



Charter School Governance Training

Brown Act, Fiduciary Duties, and Avoiding Conflicts of Interest

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Merrick A. Wadsworth, Senior Counsel

Procopio, Cory, Hargreaves & Savitch, LLP

Ralph M. Brown Act



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Holding Board Meetings: Brown Act

- The Brown Act is California's "open meetings" law for local public agencies
 - Applies to charter schools as of January 1, 2020, per SB 126 (2019)
- Generally requires that the actions of a local public agency's governing board be taken at an open meeting accessible to the public, duly noticed, where the public can attend and speak on matters on the agenda or within the agency's jurisdiction

Holding Board Meetings: Brown Act

- What is a meeting?
 - Any congregation of a majority of Board members to discuss any item of school business
 - Much broader than traditional concept
 - Avoid inadvertent meetings, e.g., at a social gathering
 - Avoid “serial” meetings, e.g., by text or email

Holding Board Meetings: Brown Act

- Limited exceptions (these are NOT a meeting):
 - A majority of Board members may attend a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to like schools, provided that a majority of the Board do not discuss school business among themselves other than as part of the scheduled program
 - May also attend an open community meeting, another agency's meeting, or social or ceremonial occasions with similar limitations, or as observer-only at committee meeting

Holding Board Meetings: Brown Act

- What else is NOT a meeting?
 - One-on-one agenda briefings (no serial meetings, please)
 - Conversations about whether to call a meeting
 - Information-only updates *received* by the full Board (no reply-all)
- What about annual retreats, strategic planning sessions, budget study sessions?
 - *These are meetings*
- What about board member use of social media?

Holding Board Meetings: Brown Act

- Types of Meetings
 - “Regular” meetings require 72 hours posting notice
 - “Special” meetings require 24 hours posting notice
 - “Emergency” – very rarely used
- Board must set time and place for regular meetings (e.g., a regular meeting schedule)
 - If necessary, regular meetings can be adjourned to a later date/time
- Special meetings held as needed between regular meetings
 - Special meeting may be called by presiding officer or majority of Board

Holding Board Meetings: Where Can Meetings Be?

- Under Brown Act, meetings must be held within the jurisdiction
- Under Ed. Code section 47604.1 (i.e., SB 126), for a board operating *one or more charter schools located within the same county*:
 - The governing body shall meet within the physical boundaries of the county in which the charter schools are located
 - A two-way teleconference location shall be established at all sites and resource centers
 - No requirement to record meetings and/or post recordings on the website

Holding Board Meetings: Teleconferencing

- Board members may use teleconferencing only if:
 - Agenda must identify teleconference locations (i.e., where Board members are dialing-in from)
 - Quorum must be within the jurisdiction
 - Agenda must be posted at teleconference locations in same timelines (72 hours or 24 hours in advance of meeting)
 - Teleconference locations must be accessible to the public
 - Roll call votes required
- These are the traditional teleconferencing requirements

AB 361 (2021): Virtual Meetings During Emergency

- During a proclaimed state of emergency, the Board may use teleconferencing without complying with many of the normal rules if:
 - State or local officials have imposed or recommended physical distancing; or
 - The Board determines that due to the emergency, meeting in person would present imminent risks to the health or safety of attendees.
- AB 361 will remain in effect until January 1, 2024, but only useful during state of emergency
 - What about AB 557 (2023)?

AB 361 (2021): Virtual Meetings During Emergency

- To hold virtual meetings, must comply with the following:
 - Make appropriate findings every 30 days
 - Roll call votes required
 - Agenda must be posted in a publicly accessible location and on the website
 - Agenda must identify how the public can access the meeting (e.g., a Zoom link)
 - The public must be notified of how they can address the Board

AB 361 (2021): Virtual Meetings During Emergency

- To hold virtual meetings, must comply with the following:
 - The public must be able to provide comments directly to the Board and in real-time
 - Can't require submission of written comments before the meeting
 - If a disruption occurs (e.g., Zoom room shuts down), Board cannot take further action until public access is restored
 - If there is a timed public comment period, the Board may not close public comment until the time has elapsed

AB 2449 (2022): Remote Participation

- AB 2249 provides new, limited teleconferencing procedures for individual board members
- If a quorum of the Board is in-person at a singular location, a board member may participate remotely without complying with many of the normal rules if:
 - There is “just cause,” which is defined as a childcare or caregiving need, a contagious illness, a need related to a physical or mental disability, or travel while on agency business; or
 - There are “emergency circumstances,” which is defined as a physical or family medical emergency that prevents a member from attending in person, and Board takes action to approve the request.

