

that the School Board and Dr. Ward provided only one opportunity for the public to speak on two different agenda items. **Attachment 2.**

II. BACKGROUND ON COMPLAINT NO. 05-04.

A. Regular Meeting Of March 9, 2005

On Wednesday, March 9, 2005, Dr. Ward and the School Board held a regular meeting. (Under the provisions of S.B. 39, the State Administrator has assumed the powers and duties of the School Board. The School Board continues to meet as a local legislative body in an advisory capacity in conjunction with Dr. Ward.) The agenda totaled 18 pages. **Attachment 3.** The agenda contained a number of specific items (Items A through L) and an item entitled "Public Comments On All Other Agenda And Non-Agenda Items" (Item M). The remainder of the agenda consisted of a "General Consent Report" (i.e., a consent calendar) that included 45 separate entries, Unfinished Business, New Business, adoption of a Pupil Discipline Consent Report, Board Discussion and Adjournment.

The item entitled "Public Comments On All Other Agenda And Non-Agenda Items" (Item M) is described on the agenda as follows:

"This section of the agenda provides an opportunity for members of the public, for a maximum of three minutes or less (depending on the number of speakers), to directly address the State Administrator and the Board on ALL other items on the current agenda and on ANY ITEM of interest that is NOT ON THE CURRENT AGENDA, but is within the subject matter jurisdiction of the District. Minutes are not transferable from speaker to speaker."
[Emphasis in original]

According to the minutes of the March 9, 2005, meeting, the School Board recognized and permitted speakers on the substantive items preceding Item M -- Item I (student directors' report); Item J (state administrator's report); and on Item K (public hearing on developer fees). Mr. Mordecai spoke on each of these items. Mr. Mordecai also spoke under Item M (Public Comments). **Attachment 4.**

Mr. Mordecai states that earlier in the year Dr. Ward limited the public's ability to address the School Board to one opportunity per meeting, regardless of the number of items and/or speakers. He states that this policy has since been modified to permit speakers to address each individual item appearing before "Public Comments" as they are brought up and considered. Members of the public are also allowed to address the School Board under "Public Comments," which serves as the School Board's "open forum" similar to that used by other local bodies in Oakland.

Despite these changes, Mr. Mordecai objects to the following conduct at the March 9 meeting:

- 1) The agenda did not notify members of the public that they have a right to speak on every item;

2) The School Board and Dr. Ward limited speakers to two minutes of speaking time even though the number of speakers did not justify the reduction from the School Board policy that provides three minutes of time;

3) The School Board and Dr. Ward required members of the public to use time allotted under "Public Comments" to address all subsequent items on the agenda; and

4) Dr. Ward uses the Consent Calendar to adopt numerous items without the benefit of separate action and keeps the items "insulated from public view."

B. Special Meeting Of March 15, 2005

On March 15, 2005, the School Board held a special meeting to discuss two items of new business contained under Item D. Item C on the agenda provided members of the public with an opportunity to address both items on the agenda:

Item C: "Public Comment On All Agenda Items"

*"This section of the agenda provides an opportunity for members of the public, for a maximum of three minutes or less (depending on the number of speakers), to directly address the State Administrator and the Board on ALL items on the current agenda. Minutes are not transferable from speaker to speaker." **Attachment 5.***

Mr. Mordecai did not attend the March 15, 2005, meeting. He alleges that it was improper for the School Board to confine speaker comments on the two items of new business to the preceding item, Agenda Item C. He contends that speakers should be permitted to address each item of business as those items are brought up.

III. ANALYSIS

A. Commission Jurisdiction And Standard Of Review

As stated above, the City Attorney's office has advised the Commission that efforts to enforce provisions of the Sunshine Ordinance, to the extent they conflict with the Brown Act, would not likely be upheld in court. The City Attorney also advised that a provision in the Sunshine Ordinance that incorporates the Brown Act is not inconsistent with state law and could mean that the Commission may determine violations of the Brown Act against local bodies such as the School Board.

As to allegations pertaining to the rules and regulations by which the School Board conducts its meetings, California courts have ruled that local legislative bodies have "wide discretion" in adopting and enforcing their rules of procedure, and that this discretionary authority will usually not be disturbed on subsequent review absent a showing of an abuse of discretion.

B. School Board Meeting Of March 9, 2005

1. Failure Of Agenda To Advise Speakers They May Speak On Every Agenda Item

The Brown Act requires the agenda for regular meetings to provide an "opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body. . . ." [Government Code §54954.3(a)] If the comments concern an item on the agenda it must be allowed before or during the local body's consideration of the item.

The Brown Act does not require agendas to advise members of the public that they have these rights, although such a disclosure constitutes a practice that some of Oakland's local bodies have chosen to adopt voluntarily. The fact that the agenda does not expressly advise members of the public of their speaking rights does not appear to violate any provision of the Brown Act.

