). Votes must be taken by roll call.

- Additional Posting Requirements. Whenever an agenda is posted or notice of a meeting time is given for a meeting at which districts elect to permit members of the public to observe and comment at the meeting via telephone or electronically, districts must provide notice of the means by which the public can do so, as well as advertise the procedure for resolving accommodation issues for people with disabilities (discussed below). If the method of allowing for public observation and comment changes, or if a meeting was noticed prior to March 17 without including notice of the means of participation, districts can satisfy the requirement by advertising the means (or the change in means) using “the most rapid means of communication available at the time,” which the March 17 Executive Order N-29-20 explains can consist of posting on the District’s website.

- Physical Presence Requirements. The Order waives any requirement calling for the physical presence of board members as a condition of participation in public meetings.

- Public Comment. In superseding the initial Order, the March 17 Executive Order N-29-20 confirms that districts “need not make available any physical location from which members of the public may observe the meeting and offer public comment.” What is unclear is that the Order allows districts to permit participation by telephone or electronically, but does not specify whether any procedure is required if a board opts not to allow such access. If a board will not allow telephone/electronic access to the public (i.e., provide a phone number or link to an audio or videoconference), the conservative approach would be to provide for public comment in some other way, such as under the superseded Executive Order (which called for making available a publicly accessible location where members of the public can listen/observe and comment; e.g., speakerphone on a table at a designated location). If the latter option is used, social distancing measures should be implemented for public participation.

- Other Suspended Teleconferencing Requirements. The March 17 Executive Order N-29-20 continues to suspend the physical presence requirement and certain notice requirements for teleconference meetings as follows:
 - The requirement to list the remote locations in the agenda is suspended.
 - The requirement to post the agenda at the remote location(s) is suspended.
 - The requirement to ensure the remote location(s) are accessible to the public is suspended.
 - The requirement that the public be able to address the Board at the remote locations is suspended.
 - The requirement that a quorum of the Board participate from locations within a district is suspended.

- Accessibility Requirements. The March 17 Executive Order N-29-20 provides that if a district holds a meeting via teleconferencing and allows members of the public to observe and comment telephonically or electronically, the district must then implement a procedure to receive and “swiftly resolve” requests for reasonable modification or accommodation from people with

disabilities, consistent with the Americans with Disabilities Act and “resolving any doubt whatsoever” in favor of accessibility, and advertise that procedure as discussed above.

- Materials. The March 17 Executive Order N-29-20 does not address availability of documents. Normally, only the agenda document itself is required to be posted on the District’s website. It is recommended if possible, where public access will be allowed by phone or electronically, that district-produced documents related to open session agenda items which are provided to a board majority or brought to the meeting be made available via the website. If public comment will take place at a physical location, physical copies of open session agenda materials should be available.

The following is sample language to be included on agendas to be held via teleconference using this flexibility:

Notice of Teleconferencing Pursuant to Executive Order N-29-20 and Government Code section 54953: The Board will conduct this meeting via teleconference or videoconference with one or more board members participating from remote locations via telephone or other electronic means. Voting at this meeting shall be by roll call.

[Use the following if the district elects to make the meeting accessible to members of the public to observe and comment via telephone or electronically:

This meeting will be accessible to members of the public, and public comment will be allowed at appropriate times, as follows: ***[list phone number, link to audio or video conference, or other means to allow electronic access.]***

[Use the following if the district elects to allow for public participation and comment via a designated physical location:

Members of the public wishing to observe/listen to the meeting or make public comments as authorized under Government Code section 54954.3 may do so at the following location: ***[list address]***. Voting at this meeting shall be by roll call. Social distancing measures will be implemented to address public health issues relating to the Coronavirus (COVID 19).]

Depending on the events of the coming weeks, it is presumed that the Governor may act to extend this flexibility. We will keep you apprised of developments.

2. Emergency Meetings. In exceptional circumstances, the Brown Act allows boards to meet on an emergency basis, dispensing with the usual 24-hour notice and posting requirements for special meetings. These include meetings to handle matters for which prompt action is necessary “due to the disruption or threatened disruption of public facilities” where the Board determines an emergency exists as defined, including a “work stoppage, crippling activity or other activity which severely impairs public health, safety or both.” Given the rapidly evolving dissemination of public health information concerning COVID-19 and its impact on education agencies in this situation, it is conceivable that a board may need to meet on less than 24 hours’ notice to address an emergency.

Business at an emergency meeting should be limited to those matters for which prompt action is required as outlined above. Not all COVID-19 related topics would be covered by this exception. The statute implies that votes at an emergency meeting should be taken by roll call.

- Media Notification. When an emergency meeting is called, the Board President or designee must notify any media who have requested notice of special meetings at least one hour before the meeting (or at or near the time board members are informed in the case of a “dire emergency,” as defined). The notice must be given by telephone, unless telephone services are not functioning, in which case notice can be dispensed with and the Board can notify the media of the emergency meeting and any action taken as soon as possible after the meeting.
- Closed Sessions. The Board can only meet in closed session in an emergency meeting if agreed to by two-thirds of board members present (or if less than two-thirds are present, by unanimous vote of those present).

There are some conceivable closed session subjects relating to the COVID-19 pandemic which could be addressed in an emergency meeting, including potential litigation situations and urgent labor negotiations issues. The Brown Act also authorizes a closed session meeting to discuss threats against a public entity with counsel, law enforcement, and safety officials. An argument can be made that this authority could lend itself to situations where public health issues threaten to interrupt the public’s access to essential educational services. However, it is recommended that this closed session authority be used sparingly in consultation with counsel, especially since the public’s desire for transparency will likely be heightened in these circumstances. Ideally, the closed session would relate to situations where public discussion of the matter under consideration somehow poses a threat to security of public facilities or services.²

- Posting Minutes. After the meeting, there is a special requirement that the minutes be posted for 10 days in a public place as soon as possible after the meeting (listing the persons who were notified or attempted to be notified), including a copy of the roll call vote and any actions taken.
- Teleconferencing Flexibility. An emergency meeting can include teleconferencing pursuant to the standard, detailed Brown Act requirements outlined in our March 13, 2020, refresher.

It is not clear whether the teleconferencing flexibility under the March 17 Executive Order N-29-20 as outlined in Paragraph 1 above can be used for an emergency meeting services.³ If your circumstances necessitate both an emergency meeting and use of the teleconferencing flexibility,

²Specifically, Government Code section 54957 provides that the Brown Act "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." It appears this provision was originally intended to address the need for confidential planning for protection of the public relating to mass demonstrations, high tension trials, and other confrontations. (Sen. Holmdahl, sponsor of Sen. Bill No. 833 (1971 Reg. Sess.), letter to Governor, Aug. 11, 1971.)

³On one hand, the Executive Order states that a local body “must give advance notice of each public meeting, according to the timeframe otherwise prescribed by the . . . Brown Act, and using the means otherwise prescribed by the . . . Brown Act.” This could be read to mean that since the Brown Act permits boards to meet with no advance notice for an emergency meeting, it would be permissible to use the teleconferencing flexibility in that context. On the other hand, as discussed in Paragraph 1, the Order also appears to require either telephone/electronic access by members of the public or physical access, such that if no advance notice is given, the right of the public to participate is effectively nullified.

posting at least a few hours in advance may help establish the participation factor and should be documented.

Attached is a sample emergency meeting agenda with optional teleconferencing language which can be tailored to various scenarios.

Do not hesitate to contact our office regarding this or other COVID-19-related matters.

- Grant Herndon

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