

PRESIDENT DAVID KAKISHIBA
ETHICS INVESTIGATIVE REPORT

November 28, 2007

Legislative File 07-1475
Introduced 10/31/07
Enactment No. 07-1223
Enactment Date 11/28/07

**SUMMARY OF ETHICS INVESTIGATION OF
BOARD PRESIDENT DAVID KAKISHIBA**

INTRODUCTION

On or about October 17, 2007, President David Kakishiba informed the District that he had received three written letters of complaint made against him alleging unethical conduct. The specific allegations were that the East Bay Asian Youth Center, an East Bay nonprofit of which President Kakishiba serves as Executive Director, had taken an advocacy position opposing the proposed development of an 810 unit condominium development project in the Fruitvale neighborhood, known as “Fruitvale Gateway Project” (“Project”). The complaints alleged that President Kakishiba had used his position as a member of the Board of Education to cause fliers opposing the project to be sent home with students at three schools: ASCEND Elementary (ASCEND), International Community School (“ICS”) and Think College Now (“Think College”). The Vice President of the Board and the Secretary of the Board also received the same written complaints within the approximate same timeframe. President Kakishiba denied he had committed any unethical conduct.

As Vice President of the Board, pursuant to Board Bylaw 9012, I directed the Interim General Counsel to retain an independent investigator to examine the allegations. I publicly disclosed the complaint and the ordering of an investigation at the October 31, 2007 Board meeting . I also announced at the time that the Board, upon receipt of the investigator’s report, would take appropriate action required, if any; that the Board would have no further comment until the investigation had been completed.

I am announcing today that the investigation has been completed and requesting that the Board make Findings of Fact and disposition of the matter consistent therewith.

BACKGROUND

The District engaged the law firm of Meyers, Nave, Riback, Silver & Wilson (“Investigator”) to investigate the allegations and to determine whether President Kakishiba violated Board Policy 1325 or any conflict of interest laws.

The Investigator interviewed the following witnesses: Complainant, Agnes Ramirez Grace; Complainant Emilia Otero; Mr. Kakishiba; Larissa Adam, Principal of ASCEND Elementary School; Christy Hogan, OCO Community Organizer; and Carlos Plazola, a representative of the developer of the Fruitvale Gateway Project. The Investigator was unable, repeatedly, to reach the third complainant, Jill Worsely.

In addition to his role as Board President, Mr. Kakishiba also serves as the Executive Director of the East Bay Asian Youth Center (“EBAYC”), a nonprofit community-based organization, among other activities, that contracts with the District to provide after-school tutoring at District schools. In its role as a community-based

organization, EBAYC has taken an advocacy position against the development of the Fruitvale Gateway Project.

During the first week of the 2007-2008 school year at the three schools in question, by means identified in the report, identical flyers were distributed to students which encouraged members of the community to attend the September 5, 2007 City of Oakland Planning Commission Meeting to oppose development of the Project. The flyers contained contact information for EBAYC along with another Oakland-based nonprofit organization, Oakland Community Organizers (“OCO”).

President Kakishiba, and the other District Officials named, received three identical complaints individually signed by Emilia Otero, Agnes Ramirez Grace and Jill Worsely. The complaints allege that:

- (1) Mr. Kakishiba used his position as Board President and Director of EBAYC to direct the distribution of the flyers to students at the schools in question;
- (2) Distribution of the flyers violated Board Policy 1325;
- (3) Mr. Kakishiba should be censured for “unethical conduct” relative to the flyers; and
- (4) If Mr. Kakishiba is “unable to discern between his role as President of the School Board and as Executive Director of EBAYC, that he step down from the position to eliminate the conflict.”

SUMMARY OF FINDINGS

Finding #1:

Mr. Kakishiba did not use his position as Board President to direct the preparation or distribution of the flyers.

Basis of Finding # 1:

- Ms. Otero acknowledged that she does not know who prepared the flyers or who distributed them to the students.
- Ms. Grace indicated that she does not know who prepared the flyers or who was responsible for their distribution.
- Larissa Adam, the principal of ASCEND Elementary School, stated that parent leaders of EBAYC and OCO passed out the flyer after school and outside of school grounds.
- During an August 2007 OCO parent meeting, parents suggested mobilizing residents of the Fruitvale neighborhood to attend the September 5th City of

Oakland Planning Commission meeting in to oppose the Fruitvale Gateway Project. As a result of that meeting, Christy Hogan, a community organizer with OCO, prepared the flyers. She contacted administrators at ICS and Think College who reviewed the flyers and told Ms. Hogan that they would be placed in the teacher mail boxes for distribution to the students. With regard to ASCEND, OCO parent leader Guadalupe Barrera decided to hand the flyers out to ASCEND parents after school and outside of school property.

- Ms. Hogan stated that she did not advise Mr. Kakishiba that the flyers were being distributed. Mr. Kakishiba disclosed that he had no knowledge of the flyer until he received a copy as an attachment to the three complaints. He stated that he did not know the origin of the flyer or who prepared and distributed it.

