

The Brown Act

School Boards and Open Meeting Laws

2022 Updates



2022 Updates

This insert provides governing board members with updated information about the legal cases, legislative changes, and constitutional changes that are relevant to the Brown Act. CSBA's Legal Department prepared this update and included the relevant changes and updated interpretations of the Brown Act to ensure this book is up to date and accurate as of November 2022.

Each update includes a chapter and page number where the new information applies. For details about how these updates apply to a specific district or county office, please contact CSBA District and County Office Legal Services or district/county office legal counsel.

Chapter 3, Page 24

SB 1100

On August 22, 2022, an amendment to the Brown Act, Senate Bill 1100, was signed into law giving presiding members of school boards, county boards of education, and other legislative bodies the statutory right to remove a disruptive individual from public meetings. Although federal and state courts have supported the removal of disruptive individuals, and Penal Code § 403 provides for their removal, before SB 1100 the Brown Act had only provided for the removal of a "group or group of persons" for disrupting a meeting. (Gov't. Code § 54957.9.) The bill defines "disruptive" as engaging in behavior during a meeting that actually disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting. This disruptive behavior can include failing to comply with reasonable and lawful regulations of the legislative body as well as behavior that constitutes use of force or a true threat of force.

Before the presiding member of the legislative body (or the presiding member's designee) may remove an individual for disruptive behavior, a warning is required. The warning must inform the disruptive individual that their behavior is disrupting the meeting and that failure to stop the behavior may result in their removal. However, this warning requirement does not apply to situations when there is a use of force or true threat of force. A true threat of force is defined as a "threat that has sufficient indicia of intent and seriousness, that a reasonable observer would perceive it to be an actual threat to use force by the person making the threat."



Chapter 3, Page 25

Remote Participation in Meetings by Board Members: What is Allowed and When Under the Brown Act, AB 361, and AB 2449?

In March 2020, in response to the COVID-19 pandemic, Governor Newsom issued several executive orders that suspended many of the Brown Act requirements and allowed for board meetings to be conducted remotely. In September 2021, as the executive orders were set to expire and the COVID-19 pandemic carried on, the Legislature passed AB 361, which added to the Brown Act an option for fully remote meetings during a State of Emergency. Most recently, the Legislature passed AB 2449, which added a third remote meeting option with a distinct set of requirements. As a result, currently, there are three remote participation schemes available: the longstanding Traditional Teleconferencing option; AB 361 (the State of Emergency Option) as added in September 2021; and AB 2449 (the Specific Circumstances Option), which was signed into law in September 2022.

All these requirements are similar yet distinct and can create confusion as to what option board members should use should they wish to participate in a meeting remotely. Below is a summary of the various requirements and timeframes for each option.

Traditional Teleconferencing (Current law as described in Chapter 3)

Most of the Brown Act requirements for governing bodies' meetings relate to in-person meetings; however, the Act also has a series of requirements that has for decades allowed members to participate remotely through teleconferencing. Those "Traditional Teleconferencing" requirements include:

- ❖ All votes shall be rollcall.
- ❖ The agenda for the meeting must be posted at all teleconference locations.
- ❖ All teleconference locations must be identified in the notice and agenda.
- ❖ All teleconference locations must be open to the public.
- ❖ A quorum of the members must participate from locations within the boundaries of the local agency.
- ❖ Public comment must be allowed at all locations.



AB 361 – State of Emergency Option (Current law, expires upon termination of any state of emergency or January 1, 2024)

On September 16, 2021, Governor Newsom signed AB 361 into law. The bill, which is an urgency bill that became effective immediately upon the Governor's signature, amends the Brown Act to provide the ability for boards to hold remote meetings during a proclaimed state of emergency without following the Traditional Teleconferencing rules. It has been relied on during the COVID-19 State of Emergency, which Governor Newsom announced will end on February 28, 2023.

