May 14, 2012

Board of Trustees
Palo Alto Unified School District
25 Churchill Ave.
Palo Alto, CA 94301

Dear Trustees:

The Palo Alto Weekly has recently become aware of Superintendent Skelly's practice of regularly communicating with you through "Confidential Weekly" memoranda.

Based on our review of his April 20, 2012 "Confidential Weekly," obtained by a citizen in response to a Public Records Act request, it is clear that these memoranda are not limited to items that could be discussed legally by trustees in a properly noticed closed session or that are exempt from disclosure under the Public Records Act. Instead, this particular memorandum conveys the thinking and potential actions of district administrators on a subject (counseling) on which you are in the midst of formulating policy and had previously directed staff to return to you at a June school board meeting with their recommendations.

Based only on our review of the April 20, 2012 memorandum, for the reasons explained below, we believe this memorandum likely resulted in a serial meeting which would constitute a violation of the Brown Act. Your participation in this violation exposes each of you liability under the statute.

To determine the extent of this practice of confidential communications, on May 8, 2012 we made a request for copies of all of these "Confidential Weekly" memoranda, as well as any other written or e-mail communications between Superintendent Skelly and trustees, from March 1, 2011 through May 8, 2012. We will also make requests for copies of future communications.

Obviously, at this time only the five of you and Superintendent Skelly know the contents of previous "Confidential Weekly" memoranda and whether they may have constituted any improper discussion or deliberation prohibited by law, but it is clear that the very purpose of this practice has been to exclude the public. I presume you have all been educated on the purposes of the Brown Act and the importance of avoiding even the perception that more than two of you engage in discussions, formulate or tacitly approve policy or administrative actions outside of the public eye, and are familiar with the serial meeting provisions of the law.

As you may know, the Brown Act's provisions pertaining to serial meetings were strengthened on January 1, 2009 to prohibit a majority of members of a legislative body to "use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body."

In passing this amendment, the Legislature specifically overturned a decision of the state Court of Appeals in *Wolfe v. City of Fremont*, which held (contrary to earlier decisions) that a violation of the Brown Act occurs only if a collective concurrence is reached.

The state Attorney General's Brown Act Guidelines, issued in 2003 before the new provision was enacted, strongly cautioned about the dangers of private communications among elected officials and staff:

> "Problems arise when systematic communications begin to occur which involve members of the board acquiring substantive information for an upcoming meeting or engaging in debate, discussion, lobbying or any other aspect of the deliberative process either among themselves or with staff. For example, executive officers may wish to brief their members on policy decisions and background events concerning proposed agenda items. This office believes that a court could determine that such communications violate the Act, because such discussions are part of the deliberative process. If these communications are permitted to occur in private, a large part of the process by which members reach their decisions may have occurred outside the public eye. Under these circumstances, the public would be able only to witness a shorthand version of the deliberative process, and its ability to monitor and contribute to the decision-making process would be curtailed. Therefore, we recommend that when the executive director is faced with this situation, he or she prepare a memorandum outlining the issues for all of the members of the board as well as the public. In this way, the serial meeting violation may be avoided and everyone will have the benefit of reacting to the same information.
>
> "However, this office does not think that the prohibition against serial meetings would prevent an executive officer from planning upcoming meetings by discussing times, dates, and placement of matters on the agenda. It also appears that an executive officer may receive spontaneous input from any of the board members with respect to these or other matters so long as a quorum is not involved."

Superintendent Skelly's April 20, 2012 memorandum is an excellent example of what the Attorney General cautioned against.

As you know, the board received a presentation and held a long discussion at its March 27, 2012 meeting on the subject of counseling programs at the two high schools. At the conclusion of that discussion, the board directed staff to return to the board in June with a proposal for implementing changes to the counseling system. No policy decisions were made at that meeting.

Through Superintendent Skelly's confidential memorandum of April 20, you learned the following information that was not made known to the public:

1. Top administrators had spent a few hours "long into the night" discussing the guidance program.

2. The Superintendent did not support changing the Gunn model immediately.

3. A specific interim plan was being discussed, consisting of adding two counselors at Gunn, adopting "something similar to Paly's freshman advisory at Gunn within existing tutorials," creating a college and career center "similar to Paly's and moving one of the existing counselors into this role," and a "variety of other smaller moves."

4. District administrators would be following up on these ideas with the Gunn principal, the vice-principal in charge of counseling and the Gunn guidance team.

Finally, you were invited by Superintendent Skelly to discuss "this sensitive issue" further with him.

The memorandum had all the qualities of a trial balloon, signaling to you the Superintendent's views and plan and testing your reactions. If you chose to communicate with him on the issue,

he could determine your views directly, and if he didn't hear from you, he could interpret your silence as approval of the direction he outlined.