Finding # 2:

Mr. Kakishiba did not violate Board Policy 1325 because he was not involved in the preparation or dissemination of the flyers.

Basis of Finding # 2:

- BP 1325 requires that prior to the distribution or publication of noncommercial or nonprofit materials, “the Superintendent, principal or designee shall review and approve all advertising copy and promotional materials to ensure compliance with Board policy.”
- See Basis of Finding # 1.

Finding # 3:

Mr. Kakishiba did not engage in unethical conduct by using his influence as Board President to have the flyers prepared or distributed.

Basis of Finding # 3:

- Government Code Section 8314(a) provides in part that "it is unlawful for any elected state or local officer... to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law." Government Code Section 8314(b) defines "use" to mean "a use of public resources which is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated."
- Mr. Kakishiba neither prepared nor distributed the flyers. There is no evidence that he knew of the flyers' existence until he received the complaints.

Finding # 4:

There is no conflict between Mr. Kakishiba's role as a member of the District's Governing Board and his role as Director of EBAYC, a non-profit that contracts with the District to provide services to District students.

Basis of Finding # 4:

Government Code Section 1090 ("Section 1090") provides in relevant part that, "members of the Legislature, state, county, district ... shall not be financially interested in any contract made by them in their official capacity, or by any body or board on which they are members..." As a consequence of this provision, it is unlawful for Board members to make a contract in which one of its members has a financial interest.

Currently, the District is in receivership and is operating under state control. Board members do not vote on contracts between the District and EBAYC. Therefore, with regard to the contract between the District and EBAYC, there is a strong argument that Section 1090 does not apply where the District is under the control of the State Administrator, and the State Administrator has the sole authority to execute such contracts.

Notwithstanding the Board's currently limited role, the Investigator evaluated whether Mr. Kakishiba's roles as Board President and Director of EBAYC would trigger Section 1090 as the Board exercises increased control over the District's affairs in the future. Government Code Section 1091 ("Section 1091") provides an exception to the general prohibition in Section 1090 if the officer's interest in the contract is deemed a "remote interest." In other words, Section 1090 is not violated if Mr. Kakishiba maintains a "remote interest" in the contract between the District and EBAYC.

Mr. Kakishiba's position as an officer or employee of a 501(c) (3) nonprofit entity, falls into the remote interest exception of Section 1091 so long as:

- (1) EBAYC maintains its status as a tax-exempt nonprofit organization;
- (2) Prior to any discussion or action taken with regard to the contract between the District and EBAYC, Mr. Kakishiba discloses his employment with EBAYC and has the disclosure noted in the official records of the District; and
- (3) Mr. Kakishiba does not attempt to influence another member of the ...board...to enter into the contract.

CONCLUSION

President David Kakishiba, based on the independent investigation of the allegations made, has not violated Board Policy 1325, has not commit any ethical violations and has no conflict of interest in his roles as President of the Board of Education and Executive Director, East Bay Asian Youth Center.

According, I recommend that the Board adopt proposed Resolution No. 0708-0132 - Findings of Fact and Disposition Regarding Ethics Complaints of Named Individuals Made Against President David Kakishiba.

Attachments: Meyers Nave Riback Silver & Wilson Kakishiba Investigative Report
Board of Education Resolution No. 0708-0132 – Findings of Fact and
Disposition Regarding Ethics Complaints of Named Individuals Made
Against President David Kakishiba

[REDACTED]

November 15, 2007

TO: Alice Spearman, Oakland Unified School District Governing Board, Vice President
Deborah A. Cooksey, Interim General Counsel

FROM: Jayne W. Williams, Attorney at Law
Stephanie Stuart, Attorney at Law



RE: Alleged Conflict of Interest of David Kakishiba, Board President

ISSUE

The Board of Education of the Oakland Unified School District ("Board") has recently received three written complaints ("complaints") expressing concern over the distribution of flyers to students at ASCEND Elementary (ASCEND), International Community School ("ICS") and Think College Now ("Think College") opposing the "Fruitvale Gateway Project", a proposed 810 unit condominium development project in the Fruitvale neighborhood ("Project"). As a result of the complaints, the Board has requested an investigation into the distribution of the flyers and a legal opinion on whether the distribution of the flyers violated Board Policy 1325 or any other conflict of interest laws. You have retained this office to conduct that investigation. We have conducted this investigation within the time requested. This memorandum contains our findings and our opinion.

BACKGROUND

Board President David Kakishiba was elected to the Board in March 2002. Prior to and subsequent to his election to the Board, Mr. Kakishiba has served as the Executive Director of the East Bay Asian Youth Center ("EBAYC"), a nonprofit community-building organization that contracts with the Oakland Unified School District ("District") to provide after-school tutoring at District schools. In addition to providing after-school tutoring services, EBAYC also serves and develops the leadership of low-income parents in the Eastlake, San Antonio and Fruitvale neighborhoods of Oakland. In its role as a community-building organization, EBAYC has taken an advocacy position against the development of the Fruitvale Gateway Project.

