

Oakland Unified School District

Board of Education
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Minutes (Long)

Thursday, November 12, 2009

6:00 PM

Special Meeting

**Board Room, Paul Robeson Building, 1025 2nd Avenue, Oakland, CA
94606-2212**

Board of Education

President Noel Gallo and Vice President Gary Yee

***Directors: Jody London, Jumoke Hinton Hodge, Alice Spearman, David Kakishiba,
Christopher Dobbins***

Student Directors: Wesley Sims and Eric Adams

Staff: Edgar Rakestraw, Jr., Secretary, Board of Education

A. Call to Order

President Gallo called the meeting to order at 6:10 P.M.

B. Roll Call

Roll Call: Present: David Kakishiba, Jumoke Hodge, Jody London, Alice Spearman and Noel Gallo
Absent: Eric Adams, Christopher Dobbins, Gary Yee and Wesley Sims

C. New Business

Roll Call (Secretary's Observation)

Jody London and Christopher Dobbins present at 6:14 P.M.

Roll Call: Present: David Kakishiba, Jumoke Hodge, Christopher Dobbins, Jody London, Alice Spearman, Gary Yee and Noel Gallo
Absent: Eric Adams and Wesley Sims

Roll Call (Secretary's Observation)

Vice President Gary Yee present at 6:28 P.M.

Roll Call: Present: David Kakishiba, Jumoke Hodge, Christopher Dobbins, Jody London, Alice Spearman, Gary Yee, Noel Gallo and Wesley Sims
Absent: Eric Adams



[09-3177](#) **Governing Board of District - Conflict of Interest Laws, Regulations**

Presentation and discussion of Conflict of Interest, Legal Overview and Application to the Governing Board of the District.

Attachments: [09-3177 - Governing Board of District - Conflict of Interest Laws, Regulations.pdf](#)
[09-3177 - Governing Board of District - Conflict of Interest Laws, Regulations.ppt](#)

Jacqueline Minor, General Counsel, said today's session was at the request of the Board to understand more specifically the issues around Conflicts of Interest and specifically as they relate to Director David Kakishiba's dual roles as Executive Director for East Bay Asian Youth Center (EBAYC) and as a member of the School Board. Ms. Minor introduced attorney, Laura Schulkind, who has worked with the District on several Conflict of Interest matters. Ms. Minor gave each Board Member a packet containing the following:

- 1. A compilation of all the contracts and grants that have been awarded to EBAYC since 2004 through July 2009 totaling \$14 million.*

2. *The Coherence Governance Policy 08 - Board Member Conflict of Interest.*
3. *Board By-law 9270, Conflict of Interest.*
5. *A summary chart comparing Conflict of Interest Policies of Other Selected CA School Districts and of the City of Oakland.*

Ms. Minor said the first document addresses why we are looking at these issues now. The first two pages were an email. The next five pages include a draft contract. Ms. Minor said she was asked to review a contract called Oakland Farms to Schools MOU. She said the draft was forwarded to her by the Director of Nutrition Services. Ms. Minor talked about on page 13, highlighted in pink, the statement written by a staff member of EBAYC referencing stating ... "David and Jennifer, how to make the language about OUSD funding less of a red flag." Ms. Minor said that coupled with the fact that the email from EBAYC was addressed to both Director Kakishiba and Jennifer LeBarre, Director of Nutrition Services, raised a red flag for her and put her on inquiry notice. She said it appeared to her that there was potentially some level of involvement by Director Kakishiba in the making of the contract. Ms. Minor said she determined based on a very detailed discussion with the Director of Nutrition Services, that Director Kakishiba had no involvement in the making of that contract. She said EBAYC's relationship with the District involves both contracts and grants. She said over the time that Director Kakishiba has been a member of the Board, EBAYC has brought to the District millions of dollars in grants. She said often times these grants are approved on the Consent Calendar so you don't get to specifically focus in on what the actual words of the grants provide.

Ms. Minor identified a grant in the packet. She said this is a grant application for Oakland High School to provide health services to our students. Highlighted was the fact that EBAYC serves as the fiscal agent and the grant requires in kind services which means both faculty support and the use of Oakland High School is a part of the grant. She said Director Kakishiba is also the Executive Director of EBAYC, the contact and managing agent for the grant.

