Report of the Orange County District Attorney

Investigation into
Allegations of Violation of the
Ralph M. Brown Act
by the
Board of Directors of the
Capistrano Unified School District

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I. INTRODUCTION

In 2005 the Orange County District Attorney's Office received citizen complaints concerning the Board of Trustees and the Superintendent of the Capistrano Unified School District. The complaints involved the misuse of public resources, conflicts of interest, nepotism, improper financing of the new administration building, holding closed meetings in violation of the Ralph M. Brown Act, and keeping secret, matters of public concern. Specifically, in relation to the Brown Act, among the complaints alleged was that the Board conducted closed pre-meeting meetings, wherein concurrence among the Board members was reached followed by what amounted to sham public meetings characterized by little or no debate, and unanimity on the part of Board members.

As a result of these complaints the District Attorney began an inquiry into the functioning of the Board of Director's. However, events within the District soon changed the focus of this inquiry.

In April 2005, a group of citizens formed an organization called "Capo for Better Representation" and thereafter initiated a recall effort in an attempt to replace the entire Board of Trustees. Numerous volunteers began collecting signatures on recall petitions in the area of the District's jurisdiction in South Orange County.

In December 2005, the completed petitions which had been gathered in support of the recall were sent to the Orange County Registrar of Voters Office, for purposes of authenticating the signatures and ordering a special recall election. On December 23, 2005, the Registrar's Office deemed the signatures to be insufficient and rejected the application for a recall election. Officials from the District then visited the Registrar's Office where they viewed the petitions and allegedly copied the names of the signature gatherers. Some of the citizens who supported the recall filed a lawsuit alleging that the Registrar's Office was wrong; however, the Registrar's determination was affirmed and the lawsuit dismissed.

Nevertheless, complaints persisted and came to include allegations that District employees had intervened in the Registrar's determination so as to affect a result favorable to the Board. This was followed in the first half of 2006 by newspaper reports

that detailed allegations by a former employee that the superintendent and other employees had created an alleged “enemies list” of recall supporters and signature gatherers, which also included the names of their children and where within the District they attended school. (As this report goes to the printers in the late summer of 2007, newspaper reports state that some of those listed on the report have filed claims against the District in preparation for civil law suits.)

As a result of this information, the District Attorney, expanded the initial inquiry into a formal investigation, with additional investigators assigned. In the summer of 2006, this expanded investigation resulted in the execution of a court authorized search warrant upon the District’s new administration building, which was soon followed by a grand jury investigation. In 2007, this grand jury investigation culminated in the return of criminal indictments against the superintendent and a deputy superintendent.

During the course of the grand jury hearings additional information relevant to the Board’s compliance with the Brown Act was uncovered. Use of this additional information by law, had to await the publication of the transcripts of the grand jury’s proceedings in the summer of 2007. In addition interviews with witnesses and documents developed during the course of the investigation (excepting those seized in the search warrant and not yet in the public domain) were also used for this report.

Following past models, the report initially discusses the applicable law . With this in mind the facts are then reviewed in considerable detail. The facts are extensively annotated to supporting law or documents as well as citations to the transcripts of grand jury testimony in the notes section. The District Attorney’s Findings are then detailed followed by the law governing enforcement of the Brown Act. The District Attorney’s Conclusions and Recommendations conclude the report.

At the outset it is important to recognize that due to the nature of the Brown Act, a finding of violations does not necessarily support criminal prosecution. In fact the Brown Act authorizes the District Attorney to commence a criminal prosecution only against elected officials, and only in very narrow circumstances. The reasons for these limitations presumably lie in the nature of the balance of powers between the administrative and Legislative branches of government. The intervention of the

administrative into the legislative branch by means of criminal prosecution is only authorized in the more egregious circumstances, in the case of the Brown Act, where a member of a legislative body acts with the specific intent to conceal matters from the public knowing that the public has a right to know those matters. Absent these circumstances the District Attorney's authority is strictly limited to civil action and only after the legislative body has been informed of his findings and given the opportunity to concede past violations and commit itself to compliance in the future. Hence this report.

This report also serves the valuable function of educating the voting public on the conduct of one of its elected legislative bodies. In the final analysis it is the voters who decide how their elected officials represent them. In providing the results of his investigation to the voting public, the District Attorney also fulfills an informative role as well as his statutory duty of oversight.

The results of the investigation into this matter have revealed numerous violations of the Brown Act including what may be a pattern of violations. The conclusions as to these findings are detailed and analyzed in the Findings Section. None of these violations support the initiation of criminal charges against any elected member of the Board of Trustees. However, the violations are serious enough and of an apparently repetitive nature to warrant further civil enforcement action against the Board in the event the District Attorney's findings are disputed. The District Attorney therefore reserves the right to commence such an action should it prove necessary in the future. We turn now to the applicable law.

II. APPLICABLE LAW

A. Intent and Purpose of the Brown Act:

The **Brown Act** is codified in Government Code section 54950 *et seq*. Its stated purpose is as follows:

> [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 their deliberations be conducted openly. 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 not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. (Govt. Code § 54950.)

To fulfill this intended purpose, with only limited exceptions, the Act requires that: "**All meetings of the legislative body of a local agency *shall be open and public*, and all persons shall be permitted to attend…"** (Govt. Code § 54953 (emphasis added).)

B. Agencies and Legislative Bodies Subject to the Brown Act:

> The Brown Act…is intended to ensure the public's right to attend the **meetings of public agencies.**
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> The Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies." *Mckee v. Los Angeles Interagency Metropolitan police Apprehension Crime Task Force* (2005) 134 Cal. App. 4th 354, 358. (Emphasis Added)

To fulfill this purpose the types of local public agencies subject to the open meeting requirements are broadly defined. Govt. Code § 54951 provides that the term "'local agency' means a county, city, whether general law or chartered, city and county, town, **school district**, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency**."** (Emphasis Added) The Attorney General has stated that by this clear language, **"A school district is a "local agency"** as defined in section 54951…" (80 Op. Atty Gen. Cal. 308) (Emphasis Added)

In *Torres v. Board of Commissioners* (1979) 89 Cal. App. 3d 545, the reach of this definition was discussed. Noting that state agencies were covered by another statute (The Bagley-Keene Act, Govt. Code § 11120, *et seq*) which provided for similar open meeting requirements, the court concluded that "**the Legislature intended that all agencies be included in some open meeting act unless expressly excluded."** *Id* at 549. (Emphasis Added)

The Brown Act also includes a broad definition of "legislative body." Govt. Code § 54952 provides in pertinent part that "legislative body" means: "The governing body of a local agency…." The Attorney General has noted that, for purposes of the applicability

of the Brown Act, **“[A] board of trustees of a school district is a "legislative body**…,” (80 Op. Atty Gen. Cal. 308) (Emphasis Added)

C. Types of “Meetings” Subject to the Brown Act’s Open Meeting Requirements

“Meeting” is also broadly defined, and “**includes any congregation of a majority of the members of a legislative body at the same time and place to <u>hear, discuss, or deliberate</u> upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.** Govt. Code § 54952.2 (Emphasis Added) Thus it is not only those meetings where decisions are made or votes taken which are subject to the Brown Act’s open meeting requirements. Meetings where only discussions occur may also be subject to these requirements.

> Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that *the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either."* [Citations.] ***The…term "meeting" must be construed expansively****….* An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. **There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors.** *Frazer v. Dixon Unified School District* 18 Cal.App.4th 781, 794-795 (1st Cir. 1993) (Emphasis Added)
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> **Thus, ‘<u>the Brown Act ... is not limited to gatherings at which action is taken</u> by the relevant legislative body; 'deliberative gatherings' are included as well**.” [Citations.] **Deliberation in this context connotes not only collective decision making, but also “*the collective acquisition and exchange of facts preliminary to the ultimate decisions*.** *216 Sutter Bay Associates v. County of Sutter* 58 Cal.App.4th 860, 876-877 (3rd Cir. 1997) (Emphasis Added)

Consistent with these rulings, The Attorney General concluded in a 1998 opinion that such “deliberative” or “fact gathering" meetings remain subject to the open meeting requirements of the Brown Act.

> “[T]he general purposes of the [Brown] Act are to ensure not only that any final actions by legislative bodies of local public agencies are taken in a meeting to which the public has advance notice but also that any deliberations with respect thereto are conducted in public as well. [Citations.] **"Deliberations" here would include mere attendance, resulting in the receipt of information. [Citation.] ". . .** Deliberation in this context connotes not only collective decision making, but also the

collective acquisition and exchange of facts preliminary to the ultimate decision." (81 Ops.Atty.Gen.Cal 156 (1998), pp. 6-7 (emphasis added).)

> **The purposes of the Brown Act are thus to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government. Not only are the actions taken by the legislative body to be monitored by the public but also the deliberations leading to the actions taken.** (84 Ops.Atty.Gen.Cal. 30 (2001), p. 2 (Emphasis Added).)

Opinions of the Attorney General, though not binding authority, are entitled to "great weight," especially in this area of the law.

> An opinion of the Attorney General 'is not a mere "advisory" opinion, but a statement which, although not binding on the judiciary, must be "regarded as having a quasi judicial character and [is] entitled to great respect," and given great weight by the courts. [Citations.]' This is especially true in the context of the Brown Act because "the Attorney General regularly advises many local agencies about the meaning of the Brown Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements**.** *Shapiro v. Board of Directors* (4th Cir. 2005) 134 Cal. App. 4th 170, 185.

D. Requirements of a Posted Agenda and Description of Topics to be Discussed

In order to invite meaningful public involvement, regular meetings are subject to notice and agenda requirements. With limited exceptions, (not pertinent here) only topics on an agenda, posted in a publicly accessible place at least 72 hours in advance of the meeting, may be discussed.

> At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing 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 need not exceed 20 words.
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> **No action *or discussion* shall be undertaken on any item not appearing on the posted agenda**…. (Govt. Code § 54954.2(a) (Emphasis Added).

This provision has been rigorously upheld.

> Under section 54954.2, subdivision (a), the legislative body must post an agenda containing 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," **and no action or discussion shall be**

> **undertaken on any item not appearing on the posted agenda….** *Shapiro v. San Diego City Council, supra*, 96 Cal. App. 4th 904, 923. (Emphasis Added)

"The purpose of the general description is to inform interested members of the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body." (The Brown Act, Open Meetings for Legislative Bodies, Office of the Attorney General, 2003 Edition, at page 16)

These description requirements are applicable to both regular and special meetings.

> In our view, section 54956's[special meetings] requirement that the notice "specify" is intended to refer back to section 54954.2's [regular meeting] requirement that an agenda provide a "description. …[T]**he two statutes contain equivalent requirements….** *Moreno v. City of King* (6th Cir. 2005) 127 Cal. App. 4th 17

E. Exceptions to the Open Meeting Requirements of the Brown Act:

Court decisions have held that the Brown Act's open meeting requirements are to be interpreted liberally to accomplish its purpose.

> [A]s a remedial statute, the Brown Act should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed. (Citation) This is consistent with the rule that "civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. *International Longshoreman's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (2nd Cir. 1999) 69 Cal. App. 4th 287, 294

Provisions that advance the concept of openness and public access therefore are to be construed broadly, while **exceptions, restricting public access are to be narrowly construed.**

> **Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act "sunshine law" is construed liberally in favor of openness in conducting public business.** [Citations.]
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> **[T]he Brown Act should be interpreted liberally in favor of its open meeting requirements, while the exceptions to its general provisions must be strictly, or narrowly, construed.** *Shapiro v. San Diego City Council* (4th Cir 2002) 96 Cal.App.4th 904, 917, 920 (Emphasis Added)

This comports with provisions of the California Constitution favoring interpretations of statutes that broaden rather than limit public access to government.

