



The Brown Act and Other Open Meeting Requirements - Update

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Important Note

The following information is designed to be a general guide and should NOT be considered specific legal advice.

Real problems are fact specific and can be complex.

Objectives for Today

- Review the Brown Act
- Consider Recent Developments in the Law
- Review the Impact of the COVID-19 Pandemic and the Governor's Executive Orders, and the Coming Return to "Normal"
- Increase and Ensure Transparency
- Limit Potential Liabilities from Board Member Communications

What is The Brown Act?

- The Ralph M. Brown Act, codified at California Government Code 54950 *et seq.*, is a State law passed in 1953 that guarantees and protects the public's right to attend and participate in meetings and decisions of local legislative bodies, including public school districts.

Related Laws:

- In 2004 the voters approved Proposition 59, which added to the California Constitution a provision guaranteeing the right of open meetings and access to public records: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."
- The California Education Code includes provisions "supplementing" the Brown Act relating to the conduct of school board meetings.

THE BROWN ACT

The best solution is prevention.



The Brown Act - Overview and Purpose

“[T]he Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people’s business. **It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.**”

Government Code §54950*

*All section references are to the Government Code unless otherwise indicated.

The Brown Act - Overview and Purpose

“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.” (Section 54953)

“Legislative body” means the governing body of a local agency.
(Section 54952(a) and (b))

“Local agency” includes a “school district.” (Section 54951)

The Brown Act - Overview and Purpose

Are Board subcommittees subject to the Brown Act?

Board advisory committees composed solely of Board Members but less than a quorum of the board are not subject to the meeting requirements of the Brown Act, unless it is a Board **standing committee** that has **continuing subject matter jurisdiction**, or an advisory committee with a **meeting schedule fixed** by formal action of the board.

(Section 54952(b); Board Bylaw 9130)

The Brown Act - Who/what does it apply to?

1. The Board of Trustees
2. Board subcommittees composed of a quorum of the Board (i.e., at least 3 members)
3. A Board standing subcommittee (irrespective of composition) that has continuing subject matter jurisdiction
4. A Board standing subcommittee (irrespective of composition) that has a meeting schedule fixed by formal action of the Board.

Note: #3 and #4 above are subject to the Brown Act requirements even if the Board subcommittees are comprised of less than a quorum of the Board.

Other District Committees and Bodies that are Subject to Open Meeting Requirements

- Bond Oversight Committee (Educ. Code §15280(b) (“All citizens’ oversight committee proceedings shall be open to the public and notice to the public shall be provided in the same manner as the proceedings of the governing board of the district.”))
- LCAP Parent Advisory Committee (Educ. Code §52063)*
- English learner parent advisory committee (if the enrollment of the school district includes at least 15 percent English learners and the school district enrolls at least 50 pupils who are English learners) (Educ. Code §52063)*
- District Advisory Committee on Compensatory Education Programs (Educ. Code §54425(b))*
- Migrant Education Parent Advisory Committee (Educ. Code §54444.2)*
- Parent advisory committees and school site councils per Educ. Code §62002.5*
- Schoolsite Councils (Educ. Code §65000)*
- Committees formed pursuant to Education Code §11503*

**** See Education Code §35147(b) for specific open meeting requirements.***

The Brown Act - “Meetings”

What is a “meeting”?

A “meeting” includes any **“congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.”** (Section 54952.2(a))

A meeting includes any use of direct communication, personal intermediaries, or technological devices (e.g., telephone, e-mail, texts, etc.) which are employed by a majority of the members of the legislative body to develop a collective concurrence on action to be taken by members of the legislative body.

The Brown Act - “Meetings”

“A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.”

Section 54952.2(b)



The Brown Act - When is a communication a “meeting”?

Think of four key concepts when considering your own communications:

1. Are you **hearing**, with 2 or more Board members, an item or issue that is within the subject matter jurisdiction of the Board?
2. Are you **discussing**, with 2 or more Board members, an item that is within the subject matter jurisdiction of the Board?
3. Are you **deliberating**, with 2 or more Board members, on an item that is within the subject matter jurisdiction of the Board?
4. Are you **developing a collective concurrence**, with 2 or more Board members, on an item that is within the subject matter jurisdiction of the Board?
5. Are you as part of a Board majority **taking action** on an item that is within the subject matter jurisdiction of the Board?

And consider how these situations might arise.

The Brown Act - “Meetings”

- Communications Outside of a Noticed Meeting that Are Not Authorized by the Brown Act and that May Be a “Meeting”:
 1. The Serial “Meeting”
 2. The Hub and Spoke “Meeting”
 3. Social Media Posts and Communications (Remember the “potluck”)

The Brown Act – Avoid The Serial Meeting

If member A contacts member B, and B contacts member C, and C contacts member D, and so on, until a quorum has been involved, this type of “serial meeting” may result in a violation of the Brown Act.