AB 361 provides that boards need not follow the Traditional Teleconferencing rules if the board makes a finding that there is a proclaimed state of emergency and either state or local officials have imposed or recommended social distancing measures or meeting in person would present imminent risks to the health or safety of attendees due to the emergency. If a board chooses to use the option provided in AB 361, the board must make findings every 30 days that the board has reconsidered the circumstances of the state of emergency and either the state of emergency continues to directly impact the ability of the members to meet safely in person or state or local officials continue to impose or recommend measures to promote social distancing.

If boards utilize the remote meeting option provided in AB 361, they must also adhere to the following requirements:

- ❖ Give notice of meetings and post agendas as otherwise required by the Brown Act.
- ❖ Provide members of the public virtual access to the meeting and an opportunity to address the board directly through that virtual access.
- ❖ Provide notice of the means by which members of the public may access the meeting virtually in any instance in which they give notice of the time for the teleconferenced meeting or post the agenda for the teleconferenced meeting.
- ❖ Ensure the agenda identifies and includes an opportunity for all persons to attend the teleconference meeting by a call-in option or internet-based service option.
- ❖ Provide an opportunity for the public to address the board in real time; boards may not require members of the public to submit comments in advance.



2022 Updates

- ❖ Stop the meeting if there is a disruption into the call-in option or internet-based service option that results in members of the public being unable to access the meeting; boards may not take action on any agenda items during this disruption of access.
- ❖ Refrain from closing a timed public comment period before the time for the comment period has elapsed. If boards do not use timed public comment periods, they must allow a reasonable time per agenda item for public comment.

See the FAQ on page 6 for more information about how AB 316 is applied.

AB 2449 – Specific Circumstances Option (Effective January 1, 2023, and expires January 1, 2026)

The Legislature passed and the Governor signed AB 2449 in September. The purpose of the bill was in part to “ensure minimum standards for public participation and notice requirements allowing for greater public participation in teleconference meetings.” To accomplish this objective AB 2449 adds a slew of requirements related to access to the meeting, notice, agendas, and cause for remote participation to the existing Brown Act requirements. Distinct from AB 361, boards do not have to make any findings, including the findings required every 30 days by AB 361, related to a state of emergency to use this option. Among the new requirements are the following:

- ❖ At least a quorum of members must participate in person from a single location within the territory, and that location must be open to the public.
- ❖ Members of the public must be able to remotely hear, visually observe, and address the board through either a two-way audiovisual platform or a two-way telephonic service and live webcasting.
- ❖ The meeting notice must include the in-person location and describe the means available for the public to access the meeting and engage in the comment process.
- ❖ The agenda must describe the public’s ability to attend the meeting and to address the board through an internet-based option, a call-in option, and an in-person option.
- ❖ Board members may participate remotely but only pursuant to the requirements and limitations described below:
 - For “just cause,” which is defined as: 1) a child care or caregiving need of a child parent, grandparent, grandchild, sibling, spouse, or domestic partner, or 2) a contagious illness, or 3) a need related to a physical or mental disability, or 4) to travel for the board or another public agency.



2022 Updates

- ◆ To participate remotely by “just cause,” the member must notify the board of the need to meet remotely and provide a general description of the reason. This notice can be given as late as the start of the meeting.
- ◆ Importantly, remote appearances for “just cause” can only occur twice per year per board member.
- For an “emergency circumstance,” which is defined as a physical or family medical emergency that prevents the member from attending in person.
 - ◆ The member must request to participate remotely and provide a general description that is 20 words or less of the circumstances requiring remote participation. The description does not need to include any personal medical information. This request process must be used for each instance of remote participation.
 - ◆ The board must approve any request to appear remotely due to emergency circumstances and can take action to do so even if it is not included on the posted agenda.
- Remote appearances are limited to three consecutive months or 20 percent of regular meetings in a calendar year or no more than two meetings if the board meets less than 10 times per year.
- Members participating remotely must disclose whether any individuals 18 years or older are in the remote location. If there is such an individual, the relationship with that individual must also be disclosed.
- The remote appearance must be by audio and visual technology.
- ❖ The board must have and implement a procedure for receiving and resolving requests for reasonable accommodations and when notice of the meeting or the agenda is posted, the procedure for resolving reasonable accommodation requests must be included.

