

**Dolores Marquez
Alum Rock Union Elementary School District
2930 Gay Avenue
San Jose, CA 95127**

September 3, 2018

(ENDORSED)
FILED
SEP 10 2018

Clerk of the Court
Superior Court of CA County of Santa Clara
BY Janice Jones DEPUTY

Honorable Patricia Lucas, Presiding Judge
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

RE: Trustee Dolores Marquez' Response to Grand Jury Report entitled, "Alum Rock School District Board: Time to Put 'Trust' Back in Trustee"

Dear Honorable Lucas:

As directed by the Grand Jury Report Jury Report titled, "Alum Rock School District Board: Time to Put 'Trust' Back in Trustee" ("Report"), I am responding individually.

I currently serve as a Trustee for the Alum Rock Union Elementary School District ("District"). I have been reelected to the Board three times. On two of the three occasions, I received the most votes out of all candidates. Prior to running for school board. I was an employee of District.

I would like to bring to the Honorable Presiding Judge's attention that legal counsel for the District has opined that certain findings and recommendations by the grand jury exceed the grand jury's legal authority. I am incorporating in my response the following legal analysis provided to the Board as a draft proposed District Draft Response at the Board's duly noticed public meeting on July 12, 2018. The Draft Response including this legal analysis was made available to the public.

The general powers and duties of a grand jury are codified in California Penal Code §§ 914-945. Relevant here, Penal Code section 933.5 authorizes the grand jury to examine the books and records of special districts. However, section 933.5 does not authorize the grand jury to widen the scope of its investigation into matters which otherwise it is not authorized to investigate." 46 Ops. Cal. Atty. Gen. 144 (1965). In *Unnamed Minority Members etc. Grand Jury v. Superior Court*, 208 Cal.App.3d 1344, 1347-48 (1989), citing to the Supreme Court, held "with respect to a grand jury's powers and limitations . . . the court stated, '[b]road though they

are, the grand jury's powers are only those which the Legislature has deemed appropriate. Attempts to exercise powers other than those expressly conferred by statute have been consistently rebuffed." (citing to *McClatchy Newspapers v. Superior Court*, 44 Cal.3d 1162, 1179 (1945)); 46 Ops. Cal. Atty. Gen. 144 (citing to *Allen v. Payne*, 1 Cal. 2d 607 (1934) (although the grand jury is an agency of the court, the grand jury has no inherent investigatory powers beyond those granted by the Legislature). In fact, through an extensive legislative analysis and statutory construction, the Attorney General specifically concluded that a grand jury was not legally authorized to inquire "as to the merit, wisdom, or expediency of substantive policy determinations which may fall within the jurisdiction of [a school district]." 95 Ops. Cal. Atty. Gen. 113, 118 (1995). Inquiring as to the duly elected governing Board's merit or wisdom of substantive policy determinations is what the grand Jury has done in this Report.

More troubling however, is the grand jury's attempt to disenfranchise a minority community by usurping their right to vote and elect governing board members. Recommendation 1 calls for my resignation, and the resignation of two of my colleagues. In California, the right to vote is expressly enshrined in the state Constitution. Article I, Section 7 subdivision (a) guarantees that "[a] person may not be . . . denied equal protection of the laws." The United States Supreme Court in *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 58 (1970), held "Where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws . . . but once a State has decided to use the process of popular election and once the class of voters is chosen and their qualifications specified, we **see no constitutional way** by which equality of voting power may be evaded." (*See also Sailors v. Bd. of Ed. Of Kent County*, 387 U.S. 105, 108, (1967); *Gray v. Sanders*, 372 U.S. 368, 381 (1963))(emphasis added). The Grand Jury's recommendation to have me and two of my colleagues of the five duly-elected governing Trustees resign their elected positions may very well be a violation of our constitutional rights, as well as the constitutional rights of the voters of Alum Rock.