We believe that after receiving this memorandum it is likely that more than two of you did have further private communication with Superintendent Skelly on this issue and that through these communications a serial meeting in violation of the Brown Act occurred.

During these conversations, we assume that a majority of the board also gave its approval for the distribution of the May 5, 2012 e-mail from Superintendent Skelly and Gunn principal Katya Villalobos to all Gunn families pertaining to the review of the counseling program.

That e-mail begins with an explanation that the Gunn leadership team has been asked to present its recommendations for "further assessment and potential enhancements to Gunn's guidance services" at a June board meeting. It then incorrectly conveys that you have already reached a decision not to adopt ("force") a specific guidance model:

> "We will continue to provide students with strong support as they transition to high school, encounter social-emotional issues, navigate graduation requirements and tackle the college application process. While local media coverage has led to a concern among some community members that a specific guidance model will be forced upon the Gunn community to the detriment of the level of expertise around college advising, as well as the funding available for course offerings and class size, ***please be assured that this is not the case.***" (Emphasis added.)

Apart from the obvious attempt to color the policy option of implementing a specific guidance model in negative and inaccurate terms, there are only two possible explanations for the language used in the e-mail. Either you authorized the language in the e-mail through your private communications with Superintendent Skelly, in which case you clearly developed a collective concurrence on a policy matter in violation of the Brown Act, or Superintendent Skelly, on his own initiative and without the board's approval, misrepresented to the Gunn community that one policy option had been ruled out by the board. As you know, the board has made no such decision (in public session) regarding the counseling program at Gunn, and as a result either explanation resulted in the public being deprived of its right to monitor and participate in the decision-making process.

Finally, as a further indication that improper discussions may have been held on this subject, Principal Villalobos informed Weekly reporter Chris Kenrick on May 9 that the Gunn staff would be returning to the school board in March, 2013 with a set of recommendations and plans relating to changes to the counseling system. Her statement suggests that she already knew a delay until March, 2013 would be approved by you. As you know, you have not adopted any such time-line (in public session.)

This is exactly the kind of process that the Brown Act is designed to prevent: a behind-the-scenes series of private communications among trustees and administrators that develops a game plan (or perhaps even an outcome) for handling a major policy matter scheduled for your upcoming consideration.

Had the April 20 memo remained confidential as intended, the public would have had no idea that communications among you and Superintendent Skelly were helping to shape the proposal that will come before you in June.

Superintendent Skelly's description of the high school counseling program as a "sensitive issue," and therefore one which you might want to discuss with him privately, is especially concerning because it suggests that private communication between trustees and him on sensitive issues is viewed as a helpful and appropriate tool. To the contrary, it is all the more important that the discussion and deliberation on sensitive issues be done in front of the public and that extra efforts are made to prevent a violation of the Brown Act.

In light of these revelations, we respectfully urge you to take the following actions to align your practices with the provisions and intent of the Brown Act and to ensure maximum transparency in the operation of the district:

1. Correct the impressions left in the May 5 e-mail to the Gunn community to make clear that the board has not yet adopted any policy nor ruled out any options regarding the counseling system at Gunn and apologize for the mischaracterizations that were made in that communication.

2. Agendize as soon as possible the subject of communications between your staff and the board of trustees and receive a briefing from a qualified attorney on the serial meeting provisions of the Brown Act.

3. Direct Superintendent Skelly to immediately cease writing his “Confidential Weekly” and other private communications to more than two trustees pertaining to matters the board has or will be considering unless those communications are concurrently released to the public.

4. Establish a policy stating that on matters that have been considered by the board or that could come before the board in the future:

    a) trustees may only provide direction or approvals to the superintendent in open, noticed public meetings (or in properly held closed session,) and not through private communications such as e-mails, phone calls or personal meetings

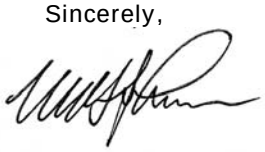
    b) neither the superintendent nor other administrators shall communicate to more than two trustees their recommendations, informal thinking, suggested courses of action or input, unless they are contained in a written document that is distributed to the public

    c) trustees who consult or have discussions with the superintendent or other administrators shall not discuss those communications with more than one other trustee except at a public meeting, and

    d) the superintendent and other administrators who consult or have discussions with individual trustees shall not discuss or share with the trustee the views of other trustees.

We look forward to your taking steps to address these issues and to change current practices so they minimize the chances of violating the Brown Act and better reflect the Act’s goal of ensuring that discussions and deliberations on issues within your jurisdiction be done in public.

Sincerely,



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Publisher