

Orange County Board of Education



March 3, 2021

Statement of the Orange County Board of Education: General Counsel Litigation Update

The Orange County Board of Education is pleased to announce that it has reached a settlement of the litigation that it commenced in October 2018 as a result of the Superintendent's unilateral appointment of Jeffrey Riel as General Counsel without required Board action and co-approval, and his refusal to pay the invoices of the Board's separately-retained counsel, Gregory Rolan, while the dispute was pending. Yesterday, the Board filed a notice of the settlement and a copy of the written settlement agreement with the Orange County Superior Court that has presided over this legal dispute. The settlement is very favorable to the Board, and it came very shortly after the Court gave a tentative statement of decision on the record in the courtroom on February 9, 2021, of how it intended to rule in the case based on the evidence before it following a 22-day bench trial.

In the coming weeks, the Board will make available additional information and materials from the case in the interest of transparency and informing the public, other county boards of education and county superintendents across the state, and of course the residents of Orange County. For now, however, the Board will provide this brief summary and update.

At its heart, this dispute has been about protecting the Board's legally conferred right to co-approve and co-appoint its shared legal counsel with the Superintendent, as expressly required by California Education Code Section 35041.5. It has also been about protecting and enforcing the system of laws, shared powers, and checks and balances enshrined in many areas of our government, including in the governance of education in California state counties by county-level boards of education and superintendents. Finally, as anyone who has engaged a lawyer and has had to rely on legal counsel knows, this dispute has been about the importance of a client's right to choose its attorney and determine if there's a conflict, and of the criticality of trust, confidence, and the highest levels of fidelity, ethics, and loyalty in the attorney-client relationship. Indeed, as several of the longer-serving members of the Board understood quite well, being advised by a lawyer that is not partial to the Superintendent or to staff and in whom the Board has full trust and confidence is a crucial and important condition of being able to conduct business and to be effective as a Board in serving the public. This was a case of first impression before the Court seeking a landmark determination of this important issue of co-governance and shared power between a county board of education and a county superintendent.

Brief Procedural Background

In 2018, when the existing General Counsel to the Board and the Superintendent retired, the Superintendent refused to recognize the Board's authority to co-appoint the new General Counsel, and he rejected the notion that the two agencies had to work and act together to select such counsel. He

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claimed the unilateral right to select the shared counsel himself, with or without the Board's approval, and despite the clear language and legislative history of Section 35041.5 and a legal opinion rendered to the Board by outside counsel more than three years earlier on January 8, 2015.

According to Dr. Mijares, he and he alone had the sole power to appoint the General Counsel and, insidiously, to dictate to the Board who its counsel would be. And he offered up convoluted, incorrect, and result-oriented legal analysis and explanation for why this was the case.

This derogation of the Board's legislatively conferred authority on a matter as critical as a client being able to select and have trust and confidence in its legal advisor was unacceptable to the Board. However, before filing its suit in October 2018, the Board had its counsel send a letter to the Superintendent's counsel on September 19, 2018, proposing an informal means of resolving the dispute and avoiding litigation, and inviting the Superintendent to respond constructively and in good faith to the proposal. The Superintendent and his counsel ignored this invitation and provided no response.

The Superintendent also did something else which was highly objectionable to the Board. He actively interfered with the Board's efforts to retain its own separate counsel to provide services in lieu of Mr. Riel, with whom the Board had an obvious conflict, while the legal dispute was pending. The Superintendent did this by threatening the lawyers the Board sought to retain, even deploying Mr. Riel to do the dirty work. This effort was successful with the first lawyer the Board tried to retain, who was a highly-regarded local education law practitioner. After she got a threatening phone call from Mr. Riel and from Associate Superintendent Nina Boyd, conveying the Superintendent's legal position and advising that he would not pay her bills for services she rendered to the Board, she abruptly and understandably withdrew her previously conveyed willingness to be engaged by the Board. This forced the Board to seek counsel from outside Orange County -- from someone who would be less susceptible to intimidation from the Orange County Superintendent. That lawyer was Gregory Rolan of Haight Brown & Bonesteel, LLC.