The makeup of the grand jury is not reflective of the voters of the Alum Rock community. I am a Latina, a woman. The Board other members being asked to resign are Latino and Asian. Yet, the grand jury asking for our resignation is comprised exclusively of white jurors. In addition, three of the five Board members are up for election this November 2018. Constitutionally, the voters of Alum Rock, and not the members of a grand jury should decide through the power of the ballot box who serves on a local school district's governing board.

This grand jury's involvement in the politics of the District is also troubling. Members of the grand jury attended numerous Board meetings. Rather than simply sitting in observations they should their bias by applauding when certain community members criticized the Trustees being asked to resign. In one instance, Foreman Peter Hertan came to me during a very disruptive public meeting, after I had asked the Superintendent to demonstrate leadership and the stated, "how can you expect her to know what she is doing if you promoted her from being a director." His comments were inappropriate for an individual who is entrusted with making recommendation regarding a school district.

I ask the Court to examine whether the grand jury stayed within their statutorily authorized role and if the recommendation calling for the resignation of three, minority duly elected board members violates the Federal and California Voting Rights Acts, as well as the constitutional due process rights of the Trustees being asked to “immediately resign”.

In addition, the grand jury report requires responses from me as an individual Trustee. Penal Code Section 933.05 requires that in responding to each recommendation I make a commitment on whether or not to implement the recommendations. Because the recommendations are all within the subject matter jurisdiction of the Board, I believe making such commitments runs a foul of the Ralph M. Brown Act codified in Government Code section 54950, et. seq.

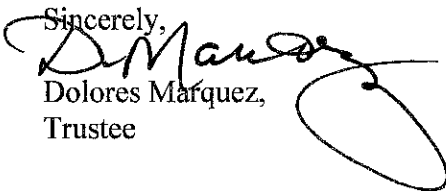
Government Code section 54952.2(b)(1) provides,

“a majority of the members of a legislative body shall not, outside a meeting . . . , use 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.”

I believe this grand jury is such an intermediary. The Recommendation I am being asked to commit to are contracts, in some instances, multi-million-dollar contracts absolutely within the subject matter jurisdiction of the Board.

Although, in compliance with this request, I’m providing responses, I believe this is highly inappropriate. Therefore, prior to releasing my response publicly, I’m requesting that this Court determine whether releasing my responses, as well as the responses of two other Trustee, a majority of a five-member governing board is the development of a collective concurrence outside of a duly noticed meeting in violation of the Brown Act.

Sincerely,


Dolores Marquez,
Trustee

FINDINGS AND RESPONSES

Finding 1.

Alum Rock Union Elementary School District Board Trustees Herrera, Marquez and Tran by action and/or inaction, have subjected the District to financial peril, public scorn and distrust.

Trustee Marquez' Response to Finding 1.

Disagree. My zealous advocacy for the family's in Alum Rock, especially the non-English speaking families is beyond dispute. The proof is in the election results. I have been reelected three times. Twice I was the highest vote getter.

The voters and property owners of my community have also shown their confidence in my leadership by reaching into their pocket book to improve the conditions of the facilities at the District. They have entrusted the governing Board with this mandate. Specifically, on June 7, 2016, the District asked the voters of Alum Rock to approve a bond measure titled, "Alum Rock Union School District, California, Bond Issue, Measure I (June 2016). ("Measure I").

The following question appeared on the ballot:

To improve local neighborhood schools, fix leaky, deteriorated roofs, improve fire safety, repair/upgrade classrooms, improve student safety and security, renovate outdated restrooms, upgrade heating/ventilation/electrical systems for energy efficiency, and computer technology, shall \$139,999,671.60 of Alum Rock Union Elementary School District bonds approved by the voters in June 2008, be reapproved at legal rates to renovate, acquire, construct, repair classrooms, sites, facilities/equipment, with independent audits, citizens' oversight, no money for administrator salaries and **all money controlled locally?** (emphasis added).

A fifty-five (55%) supermajority vote was required for the approval of measure I. The Alum Rock voters responded to bond measure with a resounding, "yes" and approved Measure I by 78.75%- significantly higher than the required supermajority.