> 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.
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> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, **shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.** (Cal. Const. Art I, § 3(b) (Emphasis Added)

1. Closed Meetings Concerning Pending litigation

One of the pertinent open meeting exceptions of the he Brown Act allows a legislative body to conduct closed sessions to discuss pending litigation with its attorney if to hold an open meeting would prejudice the agency position in the pending litigation. **Govt. code § 54956.9** provides in pertinent part:; "Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation."

However, under this exception, litigation is considered "pending" only in limited specified "existing facts or circumstances," which result in a "significant exposure to litigation against the local agency." [1] (Govt. Code § 54956.9(b) (1)) Among those qualifying "facts and circumstances" are 1) an "accident, disaster, incident or transactional occurrence that might result in litigation," 2) a statement threatening litigation that is made either at a public hearing or outside of a hearing to an official or employee of an agency. (Govt. Code § 54956.9(b)(3)(B), (D) or (E)), or 3) the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation." (Govt. Code § 54956.9(c))

2. Closed Meetings Concerning Personnel Matters.

The Brown Act also provides an open meeting exception to consider personnel matters. **Govt. Code § 54957 (b)** provides in pertinent part:

> (1) …nothing contained in this chapter shall 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.
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> (4) …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. (Emphasis Added)

In *Duval v. Board of Trustees* (5th Cir. 2001) 93 Cal. App 4th 902 the court of appeals addressed the extent of matters permissible to discuss in closed session under the phrase "evaluation of performance." In that case, in a meeting held under the auspices of this section a Board of Trustees had discussed "the form they would use to evaluate [the employee]," "general guidelines for evaluation of superintendents generally" and the "standards for such evaluation and the form that would serve as the basis for the evaluation. During those meetings the Board took action in that it found the performance of the employee "satisfactory."

In ruling that these discussions and actions fell within the "evaluation of performance" exception the court concluded that the phrase, "evaluation of performance:"

> [C]learly is meant to extend to all employer consideration of an employee's discharge of his or her job duties…. Nothing in the language of section 54957,…indicates that "evaluation of performance" is limited to the annual or periodic comprehensive, formal, and structured review of job performance commonly envisioned in a typical personnel manual or employment contract. **We conclude the phrase "evaluation of performance" encompasses a review of an employee's job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance.**
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> Further, we conclude "evaluation" may properly include consideration of the criteria for such evaluation, consideration of the process for conducting the evaluation, and other preliminary matters, to the extent those matters constitute an exercise of defendant's discretion in evaluating a particular employee. *Id* at 909 (Emphasis Added)

Such discussions, however, are to be undertaken in the context of the reason, and purpose, of the exception. As with other exceptions to the Brown Act's open meeting requirements courts have held that this one is to be narrowly construed in conformity with the purpose behind the exception and the broader intent of the Brown Act.

> [T]he underlying purposes of the 'personnel exception' are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body. [Citations.] **[W]e must construe [it] narrowly** and the 'sunshine law' liberally in favor of openness [citation]…. *Id* at 908. (Emphasis Added)

The discussions of a meeting seeking to lawfully come within this exception should therefore be narrowly confined to those topics traditionally accepted as appropriate to a determination of whether the employee's performance is satisfactory and how it can be improved in the future.

> "Feedback" to the employee is a traditional part of a formal performance evaluation. (Citation) A determination of whether an employee's performance is satisfactory and establishment of goals for future improvement are the **primary objectives** of a formal performance evaluation." *Id* at 910. (Emphasis added)

3. Agenda and Disclosure Requirements for Closed Meetings

Closed Meetings have specific Agenda and disclosure requirements. The Agenda requirements, of course, precede the closed meeting. However, there are also additional disclosure requirements that are applicable before or after closed meetings, depending on which exception they are held under.

a) Before Meeting Requirements: In order to meet the agenda and description requirements of Govt. Code § 54954.2 (discussed above), the Brown Act provides specific agenda and disclosure requirements for closed meetings held pursuant to an open meeting exception. Prior to holding any closed session, the legislative body must disclose those matters which will be discussed at the closed session.

> **Govt. § 54957.7(a),** entitled, "Disclosure of items to be discussed at closed session," provides that:
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> **Prior to holding any closed session, the legislative body of the local agency shall disclose, in an open meeting, the item or items to be discussed** in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda. In the closed session, **the legislative body may consider only those matters covered in its statement.** (Emphasis Added)

In addition pursuant to **Govt. Code § 54954.5**, the Brown Act provides for specific agenda requirements depending upon which open meeting exception authorizes the

closed session under.[2] For closed meetings held pursuant to the **"evaluation of performance"** exception, no other information need be placed on the agenda other than the employees name and title.

For closed meetings held pursuant to the **"Pending Litigation"** exception, however, additional details must be disclosed. Prior to holding a closed session pursuant to this exception, the agency's legislative body must state on the agenda or publicly announce the specific subdivision that authorizes the closed session. (Govt. Code § 54956.9(c)) If the circumstances include a "transactional occurrence that might result in litigation against the agency and that are known to the potential plaintiff… [these] facts or circumstances shall be publicly stated on the Agenda or announced." (Govt. Code § 54956.9(b)(2)(B)). If the justifying facts or circumstances involve a "statement threatening litigation" which is conveyed to the agency outside of a public hearing, then the "official or employee…receiving knowledge of the threat" must make a "contemporaneous or other record of the statement prior to the meeting." (Govt. Code § 54956.9(b)(2)(E)) This record must be made available for public inspection. (*Ibid*)

b) Post Meeting Requirements: Finally, in an open and public session held immediately after a closed meeting, the legislative body must make further disclosures as to what took place in the closed meeting. **"After any closed session, the legislative body shall reconvene into open session prior to adjournment and shall make any disclosures required by Section 54957.1[3] of action taken in the closed session."** (Govt. Code § 54957.7 (b).) (Emphasis Added) As with the agenda requirements noted above the nature and detail of the required disclosures depends upon the open meeting exception under which the closed session is held.

Specifically, if the action taken involves the approval of a "settlement of pending litigation, *disclosure of the terms of the settlement, by the legislative body, is mandated.* If the settlement involves the acceptance of a settlement offer "by the opposing party, the body **shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held**.**"** (Govt. Code § 54957.1(a)(3)(A)) (Emphasis Added) "If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that

approval, and **identify the substance of the agreement**." (Govt. Code § 54957.1(a)(3)(B)) (Emphasis Added) Either way the legislative body is under obligation to inform the public of the terms of the settlement of "pending litigation.

Having reviewed the applicable law, we now turn to the facts.

III. STATEMENT OF FACTS

Founded in 1965, the Capistrano Unified School District (CUSD) encompasses 195 square miles in seven cities and a portion of the unincorporated area of Orange County. It contains 56 school campuses and educates approximately 50,000 students a year. It is "governed" by a seven-member Board of Trustees which generally meets monthly.[4] **"**The Superintendent runs the school district on a day-to-day basis. "The Board sets policy." [5]

In **2003** CUSD contracted with Valley Commercial Contractors, L.P. ("Valley") to construct a new administration building for a Guaranteed Maximum Price (GMP) of $22.7 million. The GMP contract was recommended to the Board by a Deputy Superintendent based upon the recommendation of legal counsel and a retained architectural firm.[6] The "guaranteed maximum price" was an important reason for the recommendation.[7] The proposal was initially presented to the Board, and discussed in a closed session.[8] A member of the Board (also its Clerk) justified the initial closed session treatment of this item on the basis that it involved "a lot of detail on a lot of financing sources and things of that nature," "financial details" and "sensitive information with regard to funding."[9] This Board member explained that "we were trying to formulate the package and trying to figure out whether it was possible to even do this." [10] Then, the financial details discussed in closed session would then have been revealed to the public, "because then we would have had to vote on that whole package in open session. "We don't resolve it in closed session. "We're not allowed to vote in closed session." [11] The Board member explained, "What we would do, (sic) have a closed session, bring the pieces together, and then have a discussion in open session on a lot of it."[12] Legal counsel was present for the discussion. The Board member rationalized this practice, "[W]ith some of this funding…we have to bring in legal counsel to tell us is this fund appropriate for this. "Can we use this fund for this…and whenever

legal counsel is brought into it, then it's a closed session item."[13] The Board would rely on "staff" to inform the Board of a closed session item, but "the Superintendent made the final decision on this." [14]

In **June 2005**, while the new administration building was under construction, Valley submitted a "change order" to CUSD demanding an additional $4.3 million, over and above the previously agreed-upon Guaranteed Maximum Price. The "change order" was received by the Deputy Superintendent, presented to the superintendent and forwarded to legal counsel and an independent consulting firm (RGM and Associates) for review and comment.[15] RGM and Associates was CUSD's contract manager for the Administration building construction project. The Deputy Superintendent stated that the construction firm "threatened litigation" in the event the cost overrun was not paid.[16] CUSD was to consider this too.[17]

On **July 21, 2005**, prior to a scheduled "Evaluation of the Superintendent" meeting, the Superintendent wrote a memorandum to the Chairperson of the Board. Attached to this memorandum was another memorandum, dated December 21, 2001, from the General Counsel of the Orange County Department of Education (**See Attachment No. 1**) The memoranda discussed the import of the case of *Duval v. Board of Trustees*, supra, 93 Cal. App 4th 902. The Superintendent's memorandum in pertinent part advised that,

> Since evaluation of the Superintendent is one of those topics which can be discussed by the Board in closed session, it follows that a discussion of factors which would enter into the Board's judgment about the Superintendent's discussion are also eligible for closed session consideration.
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> Trustees may recall that several years ago, the Superintendent shared with the Board a copy of a legal opinion from [General Counsel or the County Dept. of Education] reporting the decision of an appellate court regarding an allegation of a Brown Act violation….
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> The Superintendent wanted to share a copy of this *precedent-setting legal opinion* with Trustees in advance of the Board's scheduled July 30 meeting on the evaluation of the Superintendent. As can be seen by the underlined section of [the]memorandum, the district is in a strong position to defend itself should there be the charge of violation of the Brown Act. Staff does not expect such a charge to be made…because of the care we have taken to construct the agenda in a limited fashion to focus on topics and subjects which could be factors the Trustees might include within the

> Superintendent's upcoming management plan and the basis on which his summative end of year evaluation will be determined. (Italics Added)

In the attached Counsel's memorandum there was a portion both underlined and starred which stated the following: "[D]istricts may discuss in closed session under "Evaluation of Superintendent," such items as: "Criteria for Evaluation, The evaluation form, The evaluation process, Feedback to the employee on their job performance and Particular aspects or instances of the employee's job performance." In his attached memorandum, the Superintendent described the court's ruling in this case as a "precedent-setting legal opinion."

Both legal counsel and RGM provided written memoranda on the cost overrun topic to the Board. RGM's written memorandum was dated **July, 25, 2005** RGM, labeled "Change Order Request Review," and in bold capital type bore the notation, "PRIVILEDGED (sic) AND CONFIDENTIAL INFORMATION." The memorandum discussed the reasons for the cost overrun and concluded that the additional cost was reasonable in light of "delay caused by the [governmental] planning and approval process," the "discovery of unsuitable soils which required significant site remediation," and "a redesign of the foundation system," "unusual market inflation," "considerable and extraordinary historical cost increases" and design changes requested by CUSD.

The law firm's memorandum was dated **July 28, 2005**, and in bold, capital type bore the notation, PRIVATE AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION." Its subject was stated to be a, "Review and Evaluation of Valley Commercial Contractor's L.P. Settlement Proposal for Ancillary Support Facility Project," which was the designation of the new administration building project. This memorandum advocated, in light of the findings in RGM's memorandum, that the Board adopt one of two alternative recommendations: Either 1) the Board, "Approve the GMP increase with a full settlement and release of all rights and liabilities between the parties on a negotiated not to exceed amount and give District personnel authority to negotiate the settlement, subject to Board ratification; or, 2) "Approve the GMP increase as requested by Valley with a full reservation of all rights and proceed with the binding resolution procedure outlined in…the GMP contract."

