

FINAL EXECUTIVE MEMO

To: The Chicago Board of Education:
Frank M. Clark, President
Jaime Guzman, Vice President
Mark F. Furlong
Dr. Mahalia Hines
Arnaldo Rivera
Gail D. Ward

From: Nick Schuler, Inspector General *W/S*

Date: December 5, 2017

Re: 1. Violation of the Code of Ethics by Ronald Marmer;
2. Subsequent Acts to Cover Up Contrary Attorney Opinions; and
3. Lies to the OIG by Forrest Claypool

This is an executive summary of the final report by the OIG in its investigation into whether (1) General Counsel Ronald Marmer violated the Code of Ethics by improperly exercising "contract management authority" over legal work performed by Jenner & Block for the school funding litigation while Marmer had an existing "business relationship" with that firm; and (2) CEO Forrest Claypool and Marmer acted improperly with regard to the opinions of several in-house and outside attorneys who had concluded that Marmer either was already violating the Code of Ethics because he was exercising "contract management authority," or could not exercise such authority over work performed by Jenner & Block without violating the Code of Ethics.

FINDINGS

Based on an extensive investigation, the OIG has concluded that:

1. Marmer was improperly exercising "contract management authority" over work performed by Jenner & Block on the school funding litigation because he had an existing "business relationship" with Jenner & Block.

2. Marmer and Claypool failed to take proper corrective or remedial action once they were informed that the three members of the CPS Ethics Committee — CPS Ethics Advisor Andra Gomberg, Deputy General Counsel Ruchi Verma and then-Senior Assistant General Counsel Andrew Slobodien — and a fourth high-level Law Department attorney, Joseph Moriarty, had determined that Marmer was violating the Code of Ethics. In light of the Ethics Advisor's clear standing in the Code of Ethics to advise on the matter, Claypool and Marmer should have taken her advice more seriously, and they should have worked with her on an acceptable solution.
3. After Marmer and Claypool learned of those four in-house opinions, they sought the opinions of two outside attorneys: former Board of Education General Counsel Patrick Rocks and longtime outside labor law attorney James Franczek. Rocks concluded that Marmer could not exercise any supervisory authority over the work performed by Jenner & Block without violating the Code of Ethics — but he stopped short of concluding that Marmer was violating the Code of Ethics, as he did not know what Marmer's involvement actually was. Franczek concluded that Marmer was violating the Code of Ethics because he was, in fact, exercising "contract management authority" over Jenner & Block while having a "business relationship" with the firm.
4. Franczek asked Claypool why Marmer could not simply be removed from supervising Jenner & Block. Franczek also stated that Claypool could ask the Board for an exemption for Marmer. Claypool told Franczek he was not going to do that because he did not want the matter to "go public."
5. Claypool and Marmer finally consulted with a seventh attorney, J. Timothy Eaton, who issued a June 10, 2016, opinion letter, finding that Marmer's conduct did not violate the Code of Ethics. Significantly, Eaton has known Claypool for decades, since the time Eaton served as a teacher's assistant for an undergraduate course that Claypool was in when Eaton was a law student. According to campaign records, Eaton has contributed \$5,000 to Claypool's campaigns for public office.
6. Eaton's June 10, 2016, opinion letter is incorrect and materially deficient. Eaton reached the incorrect conclusion because he failed to address the central problem relating to the definition of a "business relationship."
7. Claypool knew that Eaton's letter did not address the central question of the "business relationship," which the six previous attorneys had identified as dispositive. Claypool and Eaton both told the OIG that Eaton was never specifically asked to provide an opinion that was favorable to Marmer, and that Eaton was never specifically asked to steer clear of the "business relationship"

issue. Marmer told the OIG that he could not recall if specific terms of the Code of Ethics were discussed.

Even if what Claypool, Marmer and Eaton claim is true, Eaton's June 10, 2016, letter clearly took a generous approach by ignoring the "business relationship" question altogether. For his part, Eaton says that he decided the "business relationship" question was a non-issue, so he decided it did not need addressing.