Unfortunately, despite the loud mandate by the Alum Rock taxpayers to fix the local schools, the governing Board's efforts to move forward with their bond program has been largely derailed due to the Santa Clara County Office of Education and the County Superintendent, Mary Ann Dewan's consistent interference with the governing Board's attempt to comply with the voter mandate. It should be noted, that Mary Ann Dewan does not live in Alum Rock. Neither she nor any of the individuals that have brought the bond construction program to a screeching halt have children at these schools. The fact that low income minority children will not have classrooms conducive to learning is not of importance to them.

It is also worth noting that the voters approved a ballot measure that called for local control of the bond funds. The Santa Clara County Office of Education and Mary Ann Dewan had completely ignored this legal mandate.

Finding 2.

District's legal counsel concluded that Measure I and Measure J Construction Management contracts between the District and Del Terra likely violate Government Code section 1090.

Trustee Marquez' Response to Finding 2.

Agree that the District's previous legal counsel Rogelio Ruiz from Rehon & Roberts prepared a memorandum in which he stated, "there is a material risk that a fact finder could reasonably conclude that the referenced contracts violate Government Code section 1090." "Material risk" is not to be confused with a legal determination by judge or jury. "Material risk" means instead that there is a potential that the contracts in question might run afoul of Government Code section 1090. It means that it is also possible that a finder a fact could conclude the contracts do not run afoul of Government Code section 1090. That determination, as referenced in the Ruiz opinion, should be left to a "fact finder" in a court of competent jurisdiction, where a judge should make that legal determination. Therefore, disagree with the conclusion that the contracts likely violate Government Code section 1090.

When the various contracts were approved, I relied on the legal guidance of the District's team of lawyers in awarding, drafting and approving the contracts, years later called into question. The alleged legal deficiencies/concerns were never brought to the Board's attention when the contracts were awarded.

Finding 3.

The District does not consistently use best practices in awarding contracts.

Trustee Marquez' Response to Finding 3.

Agree that District staff would benefit from training on public entity contracting. After going through the last several years with six interim Chief Business Officials ("CBO"), the District has now hired a permanent CBO. The Board is confident that with a permanent CBO coupled with training for staff the District contract awarding practices will follow statutorily prescribed laws and regulation.

However, to the extent the Superintendent enters into contracts without notifying the Board or following any legally required procurement process, the District will continue to have issues related to properly processed and awarded contracts.

Finding 4.

Using the same contractor for both Construction Management and Program Management is not an accepted best practice, and according to the District's legal consultant, can put the district in financial and legal jeopardy.

Trustee Marquez' Response to Finding 4.

Disagree. School districts and community college districts throughout the State award construction management and program management contracts to the same contractor. Through its wisdom, the Legislature has authorized various project delivery models and delegated to local school governing boards the ability to select among the various construction delivery models which option best fits the needs of the district. There are four project delivery methods available to school districts: (1) design/bid/build, (2) design/build, (3) lease-lease back, and (4) construction management. (*See* Education Code §17400 *et. seq.*; Government Code §4525). School construction in California, using any of these delivery models, is governed by comprehensive and complex laws and regulations and requires school districts to employ experts in numerous fields including, architecture, finance, environmental, legal, etc. Thus, many school districts, such as Alum Rock do not have the staff capacity to manage multi-million-dollar school construction program in house and rely on a construction delivery method that provides for a company that manages both the bond program side and the construction side of the bond program—a legally permissible and frequently used project delivery method.

Inherently, a multi-million-dollar construction project, for a private company or any public entity carries with it the possibility of legal exposure. However, it is absolutely an incorrect conclusion that a construction management/program management delivery option per se, puts the any district any more “in financial and legal jeopardy” than any other construction delivery model. Prior to the Santa Clara County Office of Education's involvement in the District's bond program, the litigation or threat of litigation related to the bond program was minimal, if at all.

Finding 5.

The Board has repeatedly not followed the Brown Act requirements.

Trustee Marquez' Response to Finding 5.