During the first week of school at ASCEND, ICS and Think College, flyers were distributed to students which encouraged members of the community to attend the September 5, 2007 City of Oakland Planning

To: Deborah A. Cooksey, Interim General Counsel
From: Jayne W. Williams, Attorney at Law
Stephanie J. Stuart, Attorney at Law
Re: Potential Conflict of Interest re David Kakishiba
Date: November 15, 2007
Page: 2

Commission meeting to voice opposition to the development of the Project.¹ The flyers contained contact information for EBAYC along with another Oakland-based nonprofit organization, Oakland Community Organizers (“OCO”) thereby giving the impression that the flyers were produced by either EBAYC, OCO or both organizations.

In response to the distribution of the flyers, the Board received three written complaints individually signed by Emilia Otero, Agnes Ramirez Grace and Jill Worsely² expressing concern about the distribution of the flyers and Mr. Kakishiba’s service as both Board President and Director of EBAYC. Specifically, the complaints: (1) allege that Mr. Kakishiba used his position as Board President and Director of EBAYC to direct the distribution of the flyers to the ASCEND, ICS and Think College students; (2) contend that the distribution of the flyers violated Board Policy 1325³; (3) call for Mr. Kakishiba to be censured for his “unethical conduct”; and (4) if Mr. Kakishiba is “unable to discern between his role as President of the School Board and as Executive Director of EBAYC, that he step down from the position to eliminate the conflict.”

INTERVIEWS/FINDINGS

A. Summary of Relevant Interviews

At the request of Interim General Counsel Deborah Cooksey, we have conducted an investigation into the distribution of the flyers and alleged violations of Board Policy 1325. During the course of our investigation, we interviewed two of the three complainants, Agnes Ramirez Grace and Emilia Otero. We were unable to reach the third complainant, Jill Worsely. We also interviewed David Kakishiba, Board President; Larissa Adam, Principal of ASCEND Elementary School; Christy Hogan, OCO Community Organizer; and Carlos Plazola, a representative of the developer of the Fruitvale Gateway Project.

1. Interviews of Emilia Otero and Agnes Ramirez Grace

Interviews with Ms. Grace and Ms. Otero were conducted via telephone on Friday, November 2nd. Both Ms. Grace and Ms. Otero expressed their concern and dissatisfaction that flyers encouraging “political activity” were distributed to students.

a. Emilia Otero

Ms. Otero stated that the distribution of the flyers constituted “dirty politics” and was inappropriate given that elementary school children are not old enough to participate in the political process. Ms. Otero does not

¹ A copy of the flyer is attached for reference.

² A copy of the complaint is attached for reference. Please note that only one complaint has been attached given that all three complaint letters are identical except for the signatories.

³ The complaint letters incorrectly reference Board Policy “125”. There is, in fact, no such Board Policy. It is our belief that the relevant Board Policy is Policy 1325.

To: Deborah A. Cooksey, Interim General Counsel
From: Jayne W. Williams, Attorney at Law
Stephanie J. Stuart, Attorney at Law
Re: Potential Conflict of Interest re David Kakishiba
Date: November 15, 2007
Page: 3

know who prepared the flyers or distributed them to the students, but believes that since EBAYC's contact information is listed on the flyer, the flyers were likely prepared by EBAYC at the direction of Mr. Kakishiba. Ms. Otero feels that Mr. Kakishiba improperly used his position as Board President to advance the political goals of EBAYC by having the flyers distributed to the students.

Ms. Otero acknowledged that she did not have any actual knowledge or information related to who was responsible for preparing and distributing the flyers. Given that Ms. Otero could not provide any information related to who prepared and distributed the flyers, we find that there is not enough information to support her complaint that Mr. Kakishiba was directly involved in causing the distribution of the subject flyers.

b. Agnes Ramirez Grace

Ms. Grace resides in the Fruitvale district and was informed by members of the community that the flyers had been distributed to ASCEND, ICS and Think College students. Ms. Grace says that she was shocked and upset to learn that the flyers had been distributed to the ASCEND, ICS and Think College students as she feels that it is inappropriate to use children in that manner. Ms. Grace stated that the distribution of the flyers was improper because the flyers appear to have been prepared by EBAYC and Mr. Kakishiba serves as the Executive Director of EBAYC. Ms. Grace feels that Mr. Kakishiba's services as both Board President and Executive Director may cloud his judgment, thereby creating a conflict of interest. Ms. Grace indicated that she does not have actual knowledge regarding who prepared the flyers or who was responsible for their distribution.