Ms. Minor said she personally has the highest regard for Director Kakishiba. She said as she has talked to Managers, Directors and Executive Directors in the District and each has let her know they have the highest regard for Director Kakishiba, the work of EBAYC, for the community organizing, improvement in our schools and improvement in our after school programs that EBAYC has been responsible for. She said there has been no intent, no effort at all to establish, to approve, or demonstrate that Director Kakishiba has acted in any way that is unethical.

Ms. Minor said that was not the point of the analysis. The point of the analysis is to look at the question of whether someone who has dual capacity serving both as the Executive Director for a community based organization that over five years has had almost \$15 million dollars in contracts and grants from this Board can serve in both capacities. Ms. Minor said this question was raised several times during State Administration and when she joined the District as General Counsel it was presented to her as one of those issues that needed to be looked at as we moved from State Administration to the return of local control.

Ms. Minor introduced Laura Schulkind of Liebert Cassidy Whitmore, an attorney, who has done Conflict of Interest work for the District, to continue with the presentation. Ms. Schulkind guided the Board through a PowerPoint presentation entitled "Avoiding

Conflicts of Interest in Principle and Practice - Application of Law and Board Bylaws to Specific Conflict of Interest Concern.” Highlights of the Powerpoint presentation:

The Basic Principles

- *Elected officials are fiduciaries and caretakers in the highest sense.*
- *All public employees are public officials covered by conflicts laws not just elected officials; every employee of the District is a public official.*
- *Conflicts of Interest prohibitions are designed to anticipate and prevent conflict rather than to react to it.*
- *Finding of wrong-doing is not required, and none was found here, said Schulkind. This analysis and conclusions is not in any way based on any finding that Director Kakishiba has behaved improperly and there is no indication that he has behaved in any way improperly in the way these contracts arrived and in the way he conducted himself based on the information provided to the Board at that time. There is nothing that we found that indicated anything but that he is a highly dedicated public servant who has served the District quite admirably. She said that's not what the law looks at. The law looks at prevention; what could occur; opportunity.*

The Scope of Concern

- *There are two types of public officials: elected officials and public employees.*

Financial interests at issue:

- *What might be the financial interest of a Trustee who is the salaried Executive Director of a nonprofit that does business with the District?*
- *The interest of District employees who facilitate contracts for services, job security. Any employee who is involved in whether or not to put forward a contract, to negotiate it, consider terms, facilitate it, and to pass the contract on to the next level are considered part of the contracting process. Our concern is what it means when you have a District employee that has contract #1 and #2 from two different agencies and they have to decide which one to recommend. They know one of those is the organization that was founded and whose livelihood is driven by a Director on their Board. A Board that has the power to hire and fire, negotiate contracts of employment, etc. We believe there are two financial interest here recognized under the statutes. One created for the Director and one for the employees that are involved in the contracting process. Schulkind said based on the basic principles that we derive from the law and the financial interest, we have identified these recommendations and conclusions in this situation:*
 - *The OUSD Board is precluded from entering into contracts with EBAYC while its Executive Director is a Board Member.*
 - *The conflict cannot be cured by his recusal from those contract decisions under the following legal provisions: Government Code 1090, The Political Reform Act, The Common Law and Board Bylaws.*

Government Code 1090 - This body of law regulates a narrow type of decisions made by public agencies and their Boards. If there is a conflict between a member of the Legislative Body (an Elected Body) in a contract, the entire Board is precluded from entering into the contract by the terms of Government Code 1090, a recusal.

General Rule

A public officer or employee may not make contracts in which he or she is financially interested.

Analysis

Where the interest is remote, there is a financial interest, but we deem it a non interest if you disclose that you have the interest and you removed yourself from the decision. Government Code 1090 does include in the remote interest an employee of a non-profit. Ms. Schulkind said without considering the impact of the Board's Bylaw on 1090 she believes there is a potential 1090 problem because the appearance of impropriety requirements of the law exists within 1090 and not just the Common Law. She said they [lawyers] were somewhat concerned by the Board's Bylaws and how they may impact your ability to utilize the Remote Interest Exception to find there is not a conflict under the most harsh or strictest of the statute which is Government Code 1090. She said Board Bylaw 9720 states that "A Trustee does not have a financial interest if he/she is a non-salaried member of a non-profit corporation." She said GC-8 states "The Board shall not enter into any contract with any of its members or with a firm in which a member has a financial interest." The purpose of GC-8 is to avoid an issue or circumstance that could render the member unable to devote complete loyalty and singleness of purpose to the public interest. Ms. Schulkind said their ultimate conclusion that there is a conflict of interest that cannot be cured by recusal does not rest on that section or Board Bylaws. She said even in the absence of Government Code 1090 or with modifications to Board Bylaws, there is a conflict here that is not susceptible to cure through a recusal.

