

May 24, 2022

*Via electronic mail only*

Honorable Members of the Board of Education  
Irvine Unified School District  
5050 Barranca Parkway  
Irvine, California 92604

Honorable Members of the Board:

The Irvine Unified School District (“IUSD”) Board of Education is violating the First Amendment by maintaining and enforcing Board Policy 9323 Rules of Conduct. Recent enforcement of these Rules at IUSD Board meetings, along with the Board’s choice to respond to one constituent’s criticism by blocking all messages from her, suggest the Board is engaged in a misguided attempt to insulate itself from public input and criticism. We urge the Board to repeal or substantially alter its Rules of Conduct and to unblock e-mail messages from Irvine Resident Debra Kamm.

### ***Enforcement of Rules of Conduct at IUSD Board Meetings***

Board Policy 9323 Rule of Conduct (1) states, in part, that “no person shall orally initiate charges or complaints against individual employees of the District at a public meeting of the Board.” Instead complaints about—or, in other words, criticism of—a specific District employee “shall be presented to the Superintendent and/or the Board in writing, signed by the complainant.” Rule 2 prohibits any remarks “which reflect adversely upon the racial, religious, economic, or political views, character or motives of any person on the staff, and Board” and gives the Board president authority to “summar[il]y terminat[e]” the speaker’s privilege of address. Rule 4 requires that individuals “addressing the Board must identify themselves by name and address.” We discuss our concerns with each Rule in turn below.<sup>1</sup>

On March 1, 2022, Irvine resident Debra Kamm addressed the Board about retaliation she faced after submitting a uniform complaint about discrimination against children with disabilities in the District. Mrs. Kamm then e-mailed Trustee Sharon Wallin, who notified Mrs. Kamm that she could not speak directly with her about an ongoing legal issue. In response to her next e-mail, Mrs. Kamm received an automated response from the District indicating that her e-mail address had been blocked.

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<sup>1</sup> <https://iusd.org/about/board-education/board-policies/conduct-public-meetings>

**EXECUTIVE DIRECTOR** Hector O. Villagra

**CHAIR** Marla Stone **VICE CHAIRS** Sherry Frumkin and Frank Broccolo

**CHAIRS EMERITI** Shari Leinwand Stephen Rohde Danny Goldberg Allan K. Jonas\* Burt Lancaster\* Irving Lichtenstein, MD\* Jarl Mohn Laurie Ostrow\* Stanley K. Sheinbaum\*

\*deceased

On April 19, 2022, Mrs. Kamm addressed the Board about concerns with the performance and qualifications of the District’s Special Education Director.<sup>2</sup> After she made her comments, which largely consisted of reading from a published Court opinion, Board President Ira Glasky reprimanded Mrs. Kamm for her comments. He referenced the Board policy 9323 Rules of Conduct about “not initiating or making any allegations against individual employees.”<sup>3</sup>

At the beginning of the public comment period of the Board meeting on May 3, 2022, Mr. Glasky admonished attendees that Board meetings are “not the time” for complaints against individuals, and he stated that “any remarks that reflect adversely upon individual staff members are out of order.” Mrs. Kamm addressed the Board about an IUSD employee serving as an expert witness on behalf of another school district in a case involving a child with autism. After her comment, Mr. Glasky again referred her to the Board policy, told her that the Board meeting was not the forum to bring “charges” against individuals, and that her comments could lead to “summary termination of [her] rights to address the Board.”<sup>4</sup>

### *Free Speech Concerns*

Nowhere is the fundamental right to free speech and expression more vital than when people address public officials about issues of public concern. Indeed, political expression on governmental affairs and public issues “has always rested on the highest rung of the hierarchy of First Amendment values.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citation omitted). “[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.” *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Accordingly, “[c]itizens have an enormous First Amendment interest in directing speech about public issues to those who govern their city.” *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) (citing *Madison Sch. Dist. v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167, 175 (1976)). It is for this reason that California law mandates that board of education meetings be open and provide an opportunity for the public to address the board. See Cal. Gov’t Code §§ 54953 and 54954.3; see also California Constitution, Art. I, § 3(b) (“The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”).