On **Saturday, July 30, 2005**, the Board of Trustees and administrative staff met for a closed session meeting with the Superintendent staff and legal counsel. The agenda for this closed meeting was entitled "Evaluation of Superintendent," and was held ostensibly pursuant to the "evaluation of performance exception" provided in Govt. Code § 54957(b). The "Evaluation of Superintendent" meetings are held twice a year on Saturdays.[18] The Superintendent makes up the agenda for these Saturday meetings.[19]

Thirty-six (36) items were listed on the Agenda of the July 30, 2005 meeting, some of which had asterisks indicating that "Back-up material [was] included." (**See Attachment No. 2**) Among the issues listed were: "Potential 2005-2006 Major District Objective Listing," "Selling Surplus Property," "New Education Center," "Future Facility Plans," "A Challenge Associated with the Development of the 2006–2007 School Year Calendar," "Differentiated Diplomas," "Protocol Guidelines for Parent Fundraising in the Future," "Challenges Associated With the State Budget and Long-term Fiscal Outlook," "Advertising on School Buses (Draper)," "Autism," "Challenges Related to the 'E-Mail' Explosion," "Naming the Entry Street for SJHHS [San Juan Hills High School]," and "Four-Day School Week." The issue involving the cost overrun of the construction of the new administration building was not specifically listed on the agenda. As discussed below, it was apparently discussed under Agenda Item # 3, entitled "New Education Center." There was apparently no announcement at a prior open public meeting disclosing the items that were to be discussed.

Either before, or at, the closed session meeting, the RGM and legal memoranda were provided to the Board. The cost overrun issue was then presented to the Board by a Deputy Superintendent and discussed in the closed "Evaluation of the Superintendent" session. [20] (In fact the cost overrun was never discussed in open session, only in closed session.[21])

At the meeting legal counsel addressed the Board, recommending that the Board pursue settlement with Valley.[22] The issue of the cost overrun was presented to the Board as part of the "Superintendent's Evaluation." [23] The discussion among the Board members then involved what to do, how much to pay and whether to settle the matter outside of litigation.[24]

As a result of these closed meeting discussions, The Board resolved to attempt to settle the matter with Valley through continued negotiations. The Board directed staff including the Deputy Superintendent and legal counsel to meet with Valley and negotiate a settlement, with ratification of that settlement to be at a subsequent Board meeting.[25] Neither the nature of these discussions nor the decisions or actions taken were reported to the public in an immediately following open session, or in any other way.[26]

The Board's Chairperson offered reasons why the discussions of this meeting were not publicly disclosed: The discussions were kept secret "by advice of our attorney." "It was a potential litigation and it was a settlement advised by our attorney, and that is the reason we kept it secret."[27] "I rely completely on counsel on that." "They told me it was perfectly fine for that to be a closed session item. Because it was potential litigation…."[28]

Another reason advanced was that these discussions were properly part of the Superintendent's evaluation." These settlement discussions, the Chairperson claimed in testimony before the Grand Jury, were properly a part of the Superintendent's evaluation since:

> The superintendent is responsible for every single thing that goes on in the District . So all issues pertaining to the management of the District fall under his evaluation.
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> This was a legal issue we were discussing with our legal counsel. And as I stated before, all actions of the Superintendent are critical on the evaluation of him.
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> And there's really nothing else I can say regarding that.
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> ***
>
> Everything and all operations and all financial issues of the District are pertinent to the role of the superintendent and therefore that is how we evaluate him. The issue of the superintendent, all issues about his performance, are reflective of the job he has done in all respects of the District operations. And it was a legal matter.
>
> ***
>
> I don't know how else to answer you. I've answered repeatedly that every operation of the District has to do with his performance. [29]

Included on the Agenda for the Superintendent Evaluation Meeting were other topics: Among these were the "Protocol Guidelines for Parent Fundraising in the Future." This

was claimed by the chairperson to be properly part of the confidential superintendent's evaluation since, "That was part of the evaluation based on funding that we had parents do over the years and how that reflects on the District and their operations."[30] "Advertising on School Buses" was properly a topic of the closed superintendent's evaluation meeting since,

> This is an item that needed to be discussed on potential ways that the superintendent may be able to increase revenue, therefore also reflecting upon his performance." "It would be a potential way to increase revenue within the District, which does fall into how he is able to generate revenue, come up with plans for the District.
>
> ***
>
> How it relates to the operations of the District and to the evaluation is based, in my opinion, on dollars that might be potentially able to come into the District. [31]

With respect to the topic of "Naming the Entry Street for San Juan Hills High School:

> As I said before I rely on our legal counsel to review this and let me know if it is legally acceptable for a closed session evaluation of the superintendent."
>
> ***
>
> There is no good answer for you, other than anything for the evaluation of the superintendent had been sent to our legal counsel and that's what I relied upon.[32]

In justifying the creation of the agenda for this meeting by the superintendent himself, the chairperson stated, "[I]t is information pertaining to his performance and the operations of the District, so it is appropriate to come from him."[33] In justifying the inclusion of such topics generally in superintendent's evaluation meetings, the chairperson said

> We rely on legal counsel on every single Saturday evaluation. And it pertains directly to the performance. How the District operates on every aspect, whether its building, whether it's education of children, whether it's our funding sources, directly relates to the performance of the superintendent of schools.[34]

The Saturday superintendent evaluation meetings were all "very similar in nature."[35] There appeared to be two legal counsels advising the Board. On the Saturday, July 30, 2005 meeting, the attorney who had, in part, authored the legal memorandum to the Board, and who had advised the Board to negotiate a settlement with Valley, was present. However this attorney had not advised the Board on compliance with the

Brown Act. Instead this attorney was counsel on the Valley construction cost overrun issue only.[36] The superintendent had informed the Board that, prior to this meeting, he had submitted this meeting's agenda to an attorney for the Orange County Department of Education who had approved the agenda and had indicated everything on the agenda was "fine and appropriate for a closed session item." [37] The chairperson never talked to this attorney to inquire if discussing the cost overrun settlement in a closed session meeting held as an "evaluation of performance" was permissible under the Brown Act.[38] The superintendent also told the chairperson that the Department of Education Attorney had reviewed *every* agenda of the closed session Saturday meetings *prior to* the Board going into those sessions, the chairperson and apparently the board did not independently confirm whether or not this had in fact occurred.[39] (In a interview with a member of the District Attorney's Office, this attorney indicated that he had no memory of any such conversations with the superintendent. Furthermore, if there had been such conversations, he would have made a contemporaneous record of them, and he had no such records.) Finally, since the closed Saturday meeting was a superintendent's evaluation, "The public does not receive notifications on this." [40]

The chairperson stated that there are no verbatim records of closed session meetings, and "minutes" are not taken except for "actions that are taken by the School Board." [41] However, handwritten notes *are* taken of the Saturday "Evaluation of Superintendent Meetings," by a District employee attending the meetings. These notes are subsequently typewritten and after approval by the Board at its next meeting, according to the chairperson, they are posted on the District's website.[42] In fact, this is apparently not true.

A draft of the typewritten notes of the July 30, 2005 meeting provided to the District Attorney (and which was made available on the internet by the Recall Group) (**See Attachment No. 3**) indicates that nineteen (19) of the Items listed on the Agenda were discussed at the July 30, 2005 closed Saturday session. The notes indicate that among the discussions was an expression of concern "about the reaction of the community to having a continuation school…." Another trustee expressed "concerns about what the press will do about the possibility of failing schools." The notes recorded that this trustee, "Wants the public and school community prepared well in advance."

The notes also recorded discussion of a topic that was not listed as an agenda item. This discussion concerned the number of items a particular (and apparently regular) attendee of public meetings was going to be allowed to address. The notes indicated that, "In general Board members want to start to limit [name of attendee] and the amount of items he can address." In another part of the notes under the Agenda Item #19, Special Education, discussions involved instructions "to get language… to respond to [name of attendee] anticipated statements at the [upcoming] August 8 meeting."

The cost overrun issue appears to have been discussed under Agenda Item No. 3, entitled "New Education Center." The notes describe the discussions as "issues related to a change order for the new education center and the related cost of the facility" The notes also indicate that the Chairperson expressed concern that the contractor "knows the confidential nature of this settlement agreement."

After the July 30, 2005 closed meeting, in compliance with the Board's directive, the deputy superintendent legal counsel and CUSD's architectural consultant met with Valley in an attempt to settle the matter outside of litigation.[43] As a result of the meeting a legal agreement was drawn up.[44] On **August 4, 2005,** the superintendent and the vice-president of Valley signed the negotiated settlement agreement. This agreement provided for a $3.8 million additional payment to Valley for the cost overrun of the GMP contract.

On Monday, **August 8, 2005** during a regularly scheduled Board meeting the superintendent, Board and staff again met for a closed session. The agenda for the closed session contained as its first entry, "A. CONFERENCE WITH LEGAL COUNSEL – Potential settlement, Education Code 54956.9 § (b) (sic), one case." During that portion of the closed session, the Board discussed the settlement agreement reached on August 4th, and voted to ratify it. The matter having been "ultimately decided in closed session," **details of the agreement were never reported to the public by the Board**, all that was reported was that there had been a "pre-litigation settlement agreement." [45]

The Chairperson of the Board justified the non-reporting of this decision or the disclosing of the cost overrun on the basis, that "in dealing with other contractors, that

could create a potential issue for the District and end up costing the school district more funds on other projects…."[46]

> There was a reason because it was a guaranteed maximum price. We deal with many construction firms, many vendors. And for that particular information to become public it could have impaired other projects that we would have and that was our concern (sic).
>
> ***
>
> If one contractor knows that we've entered into a maximum price---maximum guaranteed price contract, and then in fact we are paying additional fees, the concern is…that other corporations we're dealing with may tend to think it's easier to get…change orders from us.[47]

At the time the cost overrun agreement was ratified there was a recall campaign against all seven members of the Board. [48] One Board member while affirming that the reason why the settlement was kept secret was "because it was legal," acknowledged that:

> If that information came out to the public I would have been uncomfortable with it, but I would have dealt with it. I believe the other Board members probably felt the same way. I didn't poll them. I didn't ask them. We didn't have a conversation. But I think the consensus based on the environment that was out there, the opposition to the building itself, the recall, we were probably all comfortable thinking about the same thing. The fact that legal counsel told us that this needed to be a closed session item and needed to stay in closed session, we were probably comfortable with hearing that because of the situation out there.
>
> ***
>
> …[B]ased on the atmosphere out there, my gut reaction is we were all comfortable with what legal told us, that this was a closed session item. [49]

On **Saturday, January 21, 2006** the Board conducted another closed "Evaluation of the Superintendent" meeting. The Agenda for this meeting contained thirty-seven (37) items, again with many having an asterisk indicating "Back-up material included." Some under the heading, Trustee Items," had the names of one of the Trustees in parentheses after the item. (**See Attachment No. 4**) Among the agenda items for this closed meeting were, "Paperless School Board Agendas* (Henness), "Laptop Program (J. Casabianca)," Community Outreach* (Kochendorfer), "Board Policy 5d11d6(a): School Attendance Boundaries* (Kochendorfer), "Post Recall Observations*, "Overview 2006-2007Administrative Reorganization," Overview Administrative Protocols on Referral Process*, "Update: New Education Center, "Update: Preschool for all initiative,* "Preview,: Upcoming Non Re-election Recommendations,* "Preview: Revision of Board

Policy 5166: Head Lice,* "Future Possible Local General Obligation School Facilities Bond,* "Future possible Parcel Tax,*

This investigation did not further elaborate on all, or which, of these issues were discussed in the "Evaluation of Superintendent Meeting" held on January 21, 2006.

With these facts and applicable law in mind we now turn to the Findings of the District Attorney.