Ms. Grace was unable to provide any information regarding who prepared and/or distributed the flyers. Moreover, Ms. Grace acknowledged that her conclusion that Mr. Kakishiba was responsible for the distribution of the flyers was based solely upon the fact that EBAYC's contact information was listed on the flyers. Based upon our interview of Ms. Grace, we do not feel that there is enough information to support her claim that Mr. Kakishiba was directly involved in causing the distribution of the subject flyers.

2. Interview of David Kakishiba

An interview with Board President David Kakishiba was conducted on Wednesday, November 7th. Mr. Kakishiba confirmed that he is an employee of EBAYC and currently serves as its Executive Director and receives compensation from EBAYC for his services. He indicated that EBAYC receives funding from the District in the form of grants for a variety of programs and projects. Sources for funding include After School Education and Safety Funds from Proposition 49 and Oakland Fund for Children and Youth Funds from Oakland Measure K Kids First Initiative. Mr. Kakishiba indicated that funding was provided to EBAYC from the District prior to his election to the Board. Mr. Kakishiba also stated that when he assumed office he delegated all of the EBAYC contracting responsibilities to the EBAYC Deputy Executive Director, including signing authority and the liaison with the District.

With respect to the complaints in question, Mr. Kakishiba disclosed that he had no knowledge of the flyer until he received a copy of it as an attachment to the three complaints. While Mr. Kakishiba acknowledged

To: Deborah A. Cooksey, Interim General Counsel
From: Jayne W. Williams, Attorney at Law
Stephanie J. Stuart, Attorney at Law
Re: Potential Conflict of Interest re David Kakishiba
Date: November 15, 2007
Page: 4

that EBAYC is part of a coalition involved in advocacy related to the Fruitvale Gateway Project, he stated that he did not know the origin of the flyer or who prepared and distributed it. We have no reason to doubt the veracity of Mr. Kakishiba's statements and find his account to be credible.

3. Interview of Larissa Adam

Larissa Adam is the principal of ASCEND Elementary School. We interviewed Ms. Adam on Thursday, November 8th. Ms. Adam stated that with regard to ASCEND Elementary, written materials are only distributed to students if (1) the materials have been authorized by the District for distribution, or (2) the materials were prepared by herself or members of the ASCEND teaching staff. Ms. Adam stated that she was aware that the flyers related to the Fruitvale Gateway Project were passed out at ASCEND Elementary School some time during the first week of school. However, Ms. Adam claims that the flyers were not handed out by employees of ASCEND, but rather were passed out after school and outside of school grounds, by parent leaders of EBAYC and OCO.

We find Ms. Adam's statements to be credible and do not have any reason to doubt the veracity of her account of the flyer incident. The information gleaned from our interviews of Ms. Adam and Ms. Hogan, (see interview summary below) support Ms. Adam's claim that she did not review the flyers or approve of their distribution. Our finding is based upon the fact that Ms. Adam's statements regarding the distribution of the flyers were corroborated by Ms. Hogan (see interview below). Accordingly, with regard to the distribution of flyers at ASCEND, we find that the flyers were distributed by an OCO parent leader and that the flyers were not submitted to Ms. Adam for her approval prior to their distribution.

4. Interview of Christy Hogan

Christy Hogan is a community organizer with OCO. An interview was conducted with Ms. Hogan on Monday, November 12th. Ms. Hogan stated that some time in late August during an OCO parent meeting, several parents suggested mobilizing residents of the Fruitvale neighborhood to attend the September 5th City of Oakland Planning Commission meeting in order to voice their opposition to the Fruitvale Gateway Project. As a result of that meeting, Ms. Hogan prepared the flyers in question for distribution at ASCEND, ICS and Think College. Ms. Hogan said that she contacted the principal of ICS and the vice principal of Think College to get permission to distribute the flyers to the students of those schools. Ms. Hogan said that with regard to ICS and Think College, upon reviewing the flyers, the Principal and Vice Principal (respectively) approved the flyers and told Ms. Hogan that they would be placed in the teacher mail boxes for distribution to the students. With regard to ASCEND, Ms. Hogan arranged for an OCO parent leader, Guadalupe Barrera to obtain approval to distribute the flyers from Principal Larissa Adam. Ms. Hogan stated that the flyers were then left with Ms. Barrera for distribution to students. Ms. Hogan stated that some time after the distribution of the flyers, she learned that Ms. Barrera decided to hand the flyers out to ASCEND parents after school and outside of school property, and as a result of this decision, did not obtain Principal Adam's approval of the flyers or permission regarding their dissemination.

To: Deborah A. Cooksey, Interim General Counsel
From: Jayne W. Williams, Attorney at Law
Stephanie J. Stuart, Attorney at Law
Re: Potential Conflict of Interest re David Kakishiba
Date: November 15, 2007
Page: 5

Ms. Hogan stated that she did not advise Mr. Kakishiba that the flyers were being distributed to the ASCEND, ICS and Think College students. Ms. Hogan further stated that, in retrospect, Mr. Kakishiba should have been notified prior to distributing the flyers to the students.