Timeline for Each Option

The Traditional Teleconferencing option is currently in the Brown Act and has no expiration date. AB 361 expires either on January 1, 2024, or upon the cessation of the current State of Emergency by Governor Newsom who has announced it will end on February 28, 2023. AB 2449, which goes in effect on January 1, 2023, expires three years later on January 1, 2026.



Implementation of AB 361 FAQ

Teleconference, as defined in the Brown Act, “means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both” (this includes telephone, video conference such as Zoom and Teams, from any device, including cell phone, tablet, or laptop). AB 361 provides that boards need not follow the Brown Act’s strict teleconferencing rules if there is a proclaimed state of emergency, and the board makes a finding that there is a proclaimed state of emergency and either state or local officials have imposed or recommended social distancing measures or that meeting in person would present imminent risks to the health or safety of attendees due to the emergency. The following questions and answers are intended to provide information on the application of AB 361’s requirements. These requirements and AB 361 expire either on January 1, 2024, or upon the cessation of the current State of Emergency. Governor Newsom has announced the current State of Emergency will end on February 28, 2023.

1. Are local educational agencies required to implement teleconferenced meetings, including remote or virtual public comment, pursuant to the provisions of AB 361?

No. AB 361 provides an option for teleconferenced meetings during a proclaimed state of emergency, but boards are not required to utilize that option. (Note: If a local public health authority requires virtual meetings, then LEAs should follow that directive. This FAQ only addresses the Brown Act.) Under AB 361, LEAs are not obligated to provide remote meeting access or remote public comment options if they hold their meetings in person and allow members of the public to comment in person. However, this generally requires that all participating board members participate in person. If any board member plans to attend a meeting remotely, the board must either comply with the previously existing teleconferenced meeting requirements of the Brown Act at Government Code §54953, subdivision (b), follow the new virtual meeting requirements in AB 361, or use the remote options for “just cause” or “emergency circumstances” under AB 2449.

2. May boards that utilize AB 361’s provisions prohibit remote public comment if the meeting is in person and public comment is allowed in person but one or more board members will participate remotely?

No. In order to utilize AB 361’s provisions, boards must allow public comment by call-in or internet-based service (e.g., Zoom).

If a board member wishes to participate remotely, but the board does not want to have remote public comment, then the board must follow the previously existing teleconference requirements of the Brown Act at Government Code § 54953, subdivision (b). This requires,



among other things, that the agenda be posted at the remote location from which the member is participating, that the agenda list all locations from which board members will participate, that the remote location from which the member is participating is made accessible to the public, and that at least a majority of the board be present within the LEA's boundaries.

3. May boards stream their meetings one-way (e.g., via YouTube) without allowing remote public comment?

Yes, but only if the board holds its meetings in person with all participating board members present in person *and* allows in-person public comment, then it may stream the meeting without allowing remote public comment. However, if the board holds its meetings pursuant to the terms of AB 361, it must provide for remote public comments via call-in or internet-based service option (e.g., Zoom).

4. May a board hold a meeting with board members and staff in person, but with the public participating electronically?

Yes, but the board would have to follow AB 361, allowing remote participation by the public, and follow all other requirements of AB 361. (The previously existing teleconferencing option would not work here because the board would have to make the board meeting room available to members of the public under those provisions.)

5. May a board continue to allow remote public comment even if its meetings are in person and in-person public comment is allowed?

Yes. Boards may always provide more public access than is required by the Brown Act. The Brown Act provides a floor for public access to meetings, not a ceiling.

6. If a board proceeds with teleconferenced meetings under AB 361, may it require members of the public to submit comments in writing, rather than participating by a remote call-in or internet-based service option?