Disagree. The Ralph M. Brown Act (“Brown Act”) codified in the Government Code requires that all meetings of a legislative body be open and public, except under limited situations. Cal. Gov't. Code §§54950 *et. seq.* The Brown Act allows a legislative body during a meeting to convene a closed session in order to meet privately with its advisors on specifically enumerated topics. The Report identifies two instances where the Santa Clara County Office of Education's fiscal advisors wrote to the Board President regarding what they alleged were Brown Act violations. The Report states, “the violation occurred when Trustees attempted to discipline the District Superintendent without giving her proper notification.” The second alleged violation

occurred with the “Board’s Facilities/Bond Projects Committee . . . failed to provide proper notice and minutes.”

The alleged violation was written in a letter from Donald Zimring, SCCOE’s fiscal advisor. It is worth noting that Mr. Zimring is not an attorney. There is no indication suggesting that Mr. Zimring has received any specialized training on the Brown Act.

Even assuming the Board had discussed personnel matters, which it did not, the Courts have held that a notice requirement to an employee only apply when the proceeding is adjudicative in character. *See Fischer v. Los Angeles Unified Sch. Dist.*, 70 Cal. App. 4th 87, 93 (1999); *Furtado v. Sierra Cmty. Coll.*, 68 Cal. App. 4th 876, 879 (1998); *Bollinger v. San Diego Civil Serv. Com.*, 71 Cal. App. 4th 568, 571 (1998); *Kolter v. Comm’n. on Prof’l. Competence of Los Angeles Unified Sch. Dist.*, 170 Cal. App. 4th 1346., 1349 (2009). Not only was Mr. Zimring wrong on the law, his role as a fiscal advisor to the District calls for him to act in a neutral, objective capacity in fiscal matters.

The District cannot address the broad, general alleged second violation since the Report does not provide any examples of when and how notice for the Facilities subcommittee was not properly given, nor is it clear to the District how the minutes relate to the alleged noncompliance with the Brown Act.

Finding 6.

The Board failed to follow their own Board By-Laws on numerous occasions.

Trustee Marquez’ Response to Finding 6.

Disagree. The Report’s alleged finding related to awarding of a construction contract based on a vote of three in favor and two against. The Report’s finding claims that Board By-Law 9005, “which in part states, to ‘maximize Board effectiveness and public confidence in district governance, board members are expected to govern responsibly and hold themselves to the highest standard of ethical conduct’” was violated. The alleged supporting fact for this finding is nonsensical. In an effort to be responsive, I will respond that as a Trustee I have acted in a manner that addresses first and foremost the educational needs of the students. As outlined in response to Finding 4, as a Trustee I have complied with the complex statutory regulations governing school construction projects. I rely on the experts to provide us accurate, and thorough information.

Finding 7.

The Board did not adequately vet all applicants in the selection of the current General Counsel.

Trustee Marquez’ Response to Finding 7.

Disagree. On October 27, 2017 the District released a Request for Proposals for Legal Services, (RFP No. 1718-BUS02) (Exhibit 3). The purpose and intent stated in the RFP was “to competitively solicit firms.” The responses to the RFP were due to the District on November 22, 2017. The District received six (6) responsive proposals from law firms statewide. The Board members received copies of the proposal to review and analyze. The Board agendized the awarding of the contract at three (3) public hearings before awarding the contract. The successful firm was selected at the Board’s February 8, 2018 Board meeting, four months after the RFP was issued and three months after all the responsive proposal were distributed to the Board and staff.

The Legislature has broadly authorized contracting for specified “special” services and codified such exception at Government Code section 53060, which provides:

“The legislative body of any public or municipal corporation or district may contract with and employ persons for the furnishing of the corporation or district special services and advice in financial, economic, accounting, engineering, **legal** or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.” (emphasis added)

Although the governing Board was not legally required to competitively bid legal services, we did. We did so, through a very comprehensive RFP requiring detailed information on the prospective law firm’s legal experience. We selected legal counsel with decades of experience representing school districts, and with incredibly impressive academic pedigree.