The Brown Act - Avoid the “Hub and Spoke”

- An intermediary, such as the District Administrator or the District’s Attorney, contacts at least a quorum of the members to develop a collective concurrence on action to be taken by Board.



Social Media Communications - AB 992 (2020)

- Until AB 992, the Brown Act did not directly or specifically address issues raised by social media. AB 992 amended the Brown Act to clarify what kind of communications a public official may have via social media and what kind of communications are prohibited.
 - A Board member *may* communicate on internet-based social media platforms to answer questions, provide information *to the public* or to solicit information *from the public* regarding a matter within the Board's subject matter jurisdiction, provided that:
 - a majority of the members of the Board do not use the social media platform to "discuss among themselves" business "of a specific nature" that is within the Board's jurisdiction
 - Also, "A member of the legislative body shall not respond directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member of the legislative body."

(Section 54952.2(b)(3))

AB 992 - Continued

- **“discuss among themselves”** is defined broadly, and includes “communications made, posted, or shared” on social media between Board members, “including comments or use of digital icons that express reactions to communications made by other members” of the Board.
- **“Internet-based social media platform”** means an online service that is open and accessible to the public.
- **“Open and accessible to the public”** means that members of the general public have the ability to access and participate, free of charge, in the social media platform without the approval by the social media platform or a person or entity other than the social media platform, including any forum and chatroom, and cannot be blocked from doing so, except when the internet-based social media platform determines that an individual violated its protocols or rules. (Based on the language of AB 992, this would appear to include Facebook, TikTok, Instagram, Twitter, SnapChat, and similar social media platforms, and also blogs, on-line forums and chat rooms such as Reddit, etc.)

(Section 54952.2(b)(3))

AB 992- Do's and Don'ts

- You may use your internet-based social media to answer questions, provide information to the public or to solicit information from the public regarding matters within the Board's jurisdiction.
- Don't use digital icons - e.g., the "thumbs up" (or similar symbols suggesting agreement), "thumbs down" (or similar symbols suggesting disagreement), "angry", and the "care" icons or emojis - to "react" or respond to other Board members' social media posts, comments, reactions or shares.
- Don't respond or reply directly to another Board member's post on social media involving any subject matter within the subject matter jurisdiction of the Board.

Quick Recap

- “A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use **a series of communications of any kind**, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.”
Section 54952.2(b)
 - A “a series of communications of any kind” is BROAD. It means verbal discussions, e-mail, text messages or other written communications, certain social media posts, the use of intermediaries, etc.
 - “The term ‘deliberation’ has been broadly construed to connote ‘not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.’” (See California Attorney General Opinion no. 00-906 (Feb. 20, 2001) (citations omitted))
 - “to discuss, deliberate, or take action on . . .” should be construed to mean any exchange of facts or information which “advance or clarify a member’s understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue.” (See California Attorney General Opinion no. 00-906 (Feb. 20, 2001))

(See also Board Bylaw 9320)

The Brown Act - What is NOT a Meeting?

- Individual contacts or conversations between a Board member and any other private individual that are not part of a serial, spoke and hub, or prohibited social media communication.
- What about “one-on-one” communications between Board members and Administration and staff?

“An employee or official of a local agency may engage in separate conversations or communications outside of a meeting with members of the Board in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the District, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.”

(Section 54952.2(b)(2)); see also Board Bylaw 9320)

What else isn't a "meeting"?

- Attendance by a majority of Board members at:
 1. a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to school districts; or
 2. an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the District; or
 3. an open and noticed meeting of another body of the District; or
 4. an open and noticed meeting of a legislative body of another local agency; or
 5. an open and noticed meeting of a standing committee of the Board, provided that the members of the legislative body who are not members of the standing committee attend only as observers; or
 6. a purely social or ceremonial occasion,is not a Brown Act violation, PROVIDED THAT that a majority of the Board members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the Board.
(Section 54952.2(c))

Regular Meetings versus Special Meetings

- What is a “regular meeting”?

“Each legislative body of a local agency, except for advisory committees or standing committees, shall provide, by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body, the time and place for holding regular meetings. Meetings of advisory committees or standing committees, for which an agenda is posted at least 72 hours in advance of the meeting pursuant to subdivision (a) of Section 54954.2, shall be considered for purposes of this chapter as regular meetings of the legislative body.” (Section 54954(a))

- **ARUESD Board Bylaw 9320**

“The Board shall hold one regular meeting each month. Regular meetings shall be held at 5:30 p.m. on the 2nd Thursday at the district office. At least 72 hours prior to a regular meeting, the agenda shall be posted at one or more locations freely accessible to members of the public and on the district's Internet web site.”