No. AB 361 specifically prohibits this. Boards may accept such comments *at the option of the commenter* but may not require advance, written comments.



7. Must the board pass a resolution finding the need to utilize AB 361 before conducting meetings under the terms of AB 361?

Not necessarily. AB 361 does not specifically require the board to pass a resolution, just to take action. However, in order to use the teleconferencing provisions under AB 361, the board has to make certain findings. A resolution is a good way to document that the board has made these findings.

8. If a board makes a finding for the need to use AB 361, as discussed in question 7, may the board also make use of the established teleconference provisions in the Brown Act, under Government Code § 54953, subdivision (b) during the time period for which the AB 361 findings are in place?

Technically yes. However, it would be a risk for a board to determine that it needs to hold teleconferenced meetings under AB 361 because of imminent risk to the safety and health of attendees of meetings, but then hold an in-person meeting with a member(s) attending remotely after making such a finding. This could undermine the board's original findings of imminent risk.

9. AB 361 provides that if there is a disruption that prevents the board from broadcasting the meeting to members of the public using the call-in option or internet-based service option, the board "shall take no further action on the items appearing on the agenda" until the public access is restored. May the board continue the meeting *while refraining from taking action on any agenda items*, or should the board stop all meeting activity until the disruption to the call-in or internet-based service option is resolved?

The board can continue the meeting, so long as the board does not take action on any agenda item. However, we recommend taking a recess until the connection is restored.

Chapter 4, Page 33

Sierra Watch v. Placer County et. al and AB 2647

The recent case *Sierra Watch v. Placer County et. al.* (69 Cal.App.5th 1 (2021)) addresses logistics related to when materials are received within the 72-hour window before a meeting. In the case, Placer County and a developer reached an agreement related to an Environmental Impact Report for a resort development in Tahoe on a Friday evening. A meeting of the Board of Supervisors was scheduled for the following Tuesday. When the parties reached the agreement, the clerk sent a memorandum prepared by county counsel detailing the new terms of the revised agreement to



2022 Updates

the governing body members. The clerk also placed the materials in the Placer County clerk's office for public review. Both actions took place around 5:40 pm on Friday evening, after the clerk's office closed.

Sierra Watch, an interested party in the matter, argued that this action violated the Brown Act requirements for materials provided to governing body members less than 72 hours in advance of a meeting because they could not access the documents in the closed clerk's office at the time the materials were distributed to the Board. The Court of Appeal agreed and outlined that the plain language of Government Code section 54957.5 makes a clear distinction between simply "placing" the materials in the designated location and making the materials "available" for inspection. Based on this distinction, the clerk's actions were insufficient to make the new agreement "available" because the office was closed. The court emphasized that at times it may be necessary to withhold materials from members of a governing body to ensure the public has an equal opportunity for review in advance of a meeting so that they may address the board on the item(s) in question.

In response to the *Sierra Watch* case, the Legislature passed and Governor Newsom signed AB 2647 to clarify public agencies' responsibilities for making materials accessible to the public when there is less than 72 hours before the meeting and how postings on an agency's website may be used to meet the availability requirement. Under AB 2647, when materials that are public records are made available to members of a legislative body with less than 72 hours before a meeting, the materials must be made available to the public at the same time. While this is the same requirement as before, AB 2647 provides an exception under which materials can be posted on an agency's website to fulfill the accessibility requirement. Online posting is sufficient only if all of the following requirements are met:

- ❖ An initial staff report or similar document with an executive summary and staff recommendation, if there is one, relating to the agenda item is available for public inspection at the office or designated location at least 72 hours before the meeting.
- ❖ The new material is immediately posted on the agency's website in a way that clearly indicates it is related to an agenda item for an upcoming meeting.
- ❖ The agency lists the web address of its website on the agendas for all meetings of the legislative body.
- ❖ The agency makes physical copies of the material available to the public during the next regular business hours at the designated location, so long as the next regular business hours are at least 24 hours before the scheduled meeting that the materials relate to.