IV. FINDINGS

A. Finding No.1

The Board of Trustees of the Capistrano Unified School District (CUSD) is a "Legislative Body" Subject to the Requirements of the Brown Act.

The Capistrano Unified School District is a "Local Agency" within the meaning of the Brown Act. By its terms Govt. Code § 54951 provides that the term "'local agency' includes a "school district." The District's website states that it is "governed by its Board of Trustees. As its "governing body" the Board is a "Legislative Body" within the meaning of Govt. Code § 54952 and is therefore subject to the requirements of the Brown Act. Based on the clear language of the statute the Attorney General has also concluded that generally a board of trustees of a school district is a "Legislative Body" within the meaning of the Brown Act. (See 80 Op. Atty. Gen. Cal. 308). (Beyond this by the clear language in the Education Code the District's Board of Trustees is subject to the open meeting requirements of the Brown Act: "All meetings of the governing board of any school district shall be open to the public and shall be conducted in accordance with Chapter 9 (commencing with Section 54950) of Division 2 of Title 5 of the Government Code [i.e. the Brown Act].") (Education Code § 35145)[48]

B. Finding No. 2

The Closed Meetings of the Board Held to Initially Discuss the Use of a Guaranteed Maximum Price (GMP) Contract to Build its Administration Building Were in Violation of the Brown Act.

The proposal to employ a GMP contract to build CUSD's new administration building was initially discussed in closed session. A Board member described this process as follows: "What we would do [is] have a closed session, bring the pieces together, and then have a discussion in open session *on a lot of it."* Justification was claimed on the bases that discussions involved "financial details and sensitive information with regard to funding," that legal counsel was present, and that no decision was made save in open session.

These "justifications" are insufficient under the Brown Act. First, as both the letter of the Act, and the cases interpreting it hold, when a majority is present there is no distinction between meetings held to discuss an issue and meetings held to decide that issue. Unless at least one of the limited exceptions applies, both types of meetings are subject to the Brown Act's open meeting requirements. Second, meetings that discuss "financial details," whether legal counsel is present or not, do not qualify as exceptions to the Brown Act.

If this is a description of how the Board regularly conducts itself it is no surprise that many of its final votes are unanimous or nearly so. As the courts have previously stated, "There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors." The practice of a "pre-meeting conference," thus "permits crystallization" of opinion such that the subsequent open meeting is little more than "ceremonial." To the extent the Board has held, and continues to hold, such pre-meeting meetings, the Brown Act was, and continues to be, violated.

C. Finding No. 3

The Agenda of the July 30, 2005 Meeting Included Items Not Properly the Subject of a Closed Employee's "Evaluation of Performance" Meeting, and Therefore Was in Violation of the Brown Act.

As noted above the exception provided in Govt. Code § 54957(b) for the evaluation of performance" of employees provides a "safe harbor" for closed meeting discussions only in a very limited sense. Current or future policy issues or decisions such as: "Potential 2005-2006 Major District Objective Listing," "Selling Surplus Property," "New

Education Center," "Future Facility Plans," A Challenge Associated with the Development of the 2006–2007 School Year Calendar," Differentiated Diplomas," Protocol Guidelines for Parent Fundraising in the Future," Challenges Associated With the State Budget and Long-term Fiscal Outlook," Advertising on School Buses (Draper)," "Autism," "Challenges Related to the 'E-Mail' Explosion," "Naming the Entry Street for SJHHS [San Juan Hills High School]," and "Four-Day School Week," are policy matters that that the Brown Act requires to be discussed in properly noticed open meetings where the public can observe and participate in the discussion and debate. It is especially egregious to the intent behind the Act that when discussed in a closed session under the "evaluation of performance" exception, unlike with other exceptions, no additional details other than the name and title of the employee need be disclosed either before or after the closed session. <u>By this practice, not only is the public effectively excluded from the decision making process during the meeting, but it is effectively excluded from it ever after. Nothing further from the intent and purpose of the Brown Act can be imagined.</u>

D. Finding No. 4

The Agenda of the July 30, 2005 Meeting Did Not Properly Describe the Topic of the Cost Overrun Involving the new Administration Building, and was Therefore in Violation of the Brown Act.

Of the thirty-six (36) items placed on the agenda of the July 30, 2005 meeting, the cost overrun issue involving the new administration building is not adequately described in any. It was apparently discussed under an agenda item described as "New Education Center" (See Attachment No. 2) As noted in the applicable law section, the description requirements for regular and special meetings are the same. 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.**" While the description "need not exceed 20 words," it must fulfill its purpose of adequately informing the public so that interested persons can "determine whether to participate in the meeting of the body." In this instance the Agenda use three words to describe the topic. The words used moreover could not adequately provide notice that the Board was describing a cost overrun of the new administration building. Indeed the

description obfuscates the topic that was actually discussed. This is not in compliance with the Brown Act.

E. Finding No. 5

Prior to its Closed Session Meeting of July 30, 2005 the Board of Trustees Did NOT Disclose in an Open Session the Cost Overrun Topic that was Discussed.

It bears repeating that Govt. § 54957.7(a), entitled, "Disclosure of items to be discussed at closed session," provides that:

> **Prior to holding any closed session, the legislative body of the local agency shall disclose, in an open meeting, the item or items to be discussed** in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda. **In the closed session, the legislative body may consider only those matters covered in its statement.** (Emphasis Added)

The Attorney General has interpreted this section to mean that the "prior to adjoining into closed session, a representative of the legislative body must orally announce the items to be discussed in closed session." (The Brown Act, Open Meetings for Legislative Bodies, Office of the Attorney General, 2003 Edition, at page 21) The topic of the cost overrun of the Administration building was not disclosed in an open public meeting prior to the closed Saturday meeting in compliance with this subsection. While the requirement of such an announcement may be satisfied by referring to the Agenda item, this presupposes that the topic for closed session discussion is adequately described in the agenda. As noted above, this was not done.

F. Finding No. 6

The Discussions of Settlement of the Cost Overrun Dispute in the Closed Session Meeting on July 30, 2005, Held Under the Agenda Title of "Evaluation of Superintendent," Were in Violation of the Brown Act.

The discussion of the cost overrun in the closed meeting held on July 30, 2005 as an "Evaluation of Superintendent" was in violation of the Brown Act for the reasons detailed in below:

1. Finding No. 6(a)

The Cost Overrun Topic Was Not Adequately Described on the Agenda; therefore, it Could Not Lawfully be Discussed in a Meeting.

As noted in the Applicable Law Section and as repeated here, "No action *or discussion* shall be undertaken on any item not appearing on the posted agenda…. (Govt. Code § 54954.2(a) The cost overrun issue was not adequately described on the Agenda for the July 30, 2005 meeting. Its subsequent discussion in closed session was therefore in violation of the Brown Act.

2. Finding No. 6(b)

The Discussions Settlement of the Cost Overrun Topic Was Not Disclosed in a Prior Open, Public Meeting; therefore, any Subsequent Discussion of that Topic in the Closed July 30, 2005 Meeting Was in Violation of the Brown Act.

As noted above, Govt. § 54957.7(a) requires that "Prior to holding any closed session, the legislative body of the local agency **shall disclose**, in an open meeting, the item or items to be discussed in the closed session." That section also provides that **"In the closed session, the legislative body may consider only those matters covered in its statement."** (Emphasis Added) Since the settlement of the cost overrun of the administration building was not properly disclosed as required by this section the subsequent discussion concerning that topic was in violation of this section of the Brown Act.

3. Finding No. 6(c)

The Closed Session Discussions of the Cost Overrun Topic Were Not Properly Held Under an Employee "Evaluation of Performance" Exception and Therefore Were in Violation of the Brown Act.

Irrespective of the agenda and disclosure violations, detailed discussions of how and on what basis to settle the cost overrun issue with the Construction firm building the new administration building were not properly included in a closed meeting held pursuant to the "evaluation of performance" exception contained in Govt. Code § 54957(b). Although it is true that such evaluations need not be limited to a "commonly envisioned"

type of general performance review, and may extend to "particular instances of job review, only an inordinately expansive interpretation of these terms would justify the inclusion of "pending litigation" settlement discussions within the "evaluation of performance" exception. As noted the language of exceptions is to be "narrowly" interpreted according to the reason for the exception.

The interpretation placed by the Board's Chairperson on the "evaluation of performance" exception to include, "Everything and all operations and all financial issues of the District," would effectively mean this exception would swallow not just the "open meeting rule," but the entire Brown Act as well. Since essentially "everything" could now be discussed in closed sessions labeled as an "Evaluation of Superintendent," there is no need for any other exception nor any rule. The Brown Act would be effectively repealed. The case of *Duval v. Board of Trustees, supra,* 93 Cal. App 4th 902, did not repeal the Brown Act which would be the result were it to be interpreted as the Chairperson or the former Superintendent wish it to be.

The letter of the General Counsel of the County Board of Education correctly characterized the limitations of that case's ruling to allow discussions of the "Criteria for Evaluation, The evaluation form, The evaluation process, Feedback to the employee on their job performance and Particular aspects or instances of the employee's job performance." The *Duvall* ruling does not constitute the type of "precedent-setting legal opinion," as it was characterized by the Superintendent.

Neither the "evaluation of performance" exception nor the *Duval* opinion stands for the proposition that, "Everything" may be discussed in closed sessions held pursuant to this exception. Rather only those matters involving the form, process and content of "feedback" on the employee's performance is properly the subject of such closed sessions. Current policy or operational issues (including proposed "pending litigation" settlement agreements) facing a legislative body are NOT properly discussed in closed sessions under the auspices of an employee's "performance evaluation." The Board of Trustees of the Capistrano Unified School District violated the Brown Act when it did so.

G. Finding No. 7

Although the Cost Overrun Could Have Been Lawfully Discussed in Closed Session, on July 30, 2005, the Required Procedures For Doing So Were Not Followed by the Board.

The cost overrun could have been legally discussed in closed session under the "pending litigation" exception contained in Govt. Code § 54956.9(b) or (c). (See Note No. 1) However, this exception requires that prior to the closed session, this topic must have been properly described on an agenda. For closed sessions held pursuant to particular exceptions to the open meeting requirements (in this case the "pending litigation" exception), Govt. Code § 54954.5 provides language whereby the agenda and description requirements of § 54954.2 may be satisfied.

For the "pending litigation" exception, Govt. Code § 54954.5(c) specifies that the agenda list the topic as "CONFERENCE WITH LEGAL COUNSEL—ANTICIPATED LITIGATION," followed by the statement, "significant exposure to litigation pursuant to subdivision (b) of Section 54956.5." This is in turn to be accompanied by a statement to "[s]pecify the number of potential cases." This was not done. As a result the notice requirements of § 54954.2 were not satisfied and the subsequent discussions on the cost overrun could not be discussed under the "pending litigation exception" without violating Brown Act. (As noted earlier, Govt. Code § 54954.2(a) states that, "No actions or discussions shall be undertaken on any item not appearing on the posted agenda."

For the "pending litigation" exception, § 54954.5(c) also states that there may be additional agenda and description requirements pursuant to subsections 54956.9(b)(3)(B) through (E). As more fully noted in the Applicable law section, subsection (B) provides (in pertinent part) that when there has occurred "facts and circumstances…that might result in litigation…and that are known to the potential plaintiff, [those] "facts and circumstances shall be publicly stated on the agenda or announced." Such facts and circumstances required to trigger this additional notice requirement were clearly present.

The facts and circumstances involving the cost overrun were clearly of the kind that might have resulted in litigation. Indeed litigation had been threatened by the construction company that had submitted the cost overrun statement in the event it was not paid. These same facts and circumstances were obviously "known to [the] potential

plaintiff," the construction company. Thus the "triggering" requirements of §54956.9(b)(3)(B) existed, but the "facts and circumstances" were neither stated on the Agenda nor "announced " as required by the Brown Act.