Dr. Mijares threatened Mr. Rolan too, going so far as to write unsolicited and directly to Mr. Rolan's managing partner, advising that he would not pay any of Mr. Rolan's bills for services rendered to the Board. Thankfully, these threats did not work with Mr. Rolan, who was also an experienced and highly-regarded education law practitioner but whose practice was located principally in Northern California. The Board engaged Mr. Rolan in September 2018, and Mr. Rolan began providing valuable and necessary legal services to the Board that same month.

Its settlement proposal and invitation to a constructive resolution dialogue having been ignored, the Board proceeded with the filing of the litigation in October 2018 in order to protect and enforce its rights and authority as granted to it by the California legislature under California Education Code Section 35041.5, and to protect the checks and balances and system of co-governance that this statute reflects, and the integrity of the attorney-client relationship. The next month, in November 2018, Dr. Mijares

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filed a cross-complaint against the Board, which he then subsequently dismissed on January 27, 2020, as the matter was getting ready to go to trial in order to take on a cosmetic posture of only being the defendant in the case and not appearing to be asserting legal claims against the Board.

The suit proceeded, and Dr. Mijares made good on his threat. He refused to pay Mr. Rolén's Board-approved bills for services, essentially forcing Mr. Rolén to work without compensation, all the while paying Mr. Riel to provide him with advice and insisting that the Board had to use Mr. Riel, or other lawyers that were supervised by and reported to Mr. Riel, each of whom was employed by the Superintendent (and, in the case of Riel, depended on Dr. Mijares for his performance evaluations and compensation determinations, among other things, and who had a clear and severe personal conflict of interest with the Board due to the legal dispute over his appointment and other conduct). As for payment to Mr. Rolén, the Superintendent did offer one qualification: at a Board meeting, he publicly declared that he would pay Mr. Rolén only once a court ordered him to do so.

A court did order the Superintendent to do so. On July 25, 2019, the Court presiding over the case issued a preliminary injunction against Dr. Mijares, ordering him to cease refusing to remit payment for Mr. Rolén's Board-approved invoices for legal services rendered to the Board. As he publicly said he would do, the Superintendent initially complied with the order and made payment on Mr. Rolén's outstanding invoices to date. But then Dr. Mijares went back on his word. He brought a second law firm into the case and implemented a new legal strategy: despite stating that he would pay Mr. Rolén if a court ordered him to do so and complying with that order, he appealed the court's preliminary injunction order, and he served notice that he would no longer comply with that order and once again would no longer pay any of Mr. Rolén's future fees. He also attempted, through this second law firm, to have the entire case stayed at the trial level while his appeal (which would take at least a year if not longer to be resolved) of the preliminary injunction was decided in the Court of Appeals. The trial court denied this request, and the matter proceeded to trial, which was delayed due to the coronavirus, but commenced on October 13, 2020.

The Trial and Tentative Decision

The Court conducted the trial of this case from October 2020 through February 2021. In all, the trial was in session for approximately twenty-two days, and numerous witnesses testified in it, including all five of the Board members from the 2018-2019 term, a former Board member from the Board's prior term, numerous members of the Superintendent's staff, Mr. Riel, Mr. Rolén, and the first lawyer the Board attempted to retain. A substantial amount of evidence, in the form of witness testimony, documents, and a video, was taken and carefully considered by the Court, and the Court heard a significant amount of legal presentation and argument from counsel throughout the trial.

As the Court recognized and stated a number times during the trial, this was "an important case." On February 9, after approving a request on December 15 from Dr. Mijares' counsel to submit a full and

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highlighted set of the legislative history on Education Code Section 35041.5 by January, the Court delivered public statements on its tentative decision in the case, based on the evidence before it. The Court's statements made clear that it intended to rule in favor of the Board on all of the Board's claims. They made clear that the Court tentatively intended to hold that Education Code Section 35041.5 conferred co-equal authority to the Board to appoint the General Counsel, and that it required that the Superintendent work together with the Board to select and co-appoint that lawyer. The Court also made clear that it tentatively intended to hold that the Board was justified in retaining Mr. Rolen in light of the conflicts with and conduct of Dr. Mijares and Mr. Riel, and that Mr. Rolen had to be paid for his services. In some of the Court's own words from that day (emphasis added):