Ms. Hogan's statements corroborate Principal Adam's statements that the flyers were distributed without her approval, and that the flyers were distributed outside of school property by parents.

5. Interview of Carlos Plazola

On Thursday, November 8th, we were contacted by telephone by Carlos Plazola. Mr. Plazola identified himself as a development consultant with Randall Whitney, developer of the Fruitvale Gateway Project, and a resident of the Fruitvale district. Mr. Plazola said that he was aware that we were conducting an investigation and he wanted make us aware of his concerns. Mr. Plazola was concerned about the distribution of the flyers to the ASCEND, ICS and Think College students because he feels that it was inappropriate to use school children to advance the political agenda of EBAYC and OCO. Mr. Plazola claims that EBAYC and OCO members pressured school officials to distribute the flyers to the students even though the flyers had not been approved by the District.

We have been unable to corroborate Mr. Plazola's claim that members of either EBAYC or OCO pressured school officials to distribute the flyers to students. Moreover, we find that Mr. Plazola's comments may be biased given that he is employed by the developer of the Fruitvale Gateway Project and therefore has interests in direct conflict with the issues raised on the flyers.

B. Findings regarding Preparation and Distribution of Flyers

As a result of our investigation and interviews of the foregoing individuals, we find the following:

Mr. Kakishiba did not prepare or distribute the flyers in question. Our findings are based upon several factors. First, neither claimant we interviewed had actual knowledge regarding the preparation or distribution of the flyers. Accordingly, we have given their assertions little weight as they seem to be based entirely upon the fact that EBAYC's contact information is listed on the flyer and Mr. Kakishiba is the Executive Director of EBAYC. Without more, we find claimants' assertions to be tenuous and unsupported by the information provided in the interviews.

Second, Mr. Kakishiba's statement that he had no knowledge of the preparation or distribution of the flyers is consistent with Ms. Hogan's statement that she both prepared the flyers and arranged for their distribution without Mr. Kakishiba's knowledge. Finally, Ms. Adam's statement that the flyers were handed out by an OCO parent leader is consistent with Ms. Hogan's account of the distribution of the flyers.

To: Deborah A. Cooksey, Interim General Counsel
From: Jayne W. Williams, Attorney at Law
Stephanie J. Stuart, Attorney at Law
Re: Potential Conflict of Interest re David Kakishiba
Date: November 15, 2007
Page: 6

LEGAL ANALYSIS

A. Board Policy 1325

The claimants contend that the distribution of the flyers violated District Board Policy 1325 ("Policy 1325"). Policy 1325 regulates advertising and promotion at District schools. Policy 1325 designates District schools as a limited open forum, and in doing so establishes criteria for the distribution of noncommercial or nonprofit materials that publicize services, special events, public meetings or other items of interest to students or parents/guardians. The flyers in question were prepared by a nonprofit organization for the purpose of publicizing a public meeting. As such, distribution of the flyers is covered by Policy 1325.

Pursuant to Policy 1325, prior to the distribution or publication of noncommercial or nonprofit materials, "the Superintendent, principal or designee shall review and approve all advertising copy and promotional materials to ensure compliance with Board policy." Among other things, the criteria for approving the distribution of materials or publishing of copy prohibits the Superintendent, principal or designee from accepting for distribution any materials or advertisements which promote any particular political interest, candidate, party or ballot measure, unless such materials are being distributed in a forum in which candidates or advocates from all sides are presenting their views to the students during school hours.

Consistent with Policy 1325, the principal of ICS and the vice principal of Think College reviewed and approved the flyers prior to their distribution to the students of each school. However, our investigation reveals that Mr. Kakishiba had no knowledge of the flyers before they were distributed to the students of the three schools.

Based on the facts, it is clear in our opinion, that Board President Kakishiba did not prepare or distribute the flyers and that he did not violate Policy 1325.⁴

C. Government Code Section 8314

Government Code Section 8314(a) provides that "it is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law." Government Code Section 8314(b) defines "personal purpose" as "those activities the purpose of which is for personal enjoyment, private gain or advantage, or an outside endeavor not related to state business. "Use" is defined by statute to mean "a use of public resources which is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated."

As Board President, Mr. Kakishiba is a local officer within the meaning of Government Code Section 8314. However, the remaining elements of Section 8314 are not satisfied in light of our finding that Mr. Kakishiba

⁴ Whether the flyer met the remaining criteria for distribution by the schools is beyond the scope of this memo, and therefore such issues have not been analyzed.

To: Deborah A. Cooksey, Interim General Counsel
From: Jayne W. Williams, Attorney at Law
Stephanie J. Stuart, Attorney at Law
Re: Potential Conflict of Interest re David Kakishiba
Date: November 15, 2007
Page: 7

neither prepared nor distributed the flyers. Therefore, we find that Mr. Kakishiba did not violate Section 8314 because, with regard to the flyers, he did not use or permit others to use public resources for personal or other purposes.