Even though Mary Ann Dewan from SCCOE and other politicians attempted to interfere with the selection of our general counsel, we remained committed to the RFP process and selected highly competent and reputable legal counsel.

RECOMMENDATIONS AND RESPONSES

Recommendation 1.

Trustees Herrera, Marquez and Tran Should immediately resign their positions on the Board.

Trustee Marquez’ Response to Recommendation 1.

Absolutely not. The grand jury calling for my resignation is comprised of an all white jury. If any of the grand jury members would like to weigh in to who is serving in an elected position, they should move into the District and vote.

So long as the Federal Voting Rights Act and the California Voting Rights Act are good law, the voters of Alum Rock will dictate who sits on the elected governing board.

It is an abuse of the grand jury power to attempt to strip the voters of the Alum Rock community from their constitutional right to elect Trustees to govern their local school district. I am requesting that the Presiding Judge determine if this recommendation is a violation of the constitutional rights of the voters of the Alum Rock community and of my due process rights.

Recommendation 2a.

The Board should terminate the Measure I and Measure J Construction Management contracts between the District and Del Terra by October 1, 2018.

Trustee Marquez' Response to Recommendation 2a.

In compliance with the Ralph M. Brown Act codified in Government Code Section 54950 et. seq., as an individual Trustee I will review the necessary facts and law at a duly noticed meeting prior to committing to any course of action related to the bond construction contracts.

I will respond, that as a Trustee I have a fiduciary obligation to consider any legal risk associated with terminating a contract, evaluate the implications to its bond program related to the delay in selecting a new construction company, consider increasing costs associated with school construction delay and ultimately how these issues impact the educational needs of the students. As a responsible Trustee I will not rush to terminate contracts by an arbitrary date. As a Trustee it is my obligation to act as prudent stewards of the Alum Rock tax payer's monies, and to manage the construction program in a manner that is most beneficial to the students and families of Alum Rock.

As an individual Trustee I do not have the legal right to unilaterally implement this recommendation or commit to a course of action outside a duly noticed public meeting.

Recommendation 2b.

The District should retain an outside legal consultant by October 1, 2018, to consider options to evaluate remedies against Del Terra.

Trustee Marquez' Response to Recommendation 2b.

In compliance with the Ralph M. Brown Act codified in Government Code Section 54950 et. seq., as an individual Trustee I will review the necessary facts and law at a duly noticed meeting prior to committing to any course of action related Del Terra.

As described in response to Finding 7, the District issued a Request for Proposals and solicited proposals from law firms across the State. Retaining new legal counsel was further done in response to the Fiscal Crisis Management Assistance Team (“FCMAT”) recommendation. As an individual Trustee I cannot legally commit the District to any action related to his recommendation.

Recommendation 3.

The District should immediately begin using competitive bidding (e.g. RFP/RFQ) for all construction projects and professional services.

Trustee Marquez’ Response to Recommendation 3.

In compliance with the Ralph M. Brown Act codified in Government Code Section 54950 et. seq., as an individual Trustee I will review the necessary facts and law at a duly noticed meeting prior to committing to any course of action related to construction projects and professional services agreements.

As a public entity, the process by which contracts are awarded are statutorily regulated, including but not limited to the requirement that all contracts be ratified by the Board at a duly noticed meeting.

As an individual Trustee I do not have the legal right to unilaterally implement this recommendation or commit to a course of action outside a duly noticed public meeting.

Recommendation 4a.

The District should enact a Board policy prohibiting the award of future Construction Management and Program Management contracts to the same company by December 1, 2018.

Trustee Marquez’ Response to Recommendation 4a.

In compliance with the Ralph M. Brown Act codified in Government Code Section 54950 et. seq., as an individual Trustee I will review the necessary facts and law at a duly noticed meeting prior to committing to any course of action related to construction projects and professional services agreements.

In making decisions on which school construction delivery model to use, as a Trustee, I rely on the professional experts to guide me on what is legally permitted, but also by what is in the best interest of the District. Please see response to Finding 4 for additional information.