The Board’s Rules of Conduct violate the Brown Act and threaten core principles of free speech. The Brown Act specifically states that a legislative body may not “prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body.” Cal. Gov’t Code 54953.5. Prohibiting public criticism is

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<sup>2</sup> See IUSD Board Meeting at 00:55:33, [https://iusd.tv/media/2022-03-01+Board+Meeting/1\\_uil6usun/218622273](https://iusd.tv/media/2022-03-01+Board+Meeting/1_uil6usun/218622273) (March 1, 2022).

<sup>3</sup> See IUSD Board Meeting at 00:15:10, [https://iusd.tv/media/2022-04-19+Board+Meeting/1\\_fbdq9z2d/218622273](https://iusd.tv/media/2022-04-19+Board+Meeting/1_fbdq9z2d/218622273) (April 19, 2022).

<sup>4</sup> See IUSD Board Meeting at 01:19:45, [https://iusd.tv/media/2022-05-03+Board+Meeting/1\\_x6km86kb/218622273](https://iusd.tv/media/2022-05-03+Board+Meeting/1_x6km86kb/218622273) (May 3, 2022).

precisely what the IUSD Board has done here. Additionally, the Rules burden free speech because they significantly limit the public's ability to convey concerns and hold public officials accountable. Not only are the Rules bad policy at odds with California's commitment to open government, but they also violate the First Amendment.

### **Rules (1)-(2) are Impermissible Viewpoint Restrictions**

It is a bedrock principle of free speech that “a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing.” *White*, 900 F.2d at 1425 (citing *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 60-61 (1983)). Federal courts in California have long rejected public meeting policies that prohibit criticism of district employees. See *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 956 (S.D. Cal. 1997) (school district bylaw restricting raising “complaints” or “charges” against employees at open board meeting “violative of core First Amendment values”); *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719, 727-28 (C.D. Cal. 1996) (“District cannot prohibit speech on the ground that it is, or may be, false or defamatory, let alone on the ground that it is negatively critical of [the] District’s employees.”). In *Leventhal* and *Baca*, the provisions at issue were substantially similar to Board Policy 9323 Rule of Conduct (1), and a court would be likely to find it unconstitutional for the same reasons.

Rule (2) prohibiting comments “which reflect adversely upon the racial, religious, economic, or political views, character or motives” of any IUSD staff or Board Member also prohibits protected speech based on the viewpoints expressed, which is “an egregious form of content discrimination.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); See *Baca*, 936 F. Supp. at 730 (“It is difficult to imagine a more content-based prohibition on speech than [a] policy [that] allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees’ conduct or performance.”). Rule (2) does just that—it prohibits “adverse” comments while allowing positive or neutral comments.

### **Rules (1)-(2) are Overbroad**

Rules (1) and (2) prohibit speech well beyond what could be related to a valid government interests. They are impermissibly overbroad because they proscribe expression that is not inherently disruptive without any regard for whether an actual disruption has occurred. The United States Court of Appeals for the Ninth Circuit has clearly established that to be facially valid and not overbroad, rules of conduct or decorum must “limit proscribed activity to only actual disturbances.” *Acosta v. City of Costa Mesa*, 718 F.3d 800, 807 (9th Cir. 2013) (en banc); *Norse*, 629 F.3d at 976 (ordinance governing decorum of city council meeting is “not facially overbroad [if it] only permit[s] a presiding officer to eject an attendee for actually disturbing or impeding a meeting”); see *White*, 900 F.2d at 1424 (construing city’s decorum provision facially valid only when read to proscribe only behavior “that actually disturbs or impedes the meeting”). Nothing about critical comments is inherently disruptive of the conduct of a Board meeting.

### **Rule 4 Violates the Brown Act and the Constitution**

IUSD Board Policy 9293, Rule of Conduct (4) states that “All persons addressing the Board must identify themselves by name and address. This requirement is counterproductive public policy and also violates the Brown Act and Constitution. Requiring individuals to identify themselves before giving public comment has a stifling effect on speech. Individuals addressing the City Council, such as those who are critical of government employees, may already be hesitant to do so out of fear of retaliation or harassment.

