



DANNIS WOLIVER KELLEY

Attorneys at Law

# **The Brown Act: A Refresher & Tips For Staying Legal**

## **Mountain View Whisman School District**

October 1, 2020

Presented by

William B. Tunick

This training is provided for educational, compliance and loss-prevention purposes only, and absent the express prior agreement of DWK, does not create or establish an attorney-client relationship.  
The training is not itself intended to convey or constitute legal advice for particular issues or circumstances. Contact a DWK attorney for answers to specific questions.

# Agenda

---

- Role of the Brown Act & Application
- What is a Meeting?
- Agenda Requirements
- Public Rights at Meetings
- Closed Sessions

→ *Modifications During COVID-19*



# Intent of the Brown Act

---

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is good for them not to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The Ralph M. Brown Act, Gov. Code, § 54950



# Applicability

---

- Act applies to a “member of the legislative body of a local agency” which includes “[a]ny person elected to serve as a member of a legislative body who has not yet assumed the duties of office ...”
- Once elected, officials are expected to know the requirements of the Brown Act, even before taking office.



# Committees

---

- Committees created by staff are not subject to the Brown Act, unless they have a quorum of Board members.
- Committees created by the Board *are* subject to the Brown Act, unless they are ad hoc *and* their membership is solely less than a quorum of Board members.
- “Mini-Brown Act” committees:
  - LCAP Parent Advisory Committee
  - English Learner Advisory Committee
  - Schoolsite Council
  - School Advisory Committee on Compensatory Education Programs
  - Migrant Education Parent Advisory Council
  - Pre-1979 Parent Advisory Committees & Schoolsite Councils
  - Parent Involvement Program

# What is a “Meeting”?

---

- A “meeting” is:
  - Any congregation of a majority of members of a legislative body at the same time and place, including teleconference locations, to **hear, discuss, or deliberate** upon any item within the subject matter jurisdiction of the legislative body.
  - There need **not be action** taken or planned, for a “meeting” to occur.
- Example: Majority of Board members meet privately over lunch to discuss how the Brown Act applies to the Board.

# Meetings – Location, Logistics

---

- All meetings must be open and public.
- Meeting place must be accessible to public—nondiscriminatory, accessible to disabled, no payment or purchase required.
- Meeting place must be within District boundaries, with limited exceptions:
  - To comply with court order or attend judicial proceeding;
  - To inspect real or personal property which cannot be brought within bounds of agency;
  - To meet with state or federal elected or appointed officials, when a local meeting impractical;
  - To participate in meetings of multi-agency significance.

# Meetings - Teleconference

---

- Teleconference locations must be identified, accessible and meet requirements:
  - The teleconference location must be open and accessible to the public.
  - The agenda shall identify all locations, including the teleconference location(s).
  - The agenda must be posted at all locations, including the teleconference location(s) at the proper time before the meeting.
  - The agenda shall provide for public comment at all locations, including the teleconference location.
  - A majority of the Board must be within the boundaries of the District, even if participating by teleconference.
  - All votes during a teleconference meeting shall be by roll call.
  - The agenda should indicate how/if the meeting will proceed if technical problems prevent teleconferencing.



# Meetings – Location & Logistics

## *During COVID-19*

---

- Executive Order N-29-20 waives many meeting requirements
  - Locations *do not* need to be identified in the agenda
  - Agendas *do not* need to be posted at each location where a member is attending via electronic means
  - *No requirement* that a quorum be within district/COE boundaries
  - Locations *do not* need to be accessible to the public
  - So long as board provides a way for public to observe and address the meeting telephonically or electronically, *no requirement* that board provide accessible meeting place
    - But board must have advertised procedure for resolving accommodation requests
  - *Alters* public comment requirements

# Meetings – Location & Logistics

## *During COVID-19*

---

- Does *not waive* most Brown Act requirements:
  - Public **meeting notice requirements** have not changed
  - Legislative bodies “are urged to use sound discretion and to make reasonable efforts to **adhere as closely as reasonably possible** to the provisions of ... the Brown Act ... in order to maximize transparency and provide the public access to their meetings.”
  - All votes at the meeting should still be by roll call

# What is/is not a Meeting?

---

- Definition of meeting excludes:
  - Appearance of a board majority at a general conference open to the public involving a discussion of broad issues and attended by a broad spectrum of officials from a variety of governmental agencies;
  - Attendance at open and publicized meetings, organized to address a topic of local concern by a person or organization other than the local agency;
  - Individual contacts and conversations;
  - Social or ceremonial occasions.