AB 2449 (2022): Remote Participation

- To participate remotely, must comply with the following:
 - Roll call votes required
 - Agenda must be posted in a publicly accessible location and on the website
 - Must provide either a two-way audiovisual platform (e.g., Zoom) or a two-way telephonic service and live webcasting
 - Agenda must identify how the public can access the meeting via a call-in option, via an internet-based service option, and in-person at the meeting location

AB 2449 (2022): Remote Participation

- To participate remotely, must comply with the following:
 - The public must be able to provide comments directly to the Board and in real-time
 - Cannot require submission of written comments before the meeting
 - If a disruption occurs (e.g., Zoom room shuts down), Board cannot take further action until public access is restored
 - Board member must publicly disclose at the meeting who is also in the room before any action is taken
 - Board member must participate via audio and visual technology

AB 2449 (2022): Remote Participation

- May use “just cause” as basis for remote participation for only two meetings per calendar year
- May not use remote participation for more than three consecutive months or 20% of regular meetings in a calendar year
- New section is repealed as of January 1, 2026
- AB 2249’s teleconferencing procedures are in addition to traditional teleconferencing procedures, as well as AB 361

Holding Board Meetings: Brown Act

— Agenda

- Brief general description of business to be transacted (20 words or less)
- Generally created by President and school team, with collaboration of Board Chair
- Post in publicly accessible physical location and on the website
 - “One-click” rule: current agenda must be posted in format that is accessible in one click on main page, word-searchable, downloadable

— What about the agenda packet?

- Agenda packet is a public record and must be available for public inspection at the time distributed to majority of Board members

Holding Board Meetings: Brown Act

- What can the Board consider at a meeting?
 - Brown Act limits to only what is on the posted agenda
 - Very high bar to add items to agenda; only allowed if:
 - (A) majority vote that there is an emergency (defined narrowly); or
 - (B) 2/3 vote of Board members present, or unanimous vote if less than 2/3 of full Board is present, that *there is need to take immediate action and need arose subsequent to agenda being posted*
 - As part of AB 2449 (2022), Board can also consider a board member's request to participate in meeting remotely in “emergency circumstances”

Holding Board Meetings: Brown Act

- *Tip:* If you miss the 72-hour posting deadline to include an item on a regular agenda, you can still post a special meeting agenda with 24 hours notice for same time and place
- Brown Act applies to committees created by Board, even if advisory:
 - Applies to all “standing” Board committees, even advisory
 - “Ad hoc” committees exempt, but only if composed of Board members only, less than a quorum, limited existence
 - Brown Act does not apply to non-Board committees, e.g. President working groups, parent focus groups, booster clubs, ELAC, SSC

Holding Board Meetings: Brown Act

- Public comment
 - At regular meetings, on any topic in Board's purview during public comment period
 - At special meetings, may limit to comments on agenda items only (check your agenda wording)
 - Right to speak *before* action taken (including closed session)
 - Right to attend meeting without having to sign in
 - May criticize the school, employees, and Board
 - Public comment can and should be time-limited (check your agenda)
 - Disruptive conduct not permitted
 - Not a conversation

Holding Board Meetings: Brown Act

- Special rules for closed sessions:
 - Only for limited topics, such as:
 - Litigation (identify matter)
 - Personnel evaluation, termination (identify position)
 - Real estate negotiations (identify property, negotiator)
 - Use the safe harbor descriptions in Gov. Code section 54954.5 on your agendas!
 - Not for budget discussions, general planning
 - Only essential persons may be present in closed session
 - What happens in closed session, stays in closed session
 - Report out final action taken

Holding Board Meetings: Brown Act

- Various special rules for executive compensation (*i.e.*, CEO) and personnel matters
 - Examples of special rules:
 - Board cannot take action regarding executive compensation at special meeting
 - Board must orally report summary of executive compensation before final action taken
 - Board must review and approve compensation of top employee for reasonableness

Holding Board Meetings: Minutes

- Minutes are important
 - This is your record of Board action and diligence
- Minutes generally approved by Board at subsequent meeting
- How much detail in minutes?
 - Minutes are not a transcript
 - Open session items: usually in a narrative format, track your agenda, briefly describe discussion, who made the motion and second, and how each Board member voted
 - Closed session items: only the description found on the agenda and anything reported out

Fiduciary Duties



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Fiduciary Duties of Board Members

- A fiduciary relationship is any relationship between parties in which one of the parties has a duty to act “with the utmost good faith for the benefit of the other party”
- Directors owe fiduciary duties to the corporation:
 - Duty of care
 - Duty of loyalty (no conflicts of interest)

Board Member Exposure to Personal Liability?