Regular Meeting: Agenda, Notice and Posting Requirements

- A written agenda must be prepared for each regular meeting.
- The agenda must be posted at least 72 hours in advance of a regular meeting.
- The governing board of each school district shall hold an **annual organizational meeting**. In a year in which a regular election for governing board members is conducted, the meeting shall be held on a day within a 15-day period that commences with the date upon which a governing board member elected at that election takes office. Organizational meetings in years in which no such regular election for governing board members is conducted shall be held during the same 15-day period on the calendar.”

(Section 54952.2 and 54956; Board Bylaw 9100 and 9320)

What is a “special meeting”?

WHO CAN CALL A SPECIAL BOARD MEETING?

The Board President or a majority of the members of the Board.

HOW IS A SPECIAL MEETING CALLED?

By delivering written notice to each member of the Board and to each local newspaper of general circulation and radio or television station requesting notice in writing and posting a notice on the District’s Internet Web site and in a location that is freely accessible to members of the public.

HOW MUCH NOTICE IS REQUIRED FOR A SPECIAL MEETING?

At least 24 hours written notice (by delivery and posting) before the time of the special meeting.

WHAT MAY OR MAY NOT BE DISCUSSED AT A SPECIAL MEETING?

- Only the business set forth in the notice and agenda may be considered at the meeting. No other business shall be considered at these meetings by the Board.
- A special meeting cannot be called regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a “local agency executive” (i.e., executive management). However, this does not apply to the District calling a special meeting to discuss the District’s budget.

(Section 54956; Educ. Code §35144; Board Bylaw 9320)

More Agenda, Notice and Posting Requirements

- The agenda must contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words.
- The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public and on the District's web site on the primary homepage with a direct link to the agenda.
- If requested, the agenda must 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. The agenda shall include information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services, may be made by a person with a disability who requires a modification or accommodation in order to participate in the public meeting.

(Section 54952.2(a))

More Agenda, Notice and Posting Requirements - PUBLIC COMMENT

- **Regular Meetings**

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 Board***.

- **Special Meetings**

“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.”

(Section 54954.3(a))

More Agenda, Notice and Posting Requirements - PUBLIC COMMENT

- The Board may adopt regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.
- If the Board limits time for public comment then it shall provide at least twice the allotted time to a member of the public who utilizes a translator to ensure that non-English speakers receive the same opportunity to directly address the legislative body of a local agency, unless the Board utilizes simultaneous translation equipment in a manner that allows the Board to hear the translated public testimony simultaneously.
- The Board cannot prohibit public criticism of the policies, procedures, programs, or services of the District, or of the acts or omissions of the Board.
- Any person has the right to record a public meeting with an audio or video recorder or a still or motion picture camera (unless the Board finds that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings).
- The Board cannot prohibit or otherwise restrict the broadcast of its open and public meetings in the absence of a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the proceedings.

(Sections 54954.3(b), 54954.5, and 54954.6)

Public Meeting Requirements - During COVID-19 Pandemic, and the Return to “Normal”

“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.”

(Section 54953)

Public Meeting Requirements since COVID-19: A Brief Timeline to Now

- **Pre-COVID-19** (Before March 17, 2020)
- Gov. Newsom's **Executive Order N-25-20** dated March 12, 2020, allowing for telephonic Board meetings provided notice of the meeting was provided in accordance with the Brown Act and on the condition that the Board must notice at least one publicly accessible location from which members of the public shall have the right to observe and offer public comment at the public meeting.
- Gov. Newsom's **Executive Order N-29-20** dated March 17, 2020, para. 3 superceding EO N-25-20
 - Authorized the Board to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to observe and to address the Board.
 - All Brown Act requirements for telephonic participation were suspended.
 - All requirements in the Brown Act expressly or impliedly requiring the physical presence of Board members, the clerk or other personnel of the District were waived. No physical location for the holding of the Board meeting was required.
 - All timelines for posting agendas were still in effect, and the agenda must also give notice of the means by which members of the public may observe the meeting and offer public comment.

Public Meeting Requirements since COVID-19: A Brief Timeline to Now

- Gov. Newsom Executive Order N-08-21 dated June 11, 2021, effective immediately.
 - EO N-29-20, paragraph 3 is withdrawn and replaced.
 - **Until September 30, 2021:**
 - The Board is authorized to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to observe and to address the Board.
 - All Brown Act requirements for telephonic participation are suspended.
 - All requirements in the Brown Act expressly or impliedly requiring the physical presence of Board members, the clerk or other personnel of the District or the public as a condition of participation in or quorum for a public meeting are waived. No physical location for the holding of the Board meeting or public comment is required.
 - All timelines for posting agendas are still in effect, and the agenda must also give notice of the means by which members of the public may observe the meeting and offer public comment.