In addition there are additional applicable notice requirements for the "pending litigation" exception contained in Subsection (E) of §54956.9(b)(3) Subsection (E) provides such additional requirements when an official or employee of the local agency has received knowledge of a "statement threatening litigation." A Deputy Superintendent had testified that the Construction Firm had "threatened litigation." He or the official who had received this threat was therefore required under this subsection to "make a contemporaneous or other record of the statement [threatening litigation] prior to the meeting…." (Govt. Code § 54956.9(b)(3)(E)). Furthermore, a record so made must have been made available to the public. (*Ibid*) None of these required procedures were followed. For this reason too, subsequent discussions of the settlement agreement could not have been discussed except in violation of the Brown Act.

H. Finding No. 8

The Discussions of the Other Topics Recorded as Having been Discussed in the Closed July 30, 2005 "Evaluation of Superintendent" Meeting were Also <u>NOT</u> Proper Under the Employee "Evaluation of Performance" Exception and Therefore Discussions of Them Were in Violation of the Brown Act.

The "notes" of the July 30, 2005 closed meeting reveal that twenty (20) topics were discussed nineteen of which were *ostensibly* listed on the agenda, one of which was not. Referring to these notes in **Attachment No. 4** and comparing the topics listed with the law governing the "evaluation of [employee] performance" exception quickly leads to the conclusion that <u>NONE</u> of these discussions are lawful under that exception. A review of these notes in fact reveals a behind-the-scenes manifestation to control and limit public participation in open meetings, as well as an unflattering concern for community reaction and "what the press will do" concerning actions of the Board or the failures of the school system it manages. That these concerns are coupled with expressions of desire to see that before bad news is revealed, "the public and school community [is] prepared well in advance," evinces a desire to manipulate press and public opinion from behind closed doors. **That such discussions are undertaken in**

secret by a body charged with the community's most important obligation, to adequately educate its young, is nothing short of disturbing.

I. Finding No. 9

The August 8, 2005 Closed Meeting Held Pursuant to the "Pending Litigation Exception," Was Not Preceded by A Proper Agenda Description or Announcement as Required by the Brown Act.

The August 8, 2005 meeting at which the Board voted to ratify the cost overrun settlement was not preceded by the required Agenda Descriptions or Announcements. The Agenda item merely stated, incorrectly at that, the subsection of the Brown Act under which the closed meeting was ostensibly authorized. The Agenda stated the closed meeting was being held pursuant to "Education Code 54956.9 § (b)." The correct citation should have been *Govt. Code* § 54956.9(b). This is a minor, if technical, error, of course, but not so the omission to comply with the pertinent subsections of the Brown Act.

The proper utilization of the "pending litigation" exception required that prior to the closed session, the issue involved must have been described on an agenda with far more detail than was used. As discussed above Govt. Code § 54954.5 provides the language whereby the notice and description requirements of Govt. Code § 54954.2 could have been satisfied for the "pending litigation" exception. Neither this language, nor any other similarly descriptive language was used.

Neither were the requirements of Govt. Code § 54956.9(b)(3)(B) followed. Again, as noted above, that subsection expressly states where there has occurred "facts and circumstances…that might result in litigation…and that are known to the potential plaintiff, [those] "facts and circumstances shall be publicly stated on the agenda or announced." These facts and circumstance were neither stated on the Agenda nor "announced " as required by the Brown Act.

Finally, again as previously noted, a Deputy Superintendent had received knowledge that the Construction Company had threatened litigation. As with the July 30th meeting, this Deputy Superintendent (or other official who had received such knowledge) was,

"*prior to the meeting*," obligated to make a "contemporaneous or other record" of any statement that threatened litigation. Any record so made must have been made available for public inspection. (Govt. Code § 54956.9(b)(3)(E)) None of these requirements were performed.

J. Finding No. 10

Since the August 8, 2005 Meeting Held Pursuant to the "Pending Litigation" Exception Was Not Properly Described on the Agenda or Announced, the Discussions and Actions Undertaken in that Meeting Were in Violation of the Brown Act.

As with the July 30, 2005 meeting the discussions and action by the Board at the August 8, 2005 closed meeting were in violation of the Brown Act, and for similar reasons as outlined above: the closed session was not preceded by the required Agenda descriptions or announcements. Since this meeting was ostensibly held under the "pending litigation" exception contained in Govt. Code § 54956.9(b), as discussed above, there were specific agenda, description and announcement, as well as public record requirements applicable. These requirements were not followed. Therefore, the subsequent discussions and action on the cost overrun could not be undertaken without violating Brown Act.

K. Finding No. 11

After the Closed Session of the August 8, 2005 Meeting, The Board Did Not Make the Required Public Disclosures Describing the Action it Had Taken in the Closed Session. This Was in Violation of the Brown Act.

Govt. Code § 54957.7 (b) provides that "After any closed session, the legislative body shall reconvene into open session prior to adjournment and shall make any disclosures required by Section 54957.1 of action taken in the closed session." Govt. Code § 54957.1, entitled, "Public Report of Action Taken in Closed Session;…," specifically covers the disclosures required in closed meetings where the "settlement of pending litigation" is involved.

If the action taken involves the acceptance of a "settlement of pending litigation," *disclosure of the terms of the settlement, by the legislative body, is mandated.* If in the closed session "the Legislative body accepts a settlement offer signed by the opposing party, the body **shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held**.**"** (Govt. Code § 54957.1(a)(3)(A)) (Emphasis Added) This is clearly the case here. By the time of the August 8th meeting the "opposing party," the construction company had already signed the agreement on August 4th. The agreement was returned to the Board on August 8th at the Board's specific request so that it would have final approval. Upon the Board's approval at the closed session, it was obligated to *immediately* go into open session, report its acceptance of the settlement agreement and disclose the "substance" of the agreement it had just reached. Its failure to do so violated the Brown Act.

L. Finding No. 12

The Agenda of the January 21, 2006 Meeting Included Items Not Properly the Subject of a Closed Employee's "Evaluation of Performance" Meeting, and Therefore Was in Violation of the Brown Act.

As with the July 30, 2005 Saturday, Evaluation of the Superintendent" meeting, the Agenda of the January 21, 2006 "Evaluation of Performance" meeting contained items not properly the subject of a closed meeting pursuant to the employee "evaluation of performance" exception provided in Govt. Code § 54957(b). Topics such as "Board Policy…School Attendance Boundaries, "Post Recall Observations,* "Administrative Reorganization," "Revision of Board Policy [on] Head Lice,* or discussions of the impact or effect of initiatives, bonds or parcel taxes are matters properly "agendized" and discussed only in regularly scheduled open meetings, not closed ones.

M. Finding No. 13

The Practice of the Board in Discussing a Wide Range of Policy Topics in Closed Session Ostensibly Under the "Evaluation of Performance" Exception to the Open Meeting Requirements of the Brown Act Violates the Brown Act.

The similarity between the agenda of the July 30, 2005 meeting and the one of January 21, 2006 supports the conclusion that holding discussions of such topics in closed

"Evaluation of Superintendent" meetings is a pattern and practice of the Board. As previously pointed out the case of *Duval v. Board of Trustees, supra,* 93 Cal. App 4th 902 provides NO justification for such a whole sale expansion of this exception. That in one of these sessions discussions involve how to limit participation of a particular attendee of open meetings, or how to manage the press or public opinion serves only to add an additional aggravating to this practice. **It is the position of the District Attorney that this practice of the Board violates the Brown Act and must cease forthwith.**

We turn now to the enforcement mechanisms provided by the Brown Act.

V. ENFORCEMENT OF THE BROWN ACT

Compliance with the Brown Act is considered of great importance by the Legislature. **"The Legislature hereby finds and declares that <u>complete, faithful, and uninterrupted compliance</u> with the Ralph M. Brown Act (citation) is a matter of <u>overriding public importance</u>."** (Government Code § 54954.4 (emphasis added).) The Brown Act contains several enforcement provisions, both criminal and civil. Criminal actions are applicable only to elected members of a legislative body and only in limited circumstances, which involve knowledge and intent.

> **Criminal penalties are available only where some action is taken by the legislative body in knowing violation of the Act**." [Citation.] **Civil remedies are available to prevent further or future violations and do not require knowledge, or action taken.** (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1287 (emphasis added).)

The Brown Act has a two tier requirement for the knowledge requirement: The member must either know or have reason to know that the public is entitled to know information and yet intends to deprive the public of that information.

> **Each member of a legislative body** who attends a meeting of that legislative body where **action is taken** in violation of any provision of this chapter, and where the member **intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter**, **is guilty of a misdemeanor.** (Government Code § 54959 (emphasis added).)

The second requirement needed to establish criminal liability is that a member *attends* a meeting where *action is taken* in violation of the Brown Act. The **term, "action taken:"**

> **[M]eans a collective decision made by a majority** of the members of a legislative body, **a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision**, **or an actual vote by a majority** of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (Government Code § 54952.6 (emphasis added).)

These elements of course must be proven *beyond a reasonable doubt* for criminal liability to be established. From this it follows that although violations of the Brown Act may be found, *criminal sanctions are authorized in only very limited circumstances,* where a specific mental state, attendance at a meeting and action taken in violation of the Brown Act, at that meeting, coexist. Civil Actions to enjoin violations of the Act, or which provide for "declaratory relief," do not require any such specific intent or actions in furtherance of that intent.

The power to bring such actions is vested in the District Attorney or other interested persons.

> The district attorney or any interested person may commence an action by mandamus, **injunction or <u>declaratory</u> relief for the purpose of stopping or preventing violations or threatened violations** of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body…. (Government Code § 54960(a).)

"Declaratory relief" under Government Code section 54960 is available for past violations where there is a dispute as to whether or not a violation occurred, on the grounds that a denial that past actions were violations of the Act may support an inference that such violations will reoccur.

> [F]or its part [defendant] city does not believe any violation has occurred. City's belief as to the propriety of its action may be found… **in city's failure to concede that the facts alleged by plaintiffs constitute a violation of the Brown Act….. (**Citation) **(courts may presume that municipality will continue similar practices in light of city attorney's refusal to admit violation).** Thus there can be no serious dispute that a controversy between the parties exists over city's past compliance with the Brown Act and the charter. **On that basis alone plaintiffs are entitled to**

> **declaratory relief resolving the controversy**. (*California Alliance for Utilities etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1030 (Emphasis Added).)

Therefore, **“the ripeness doctrine does not require that to obtain declaratory relief [the plaintiff] allege and prove a pattern or practice of past violations. Rather, it is sufficient to allege there is a controversy over whether a past violation of law has occurred."** (Id.*,* at 1029, emphasis added.) “[I]n the absence of declaratory relief plaintiffs will have some difficulty in preventing future violations.” (Id.*,* at 1031). Such relief may therefore be sought in such disputes to declare past actions to be in violation of the Brown Act and to enjoin the legislative body from committing them in the future.

VI. CONCLUSIONS

A. Conclusion No. 1

Criminal Prosecution For the Violations of the Brown Act Found is Not Warranted.

As noted above criminal prosecutions of violations of the Brown Act are authorized in only very limited circumstances. First, “action” must be taken in a meeting. Action requires that a **collective decision**, **commitment or promise by a majority of the members of a legislative body be made to make a positive or a negative decision**, **or that an actual vote by a majority** be taken. Of all of the violations of the Brown Act heretofore detailed, only one definitely has this element, the decision to accept settlement of the cost overrun dispute at the August 8, 2005 meeting. There was clearly a commitment at that meeting to approve the settlement agreement that had been previously signed on August 4th. The July 30th meeting may also qualify as “action taken,” in that at that meeting there was apparently a collective decision to pursue settlement with the construction company as opposed to litigation. However, the disclosure requirements under Govt. Code § 54957.1 would not have required disclosure as the final settlement had not yet been reached. Furthermore, as noted earlier, had the proper procedures been followed, a closed session under the pending litigation exception would have been appropriate. Therefore, **any inquiry as to the propriety of criminal prosecution should focus on the August 8th meeting** solely.