- Broad nonprofit law immunity for volunteer Board members
- D&O insurance to defend claims against Board members acting within scope of duties
- Board members can be personally liable when:
 - Acting outside the course and scope of duties
 - Breaching fiduciary duties
 - Conflicts of interest
 - Intentional or willful misconduct

Duty of Care

- Act with care, skill, prudence, and diligence,
- Under the circumstances,
- Of a prudent person acting in a like capacity,
- With familiarity with those matters, and
- Considering the background and experience of the director.
 - Note: Board may rely on information, opinions, reports, or statements by officers of corporation whom the Board believes to be reliable and competent; counsel, committee, independent accountants, or other persons

Duty of Care

- Be informed, stay informed, and be proactive in your role
- Ask questions to seek clarity before voting
- Listen to all perspectives and test your understanding of information and implications
- Ok to rely on your resources, but ask probing questions necessary to own your decision

Duty of Loyalty

- Must act in good faith and in the best interests of the corporation
 - Board members must place the interests of TFHE as a whole before their own interests
- Individuals in a position of public trust must avoid *conflicts of interest* that prevent them from fulfilling their duties in an impartial manner
 - More on this next...

Avoiding Conflicts of Interest



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Avoiding Conflicts of Interest

- Understanding the context
 - More scrutiny and regulation of conflicts of interest and even the appearance of impropriety; serious consequences for charter schools
- Charter schools must comply with all of these:
 - Policies, charter, and bylaws
 - Corporations Code standards
 - Political Reform Act
 - Government Code section 1090
 - Other applicable sources, e.g., federal rules for federal funds

Corporations Code

- Applies to boards of all nonprofit public benefit corporations
- Directors must avoid “self-dealing” transactions, *i.e.*, no material financial interest in transaction
- For *most* charitable nonprofits, the corporation could still enter into the transaction if:
 - transaction is beneficial and fair to the Corporation;
 - majority of Board affirms “fairness” of the transaction; and
 - financially interested Board member may be required to disclose and disqualify.

...but wait, there's more

Political Reform Act

- The PRA has two main requirements for charter schools:
 - Disclosure (i.e., filing Forms 700)
 - Disqualification (i.e., recusal when a conflict arises)

Political Reform Act – Disclosure

- The PRA requires that decision-makers disclose certain personal financial interests by filing Forms 700 at designated intervals
- Every charter school must adopt a Conflict of Interest Code that describes, among other things:
 - **Designated Positions:** the positions that are required to file Forms 700
 - **Disclosure Categories:** what must be disclosed on each position's Form 700

Political Reform Act – Disqualification

- The PRA also requires disqualification/recusal from any decision that may materially affect personal financial interests
 - Must recuse from all parts of the decision-making process
 - What is considered a “financial interest” is clearly defined by law
 - What are the different types?
 - Financial interests of spouse and sometimes dependents count

Political Reform Act

- Applies to Board members and other decisionmakers
- Special rules for gifts
- Civil and criminal penalties for violations
- No defense or indemnity by school or insurers
- Under the PRA, the agency can still enter into such a transaction as long as the official meets the disclosure and disqualification rules

...but wait, there's more

Government Code Section 1090

- Section 1090 provides that a public agency officer or employee may not make, participate in making, or attempt to influence a contract in which he or she is financially interested
- Section 1090 deals specifically with conflicts of interest in the *contract-making process*
 - It does not supplant the Political Reform Act, but acts in tandem (and is more strict)
- Financial interest is broadly defined

Government Code Section 1090

- A public official who has a financial interest in a contract under Section 1090 cannot be involved in the contract process at all
 - Includes all preliminary discussions, negotiations, planning, etc.
- Unless an exception applies (there are a few), if a Board member has a conflict, TFHE is prohibited from entering into the contract
 - Recusal from the contract process and vote is not enough
 - What about Board-delegated authority?
- Harsh penalties and remedies

Other Conflict of Interest Considerations?

- Appearance of impropriety
- Common law
- Nepotism
- IRS rules for executive compensation
- Special rules tied to funding, e.g., federal programs

Questions (now or later)?



Merrick A. Wadsworth

Senior Counsel

Procopio, Cory, Hargreaves
& Savitch LLP

525 B Street, Suite 2200
San Diego, CA 92101

merrick.wadsworth@procopio.com

direct dial: (619) 906-5753

www.procopio.com