Government Code Section 54953.3 states that members of the public cannot be required to identify themselves to participate in a meeting. *Id.* (“A member of the public shall not be required, as a condition to attendance at a meeting of a legislative body of a local agency, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.”). Further, it is well settled that anonymous speech is protected under the Constitution as a time-honored tradition stretching back to our country’s inception. *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (“Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.”); *Talley v. California*, 362 U.S. 60, 65 (1960) (invalidating a California statute prohibiting the distribution of “any hand-bill in any place under any circumstances” that did not contain the name and address of the person who prepared it, holding that identification and fear of reprisal might deter “perfectly peaceful discussions of public matters of importance”); *Doe v. 2themart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001) (“The right to speak anonymously was of fundamental importance to the establishment of our Constitution. Throughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate.”).

Recognizing these principles, the League of California Cities, an association of California city officials, makes clear in its guide to the Brown Act for officials, “Public speakers cannot be compelled to give their name or address as a condition of speaking. The clerk or presiding officer may request speakers to complete a speaker card or identify themselves for the record, but must respect a speaker’s desire for anonymity.”<sup>5</sup>

We previously successfully challenged a provision enacted by the Orange County Board of Supervisors (“OCBOS”) requiring speakers to submit their names and addresses on their speaker cards. In response to that litigation, the OCBOS revised the speaker request forms and county website to *expressly* state that a member of the public may use a pseudonym when completing the speaker request card or addressing the Board.<sup>6</sup> We recently raised the same

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<sup>5</sup> Open & Public V: A Guide to the Ralph M. Brown Act, at 37, *available at* <https://www.cacities.org/Resources-Documents/Resources-Section/Open-Government/Open-Public-2016.aspx>.

<sup>6</sup> *See* Addressing the Board, Board of Supervisors, County of Orange, California, <https://board.ocgov.com/addressing-board> (last visited Mar. 21, 2022).

concern with the Irvine City Council about Section 1-2-313(B), which required that an individual provide their name and address before addressing the Council. In response to our letter, the Irvine City Council approved a revision removing this requirement.<sup>7</sup> IUSD should do the same and remove the name and address requirement from the Municipal Code revisions under consideration.

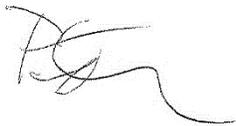
Accordingly, the IUSD Board must rescind Rule of Conduct (4) and allow members of the public to provide public comment anonymously or using a pseudonym.

### Conclusion

The Rules of Conduct, especially considered together with Mr. Glasky's threat to ban Mrs. Kamm from addressing the Board in the future, suggest an unacceptable pattern of silencing dissent and criticism. Further, the Board's decision to block Mrs. Kamm in response to her raising concerns about matters of public interest indicates that the Board is more concerned with avoiding unpleasant or embarrassing criticism than it is with hearing and taking seriously the public's concerns. The Rules are plainly unlawful for the reasons discussed above, and the Board must rescind them. To protect transparency and public access to the IUSD Board, it should also unblock Mrs. Kamm's communications. We hope that we can resolve disputes without need for further legal action. However, should the Board refuse to repeal or substantially alter its policy to bring it into compliance with the First Amendment and reinstate Mrs. Kamm's ability to e-mail the Board, we will consider all appropriate action including seeking immediate relief from the court.

Please respond by June 3, 2022 confirming the steps the Board intends to take to remedy these important issues. In the meantime, you may contact either Peter Eliasberg, [PEliasberg@aclusocal.org](mailto:PEliasberg@aclusocal.org), or Zoë McKinney, [ZMcKinney@aclusocal.org](mailto:ZMcKinney@aclusocal.org), with questions.

Sincerely,



Peter Eliasberg  
Chief Counsel  
Manheim Family Attorney for  
First Amendment Rights



Zoë McKinney  
First Amendment and Democracy Staff Attorney

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<sup>7</sup> See City Council Minutes 12-13 (March 22, 2022) available at <https://legacy.cityofirvine.org/cityhall/citymanager/pio/ictv/player/default.asp?ID=512>

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Cc: Ms. Claire Morey – via e-mail (cmorey@ocde.us)