- “So it’s my intention and my statement of intended decision to say that **Superintendent Mijares violated Education Code 35041.5** when he hired Mr. Riel without the prior approval of the Board.”
- “So I don’t intend to say there was knowing and intentional violating the law by Dr. Mijares. He may have, in good faith, thought he had a right to do this. In fact, General Counsel – retiring General Counsel told him he could do that, although there is a conflicting opinion back in 2014, that from Cota Cole, that he couldn’t. But all I’m saying is it appears there was a violation. It appears from the evidence that **Dr. Mijares knew the Board wanted to be involved** and felt that they had a right to be involved and he told them they would be involved **and then he didn’t involve them and that does not comport with the requirements of the law.**”
- “There’s sufficient evidence to indicate that **Dr. Mijares has used his position to coerce the Board** to accept his authority to hire Mr. Riel. The actions that have been taken to not pay Mr. Rolen have had serious consequences, not only to the Board, the party here, but to Mr. Rolen and his law firm....So **it appears that it’s retribution to the Board for suing, retribution to the Board for picking out a new lawyer.**”
- “But as soon as [Mr. Riel] had this issue presented to him and **he chooses one client over another** because he’s the lawyer for both the Board and Superintendent, that conflict is cast in concrete. But then he compounded that issue by calling [the Board’s would-be lawyer] and telling her that the Superintendent would be disappointed if she represented the Board of Education. **So here he’s taken another position contrary to his own client, the Board of Education**”
- “So it appears to me that **the Board was right in picking their own counsel** because...they have a right to a lawyer they can trust.”

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- “I’m sure it would have been difficult for Mr. Riel coming on the job the first day to tell his boss on the first day, hey, I can’t help you on that one, that’d be a conflict. And four big issues came up where there’s a conflict. **But he didn’t say, there’s a conflict, and say, I can’t give you advice, you have to get somebody else, Mr. Superintendent. He sided with the Superintendent.**”
- “It’s a question of a lawyer who’s the lawyer for the Board under the Statute has taken so many conflicting positions to the Board that they’d be foolish to trust him.”
- “But this became personal. This is where Mr. Riel went to [the Board’s] chosen lawyer and said, don’t represent them; where Mr. Riel took the position of the Superintendent against [the Board] on the budget issue and actually tried to get it continued. It’s not that there was a conflict issue that was resolved; it’s that there’s been an ongoing conflict, **for every single intersection [Mr. Riel] turned toward Dr. Mijares and away from the Board and, in fact, took positions contrary to the Board’s position.** So my tentative finding on that is there’s been a[n] irreconcilable difference of opinion and conflict of interest where [Mr. Riel] lost their trust and, in fact, **I think any Board would be foolish to have a lawyer giving them advice when the lawyer has clearly taken adverse positions to them.**”

The Settlement

The next morning, on February 10, 2021, Dr. Mijares through his counsel made a compromise proposal to the Board on the record in open court pursuant to which “the present dispute may be resolved.” The proposal was a noteworthy shift from Dr. Mijares’ previous intransigence. It was the first time after numerous efforts by the Board to settle the dispute with Dr. Mijares that he had offered to recognize the Board’s right, as the client, to declare a conflict of interest with its prospective legal counsel. It was also the first time he offered to agree that the Board could continue to retain Mr. Rolan or other separate counsel for as long as it determined that it had a conflict, including with Mr. Riel, and to agree to pay Mr. Rolan for his work on behalf of the Board. In exchange, Dr. Mijares proposed that the Board agree not to seek Mr. Riel’s removal as the Superintendent’s counsel.