The Political Reform Act

May be cured in some instances by a recusal, but not always. The requirement that you avoid appearances of impropriety is codified in Government Code 1090 and in the Political Reform Act and required by the Common Law.

*Political Reform Act Conflicts**Government Code Section 87100*

No public official may make/participate/use their position to influence any decision if they know or should know they have some disqualifying conflict of interest.

The Common Law

The Common Law prohibits that you engage in the decision where you have any form of bias or any form of conflict comes into play whether it is financial or not. She said the laws are created not to those who behave well it's there to respond to those who have behave badly.

Application of Government Code 1090 and Board Bylaws

She said the contracts that arrange for services for EBAYC in the Oakland Schools are contracts. It does not matter where the money comes from. She said they would be contracts even if there was nothing in writing. Ms. Schulkind noted one of the sample grants which asked "does the grant require any resource from the school? If so, describe." She said the grant requires in-kind resources. She said those two lines create a contract.

Application of Political Reform Act

The financial interest of the trustee could be cured by disclosing and recusal if the disclosure also addresses the appearance of impropriety. The financial interest of the employee cannot be cured by Trustee recusal.

Application of Common Law Doctrine

A subjective analysis, based on facts and reasonable standard. We have determined there is a significant appearance of impropriety for a director to sit on a board and then does millions of dollars worth of business with his organization. In addition there have been expressions of public concern made at Board Meetings. We have seen the email where this has been openly acknowledged and referred to as a red flag.

Options and Next Steps

The decision whether to step down is Director Kakishiba's. There is no Board action that can affect his elected status. If the Trustee resigns it is effective and irrevocable upon submission to the County Superintendent. If the Trustee does not resign, the Board should refrain from entering into contracts with EBAYC that includes any arrangement, formal or informal, for goods and services.

Public Comments

Liz Sullivan, resident of District 2, said OCO sent a letter to the Superintendent and the Board urging the Bylaws of the District be changed to be aligned with state law regarding the ability to disclose and recuse when you have a conflict of interest on something that is going to be voted on. She encouraged the Board to do that. She said part of the reason she voted for Director Kakishiba was because he was involved in the schools in the lower San Antonio Neighborhood.

Board Members Comments

Vice President Yee said overall the presentation affirms his determination to ask Director Kakishiba to stay on the Board, not the other way around. Vice President Yee had several questions.

He said the actual emphasis of this entire presentation was the Common Law notion appearance of impropriety. Vice President Yee asked who defines the appearance of impropriety? Does an attorney, the public or the Board?

Ms. Minor replied the Common Law standard is a subjective standard. The question as to whose decision this is, she said it was Director Kakishiba's decision.

Vice President restated his question. He asked who determines the subjective level of the appearance of impropriety? He said the notion of an appearance of impropriety has been defined by the General Counsel's Office that has yet to be affirmed by this Board if we believe it's an appearance of impropriety or not.

Ms. Minor said in assessing the appearance of impropriety, you look at the facts and circumstances that are presented to you. She said the law is based on a reasonable person's standard. She said it is a reasonable person interpreting the facts and circumstances that are presented to him or her.

Vice President Yee said he agrees with that. He said he was a reasonable person and he does not see the appearance of impropriety. He said Director Kakishiba has been very diligent in recusing himself and stating very clearly his involvement. Vice President Yee wanted to know who determines the appearance of impropriety in this circumstance.

Ms. Minor said the facts and circumstances were presented to us as lawyers. She said we looked at those facts and circumstances stated thus far that drove her to look more

carefully at this and to seek advice from lawyers who have expertise in Conflicts of Interest. She said once she applied those facts and circumstances, she reached a conclusion based upon her understanding of the law. She said what we presented today was their analysis of the facts and circumstances informed by our legal opinion that we presented to you.