D. Government Code Section 1090

Government Code Section 1090 ("Section 1090") provides in relevant part that, "members of the Legislature, state, county, district ... or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board on which they are members...." As a consequence of this provision, it is unlawful for Board members to make a contract in which one of its members has a financial interest. Any contract made in violation of Section 1090 is void and violation of Section 1090 is punishable as a felony. Section 1090 is the prohibition against "self contracting."

Mr. Kakishiba meets several elements of Section 1090. First, as an officer of the Board, Mr. Kakishiba is subject to Section 1090. Second, Mr. Kakishiba has a financial interest in the contract between the District and EBAYC as a portion of the grant funds provided to EBAYC is used to pay a portion of Mr. Kakishiba's salary as the executive director. However, one key element of Section 1090 does not apply to Mr. Kakishiba. Because the District is currently operating under state control, Board members do not vote on contracts between the District and EBAYC. Therefore, with regard to the contract between the District and EBAYC, there is a strong argument that Section 1090 does not apply where the District is under the control of the State Administrator, and the State Administrator has the sole authority to execute such contracts.⁵

However, in light of the fact that the District has recently regained some of the authority that had been vested in the State Administrator and will eventually gain additional authority over school affairs, we feel that it would be prudent to evaluate whether Mr. Kakishiba's roles as Board President and Director of EBAYC will trigger Section 1090 as the Board exercises increased control over the affairs and operations of the District in the future. Therefore, for the purpose of a thorough evaluation of any potential conflicts of interest, assuming that Section 1090 applies to Mr. Kakishiba, it is important to analyze whether any of the exceptions to Section 1090's general prohibition apply to Mr. Kakishiba.

Government Code Section 1091 ("Section 1091") provides an exception to the general prohibition in Section 1090 if the officer's interest in the contract is deemed a "remote interest." In other words, Section 1090 is not violated if Mr. Kakishiba maintains a "remote interest" in the contract between the District and EBAYC. The "remote interest" exception set forth in Section 1091 provides, in relevant part:

- (a) An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter

⁵ The foregoing analysis is based on a legal opinion provided on August 28, 2007 by Bruce Sarchet of Littler Mendelson regarding possible conflict of interest related to EBAYC.

To: Deborah A. Cooksey, Interim General Counsel
From: Jayne W. Williams, Attorney at Law
Stephanie J. Stuart, Attorney at Law
Re: Potential Conflict of Interest re David Kakishiba
Date: November 15, 2007
Page: 8

the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

(b) As used in this article, "remote interest" means any of the following:

- (1) That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Section 501(c)(3)) or a nonprofit corporation, except as provided in paragraph (8) of subdivision(a) of Section 1091.5.⁶...

Even if Mr. Kakishiba's service as both Board President and Director of EBAYC is deemed to trigger Section 1090, his role as an officer of a nonprofit 501(c)(3) organization may qualify Mr. Kakishiba for the "remote interest" exception.

In order to qualify for the exception, EBAYC must maintain its status as a tax-exempt nonprofit organization. Additionally, prior to any discussion or action taken with regard to the contract between the District and EBAYC, Mr. Kakishiba must disclose his employment with EBAYC and have that disclosure noted in the official records of the District. Importantly however, the "remote interest" exception provided by Section 1091 does not apply to an officer who "influences or attempts to influence another member of the ...board...to enter into the contract."

As noted above, Mr. Kakishiba can likely avoid a potential conflict of interest under Section 1090 by taking advantage of the exception set forth in Section 1091. In order to avail himself of the Section 1091 exception, Mr. Kakishiba must follow the steps set forth in Section 1091(a).

Mr. Kakishiba recused himself from participating in any discussions involving contracts with EBAYC. Mr. Kakishiba's recusal and disclosure of his employment with EBAYC is presumably noted on the record. As such, we are of the opinion that Mr. Kakishiba has not violated Section 1090.

We are of the opinion that Mr. Kakishiba does not violate Section 1090 in that: (1) The Board of Education presently has no contracting authority and is not in a position to approve any contracts between EBAYC and the District; and (2) Notwithstanding the lack of contracting authority, Mr. Kakishiba has recused himself from participation in any discussion involving the contract between EBAYC and the District.

Although it does not appear that Mr. Kakishiba presently violates Section 1090, once the District has regained full contracting authority from the State Administrator, we recommend that the Board revisit the potential conflict of interest issues raised by Section 1090.

⁶ The "exception to the exception" of Section 1091.5 does not apply because that section addresses noncompensated members of nonprofit organizations.

To: Deborah A. Cooksey, Interim General Counsel
From: Jayne W. Williams, Attorney at Law
Stephanie J. Stuart, Attorney at Law
Re: Potential Conflict of Interest re David Kakishiba
Date: November 15, 2007
Page: 9

CONCLUSION

Mr. Kakishiba was not involved in either the preparation or distribution of the flyers to the ASCEND, ICS and Think College students. Accordingly, Mr. Kakishiba has not done anything to violate Board Policy 1325 or any related conflict of interest laws. Finally, given that our conclusions related to Section 1090 are based, at least in part, on the fact that the State Administrator still exercises control over District contracting, we recommend that the District revisit any issues related to Section 1090 upon regaining full contracting authority from the state.