The Board responded to Dr. Mijares’ proposal that afternoon, and the parties commenced settlement negotiations in earnest thereafter. These negotiations ultimately resulted in a final settlement agreement between the Board and the Superintendent which the Board approved at a special board meeting on February 22, 2021, and which both parties signed. Under the settlement, Dr. Mijares may continue to employ Mr. Riel as his counsel and as a legal advisor to other non-Board operations in his office and the department (e.g., school districts, community college district, departmental staff, etc.). Also under the settlement, the Board may continue to use Mr. Rolan or any other lawyer in lieu of Mr.

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Riel and his subordinates for as long as it determines in its sole discretion that there is a conflict, and Dr. Mijares will no longer refuse to pay Mr. Rolén's Board-approved fees for services rendered.

The settlement agreement requires the Superintendent to make amends for some of the harms that his conduct imposed, both to the Board's separate (and would-be separate) counsel and to the integrity of the attorney-client relationship and a legal advisor's duty of loyalty and professional responsibility. For example, even though the Superintendent's counsel has pointed out to the Court that interest is not a recoverable remedy on the legal claims asserted in this particular case, the Superintendent nonetheless agreed to pay interest to Mr. Rolén and the other lawyer that first agreed to represent the Board. The agreement also strongly protects the Board's right to decide whether it has a conflict of interest with a lawyer, and it codifies by agreement the Board's long-held view that it has an irreconcilable conflict with Mr. Riel, and that this will continue to be the case while Dr. Mijares continues to employ him (and while Dr. Mijares continues to take the position contrary to the Board that the Board does not have the authority under Education Code Section 35041.5 to co-appoint the shared legal officer with the Superintendent, and that Dr. Mijares' unilateral appointment of Mr. Riel was valid).

Left unresolved by the settlement is one of the central issues in the case: whether California Education Code Section 36041.5 grants the Board authority to appoint the shared legal officer with the Superintendent and requires the two agencies to work together and co-appoint that attorney. Although this issue technically is left undecided, the Court's statement of intended decision is unmistakable. The Superintendent avoided a likely decision in the Board's favor on this issue via the settlement. Thus, in theory, this dispute could arise anew when the next General Counsel vacancy occurs. It is the Board's hope that, when that day arrives, the Superintendent will be far less combative and far less authoritarian than this one. Indeed, apart from the fact that there is a clear legislative delegation of such authority to the Board to co-appoint its legal counsel, it is of course eminently reasonable for the Board, *or for any client*, to wish to have a say in who represents it as its lawyer. Likewise, it seems eminently *unreasonable* for the Superintendent to deny that opportunity and insist on deciding for the Board who its attorney will be. It would not have been hard for the Superintendent to have worked with the Board and to have selected and appointed the new General Counsel together.

Although the issue under Section 35041.5 is technically undecided, the Board feels strongly vindicated by the settlement and by the Court's February 9 statements on the record, and the Board looks forward to being advised by Mr. Rolén on a General Counsel basis while the Superintendent continues to utilize Mr. Riel as his General Counsel.

The Board also looks forward to collaboratively working with the Superintendent going forward within the established system of shared powers and checks and balances that the law provides. It also hopes that this litigation and resolution will help usher in a new era of respect for those checks and balances,

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for collaborative co-governance between the two agencies, and for an end to autocratic and unitary rule by just one official over matters of educational governance in the County of Orange.

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We are a nation of laws, and it is incumbent on every citizen, official, and government agency to respect and observe those laws. That no one is above the law is fundamental, not just to the fair and effective running of government, but also to the very foundation of freedom itself – to a government that is truly for and by the people. It is particularly crucial for those in positions of power to be very scrupulous and respectful of the limits on their power that the law prescribes, including the checks and balances written into the structure of our government through the powers granted to other agencies and branches. One such power and check and balance – the power of the Board to co-appoint the General Counsel together with the Superintendent – was under threat and at issue in this case. It is a power expressly conferred to both county boards and county superintendents in California, and it requires those two agencies to work together to select and co-appoint that person. The Superintendent did not respect this law or the Board’s authority under it, thus making the suit necessary. Now that the dispute has been resolved, the Board looks to turn a hopeful page toward working together constructively with the Superintendent for a better future (and reopened schools!) for the students, parents, families, educators, and educational administrators of Orange County.