In order to warrant a criminal prosecution of a Board member for the action taken at the August 8th meeting, their attendance at that meeting must have been accompanied by a specific intent to conceal from the public, information that the Board member, knew, or had reason to know, should have been made available to the public. **While it is clear that the Board members at the time the August 8th meeting was held, in fact, *did intend* to conceal information concerning the cost overrun settlement from the public, it is *not* established *beyond a reasonable doubt*, that they knew or had reason to know that the public was entitled to know this information.**

As discussed in the Facts section the Board members had legal counsel present at both the July 30th and August 8th meetings. Although this counsel was advising the Board on the cost overrun, not necessarily the Brown Act, that counsel did apparently advise the Board to maintain the confidentiality of the settlement reached at the closed August 8th meeting. The reason expressed, that it would cause problems with the District's other contractors, of course does not qualify as an exception to the Brown Act; nevertheless, this was the legal advice apparently given to the Board.

In addition there is evidence that the superintendent had advised the Board that he'd consulted with an attorney with the County Board of Education and had been advised that the Board's conduct during the July 30th and August 8th meetings was in compliance with the Brown Act. Irrespective of the evidence adduced by the District Attorney's investigation, that no such advice was ever given to the superintendent, it is un-contradicted that this was the advice given to the Board by the superintendent.

In view of the "legal" advice apparently given to the Board, irrespective of the fact that it was wrong, the evidence does not establish *beyond a reasonable doubt*, that members of the Board knew, or had reason to know, that the public was entitled to know the terms of the pre litigation settlement agreement reached on August 8, 2005. Accordingly, criminal prosecution of any Board member is <u>not</u> supported.

B. Conclusion No. 2

A Civil Action for Injunctive and Declaratory Relief is, at Present, Premature, but Authorized in the Event the District Attorney's Findings are Disputed.

As noted above, "Civil remedies are available to prevent further or future violations and do not require knowledge, or action taken." Accordingly, the absence of knowledge that the Board was violating the Brown Act is not a bar to a civil action against the Board. The civil remedies available are "injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations…or to determine the applicability of [the Brown Act] to actions or threatened future action of the legislative body…." (Government Code § 54960(a).) The letter of the law provides that the power to bring an action is essentially prospective. That is the purpose is "stopping or preventing violations or threatened violations," of the Brown Act or to determine whether the requirements of the Brown act are applicable to specific actions or future actions. Civil action for injunctive or declaratory relief is NOT authorized against what are solely past violations, *unless* similar present or future violations are occurring or threatened.

As noted above, courts have held that "failure to concede" that past conduct or actions constitute a violation of the Brown Act, in fact will support a presumption by the courts that a legislative body "will continue similar practices." Therefore "a controversy between the parties…over…past compliance with the Brown Act," would mean that a party would be "entitled to [bring a civil action for] declaratory relief resolving the controversy." The courts have held that "it is sufficient to allege there is a controversy over whether a past violation of law has occurred," since "in the absence of declaratory relief [there might be] some difficulty in preventing future violations."

This report culminates an extensive investigation into the past practices of officials of the Capistrano Unified School District, an investigation that, in part, resulted in the initiation of criminal prosecution against two of those officials. **Although the evidence does not support further criminal prosecutions, the District Attorney's Findings have identified *numerous* violations of the Brown Act by the Capistrano Unified School District's Board of Trustees.** These numerous violations together with the grand jury testimony of District officials justifying such conduct, leads to the conclusion that such violations of the Brown Act have been a past pattern and practice of the

District's Board of Director's. This conclusion is substantiated by the fact that in 1991 the Orange County Grand Jury also found the then Board of Trustees to have committed violations of the Brown Act. Given the fact that the law "declares that complete, faithful, and uninterrupted compliance with the Ralph M. Brown Act is a matter of overriding public importance," practices that foster, or themselves constitute, repetitive violations of that law cannot be allowed to persist.

The District Attorney therefore issues this report not only for the purpose of informing the public, but also to place before the Board of Trustees his findings. ***If* the District Attorney's findings are formally accepted by the Board, and a commitment made by the Board to cease such violations and to institute "complete, faithful and uninterrupted compliance" with the Brown Act, further action by the District Attorney will be rendered moot. In the event his findings are disputed, the District Attorney reserves the right and the authority to commence such further enforcement actions as are authorized by law.**

VII RECOMMENDATIONS

A. Recommendation No.1

The CUSD Board Should Retain of Legal Counsel Familiar with the Brown Act

In addition to accepting his findings, the District Attorney strongly urges the Board of Director's to retain competent legal counsel familiar with the Brown Act to advise it. This counsel should be present, and available for consultation, at all Board meetings, public or closed. In addition this counsel should be asked to review and approve all agenda items, especially those for closed sessions, *before* the agendas are posted. The past practices of the Board in relying on hearsay consultations by other officials with off site attorneys (consultations which may never have occurred), attorneys apparently unfamiliar with, or inexperienced in, the Brown Act or allowing the "Superintendent [to make] the final decision," on agenda items are insufficient in guiding the Board in complying with the Brown Act.

B. Recommendation No. 2

The CUSD Board Should Broadcast or Make Available on Its Website, Recordings of Its Open Meetings.

To promote increased public confidence, awareness and participation in the matters facing the District, the District Attorney recommends that the Board's open meetings be either broadcast live or video recorded for broadcast at a later time or placed on the District's web site. Such procedures are employed by other agencies within Orange County to good effect. This procedure could also help lead to a restoration of public confidence in the Board.

C. Recommendation No. 3

The CUSD Board of directors should Record or Transcribe all Closed Sessions

The District Attorney also recommends as a measure to restore and maintain public confidence that the Board record or transcribe its closed sessions. Such recording or transcriptions need not be disclosed to the public, however, they would be available for review by a court or other governmental body if necessary.

D. Recommendation No. 4

The CUSD Should Institute and Maintain a Vigorous and Continuous Training Program in the Brown Act for both Board Members and Executive Officers and Assumption of Responsibility for Compliance with the Brown Act.

Finally, the Board should institute vigorous and continuous training in the Brown Act for all of its members and executive officials. It is not sufficient for members of an elected body to simply rely on the advice of others or to abdicate to the Superintendent total decision making power over the formulation of agenda topics for closed meetings. As elected officials answerable to the public, and the laws, it is their *own* responsibility to familiarize themselves with the requirements of the Brown Act and to conduct their official duties in compliance with it. This includes ensuring that those items discussed in closed session are proper under the Brown Act. In issues of doubt, it should be kept in mind that, in a representative form of government, the public's right to know, not the electoral viability of elected officials, is of "overriding importance." In short the Brown Act is not a nuisance and neither keeping secrets from the public nor managing the press or

public opinion should make elected officials feel "comfortable." Elected office is not a right or benefit to be jealously guarded by its holder nor does the comfort level of such officials override the public's right to know.. Elected Office is rather an honored position of trust to be held solely for the benefit of the public, not the office holder. An elected official can seldom do wrong by keeping this in mind.

VIII. NOTES

1. These circumstances are: 1) Litigation, to which the local agency is a party, has been initiated formally; 2) *based on existing facts and circumstances*, there is a significant exposure to litigation against the local agency, or 3) the local agency has decided to initiate or is deciding whether to initiate litigation. In turn the term "existing facts and circumstances" in 1) or 2) above is limited to: A) Those that might result in litigation but which are not yet known to a potential plaintiff; B) those including but not limited to an accident, disaster, incident, or transactional occurrence that might result in litigation that are known to a potential plaintiff, **"which facts or circumstances shall be publicly stated on the agenda or announced."** (C) The receipt of a written communication from a potential plaintiff threatening litigation, (D) A statement made by a person in an open and public meeting threatening litigation, or, E) A statement threatening litigation made by a person outside an open and public meeting on a specific matter within the responsibility of the legislative **body so long as the official or employee of the local agency receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting.** (Govt. Code § 54956.9(a), (b) and (c)) (Emphasis Added)

2. **Govt. Code § 54954.5 provides in pertinent part:**

For purposes of describing closed session items pursuant to Section 54954.2, the agenda may describe closed sessions as provided below. No legislative body or elected official shall be in violation of Section 54954.2 or 54956 if the closed session items were described in substantial compliance with this section. Substantial compliance is satisfied by including the information provided below, irrespective of its format.

(b) With respect to every item of business to be discussed in closed session pursuant to Section 54956.8:

***

CONFERENCE WITH LEGAL COUNSEL-ANTICIPATED LITIGATION

Significant exposure to litigation pursuant to subdivision (b) of Section 54956.9: (Specify number of potential cases)

(In addition to the information noticed above, the agency may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to subparagraphs (B) to (E), inclusive, of paragraph (3) of subdivision (b) of Section 54956.9.)

LIABILITY CLAIMS

Claimant: (Specify name unless unspecified pursuant to Section 54961)

Agency claimed against: (Specify name)

(e) With respect to every item of business to be discussed in closed session pursuant to Section 54957:

***

PUBLIC EMPLOYEE PERFORMANCE EVALUATION

Title: (Specify position title of employee being reviewed)

PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

3. **Govt. Code §54957.1 provides in pertinent part as follows:**

§ 54957.1. Public report of action taken in closed session….

(a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention on that action of every member present, as follows:

***

(3) Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as follows:

(A) If the legislative body accepts a settlement offer signed by the opposing party, the body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that approval, and identify the substance of the agreement.

***

(5) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

***

(a) Reports that are required to be made pursuant to this section may be made orally or in writing. The legislative body shall provide to any person who has submitted a written request to the legislative body within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally approved or adopted in the closed session. If the action taken results in one or more substantive amendments to the related documents requiring retyping, the documents need not be released until the retyping is completed during normal business hours, provided that the presiding officer of the legislative body or his or her designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present and requesting the information. (Emphasis Added)

4. Official web site of CUSD: http://www.capousd.org/about.htm
5 Grand Jury Transcript, Testimony of Marlene Draper, Nov. 27, 2006, p 624
6. Grand Jury Transcript, Testimony of Dave Doomey, Nov. 29, 2006, pp 805 – 806, 818, 846.
7. Id at 844.
8. Grand Jury Transcript, Testimony of John Casabianca, Oct. 18, 2006, pp 412 – 414 and, Testimony of Marlene Draper, Nov. 27, 2006 p 565.
9. Testimony of John Casabianca, Oct. 18, 2006, pp 413 – 415.
10. Id at 413 – 414.
11. Id at 414
12. Id at 417
13. Id at 416 – 416, 425.
14. Id at 416
15. Testimony of Dave Doomey, Nov. 29, 2006, pp 882 – 885.
16. Id at 882, 884.
17. Id at 884.
18. Testimony of Marlene Draper, Nov. 27, 2006, pp 588, 607 – 608.
19. Id at 623.
20. Testimony of Marlene Draper, Nov. 27, 2006, pp 611 – 612, 630; Testimony of John Casabianca, Oct. 18, 2006, p 419, and Testimony of Dave Doomey, Nov. 29, 2006, pp 887 – 888.
21. Testimony of Marlene Draper, Nov. 27, 2006, p 574.
22. Testimony of Dave Doomey, Nov. 29, 2006, p 886.
23. Id at 887.
24. Id at 889.
25. Testimony of Dave Doomey, Nov. 29, 2006, pp 887, 889 – 891; Testimony of Marlene Draper, Nov. 27, 2006, p. 624.
26. Testimony of John Casabianca, October 18, 2006, p 429, 433, 440; Testimony of Marlene Draper, Nov.27, 2006, pp 635, 639.