# What is/is not a Meeting?

---

- Definition of meeting excludes:
  - Attendance by a board majority at open and noticed meetings of another body of the same local agency or any other agency; or
  - Attendance by a board majority at an open and noticed meeting of a standing committee of the board, if members of the board that are not members of the committee attend only as observers.



# What is/is not a Meeting?

---

- A majority of the members of a board shall not, outside a noticed meeting, **use a series of communications** of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the board's jurisdiction.
- This includes communications through:
  - Telephone, electronic mail, facsimile, internet;
  - Communication through an intermediary



# What is/is not a Meeting?

---

- Serial Meetings: **A COVID-19 Exception** in Executive Order N-34-20
  - All board members may receive simultaneous updates relevant to the COVID-19 emergency from federal, state, and local officials, and may ask questions of those officials.
    - This does **not** give board members the right to take action on, or to discuss amongst themselves, any item within the board's subject matter jurisdiction without complying with the Brown Act.



# What is/is not a Meeting?

---

- Receipt of information from District staff between meetings.
- Communications with members of the public.
- Response from Board member to email sent to entire Board.
- But, communication may not communicate to board members the comments or position of any other board member.

# New Social Media Rules (AB 992)

---

- Board members may use social media for:
  - Conversations
  - Answer questions
  - Provide information
  - Solicit information from the public
- May not:
  - Use social media to “discuss” among Board members
  - “Respond directly” to content, “made, posted, or shared by” another Board member
- Limited to platforms which are open and accessible to the public

# Agenda Requirements

---

- Publicizing a Meeting
  - Prominent, direct link to agenda posted on the homepage
  - Agenda must be downloadable, indexable, retrievable and searchable
    - 72 hours before regular meeting
    - 24 hours before special meeting
  - Post on the district's website
  - Mail to persons requesting mailed notice including local news media
  - Agendas and backup should be made available when distributed to a majority of the board

# Agenda & Board Materials

Time of Distribution to Board	Disclosure Requirement
Any time	<ul style="list-style-type: none"> <li>Records which relate to the conduct of the public's business pursuant to the California Public Records Act.</li> <li>Generally records which are exempt from public disclosure pursuant to the California Public Records Act are not required to be disclosed by the Brown Act.</li> </ul>
More than 72 hours prior to a regular meeting or before a special meeting	Meeting agenda and material distributed to at least a majority of a board in connection with an open session, not otherwise exempt from disclosure under the California Public Records Act, must be made available "without delay."
Within 72 hours of a regular board meeting	Materials related to an open session of a regular meeting which are distributed to a majority of the board members less than 72 hours before a regular meeting, not otherwise exempt from disclosure under the California Public Records Act, <u>must be made available for public inspection at that time at a location designated by the agency for that purpose and may be posted on the agency's web site.</u>
At a meeting	<ul style="list-style-type: none"> <li>If created by the district, copies must be available at the meeting.</li> <li>If created by a third party, copies must be available after the meeting.</li> <li>If approved in closed session, copies must be provided following closed session or the next day if revisions were made prior to approval in which case the governing board must describe the agreement if requested.</li> </ul>

# Agenda Requirements

---



## Information on Agenda

- Whether the meeting is a regular or special meeting;
- Location of the meeting so members of the public can attend;
- Information regarding how, to whom, and when a request for disability-related modification or accommodation may be made by a person with a disability who requires a modification to participate in the public meeting;
- The meeting start time;
  - **Note:** A board may include times at which certain items will start, however, if it does so, it should not begin consideration of those items prior to that time
- Information regarding where materials which were distributed within 72 hours of a regular meeting to a majority of board members can be inspected starting at the time they are distributed to the board members.