2. Two-Minute Speaker Limit

Mr. Mordecai states that Dr. Ward limited speakers addressing those items listed before Public Comments to two minutes. Speakers recognized under Public Comments were also recognized for two minutes. He states that speakers are normally provided three minutes "unless there are a large number of speakers."

As quoted above, the Brown Act requires every agenda for a regular meeting to provide the public an opportunity to directly address the legislative body on any item of interest, before or during the legislative body's consideration of the item. The Brown Act further provides that a legislative body may adopt "reasonable regulations" to ensure the public's right to address a legislative body, including "regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." [Government Code §54954.3(b)] The Sunshine Ordinance provides similar rights, and permits persons "to speak once based on previously adopted time constraints which are reasonable and uniformly applied."

A 1992 opinion by the California Attorney General concluded that a local legislative body may limit the right of the public to speak on particular items to five minutes **or less** for each individual speaker, depending on a number of circumstances. [See 92 Ops.Atty.Gen. 212.] The opinion noted that local legislative bodies have "wide discretion" in adopting rules of procedure, and that this discretionary authority will usually not be disturbed on subsequent review.

The School Board meeting bylaw No. 9323 states in pertinent part:

"1. The Board shall give members of the public an opportunity to address the Board either before or during the Board's consideration of each item of business to be discussed at regular or special meetings. [Citations to Education Code; Government Code Section 54954.3]

". . .5. A person wishing to be heard by the Board shall first be recognized by the president and shall then proceed to comment as briefly as the subject permits. Individual speakers shall be allowed three minutes to address the Board on each agenda or nonagenda item. The Board shall limit the total time for public input on each item to 20 minutes. With Board consent, the president may increase or decrease the time allowed for public presentation, depending on the topic and the number of persons wishing to be heard. The president may take a poll of speakers for or against a particular issue and may ask that additional persons speak only if they have something new to add."

There is no dispute that the meeting bylaws provide three minutes of speaking time and that this time was further limited at the March 9, 2005, meeting. Under the Brown Act, the question before the Commission is whether these limits were "reasonable" and whether the School Board abused its discretion by limiting speaker time to two minutes instead of three.

Commission staff cannot conclude as a matter of law or fact that a three minute limit on speaker time is unreasonable. Nor can it conclude, at the March 9 meeting, that the School Board abused its discretion by limiting speakers to two minutes per item. As explained earlier and in other previous complaints brought before the Commission, the amount of time provided to speakers at a meeting is the type of decision which, in the absence of a prejudicial abuse of discretion, should not be "second guessed" by a reviewing court or, by analogy, the Commission. Serious and prejudicial denial of the right to address a local body can arguably be questioned and adjudicated by the Commission. But the fact that Mr. Mordecai received two minutes of time on the items he was permitted to address does not rise, in Commission staff's opinion, to the level of prejudice or harm sufficient to believe a violation of the Brown Act occurred.

3. Requiring members of the public to use time allotted under "Public Comments" to address all subsequent items on the agenda

Mr. Mordecai states that speakers were required to address all the items that followed Item M (Public Comments) on the agenda within the two minutes of time allotted under Item M.

As stated above, there were several items that followed Item M (Public Comments) on the agenda at the March 9 meeting -- the "General Consent Report" (i.e., a consent calendar) that included 45 separate entries; Unfinished Business (no items that evening); New Business (three separate entries); adoption of a Pupil Discipline Consent Report (a consent calendar consisting of eleven confidential pupil discipline reports); Board Discussion (no items that evening) and Adjournment. The agenda description for the "Public Comments" item stated that this item was to be used to address all remaining items *and* for general public comments. **Attachment 3.**

Unlike the allegation in subsection III.B.2 above, Mr. Mordecai argues that it was unreasonable to require speakers only two minutes to address all remaining items on the agenda as well as make any general comments to the School Board. Even a conservative allotment of two minutes for the two consent calendars and two minutes' total for the three items of New Business, Dr. Ward and the School Board provided only two minutes for items conservatively justifying eight minutes or more.

Commission staff believes that this allegation creates a closer question of whether the speaking rules were "reasonable" at the March 9 meeting and whether the School Board abused its discretion as to Items M through R. Technically the agenda does provide an opportunity to address these remaining items before their consideration. But the amount of time provided to do so may not have been sufficient for a person to reasonably address the School Board on the remaining items.

4. Use of the Consent Calendar to adopt numerous items in one motion

Mr. Mordecai contends that Dr. Ward is using the General Consent Report to pass a large number of items in one motion "insulated from public view." He notes that a total of 45 items were adopted at the March 9 meeting under the General Consent Report.

The agenda provides the following description of Item N -- Adoption of General Consent Report:

"Adoption of the General Consent Report means that all matters appearing under this topic are approved in one motion unless the State Administrator allows an item to be removed and voted upon separately or otherwise acted upon. Generally, items under this topic are routine items of business and are acted upon in one motion to conserve time and permit focus on other-than-routine items on the agenda."