27. Testimony of Marlene Draper, Nov. 27, 2006, p. 580.
28. Id at 593.
29. Id at pp 608 – 619.
30. Id at 619 – 620.
31. Id at 620, 627.
32. Id at 622 – 623.
33. Id at 623.
34. Id at 624.
35. Id at 624.
36. Testimony of Marlene Draper, Nov. 27, 2006, p 635; Testimony of Marlene Draper, Nov. 28, 2006, p 700.
37. Testimony of Marlene Draper, Nov. 27, 2006, pp. 627 – 629, 634 – 635.
38. Testimony of Marlene Draper, Nov. 27, 2006, 634; Testimony of Marlene Draper, Nov. 28, 2006, p 664.
39. Testimony of Marlene Draper, Nov. 27, 2006, p 589 – 590, and Nov. 28, 2006, p 666.
40. Testimony of Marlene Draper, Nov. 27, 2006, p 588 – 589.
41. Id at 626
42. Id at 635-636
43. Testimony of Dave Doomey, Nov. 29, 2006, p. 889.
44. Testimony of Dave Doomey, Nov. 29, 2006, pp 889 – 890.
45. Testimony of Dave Doomey, Nov. 29, 2006, pp 889 – 890; Testimony of John Casabianca, Oct. 18, 2006, pp 424, 428 – 429, 433, 440; Testimony of Marlene Draper, Nov. 27, 2006, pp. 583 – 584, 635, 639.
46. Id at 592 – 593.
47. Id at 580.
48. Testimony of John Casabianca, October 18, 2006, p 464.
49. Id at 455 – 456.
50. In 1986, the Legislature affirmed that by this statute it did not intend to imply that sections of the Brown Act other than those specifically involving open meeting requirements are not applicable to the governing boards of school districts. Stats 1986 ch 641 provides:

    SEC. 11. The Legislature does not intend, by including an express reference to Sections 54954.2 and 54960.1 of the Government Code in Sections 35145 and 72121 of the Education Code, as amended by this act, to imply that other sections of the Ralph M. Brown Act which have been construed as applying to meetings of the governing boards of school and community college districts shall not continue to apply to those meetings.

ATTACHMENT NO. I

CAPISTRANO UNIFIED SCHOOL DISTRICT
San Juan Capistrano, California

July 21, 2005

TO: Marlene Draper, President and Members
CUSD Board of Trustees

FROM: James A. Fleming, Superintendent

SUBJECT: **THE BROWN ACT**

As Trustees are aware, over the years we have been diligent about ensuring Brown Act compliance when it comes to conducting our semi-annual *Evaluation of the Superintendent* Saturday closed-session meetings. We will, of course, continue such diligence.

Since evaluation of the Superintendent is one of those topics which can be discussed by the Board in closed session, it follows that a discussion of factors which would enter into the Board's judgment about the Superintendent's performance are also eligible for closed session consideration. In doing this, however, we have been diligent about not discussing topics substantively which should be on an open session agenda, and, most importantly, the Board has not made any decisions about policy, program, fiscal, or operational matters which, by their nature, are open session agenda items.

Trustees may recall that several years ago, the Superintendent shared with the Board a copy of a legal opinion from Ron Wenkart, General Counsel, reporting the decision of an appellate court regarding an allegation of a Brown Act violation by a local governmental body. The body had met in closed session to discuss the "criteria" for evaluation of its chief executive. Notably, the court of appeal in the referenced case found in favor of the governing board and in its opinion stated, "determination ...and establishment of goals for future (employee) improvement are the primary objectives of a formal performance evaluation."

The Superintendent wanted to share a copy of this precedent-setting legal opinion with Trustees in advance of the Board's scheduled July 30 meeting on the evaluation of the Superintendent. As can be seen by the underlined sections of Counsel Wenkart's memorandum, the district is in a strong position to defend itself should there be the charge of violation of the Brown Act. Staff does not expect such a charge to be made, both because of our long-time unchallenged practice of conducting these meetings, all properly publicly noticed, and because of the care we have taken to construct the agenda in a limited fashion to focus on topics and subjects which could be factors the Trustees might include within the Superintendent's upcoming management plan and the basis on which his summative end of year evaluation will be determined.

General Counsel Ron Wenkart's December 21, 2001, legal opinion is attached for your review and information.
JAF:lz

To: Community College Chancellors
District Superintendents
ROP Superintendents

From: Ronald D. Wenkart
General Counsel

OPAD 01- 63

Re: Brown Act . Closed Session

In a recent decision in Duval v. Board of Trustees, -_______Cal.App.4th______ (2001), the Court of Appeal broadly interpreted the phrase, "evaluation of performance," for the purposes of closed session pursuant to Government Code section 54957. The Court of Appeal rejected the plaintiff's lawsuit seeking to narrowly define the personnel exception language in the Brown Act that allows boards to meet in closed session to discuss certain personnel matters.

The Brown Act requires the governing boards of school districts, community college districts, regional occupational programs, and other local agencies to conduct their business in public meetings. The Brown Act contains certain limited exceptions to the public meeting requirement. Government Code section 54957 allows a governing board to hold a closed session "...to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee…."

At two consecutive board meetings, the school district placed on the agenda a closed session agenda item to evaluate the superintendent's performance. The plaintiffs alleged in their complaint that the board members discussed the form they would use to evaluate the superintendent and the school board decided that the superintendent's performance was satisfactory triggering the renewal provisions of the superintendent's employment contract. The plaintiffs alleged that these actions exceeded the scope of the agenda item which stated that the closed session was for "Evaluation of the Superintendent."

The plaintiff's attorney notified the school district of potential Brown Act violations, as required by the Brown Act and filed a complaint for declaratory relief in Superior Court. The Superior Court found that the complaint was insufficient and ~ranted judgment in favor of the school district.

The Court of Appeal noted that Section 54954.2(a) of the Brown Act requires a brief, general description of each item of business to be transacted or discussed at the meeting including items to he discussed in closed session. A brief general description generally need not exceed 20 words. Section

54954.5 sets forth sample agenda items. The Court noted that the underlying purposes of the personnel exception allowing closed sessions is to protect the employee from public embarrassment and to permit free and candid discussion of personnel matters by the governing board. See San Diego Union v. City Council, 146 Cal.App.3d 947, 955 (1983).

The Court of Appeal disagreed with the narrow interpretation advocated by plaintiffs. The Court held that the phrase. "evaluation of performance," was clearly meant to extend to all employer consideration of an employee's discharge of his or her job duties after appointment or employment up to but excluding discipline or dismissal of the employee. The Court of Appeal held that nothing in the language of Section 54957 indicates that evaluation of performance was limited to the annual or periodic comprehensive formal and structured review of job performance, commonly envisioned in a typical personnel manual or employment contract. The Court of Appeal held that the phrase, "evaluation of performance," encompasses a review of an employee's job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance.

The Court of Appeal also held that the phrase, "evaluation of performance," may properly include consideration of the criteria for such evaluation, consideration of the process for conducting an evaluation and other preliminary matters, to the extent those matters constitute an exercise of the district's discretion in evaluating a particular employee. The Court ruled that preliminary considerations are an integral part of the actual evaluation oft he superintendent and are properly a part of the governing board's consideration of the evaluation of performance of the superintendent. Feedback to the employee is a traditional part of the formal performance evaluation process and would also fall under the "evaluation of performance," closed session exception. The Court of Appeal stated:

> "A determination of whether an employee's performance is satisfactory and establishment of goals for future improvement are the primary objectives of a formal performance evaluation."

In our opinion, the conclusions reached by the Court of Appeal in interpreting the phrase "evaluation of performance" from Section 54957 of the Brown Act are a reasonable interpretation of the statutory language and consistent with the legislative intent. In summary, the Court of Appeal concluded the districts may discuss in closed session under "Evaluation of Superintendent," such items as:

- Criteria for the evaluation
- The evaluation form
- The evaluation process
- Feedback to the employee on their job performance
- Particular aspects or instances of the employee's job performance

If you have any further questions, please do not hesitate to call.

ATTACHMENT NO. 2

CAPISTRANO UNIFIED SCHOOL DISTRICT
San Juan Capistrano, California

Evaluation of the Superintendent

Discussion of Superintendent's 2005-0 6 Management Plan

July 30, 2005, Agenda
8:30 a.m. to 4:00 p.m.

I. Potential 2005-06 Major District Objectives

1. Potential 2005-06 Major District Objective Listing* page 1

II. Other Potential Areas Related to the Superintendent's 2005-06 Management Plan

Facilities Issues

2. SB 177: Selling Surplus Property * page 5
3. New Education Center * page 17
4. Oso Grande page 23
5. K-8 Conversions page 25
6. Future Facility Plans * page 27
7. Rancho Mission Viejo Development page 31

Personnel Issues

8. Overview of Pending 2005-06 Administrative Organizational Adjustments page 33
9. Cabinet Members: Overview and Contract Status Update page 35
10. *Future Superintendents* Academy page 37

Operations Issues

11. A Challenge Associated with Development of the 2006-07 School Year Calendar* page 39
12. Logistical Challenges Associated with the Move to the New Education Center page 41
13. Expansion of *Data Warehousing* Concept page 43

Policy Issues

14. Differentiated Diplomas * page 45
15. Protocol Guidelines for Parent Fundraising in the Future * page 47

Fiscal Issues

16. Challenges Associated With the State Budget and the State's Long-term Fiscal Outlook * page 67
17. Development of the 2005-06 District Budget * page 69
18. Advertising on School Buses (Draper) * page 71

Program Issues
19. Special Education page 75
20. Autism * page 77
21. Child Health, Nutrition and Fitness page 99

Miscellaneous Issues
22. Communications (Kochendorfer) page 101
23. The Escalating Accountability Thresholds of NCLB: Impacts on Schools & Districts * page 103
24. Challenges Related to the "E-Mail Explosion'[1] * page 113
25. Paperless School Board Agendas * page 121
26. Avoiding the Pitfall of the "Ladder Of Inference" Phenomenon * page 129
27. Foster Care Parent Training Program page 135
28. PTA Presentations * page 137
29. Interim Housing for the Coastal Mountain Academy Program page 141

III. Planning for Future Activities
30. Walking Tour of Current District Office Complex page 143
31. Moiso Briefing on Rancho Mission Viejo Development page 145

IV. Appendix: Included for Trustee/Superintendent Reference, Discussion, or for General Interest
32. Looming Significant National Court Decision Regarding IDEA * page 147
33. Naming the Entry Street for SJHHS * page 153
34. Four-Day School Week * page 165
35. La Pata Extension * page 169
36. Board of Trustees/Superintendent Working Relationships * page 175

**Back-up material included*

ATTACHMENT NO. 3

DRAFT

CAPISTRANO UNIFIED SCHOOL DISTRICT
San Juan Capistrano, California

July 30, 2005

TO: Dr. James A. Fleming, Superintendent

FROM: Heather Wheeler, Manager, Board Office Operations

SUBJECT: FOLLOW- UP TO JULY30 CLOSED SESSION BOARD MEETING – EVALUATION OF THE SUPERINTENDENT

The Closed Session meeting of Saturday, July *30,* Evaluation of the Superintendent, started at 9:00 am.