Vice President Yee said to Ms. Minor her opinion was a legal opinion, however not binding on the Board, to Director Kakishiba or anyone else in terms of the definition of appearance of impropriety. He asked if Ms. Minor as General Counsel have the authority to define appearance of impropriety for the Board. He said his understanding she had the right to give her opinion.

Ms. Minor said as General Counsel she is going to take the facts and circumstances and apply it to the law. She said she is going to give the Board her best opinion and her best advice. Ultimately, it is the decision of this Board whether or not it is going to accept that advice.

Vice President Yee wanted to know if there was any evidence that Director Kakishiba responded to the email?

Ms. Schulkind said there has never been a finding that Director Kakishiba acted improperly. She said the decision to step down is entirely Director Kakishiba's. She said if he does not decide to step down there is another remedy. The option is that he is a valued member of this Board and you would not do contracts with the organization.

Vice President Yee said he wanted to know if it was the professional responsibility of the Legal Counsel's office to withhold those contracts or for the Board to make an individual decision each time a contract from EBAYC comes up.

Ms. Minor said that was a recommendation based upon our analysis of both the law and the facts and a recommendation to the Board. She said ultimately it's the Board's decision to make that determination.

Director Hodge said it seems for the last few weeks we have had EBAYC contracts held up. She asked if that was a legal decision or was that the President's decision? She said it was not a Board's decision.

Ms. Minor said the contract she pulled was the one related to the Oakland Farms to School Program which is included in your packet tonight.

Director Hodge said it seems inappropriate because we have the decision to make. She said the question is whether or not the Board will take this recommendation. Director Hodge noted the expressions of public concern and not using recusal to take away the perception. She said she is concerned where all this came out of. Was it just the email? Director Hodge said she wanted to hear a little more about the public concern and whether Board Members brought it up because they really had a problem or distrusted Director Kakishiba in some way.

Ms. Minor said the process has been underway for several weeks. She said she initially met with Director Kakishiba and Board President Gallo and subsequently with Director

Kakishiba, Vice President Yee and President Gallo.

Ms. Minor said based upon her review of the law, she was concerned that if this Board took action, given her understanding of the law, it would question the legality of the contracts. She said until she got direction from the Board as a whole, she thought it was prudent to hold any contract that raised questions as to Director Kakishiba's involvement. She said the red flag contract for her raised questions for her as to his involvement so she said that is why she pulled that particular contract.

Director Dobbins said a lot of the law is outside of the Board's control. The one thing under the Board's control is the Board Bylaws. He said if the Board did change the Bylaws it would not apply retroactively to the situation.

Ms. Schulkind said the impact of Government Code 1090 created a concern before we looked at the potential; the Bylaws created a further restrictive impact.

Director Dobbins wanted to know if the Board changed the Bylaws and made the change retroactive, was it irrelevant legally because there are three other things.

Ms. Schulkind said that was her interpretation.

Ms. Minor addressed the Bylaws. She said the question has been raised several times today. She said she has gotten emails and letters from citizens asking about the Bylaws. Ms. Minor said as a basic principal of American Law, generally laws are not changed retroactively. She said they can be. She said usually you want to cite a significant public policy reason for changing a law and applying it retroactively.

Director Spearman

Director Spearman said two years ago there was a political fight in one area and one political entity did not like the other political entity taking a stand. Form letters were sent to the District so we had to investigate it because the complaints came in. She said during the investigation it was determined at that time there was no conflict. She said when we [the Board] regained [local] control there was a conversation where a person was asking was there a conflict? Director Spearman said she thinks that person pushed it until; to where there was a conflict. She said when the Board had its Ethical Training she did not understand how the conflict applied to the Superintendent's wife. She said it was brought back to her because she asked questions, it was decided to take it further and ask that question. Director Spearman said she believes this is how this whole thing came about. She said it is purely political. Director Spearman said the ultimate responsibility to take these recommendations is on this Board; whether we decide we want to accept these recommendations or not. She said the appearance of conflict of interest would have to be decided by the Board. Director Spearman said she does not like the recommendation that if Director Kakishiba refrains from resigning this Board it should not enter into any contracts with EBAYC. Director Spearman said she read the email and said she did not see anything contrived in the email. She said what she saw said help me craft some language so it doesn't look messy. Director Spearman said she recommends to Director Kakishiba that he not resign from the Board. She said if we need to change some language it is our decision and authority to change some language for the betterment of the District.