Commission staff notes that the General Consent Report separately itemizes and describes each action item. Each action item has a corresponding file number for those seeking more information; internet users can link to the report from an electronic version of the agenda.

Many legislative bodies use a consent calendar for the reasons given on the School Board agenda. Different procedures exist specifying how an item can be "removed" or "pulled" from a consent calendar and considered and/or acted upon separately. Under the School Board's current procedures, only the State Administrator may remove an item for separate consideration.

The use of a consent calendar appears to be well within the discretion of a local legislative body to employ. Given the extensive disclosure of each item under the consent calendar, Commission staff finds little merit for the contention that items are being "insulated" from public view. A more pertinent question under the Brown

Act is whether the agenda afforded sufficient time to address consent calendar items. This question was addressed in the preceding subsection.

C. School Board Special Meeting Of March 15, 2005

As stated above, the March 15 special meeting had two items for consideration under Agenda Item D -- New Business. The agenda stated that all speakers were required to speak to these two items under Agenda Item C -- Public Comment On All Agenda Items. Mr. Mordecai alleges that it was improper for the School Board to confine speaker comments on the two items to the Public Comment item. He contends that speakers should be permitted to address each item of business as those items are brought up and considered.

The Brown Act requires that speakers be permitted to address a legislative body before or during the consideration of an item. The Brown Act does not require a special meeting agenda to provide an "open forum/public comment" item. Thus speakers at the March 15 special meeting were provided with an opportunity to address the two pending items under the Public Comment item without having to compromise their time to speak on general matters. It is difficult to conclude under these circumstances that the speaking rules were unreasonable and prejudicial, especially as to Mr. Mordecai who did not attend the March 15 meeting.

IV. STAFF RECOMMENDATION

A. Complaint No. 04-09

Mr. Mordecai filed Complaint No. 04-09 alleging that the School Board violated the Brown Act and Sunshine Ordinance by failing to agendize an "open forum" item at its January 3, 2005, meeting. Commission staff concluded there was an issue whether the School Board violated the Sunshine Ordinance by failing to provide an open forum item at this meeting. Mr. Mordecai correctly pointed out that Education Code Section 35149 characterizes the annual organizational meeting of a school board as a regular, and not a special, meeting. Thus the question raised in Complaint 04-09 is whether the School Board violated Brown Act Section 54954.3(a) for failing to provide an opportunity for comment on general matters on its January 3, 2005, agenda.

While Commission staff previously determined there was an issue whether such failure violated open meeting laws, it also did not recommend that the Commission schedule a formal hearing on the complaint. This is due to an absence of any harm or prejudice to Mr. Mordecai. Commission staff found that even though the School Board's agenda for the January 3 meeting did not provide an express item for general public comment, such an opportunity was actually provided to Mr. Mordecai and other members of the public at the start of the meeting. Commission staff believes that the absence of any apparent harm or prejudice to Mr. Mordecai should be a significant if not decisive factor in the Commission's decision whether to pursue a formal hearing on this allegation.

B. Complaint No. 05-04

Commission staff finds that there is an issue whether the amount of time allotted to speakers on agenda items M through R at the School Board's meeting of March 9, 2005, may have violated Brown Act Section 54954.3(a) and (b) requiring reasonable time limits for speakers and issues. The Commission recommends dismissal of all other allegations asserted in Complaint No. 05-4 for the reasons given above.

The Commission has discretion whether to schedule a formal hearing on whether the School Board violated Brown Act Section 54954.3(a) and (b). Ordinarily, if the Commission were to determine that a violation occurred, the Sunshine Ordinance would require the School District to agendize "for immediate determination" whether to cure and correct the violation after first taking any new public testimony. If the School Board chose to cure and correct, it would then decide whether to affirm or supersede any previous actions taken in closed session. [O.M.C. §2.20.270(D)]

However, based on the City Attorney's opinion, Commission staff questions whether the unique administrative remedy provisions of the Sunshine Ordinance can be enforced against the School Board. While the Commission may be able to determine a violation of the Brown Act as against the School Board, it may not be able to enforce the remedy provisions of O.M.C. Section 2.20.270(D) since they are inconsistent with the remedy provisions of the Brown Act.

As an alternative approach, and in light of the changes in meeting procedures reported by Mr. Mordecai that now permit additional public comment, the Commission may wish to direct a letter to the School Board expressing its concern and/or objection to the limitation of speaker time at the March 9, 2004, meeting and to encourage broader allocations of speaking time.

Finally, as to any allegation the Commission may wish to set for formal hearing, Commission staff recommends that staff first be directed to attempt a settlement of the issue subject to Commission approval under Section XII(F) of the Commission's General Complaint Procedures.

Respectfully submitted,

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*** City Attorney approval as to form and legality elates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*