AGENDA ITEM #	TOPIC	DISCUSSION/ACTION/FOLLOW UP
	School Board Meeting Conduct Protocol	**Follow up:** **Trustee Stiff:** **Suggests that in the future when the Board waives Board Policy that a roll call vote be taken.** **Trustee Benecke:** **If we are going to permit Ron Lackey to speak to numerous items on the agenda, do not list them individually in the minutes. Simply provide a listing of the pulled items.** **NOTES:** **In general Board members want to start to limit Ron Lackey and the amount of items he can address.** **Suggest that the Board go back to only allowing members of the public to address two items as stated in Board Policy.**
	Miscellaneous	**(Dr. Fleming wants to discuss the Ron Lackey list.)** **Trustee Henness:** **When we get into negotiations, try not to drag them out again and allow it to become a big issue.**

#1	Potential 2005-06 MDOs	Dr. Fleming provided an overview of the potential 2005-06 Major District Objectives. **Follow up:** **Trustee Henness: Remove the extra word 'is" in MDO #4 (second line from the bottom).** **Trustee Benecke: Follow up with a letter from principals thanking the community and citizens for the bond money. Trustee Draper suggested that Debbie Morgan write the letter. (McGILL)** **Trustee Draper: Add Email addresses to the list provided on page 3.6 and send to Trustee Draper via Email.** **NOTES:** **JAF: Talk to Susan McGill about #4 of the Public Relations Outreach Plan.** **Trustee Draper: Terry Wedel piece needs to be added.**
#2	SB 177: The Possibility of Selling Surplus Property	Attorney Jeff Hoskinson provided information and regulations related to SB 177 and the Naylor Act. **Follow up:** **Trustee Casabianca:** **1. What would the replacement site be for the Capo bus yard?** **2. Provide a list of how much money is involved for each of the potential properties being declared surplus.** **Trustee Benecke:** **1. Concerned about the reaction of the community to having a continuation school at the Paseo Colinas site. (LaROE)** **2. If the Capo Beach property is sold for affordable housing, are we not creating a problem with a low scoring school?** **Trustee Kochendorfer:** **1. If we sell a piece of land for affordable housing, could we make it part of the agreement that a portion of that housing be set aside for teachers (as a way of attracting teachers to our district). (DOOMEY)**

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2. **Do a comparison study of selling vs. lease agreements. Note, any time there would be a lease agreement, cash would have to be provided up front. (DOOMEY)**

3. **Would like staff to come back to the Board with a list of potential members of the advisory committee that will be established (per Education Code) as to the use of surplus properties.**

4. **With regard to accusations regarding pollution from bus yard causing problems with Doheny Beach, Trustee Kochendorfer would like us to get something from the water district stating that we are not polluting Doheny Beach. (DOOMEY)**

5. **Concerns about money being supplanted. Be certain that any money coming from the sale or lease of real estate not be spent on items that the district should be budgeting for.**

Trustee Draper: Shares Trustee Kochendorfer's concerns. Would like some idea of how much money the district could get for these properties and supports a bidding war. Urges the district to move slow and cautiously and always with Board review and approval.

NOTES:
If any of these properties are sold for affordable housing, the district should Mello the property.

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<tr>
<td>#3</td>
<td>New Education Center</td>
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Attorneys Sean Absher and Denise Hering presented issues related to a change order for the new education center and the related to the cost of the facility.
Mr. Absher provided the third party reviewer's report and analysis of the project.

Follow up:

Trustee Kochendorfer: Make sure that the city is aware that they were the cause of extensive additional costs. Mr. Doomey indicated he has let the city of SJC know that the district WILL recover those costs at a future time. (DOOMEY)

Trustee Draper: Make sure that the contractor knows the confidential nature of this settlement agreement

NOTES:
In the absence of objection. Dave Doomey and attorneys Absher and Hering will meet with Valley and their attorneys on Monday, August 1, at 9:00 a.m. and attempt to negotiate in the range of not less than 5% of the requested increase.

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#4	Oso Grande	Due to the rains this past winter, Dan Crawford reported that Oso Grande will be 90% complete. However, students will occupy the school at the beginning of the school year.
#5	K-7 Conversion	Dan Crawford reported on the status of the K-8 conversions and indicated that the traffic mitigation will be completed by the first day of school.
#8	Overview of Pending 05/06 Administrative Adjustments	Dr. Fleming provided Trustees with an overview of the pending 2005/06 administrative organizational adjustments and changes for the new- school year. **Follow up:** **Trustee Henness: ensure that the district is not working too thin on lower levels, especially in the Business Division.** **Trustee Casabianca: If the money is available, allow senior staff to hire middle management and clerical staff that may be needed.** **Trustee Darnold: Echoed both Trustee Henness and Trustee Casabianca.**
#11	2006-07 School Year Calendar	Dr. Fleming present 3 options for the 2006-07 School Year Calendar for Trustee review. NOTES: Trustee Kochendorfer expressed concerns about Option #3 calendar that it might create a loss of ADA. Her preference would be Option #2 calendar. Trustee Henness suggested putting the calendars on the web site and have parents vote. Trustee Benecke said we should go with the calendar that will give us the highest student enrollment and bring the district the most money. Trustee Casabianca preferred Option #3 calendar. Trustee Draper does not agree with putting it up for a vote. **Follow up:** **Trustee Draper: Go back to Sherine Smith with direction to review calendars for what is best academically for the kids and also best for attendance.**

#14	Differentiated Diploma	Staff recommendation is to not offer a Differentiated Diploma and that the district offer a Certificate of Completion which will maintain the integrity of the graduation process. **Follow up:** **Trustee Henness: Permit all students to walk in graduation ceremony.** **Trustee Casabianca: Suggests staff work with legal counsel on the wording for accepting the class.**
#15	Protocol Guidelines for Parent Fundraising	**Follow up:** **Trustee Casabianca: Revise current Board Policy. (BUFFUM — Nov/Jan)** **Trustee Henness: Ensure that when the money is raised that it is gifted over to the school district and that if we are hiring a teacher, that the district does the hiring.** **Trustee Draper: Include a statement (recital) on the Board Policy indicating that CUSD does not require or promote parent fundraising and that the Board and staffs responsibility is to provide the core curriculum. (BUFFUM)** **Trustee Benecke: Ensure that the fundraising being done by the Foundations goes to those schools that do not have a large amount of parent support.**
#17	Development of the 2005-06 Budget	Dr. Fleming presented a Power Point presentation which provided an overview of the Revised Final Budget which will be presented at the August 8 Board meeting. **Follow up:** **Trustee Casabianca:** **Since the budget picture is looking better, Trustee Casabianca requested an updated list of priorities for Trustees to revisit. This could be provided in a Board Packet.** **Trustee Kochendorfer:** **What is the bill owed to the district in mandated costs? Also, provide a list of what the district has paid out of pocket.** **NOTE:** **Add a section in Board item for August 8 on mandated costs.**

#18	Advertising on School Buses	Dan Crawford reported that advertising could only be done on the inside of school buses and this is governed by CHP. Mr. Crawford indicated that he is not ready, at this time, to bring information forward on this topic. He will do further research and return to the Board.
#19	Special Education	Cindy Frazee provided Trustees with an update regarding special education parent Ten Morelli. **Follow up:** **Trustee Casabianca: Requested staff to ask Mrs. Morelli's approval to tape the IEPs.** **Cindy Frazee to get language from Carolyn Zuk to respond to Ron Lackey's anticipated statements at the August 8 meeting. Also, Cindy will ask Carolyn Zuk to attend the Board meeting.**
#23	The Escalating Accountability Thresholds of NCLB: Impacts on Schools and Districts	Sr. Deputy Superintendent Austin Buffum presented a Power Point regarding updated information related to NCLB. **Follow up:** **Trustee Draper: Would like to see Dr. Buffum's Power Point to be a public presentation at a future Board meeting.** **Trustee Kochendorfer: Work with SVUSD and realtors on getting this updated information out to the communities.** **Trustee Draper: Concerns about what the press will do with the possibility of 17 failing schools, Wants the public and school community prepared well in advance.** **Trustee Casabianca: Praised the presentation and wishes it could be presented to our state legislators.** **Trustees all were in support of using this video and do video streaming. (BUFFUM)** **Trustee Kochendorfer requested that Cupertino School District and other similar districts be included in the video streaming.**

#24	Email Explosion	Following a brief discussion, Trustees, for the most part. did not want to change their Email addresses. **Follow up:** **Trustee Draper: When Email is used for a request for information, can we require that it be done only via U.S. mail? Have staff check with Dave Larsen. Possibly a Board Policy should be developed. (LaROE to write letter to Larsen).** Trustee Kochendorfer: Include the risk for viruses in the wording of the Board Policy.
#25	Paperless Agendas	Trustees, in general, would like to see the district move toward paperless agendas for the new education center. **Follow up:** **Trustee Casabianca:** **1. Suggests going and looking at another school district that is working with paperless agendas. (SEXSMITH through A/B)** **2. Will lap tops be provided by the District? Will there be computers set up for parents to access?** **Trustee Stiff: Would like to know the cost savings of using a paperless agenda.** **Trustee Henness: Feels that this should be included in the new education center at this time so that Board action will not be required at a later date.**
#27	Foster Care Parent Training Program	Trustee Kochendorfer serves on the Board of Beta Foster Care. This program matches kids with foster families in an attempt to avoid moving kids from home to home. They am now working on offering parenting classes to help families with parenting skills who serve as foster families.
#29	Coastal Mountain Academy Program	Trustee Darnold indicated that housing this program atone of our sites has been placed on the “back burner” at this time.

#30	Walking Tour of Current District Office Complex	Trustees were most supportive of this idea. **Follow up:** **Dr. Fleming will work on dates for this tour and submit them to Trustees.** **Trustee Benecke: Suggests Parent Council also be provided with a tour.**
#31	Planning for Briefing by Tony Moiso Regarding Rancho Mission Viejo Development	Trustees -are in favor of having a briefing by Tony Moiso. **Follow up:** **Dave Doomey will work on arranging this briefing. (DOOMEY)** **Trustee Draper: Wants to talk to Tony Moiso first.**

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ATTACHMENT NO. 4

CAPISTRANO UNIFIED SCHOOL DISTRICT
San Juan Capistrano, California

Evaluation of the Superintendent

Discussion of Superintendents 2005-06 Management Plan

January 21, 2006, Agenda

8:30 a.m. to 4:00 pm

Trustee Items

1. Paperless School Board Agendas * (Henness) page 1
2. Laptop Program (J. Casabianca) page 11
3. Title 1 Schools (J. Casabianca) page 13
4. Community Outreach * (C. Kochendorfer) page 15
5. Middle School Grade Advancement and Retention (Draper) page 19
6. Federally Mandated Weilness Policy * (Kochendorfer) page 21
7. Farsi Foreign Language (Kochendorfer) page 29
8. *Victory with Honor* Gold Medal Standards * (Kochendorfer) page 31
9. Science, Math and Engineering (Kochendorfer) page 49
10. Board Policy 5116(a): School Attendance Boundaries * (Kochendorfer) page 51

Staff Items

11. Post-Recall Observations * page 57
12. Overview: 2006-07 Administrative Reorganization page 79
13. Overview Administrative Protocols on Referral Process * page 81
14. Overview: SB 687 SARC Reporting Requirements * page 89
15. Overview: Requirements for Teacher Dismissal * page 93
16. Overview: Students Not Passing the CAHSEE * page 97
17. Overview: Need for Additional Alternative/Continuation High School * page 109
18. Update: Certificates of Completion * page 113
19. Update: New Education Center page 125
20. Update: OCTFCU Lease Arrangement page 127
21. Update: SB 177 Activity page 129
22. Update: CUEA Negotiations* page 131

23. Update: K-8 Conversions * page 143

24. Update: New Conununity Facilities Districts * page 151

25. Update: *Preschool for All* Initiative * page 163

26. Preview: Upcoming Non Re-election Recommendations * page 191

27. Preview: Class Rank on Transcripts * page 195

28. Preview: Upcoming GAMUT Policy Revisions * page 199

29. Preview: Revision of Board Policy 5166: Head Lice * page 311

30. Preview: New Policy on Expulsion Hearing Panel * page 321

31. Future Possible Local General Obligation School Facilities Bond * page 327

32. Future Possible Parcel Tax * page 343

33. Potential 2006-07 MDOs page 351

34. Cabinet Members' Contract Issues * page 353

35. Superintendent's Contract Issues page 359

Appendix:

36. Board/Superintendent Working Relationships * page 361

37. Report: Federal Funding for Education * page 369

* *Back-up material included.*