

# EL DORADO COUNTY GRAND JURY 2014-2015

## *A SCHOOL BELL RINGS OFF-KEY*

Case GJ-14-08

Citizen Complaints along with a dismissive response to last year's Grand Jury report about the Ponderosa High School football field, caused the Grand Jury to be concerned about the decision making practices of the El Dorado Union High School District Board of Trustees.

### **BACKGROUND**

The El Dorado Union High School District (EDUHSD) is relatively large geographically, encompassing about 1,260 square miles on the West Slope of the Sierra Nevada in El Dorado County, between the South Fork of the American River and the Cosumnes River. Despite its geographic size, it serves fewer than 7,000 students with four high schools and six alternative schools or alternative school programs for students with special needs. The traditional high schools — El Dorado High School, Union Mine High School, Ponderosa High School and Oak Ridge High School — have four-year comprehensive academic curricula enhanced by what the district calls "an extensive advanced placement program." College Board scores exceed both California and U.S. averages as recently as 2011. The district also offers specialty programs such as culinary arts.

The district is governed by a five member elected Board of Trustees. The current president is Kevin Brown, was first elected in 2010. The previous president, Timothy Cary, is the longest serving member of the board, having been appointed to the board in 2001. Mr. Cary is an attorney, licensed to practice law in the State of California, whose practice specializes in the representation of public entities and specifically, school districts.

### **METHODOLOGY**

- The Grand Jury interviewed the complaining witnesses and members of the El Dorado High School Union School District board of trustees, plus elected and appointed officials from other governmental bodies.
- The Grand Jury contacted the California Fair Political Practices Commission for its opinion on certain matters related to the investigation leading to this report.

## DISCUSSION

*Is it legal advice or the opinion of one board member?*

Numerous witnesses complained to the Grand Jury that Mr. Cary has a conflict of interest. While acting as member of the El Dorado Union High School District board of trustees he has simultaneously acted as unofficial legal counsel to the district. They stated that Mr. Cary argues that the other board members should follow his advice, citing his expertise as an experienced education law attorney. They asserted that his opinions are too often offered under the guise of legal counsel.

Decisions of the Board of Trustees are made by majority vote of the members. A minimum of three votes are required for a proposal to become a decision of the Board. The vote of any one board member has no more weight than the vote of any another board member, and each member must take responsibility for his or her own vote.

There is no question that having a board member acting as both legal counsel to the board and as a member of the board is a dangerous practice. The most obvious risk is that both the attorney and other board members may fail to distinguish if the attorney member's views are legal advice or statements of his personal policy perspective. Mr. Cary may fail to disclose alternative legal arguments, leaving the impression that there is no legal ambiguity when such ambiguity does exist. He may fail to disclose that his views are his personal opinions and not legal advice. Indeed, he may fail to make that distinction for himself. Other board members may certainly be easily confused about the source of his opinions. It is natural and appropriate for board members to want their actions to be consistent with law and for them to be concerned with the legal sustainability of their decisions. This may lead them to defer to Mr. Cary when his opinions merely reflect his own policy perspective rather than true legal viability.

*Ponderosa High School Football Field*

A 2013-14 Grand Jury report, Case GJ-13-05, described deficiencies in the Ponderosa High School new football field. It's recommendations to fix the field were dismissed in the district's response. The 2014-15 Grand Jury issued a follow up report, Case GJ-14-01, questioning the board's assertion that the problem was not significant and a fix unwarranted.

Mr. Cary advised the Board that it should ignore the Grand Jury's report to avoid exposing the district to litigation. Mr. Cary's duty as a member of the Board of Trustees should have been to the students of the district, but he assumed the role of legal counsel telling the other board members they should ignore the report, risking injury to students. In this action Mr. Cary clearly confused his roles.

### *Conflict of Interest*

It is good business practice for a public entity to turn to its legal counsel for advice when a member of the governing body appears to have a conflict of interest. When the question of conflict is raised regarding the board member that is also acting as legal counsel, to whom is the question addressed? Numerous witnesses raised questions about whether Mr. Cary has conflicts of interest.

Mr. Cary cites his service as a member of this and other school boards in support of his qualifications as an education law attorney. He cites that service as "academic/professional achievement." In a proposal submitted to the Twin Rivers School District to become that district's general counsel, Cary cited the El Dorado Union High School District in a listing of references and clients. He also listed EDUHSD Superintendents Christopher Hoffman and Sherri Smith as references, both of whom had, in effect, worked for him by virtue of his membership on the Board of Trustees.

### *Brown Act Violations*

When he was president of the district's board of trustees, Cary exercised strict control over the agenda for board meetings. He imposed a rule requiring three members of the board to agree that an item should be on the board's agenda before it could be placed on the agenda. That made it virtually impossible for a fellow board member or parent to place an issue on the board agenda for discussion.

Education Code § 35145.5 requires school districts to allow members of the public to place an item on a board agenda. The practice of requiring three members to agree before an item is placed on the agenda is in violation of Education Code § 35145.5.

Government Code § 54952.2 prohibits what is commonly referred to as a serial meeting, that is "using a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." The California Attorney General advises that "... a serial meeting is a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the body's members." The requirement that three board members must agree to placing an item on the board's agenda required conduct of a serial meeting in violation of the Brown Act.

## **FINDINGS**

1. The El Dorado Union High School District has, for a number of years, operated outside the clear intent of the Ralph M. Brown Act.
2. Timothy Cary, a long-time member of the EDUHSD board of trustees, has wielded too much influence over the board and is primarily responsible for its deviation from strict adherence to the Ralph M. Brown Act.
3. Mr. Cary, an experienced school law attorney, has confused his participation on the EDUHSD board of trustees with his professional career, to the detriment of the district.

## **RECOMMENDATIONS**

1. The El Dorado Union High School District Board of Trustees should contract for training its members in the requirements of the Ralph M. Brown Act. That training should be conducted by an attorney other than Mr. Cary and not an employee of the EDUHSD and should be held at an open meeting of the Board of Trustees with all members of the Board and appropriate staff in attendance.
2. The EDUHSD Board of Trustees should formally adopt procedures for the conduct of their meetings immediately. Those procedures must conform to the requirements of the Ralph M. Brown Act. They should be adopted at an open meeting of the Board, after both notice to the public and an opportunity for the members of the public to comment on the proposed procedures prior to their adoption.
3. Mr. Cary should separate his professional role as an education law attorney from his role as a member of the EDUHSD Board of Trustees.
4. Each member of the EDUHSD Board of Trustees should recognize his or her own responsibility for the decisions and actions of the Board. No one member is entitled to deference not given to other members.

## **RESPONSES**

Responses to both findings and recommendations in this Report are required by law in accordance with California Penal Code §933 and §933.05. Address responses to:

The Honorable Suzanne N. Kingsbury  
Presiding Judge of the El Dorado County Superior Court  
1354 Johnson Blvd.  
South Lake Tahoe, CA 96150

This Report has been provided to the El Dorado Union High School District Board of Trustees.

The Presiding Judge of the El Dorado County Superior Court additionally requests that the responses be sent electronically as a *Word* or *PDF* file to facilitate the economical and timely distribution of such responses. Please email responses to the El Dorado County Grand Jury at: [courtadmin@eldoradocourt.org](mailto:courtadmin@eldoradocourt.org)