We are happy to augment or refine any portion of this memorandum and will be happy to provide answers to any questions that you have pertaining to our findings and conclusions.

If you have any questions or require further assistance, please do not hesitate to call or email me.

Attachments
1028648-3

City of Oakland School Board
Vice President *Spearman*
1025 Second Avenue
Oakland, CA 94606-2212

Received
Wed, October 17, 2007

Dear Ms. *Spearman*

I am writing to you regarding the actions of your Board president, David Kakishiba. Plainly, Director Kakishiba is also the Executive Director of the non-profit East Bay Asian Youth Center (EBAYC). EBAYC has taken an advocacy position on the proposed development of condominiums and townhomes in Jingtletown. On the first week of school, Director Kakishiba used his position so that flyers opposing the project were sent home with students in neighboring schools. That is, students from the schools at CCEC and ASCEND were sent home with flyers endorsed by EBAYC telling them to attend to protest the development.

While I support Director Kakishiba's right to free speech, I cannot condone his use of children to advance his political agenda. Moreover, his actions are in complete violation of the Oakland Unified School District Board Policy # 125. Therefore, I ask that Director Kakishiba be censured by the Board for his unethical conduct and that if Director Kakishiba is unable to discern between his role as President of the School Board and as Executive Director of EBAYC, that he step down from the position to eliminate the conflict.

I would be happy to stand testimony regarding the above and can also provide other witnesses to the actions described above.

Sincerely,


Emelia Otero

706-5372

cc Board of Education
Senator Swanson
State Administrator
Jack O'Connell

Ven a oponerse al proyecto

Fruitvale Gateway

Los miembros de la comunidad han estado hablando sobre los 810 condominios propuestos en el Proyecto **Fruitvale Gateway**. La comunidad esta opuesto a este proyecto, y quiere algo que empieza a realizar la comunidad ideal que queremos.

Acompáñenos a la Reunión de la Comisión de Planificación para OPONER al proyecto Fruitvale Gateway

Miércoles

5 de Septiembre

a las 6:00 P.M.

City Hall, salón de audiencia #1

One Frank H. Ogawa Plaza

Iremos en autobuses para llegar a la reunión, **Saliendo a las 5:00 P.M.** de dos lugares:

Iglesia San Antonio, 1535 16th Ave. o
Escuela ASCEND 3709 E 12th Street, y
pasando por las escuelas de Cesar Chavez

Habrà traducción pero necesitan una forma de identificación: licencia de conducir, identificación con foto, o tarjeta de crédito como un deposito por los audífonos. También, habrá cuidado de niños en la Iglesia San Antonio

Para mas información, llame a
OCO 510.639.1444x303 Ingles/Español
EBAYC 510.533.1092 x41 (Español) o x51 (Vietnemesa)

City of Oakland School Board
Vice President *Spearman*
1025 Second Avenue
Oakland, CA 94606-2212

Dear Ms. J *Spearman*

I am writing to you regarding the actions of your Board president, David Kakishiba. Plainly, Director Kakishiba is also the Executive Director of the non-profit East Bay Asian Youth Center (EBAYC). EBAYC has taken an advocacy position on the proposed development of condominiums and townhomes in Jingletown. On the first week of school, Director Kakishiba used his position so that flyers opposing the project were sent home with students in neighboring schools. That is, students from the schools at CCEC and ASCEND were sent home with flyers endorsed by EBAYC telling them to attend to protest the development.

While I support Director Kakishiba's right to free speech, I cannot condone his use of children to advance his political agenda. Moreover, his actions are in complete violation of the Oakland Unified School District Board Policy # 125. Therefore, I ask that Director Kakishiba be censured by the Board for his unethical conduct and that if Director Kakishiba is unable to discern between his role as President of the School Board and as Executive Director of EBAYC, that he step down from the position to eliminate the conflict.

I would be happy to stand testimony regarding the above and can also provide other witnesses to the actions described above.

Sincerely,

Jill Worsley
Jill Worsley

925.988.0804

Come oppose the Fruitvale

Gateway Project

Members of the community have been talking about the 810 condos being proposed by the Fruitvale Gateway Project. The community is opposed to this Project, and wants something that builds the ideal community we all want.

Join us at the Planning Commission Meeting to oppose the Fruitvale Gateway Project.

Wednesday

September 5, 2007

at 6:00 P.M.

