

## A Response to Academic Senate President's Cure and Correct Letter

October 30, 2019

Presiding Officers  
Curriculum Committee  
Bakersfield College, KCCCD

Dear Curriculum Co-Chairs Billie Jo Rice, Jennifer Johnson, and Erica Manchaca: Presiding Officers

**Purpose:** This letter is to call your attention to three issues that I believe may jeopardize the finality of action to be taken by the Bakersfield College Curriculum Committee.

**Issue 1:** The "Email 1" written by "Employee 1," a curriculum committee voting member (see redacted emails) that was referenced in Academic Senate President's Cure and Correct letter and then subsequently posted on the Curriculum Committee public website did not, I believe, violate the Ralph M. Brown Act and Article I, Section 3 of the California Constitution and that by implicating employee 1's freedom of speech rights as a violation creates the potentiality for an unfair and unjust discussion on the upcoming voting item at hand;

**Issue 2:** The mischaracterization of the violation as stated in Issue 1 (see explanation below) may have made the cure effect futile;

**Issue 3:** The cure effort may also be questionable given the omissions of the expectation of having the redacted emails be placed on the agenda and given that the full language of the cure and correct actions that were voted on were omitted from all the following: 1) the Minutes (Draft version as of this writing) to the Oct 17, 2019 meeting, 2) the "Cover Letter" written by the Presiding Officers on October 28, 2019, and 3) the Oct 31, 2019 Agenda.

**Explaining Issue 1:** The cure and correct letter states *two* employees acted to create a convergence on an item that led to an alleged legal violation of the Ralph M. Brown Act and Article I, Section 3 of the California Constitution. Whereas Email 2 authored by Employee 2 might be construed as trying to "develop a concurrence regarding a non-agendized item, History B9," Email 1 authored by Employee 1 certainly had no intention of doing so. There is no evidence to which one can point to suggest Email 1 does. Email 1, exercising the author's freedom of speech rights, asks for a general professional apology from Employee 2 for mischaracterizing facts and character on "an issue" not defined. It solicits no discussion. Seeks only an apology on a CTA-owned listserv. Leads me to question why Employee 1 was implicated in said violation at all. Academic freedom rights and freedom of speech are protected under our KCCD/CCA/CTA/NEA Contract (Article 4A1, 4A4) and First Amendment of the Constitution of the United States.

I believe Email 2 to be an alleged violation of Section 54952.2 of the Ralph M. Brown Act and Article I, Section 3 of the California Constitution when it "communicated to members of the legislative body [the curriculum committee] the comments and positions of" Employee 1, a curriculum committee voting member, on "a matter that is within the subject matter jurisdiction of the local agency." *Violation of Section 54952.2 does not require a majority.*

### **California Government Code, Section 54952.2**

(2) Paragraph (1) shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, *if that person does not communicate to the members of the legislative body the comments or position of any other member or members of the legislative body* (italics mine).

Email 2 states the voting position and comments of Employee 1, a voting member, to other curriculum committee voting members through a "hub and spoke" manner and/or through the use of bc\_faculty and bc\_adjunct listserves. Email 2 states, "in an attempt to offset [Employee 1's name is listed] self-admitted voting bloc, I [Employee 2] wrote to half a dozen departments (chairs and/or curriculum committee representatives) who I suspected would be sympathetic to expanding the critical thinking GE"; and "As we inched closer to the resubmission of Hist B9, [Employee 1's name is listed] asked me not to resubmit the course, [Employee 1] informed me that English had joined [Employee 1's] Phil-Comm voting bloc." Employee 2 states explicitly that other voting members may have been contacted by reaching out to them in which Employee 1's comments and position may have been shared, but Employee 2 also shared Employee 1's comments and position on a faculty listserve to which curriculum committee voting members subscribe.

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The privacy of the vote of one voting member to another voting member is a key protective measure of the Ralph M. Brown Act and Article I, Section 3 of the California Constitution.

By implicating Employee 1's freedom of speech rights as a violation and not addressing the alleged violation of 54952.2, the cure and correct letter creates the potential for an unfair and unjust discussion on the upcoming voting item at hand.

**Explaining Issue 2:** The mischaracterization of the violation as stated in Issue 1 may have made the cure effect futile.