# Agenda Requirements

---



## Items on Agenda

- A meeting opening - even if the board will recess to closed session as the first item, the meeting should begin with an opening in public.
- A statement triggering roll call and to ensure the board has a quorum present at the meeting.
- For regular meetings, an opportunity for members of the public to address the board on matters within the jurisdiction of the board which are not on the agenda.
- Descriptions of all items to be discussed, in open and closed session.
- An opportunity for public to address board prior to, or during, consideration of any agenda item.
- An indication that the Board will report out of closed session whether the Board took any actions in closed session which must be reported in open session following closed session.
- A statement of adjournment.



# Agenda Requirements

---



- Content of Agenda – **During COVID-19**
  - Example of language for notice of public meeting:
    - “This meeting is being held pursuant to Executive Orders N-25-20 and N-29-20 issued by California Governor Gavin Newsom. Any or all Board members may attend the meeting by phone or teleconference. Members of the public may also join the meeting electronically. The meeting will be conducted via Zoom, a teleconferencing platform. Members of the public may join the meeting through the following Zoom link:”

# Action on Non-Agenda Items – Regular Meetings

---

- Board may consider items not on agenda in two circumstances:
  - Emergency Items
    - Majority vote
    - Limited application
  - Need to take immediate action (urgency item)
    - Arose after agenda posted
    - Requires 2/3rds vote, unanimous if less than 2/3rds of Board present
- May be best to call a special meeting, with if sufficient time

# Non-Agenda Items

---

- Board may also:
  - Ask for clarification
  - Make a brief announcement or brief report of activity
  - Request staff to “report back” or place item on future agenda
  - “Briefly respond to statements made or questions posed by persons exercising their public testimony rights”

# Emergency Meetings

---

- Not subject to the 24-hour notice requirement
  - But only for:
    - Work stoppage
    - Crippling activity
    - Activity which severely impairs public health, safety or both
    - Disaster
  - Must still attempt to provide notice

# Emergency Meetings

---

- “Activity which severely impairs public health, safety or both”
  - COVID-19
  - If utilizing this provision, a board can forgo the 24-hour notice period if it notifies – at least one hour prior to the meeting – each media outlet (by phone) that has requested notice of the board’s special meetings.
  - Closed session is limited to items regarding the emergency, and board can only meet in closed session with the approval of 2/3 of members present (or all members if <2/3 present).
  - Minutes of meeting must be posted as soon as possible in a public place for 10 days.

# Emergency Meetings

---

- Recommended Agenda Language – **During COVID-19**
  - Top of agenda: *“Emergency Meeting of the Governing Board: The Board is holding an emergency meeting pursuant to Government Code section 54956.5 to address the COVID-19 pandemic that severely impacts public health and safety.”*
  - First agenda item: “Determination by the Board that COVID-19 severely impacts public health and safety necessitating an emergency meeting of the Board.”



# Meetings – Public Rights

---

*“Board meetings are meetings of the Board held in public. They are not ‘town hall meetings’ where the elected officials and community members freely engage each other in an unstructured manner. Meetings are conducted in a civil, orderly and respectful manner under the administration and discretion of the Board president. Board members want to ensure that all and multiple voices are heard at the designated times during the meeting with the purpose of informing Board deliberations.”*

# Meetings – Public Rights

---

- Right to comment:
  - Agenda must provide opportunity for public comment
    - Before (open and closed session) or during consideration of item
    - Public comment must be allowed on any other matter under the board's jurisdiction.
    - For meetings conducted via teleconference during COVID-19 pandemic, public comment requirements altered by Executive Order.
- Board may place reasonable time limitations on particular topics or speakers.
- Speakers using a translator get twice the allotted time unless simultaneous translation is available.
- At special meetings, the public comment is limited to agenda items.



# Meetings – Public Rights

---

- Public may place items “directly related to school district business” on the agenda.
- Is Board obligated to speak to each agenda item?
- Check board bylaws for member response protocol.
- Check board bylaws for process by which board member may request to place an item on the agenda.