As an individual Trustee I do not have the legal right to unilaterally implement this recommendation or commit to a course of action outside a duly noticed public meeting.

Recommendation 4b.

The District should award all future Construction Management and Program Management contracts to unrelated contractors.

Trustee Marquez' Response to Recommendation 4b.

In compliance with the Ralph M. Brown Act codified in Government Code Section 54950 et. seq., as an individual Trustee I will review the necessary facts and law at a duly noticed meeting prior to committing to any course of action related the future awarding of Construction Management and Program Management contracts to unrelated contractors.

In making decision on which school construction delivery model to use, as one Trustee I am guided not only by what is legally permitted, but also by what is in the best interest of the District. Please see response to Finding 4 for additional information.

As an individual Trustee I do not have the legal right to unilaterally implement this recommendation or commit to a course of action outside a duly noticed public meeting.

Recommendation 5.

The Board should obtain a comprehensive Brown Act training from a qualified third party, by December 31, 2018, and within 30 days of the swearing in of new Trustees.

Trustee Marquez' Response to Recommendation 5.

Since my election to the governing Board I regularly participate in Brown Act trainings from statewide and national organizations, including, but not limited to the California School Boards Association, the California Association of Latino Superintendents and Administrators and the National School Board's Association. I will continue taking such trainings and will encourage newly elected Board members to do the same. Legally, as one Trustee I cannot impose the training requirement on future elected Board members. The permissible portion of this recommendation has already been implemented. As a Trustee I do agree that District staff and all consultants assigned to work for the District, including but not limited to the SCCOE fiscal advisors should receive training on the Brown Act.

Recommendation 6.

All current Board members should sign a declaration saying they have read, understood and will comply with the Board By-Laws, and any subsequent revisions, by September 30, 2018. Future Trustees should sign the same declaration within 30 days of their swearing in.

Trustee Marquez' Response to Recommendation 6.

As a Trustee I already comply with the District's governing documents. Signing an arbitrary declaration, by an arbitrary day, saying I will do what I'm legally supposed to do, does not add any further force or effect to a legally required mandate. As a single Trustee I do not have the legal authority to impose conditions for holding office for future Board members. As one Trustee I do not believe there is any need to implement this recommendation given that the compliance portion of the recommendation is already in place.

Recommendation 7.

The Board should terminate the contract with its General Counsel and use a competitive process (RFP/RFQ) that includes a proper vetting mechanism to hire new General Counsel by December 31, 2018.

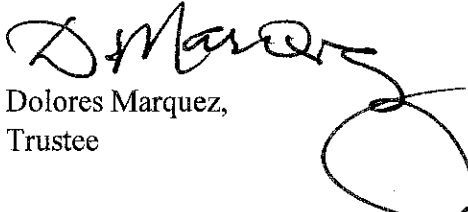
Trustee Marquez' Response to Recommendation 7.

In compliance with the Ralph M. Brown Act codified in Government Code Section 54950 et. seq., as an individual Trustee I will review the necessary facts and law at a duly noticed meeting prior to committing to any course of action related hiring a new general counsel for the District.

I will respond however, regarding my past actions as a Trustee. As discussed in more detail in response to Finding 7, on October 27, 2017 the Board directed staff to release a very comprehensive and thorough Request for Proposals for Legal Services, (RFP No. 1718-BUS02). The responses to the RFP were due to the District on November 22, 2017. Trustees had over three months to vet the responsive proposals. To my knowledge we are one of a handful-at most, of school districts in Santa Clara County who used an extensive, competitive process to select our General Counsel, even though we were not legally required to do so. As a result of this extensive process we now have a law firm representing the District that collectively has decades of experience providing school districts legal guidance. Their pedigree and legal knowledge is beyond reproach. As one Trustee, I would not support implanting this recommendation.

As an individual Trustee I do not have the legal right to unilaterally implement this recommendation or commit to a course of action outside a duly noticed public meeting.

Sincerely,


Dolores Marquez,
Trustee

Honorable Lucas
September 3, 2018
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