First, prior to the submission of the cure and correct letter to the Curriculum Committee on October 17, 2019, Employee 1 shared the stated violation of Section 54942.2 with 1) the Academic Senate President informally and 2) the Vice President of Instruction who is also the Administrator Co-Chair of the Curriculum Committee informally and formally. Whereas the former mentioned to look into it at the time, the latter on two different occasions had decided that no violation of that section occurred—one such time was on October 16, 2019. Moreover, just days prior to the submission of the cure and correct letter to the committee, an email discussion between curriculum members expressing concerns over possible Brown Act violations occurred. The co-chairs were cc'd in the exchange. Replying to those concerns, the Academic Senate President sent an email to the curriculum committee stating that no violation had taken place, except maybe with regard to the Gen Ed Team. One of the faculty co-chair's replied to the Academic Senate President's email 3 hours later expressing thankfulness for such an email – the same faculty co-chair did not reply on the listserv to any of the committee members regarding their concerns. So, on or around October 14, 2019, the Curriculum co-chairs published the Curriculum Committee Agenda and they agendized the item in possible violation of the Brown Act, Hist B9, without at the same time identifying that the item, HistB9, may actually have potential Brown Act violations attached to it. In fact, one of the faculty co-chairs of Curriculum emailed Employee 1 to say that there will be no opportunity for discussion on HistB9 on October 17, 2019 and omitted any mention of any possible Brown Act violations surrounding the HistB9 item.

At Academic Senate Executive Board on October 16, 2019, the day before the Curriculum Committee was to meet, Employee 1 raised a process concern regarding the agendizing of an item without allowing the Curriculum Committee to have any discussion or resolution regarding the shared concerns of the committee on the possible Brown Act violations. Employee 1 was concerned that the Curriculum Co-Chairs were avoiding the committees' concerns or trying to keep the issue quiet. And, Employee 1 stated such avoidance actions create communities of distrust. The next day, October 17, 2019, the Curriculum co-chairs gave a standard report to the committee and yet again no mention of any potential Brown Act violations were mentioned by them. Following the reports, the Academic Senate President addressed the committee presenting a cure and correct letter outlining an alleged violation of the Brown Act and identified a violation that had no section of the Brown Act attached to it, only a legal opinion dated from 2004. The Brown Act however was updated in 2008. Moreover, the violation presented in the cure and correct letter implicated Employee 1 as having allegedly taken part in this possible violation. The violation identified in the letter involved “two employees of Bakersfield College, KCCD, in separate e-mails, utilized the listservs bc\_faculty and bc\_adjunct potentially creating a serial communication leading to developing a concurrence regarding a non- agendized item, History B9, likely to be considered by the body” (italics mine).

And, on October 17, 2019, the cure and correct letter was submitted without the alleged violation of Section 54952.2. A violation that involves the disclosure of one voting member's position and comments to another voting member would seem to suggest a different set of cure and correct actions than the actions taken for an alleged serial meeting violation. The actions taken by the curriculum committee to make the emails by two employees public, in my opinion, does not simply “cure and correct” the right to privacy violation of a voting member.

In fact, the mischaracterization of the violation as stated in Issue 1 may have made the cure effect futile.

**Explaining Issue 3:** The Minutes (Draft version as of Oct 31, 2019) to the Oct 17, 2019 meeting explicitly states the following: “Demand to Cure requested by Academic Senate President, Hist B9 and redacted emails to be placed on the first agenda October 31, 2019.” However, the Agenda of October 31, 2019 omits the placement of the redacted emails on the first agenda. As for the Cover Letter” posted online that claims to have met this “Cure” states, for the last item, “Post the Demand to Cure letter and the redacted communications regarding the course in question.” Note well, this last item omits the expectation that the redacted emails be placed on the first agenda.

Moreover, whereas the cure and correct letter explicitly states the following as the cure, “History B9 be removed from the Thursday, October 17, 2019 Curriculum Committee agenda and re-agendized for your next meeting with a disclosure of the improper communications allowing the public to access the information and giving them the


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opportunity to comment on the information, of which it has been deprived," three important public documents omit the part, "giving them [the public] the opportunity to comment on the information, of which it has been deprived." The three documents include 1) the Minutes (Draft version as of this writing) to the Oct 17, 2019 meeting, 2) the "Cover Letter" written by the Presiding Officers on October 28, 2019, and 3) the Oct 31, 2019 Agenda.

Omitting the expected placement of the "redacted emails" on the first agenda and omitting that language in the Cover Letter, in my opinion, violates the "Cure" that was voted on and recorded in the Minutes on October 17, 2019. Omitting the last section of the full language of the cure and correct and any explicit mention of the reason for making the recommended documents public—for the purpose of "giving them [the public] an opportunity to comment on the information"—in the Minutes, in the Cover Letter and/or on the Agenda, may in fact create a barrier for the public from knowing that the public is now given an opportunity to comment on the potential violation of the Brown Act and Article 1, Section 3 of the California Constitution. This omission may be perceived as a way to not encourage or appropriately inform the public of their right to comment on these alleged violations.

These omissions lead me to question the efforts made to meet the voted-on expectations of our promises to the public where we want to give the public "an opportunity to comment, of which they were deprived." Having the "Opportunity to Address the Committee" on an agenda does not give a good faith effort of the committee to meet these very specific voted-on expectations.

Sincerely,

  
Michael McNellis  
Member, Bakersfield College Curriculum Committee  
Member, Bakersfield College Assessment Committee  
Member, Bakersfield College Academic Senate Executive Board  
Co-Chair, Bakersfield College Bookstore Advisory Committee  
Bakersfield College Department Chair