At Oakland City Hall, Hearing Room One
One Frank H. Ogawa Plaza

We will be getting on buses to go downtown

Leaving at 5:00 P.M. from two locations:

St. Anthony Church, 1535 16th Ave. or
ASCEND School, 3709 E 12th Street and
passing by Cesar Chavez Schools

Child care will be provided at St. Anthony Church

For more information, please call
OCO 510.639.1444x313 English/Spanish
EBAYC 510.533.1092 x41 (Spanish) or x51 (Vietnamese)

City of Oakland School Board
Vice President *Spearman*
1025 Second Avenue
Oakland, CA 94606-2212

Dear Ms. *Spearman*

I am writing to you regarding the actions of your Board president, David Kakishiba. Plainly, Director Kakishiba is also the Executive Director of the non-profit East Bay Asian Youth Center (EBAYC). EBAYC has taken an advocacy position on the proposed development of condominiums and townhomes in Jingletown. On the first week of school, Director Kakishiba used his position so that flyers opposing the project were sent home with students in neighboring schools. That is, students from the schools at CCEC and ASCEND were sent home with flyers endorsed by EBAYC telling them to attend to protest the development.

While I support Director Kakishiba's right to free speech, I cannot condone his use of children to advance his political agenda. Moreover, his actions are in complete violation of the Oakland Unified School District Board Policy # 125. Therefore, I ask that Director Kakishiba be censured by the Board for his unethical conduct and that if Director Kakishiba is unable to discern between his role as President of the School Board and as Executive Director of EBAYC, that he step down from the position to eliminate the conflict.

I would be happy to stand testimony regarding the above and can also provide other witnesses to the actions described above.

Sincerely,

Agnes Ramirez Grace
Agnes Ramirez Grace

532-1210

**RESOLUTION
OF THE
GOVERNING BOARD
OF THE
OAKLAND UNIFIED SCHOOL DISTRICT
No. 0708-0132**

**Findings of Fact and Disposition Regarding Ethics Complaints of Named Individuals
Made Against President David Kakishiba**

WHEREAS, the Governing Board is committed to promptly investigating and addressing all credible allegations or complaints of unprofessional, inappropriate or unethical behavior on the part of a Governing Board member; and

WHEREAS, on or about October 17, 2007, President David Kakishiba, Vice President Alice Spearman and Secretary Edgar Rakestraw, Jr. each received the same copy of three written letters of complaint against President Kakishiba alleging unethical conduct, as a Board member, in the East Bay Asian Youth Center, an East Bay nonprofit of which President Kakishiba serves as Executive Director, having taken an advocacy position opposing the proposed development of an 810 unit condominium development project in the Fruitvale neighborhood, known as "Fruitvale Gateway Project" ("Project"); and

WHEREAS, the Governing Board seeks to presently and publicly respond to the allegations that President Kakishiba had specifically used his position as a member of the Board of Education to cause fliers opposing the Project to be sent home with students at three schools: ASCEND Elementary (ASCEND), International Community School ("ICS") and Think College Now ("Think College"); and

WHEREAS, the Vice President of the Governing Board, pursuant to Board Policy 9012, on or about October 31, 2007, directed the Interim General Counsel to engage an independent investigator to prepare a report including findings of fact regarding the allegations made against President Kakishiba; and

WHEREAS, the investigator, in a report dated November 15, 2007, has found no credible facts to support the allegation that President Kakishiba violated Board Policy 1325, committed any ethical violations and has a conflict of interest in his roles as President of the Board of Education and Executive Director, East Bay Asian Youth Center, the later a contractor of the District; and,

WHEREAS, the Governing Board has reviewed the investigative report and findings,

NOW, THEREFORE, BE IT RESOLVED that the Governing Board hereby adopts the investigative report and finds that President Kakishiba, based on the allegations made, has not violated Board Policy 1325, has not committed any ethical violations and has no conflict of interest in his roles as President of the Board of Education and Executive Director, East Bay Asian Youth Center, pursuant to Government Code Section 1090, while the Youth Center presently serves as a contractor of the District; and

BE IT FURTHER RESOLVED THAT the Governing Board based on the foregoing determination closes with prejudice the investigation regarding the Ethics Complaints of Named Individuals Made Against President David Kakishiba.

Passed by the following vote:

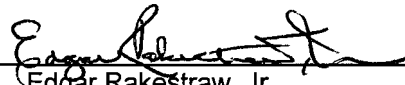
AYES: Kerry Hamill, Gregory Hodge, Gary Yee, Noel Gallo, Christopher Dobbins and Vice President Alice Spearman

NOES: None

ABSTAINED: David Kakishiba

ABSENT: None

I hereby certify that the foregoing is a full, true and correct copy of a Resolution adopted, under its Community Relation and Governance Authority, at a Regular Meeting of the Governing Board of the Oakland Unified School District held on November 28, 2007.



Edgar Rakestraw, Jr.
Secretary

Governing Board of the Oakland Unified School District

Legislative File

File ID No.: 07-1475
Introduction Date: 10/31/07
Enactment No.: 07-1223
Enactment Date: 11/28/07
By: er