Director London

Director London said this issue has been giving her a great amount of thought and

heartache. She said Director Kakishiba was elected by the approximately 55,000 people in District 2. She said she has not heard them calling for his recall. She said if they thought there was impropriety there are many avenues they can take. She said when you run for school board its because you want to serve the public. She said if this was a situation where Director Kakishiba was pulling down a salary [as a Board member] of \$40,000 a year she could see this. She said we are doing this for not a lot of money and the reward for her is when she goes to school sites seeing kids learning and seeing people get excited about what we are doing in our schools in Oakland. She said she hopes when this discussion is over they all can walk away with mutual respect all around and know you are doing your job and we are doing our job.

Director London said Director Kakishiba adds extreme value to this Board around developing our budget and making sure the numbers track to what we said were are our priorities. She said her preference is for him to serve out his term for a number of reasons.

Director Kakishiba

Director Kakishiba said he announced his resignation to be effective October 31, 2009. He said he realized he had to submit a letter of resignation to the County Superintendent to have an effect on the resignation. He said he was asked by one Board Member as well as a number of constituents within and outside District 2 not to submit that letter of resignation until this Board and the public had an opportunity to hear the legal analysis that prompted his announcement to resign. Director Kakishiba said whatever the Board does, the important thing was the legal analysis needed to be transparent to the public. He said it was important to do. Director Kakishiba said this was uncomfortable for him. He had intended not to be here but he said in the interest of public transparency he is here. He said he would not weigh in on any of the discussion. He said that is why he did not submit his letter until the Board and the public had the opportunity to learn and weigh in on the issue. Director Kakishiba said he is available to answer question from anyone.

Superintendent Smith

Superintendent Smith said he has been through this and learned a considerable amount about the codes and conflicts. He said the one thing he has not heard discussed was the potential of a reasonable person bringing suit against the District. He wanted to know if that was still a possibility. He said Director Kakishiba has the best intention of the District at heart and he is an incredible leader in District 2.

Ms. Minor said the reasonable person standard the law assumes a reasonable person includes all of us. She said reasonable people can disagree.

Superintendent Smith said having been through this with Ms. Minor and Ms. Schulkind they are very respectful. The diligence done to reflect the law should not be taken personally and he appreciates their professionalism and thoughtfulness. He said they are providing an opinion.

President Gallo thanked Legal Counsel for the presentation. He said the options and next steps are in front of us. President Gallo said he would support the recommendation of Legal Counsel. He said it is the way it is defined. He said the decision rests with Director Kakishiba in terms of what he chooses to do. President Gallo said the other decisions rest with the Board. It is up to the Board to define policies.

*Director Spearman asked for a five minute recess before adjourning the meeting.
President Gallo said yes.*

Secretary Rakestraw said the Board could only schedule items for future consideration.

The Board took a five minute recess at 8:05 P.M.

Director Spearman said she would like to propose the Board call a Special Meeting on Wednesday, November 18th before or after the Regular Board Meeting for the Board to make a decision on this issue. She asked Director Kakishiba to wait and not take any action until he hears from his colleagues.

President Gallo asked Director Spearman if she has anything specific.

Director Spearman said her request is to take a vote on whether the Board will support the recommendations of Legal Counsel or not.

Vice President Yee said he would like to add a review of the Board Bylaws.

Director London said it might make sense to look at if we need some whistle blower provision if someone of the public feels there is some kind of impropriety of any sort. She said if anyone has a concern about what is going on in the District they should be able to call an anonymous tip line and report it.

Director Spearman said the Bylaws should be sent to committee and discussed.

A Special Board Meeting will be scheduled next week to discuss and take a vote to accept or not accept the recommendations of Legal Counsel on the Conflict of Interest.

Director London said her understanding of the decision lies with Director Kakishiba whether he chooses to tender his resignation. If he chooses not, the Board has a decision to make whether or not we continue to approve contracts with EBAYC.

Director Spearman said that was not her motion. She said if we accept the recommendations from Legal Counsel we could recommend to Director Kakishiba not to resign and take up the issues of contracts or we don't have to take up the issues of the contract. If we reject the recommendations there is nothing else to discuss.

Discussed and Closed

D. Adjournment

President Gallo adjourned the meeting at 8:09 p.m.

Prepared By: _____

Approved By: _____