Public Meetings After September 30, 2021

- **Will Teleconference or Zoom Participation Be Allowed? Yes, but subject to specific requirements.**
 - 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. (Section 54953(b))
 - “**Teleconference**” means a meeting of the Board, the members of which are in different locations, connected by electronic means, **through either audio or video, or both.**
 - The Board is not prohibited from providing the public with additional teleconference locations.
 - Teleconferencing may be used for all purposes in connection with any meeting within the subject matter jurisdiction of the Board.
 - All votes taken during a teleconferenced meeting shall be by rollcall.
 - The agenda must be posted at all teleconference locations.
 - 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 Board shall participate from locations within the boundaries of the District*** (subject to a limited exception).
 - 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.

Conducting the Meeting: Where must the meeting take place?

- With limited exceptions, all regular and special Board meetings must be held within the boundaries of the District.
 - Special application to school districts:
 - Meetings of the Board may be held outside the District to do any of the following:
 - Attend a conference on nonadversarial collective bargaining techniques
 - Interview members of the public residing in another district with reference to the Board members' potential employment of an applicant for the position of superintendent of the district
 - Interview a potential employee from another district

(Section 54954; Board Bylaw 9320)

Special Issue: Action on Item Not on the Agenda (Emergencies)

- The Board may take action on items of business not appearing on the posted agenda in the case of an **emergency situation** involving matters upon which prompt action is necessary due to the disruption or threatened disruption of public facilities. The Board may hold an emergency meeting without complying with either the 24-hour notice requirement or the 24-hour posting requirement of Section 54956 or both of the notice and posting requirements.
 - “emergency situation” means both of the following:
 - (1) a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, **as determined by a majority of the members of the legislative body.**
 - (2) a dire emergency, which shall be defined as a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a legislative body to provide one-hour notice before holding an emergency meeting under this section may endanger the public health, safety, or both, **as determined by a majority of the members of the legislative body.**

(Section 54956.5)

Special Issue: Action on Items Not On The Agenda (Need for Immediate Action)

- The Board may take action on items of business not appearing on the posted agenda upon a determination by a two-thirds vote of the members of the Board present at the meeting, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the District subsequent to the agenda being posted.

(Section 54954.2(b)(2))

Closed Session

- The Board is allowed to meet in closed session only to the extent expressly authorized by the Brown Act or other law.
 - The Brown Act is interpreted liberally in favor of openness and transparency. Any statutory exceptions allowing closed session discussions are narrowly construed by the courts.
 - The exceptions allowing closed session discussions are generally designed to protect confidentiality (e.g., to not prejudice or undermine the district's position in litigation or negotiations or compromise the privacy interests of employees and others).
 - If there is no applicable closed session exception, then the item must be considered in public session.
 - Prior to holding any closed session the Board must disclose, in an open meeting, the item or items to be discussed in closed session. The disclosure may be by reference to the item or items as they are listed by number or letter on the agenda.

Section 54957.7)

Key Permissible Closed Session Discussion Items

- Pending Litigation (Section 54945.9)
- Real Estate Negotiations (section 54956.8)
- Public Employment (Section 54957(b))
- Labor Negotiations (Section 54957.6)
- Student Expulsions (Educ. Code section 48918)
- State Audit Reports (Section 54956.75)

Closed Session - Confidentiality and Other Requirements

- Reporting closed session actions
 - After any closed session, the Board must reconvene in open session prior to adjournment and shall report actions taken in closed session as required by law, which must specify the vote of each Board member.
- Who may attend closed session meetings?
 - Closed sessions may involve only the Board members, the District's legal counsel, and the District's management and support staff necessary for consideration of the matter. This is narrowly construed.
- No person may disclose confidential information that has been acquired by being present in a closed session to a person not entitled to receive it, unless the Board authorizes the disclosure of the confidential information.

Consequences for Brown Act Violations

- Unauthorized disclosures could:
 - (1) Disclose confidential and privileged attorney communications;
 - (2) Violate privacy rights of students or employees and expose the district to liability; or
 - (3) Negatively impact collective bargaining, settlement communications or other confidential matters.

The district attorney or any interested person may bring a civil action to stop or prevent violations or to have the Board's action(s) declared null and void or to obtain a court order compelling the Board to audio record its closed session meetings. (Sections 54960 and 54960.1)



QUESTIONS?

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