# Meetings – Public Rights

---

- Public meetings are considered a limited public forum.
  - The public has broad constitutional rights to comment on any subject relating to the business of the governmental body.
  - Attempt to restrict the content of such speech must be narrowly tailored to effectuate a compelling state interest.
  - Prohibiting members of the public from criticizing school district employees is unconstitutional.
- Board need not permit disruptive conduct in a meeting.
  - Penal Code section 403 prohibits acts that disturb or break up a lawful assembly or meeting.
- Any person attending a public meeting may videotape, unless disruptive.

# Closed Session

---

- Board may meet in closed session to discuss/take action on items within enumerated “exceptions” to the open meeting requirements;
- Prior to closed session, disclose in open session the items to be discussed in closed session which may be a reference to items on the board’s agenda.
- Act provides sample “safe harbor” closed session item descriptions



# Closed Session Procedure

---

- Who may attend?
  - Board
  - Administrators
  - Legal counsel
  - Board's negotiators
  - Parties specifically allowed
- Who may not attend?
  - Opposing party?
  - Other consultants?



# Closed Session Topics

---

- Most Common:
  - Personnel Actions – Appointment, Employment, Evaluation, Discipline/Dismissal/Release
  - Hearing “Complaints or Charges” against employees
  - Labor Negotiations



# Closed Session Topics

---

- Real Property Transactions
- Pending and Anticipated Litigation
- Tort Claims
- Student Matters

**TOPICS**

# Personnel Exception

---

- Governing boards may meet in closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee.
- Governing boards may meet in closed session to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.

# Employment Contracts

---

- **Contracts shall be ratified in an open session of the governing body which shall be reflected in the governing body's minutes.**
- **The Brown Act prohibits a board from holding a special meeting “regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a “local agency executive.”**  
Prior to any action on compensation, a board must **orally report a summary of a recommendation** for final action in open session.



# Labor Negotiations

---

- May discuss salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and for represented employees, any other matter within the statutorily provided scope of representation with designated representative.

**Note:** Compliance with Brown Act not required for discussions regarding negotiations with represented employees.



# Real Property Transactions

---

- Limited to meeting with real property negotiators prior to sale or lease of property, to discuss confidential information concerning price or terms of payment during property negotiations
  - General real property issues are not included within this exception



# Pending and Anticipated Litigation

---

- To confer with, or receive advice from legal counsel regarding pending or threatened litigation when discussion in open session would prejudice the position of the district in the litigation.
  - Includes consideration of tort claims
  - Must counsel be present?



# Reporting Out

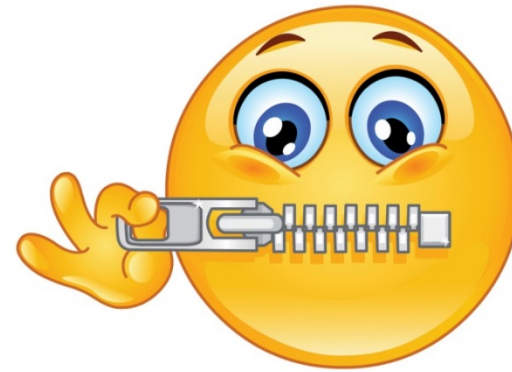
---

- Board must publicly report action taken in closed session
  - “Action taken” is defined in the Act
  - Must report the vote of every member present
  - Must provide copies of contracts, agreements or other approved documents to a requester at time session ends (if prior written request on file), otherwise next day
- Specific requirements for reporting out depending on type of action taken

# Confidentiality of Closed Session

---

- Board member may not disclose confidential information from closed session.
- Consequences:
  - Injunctive relief
  - Disciplinary action
  - Referral to grand jury
  - Expose the district/COE to potential liability
- “If a board member violates the legal requirement to keep all closed session discussion confidential, the board president and superintendent will take immediate action to rectify the matter.”





DANNIS WOLIVER KELLEY

Attorneys at Law

thank  
you!

SAN FRANCISCO

LONG BEACH

SAN DIEGO

SAN RAFAEL

CHICO

SACRAMENTO

SAN LUIS OBISPO

[www.DWKesq.com](http://www.DWKesq.com)



William B. Tunick  
Shareholder  
San Francisco Office  
415.543.4111  
[wtunick@DWKesq.com](mailto:wtunick@DWKesq.com)