Regardless, Claypool should never have accepted the opinion in the first place. Instead, he should have sent it back to squarely address the issue that the six previous attorneys thought was dispositive. In the end, the OIG cannot definitively conclude whether Eaton issued his opinion within narrowly tailored confines outlined by Claypool or Marmer, whether such strictures did not need to be spoken aloud because of the relationship between Claypool and Eaton, or whether Eaton somehow entirely missed the mark on his own.

In any case, Claypool's reliance on Eaton's June 10, 2016, opinion letter was manifestly deceptive and disingenuous.

8. Claypool failed to adequately inform the Board about the six attorney opinions that were in lock-step agreement that Marmer could not have supervisory authority over work performed by Jenner & Block. Also, around the time that the Jenner & Block contract was up for Board approval in July 2016, Claypool apparently misled President Clark into believing that Marmer was not highly or substantively involved in the work performed by Jenner & Block, which had been occurring since at least March 2016. Accordingly, Claypool violated his fiduciary duty under the Code of Ethics to act in good faith with the Board.
9. On July 28, 2016, the day after the Board approved of the retention of Jenner & Block for the school funding litigation, a *Chicago Sun-Times* article raised the question of whether Marmer was violating the CPS Code of Ethics. In the wake of the *Sun-Times* article, the OIG opened an investigation into the matter. On August 8, 2016, the *Sun-Times* reported that the OIG had confirmed an investigation into the matter. On August 9, 2016, the *Chicago Tribune* quoted Claypool as saying, "Obviously the inspector general looks at a lot of things routinely. We're happy to walk him through the process." On August 14, 2016, the *Sun-Times* published a letter from Claypool, in which he defended his and Marmer's actions in the matter. In that letter, he said, "[W]e welcome the opportunity to answer questions from the inspector general or anyone else."

10. Claypool attempted to paper over the opinions of the six attorneys with Eaton's letter, which was released to the press in the wake of public questions about Marmer's involvement in the contract work.
11. After the OIG investigation was publicly known, Claypool took improper steps to alter relevant records with the intent of obscuring the work that Franczek had done on the matter. Specifically, Marmer had complained to Claypool about the size of Franczek's \$2,124 bill, including the fact that references to "CPS's Code of Ethics" and "ethics issues" were listed on it. After Marmer complained about the bill, Claypool personally handed Franczek's bill back to Franczek and asked him to change the entries that described work on "CPS's Code of Ethics" and "ethics issues." Franczek promptly acted on that request, and changed his invoice to reflect work only on a generic "personnel matter." Franczek then sent the changes via courier back to Claypool's personal attention under a cover letter marked in bold letters: "Attorney-Client Privileged and Confidential" and "For Forrest Claypool's Eyes Only." Franczek's revised bill was subsequently found on CPS's billing system. Importantly, no record of the original bill was found on the CPS billing system or at the Law Department.
12. Claypool greatly compounded the severity of his misconduct when he repeatedly lied to the OIG through two separate interviews — and after being advised in writing each time that false statements could result in discipline up to and including termination of employment — by unequivocally, emphatically and repeatedly denying that he had asked Franczek to make changes to his bill. He even stated he would never have been involved in such lowly billing matters. At one point, he said that he runs a \$5.6 billion operation, and "I'm not looking at freaking bills." The evidence clearly shows otherwise.
13. On November 17, 2017, just three days after his second interview, Claypool issued a written public statement that put a disingenuous spin on the lies he had made during his OIG interviews regarding Franczek's bill. He changed his categorical and emphatic statements that he never saw the bill and never asked for any changes to an abrupt I don't recall. He turned 180 degrees from claiming certain memory to no memory at all. His letter was designed to taint the Board's reception of the OIG's final report by falsely portraying lies on two separate occasions as a mere lapses of memory.
14. In addition, Claypool's public release of his letter to the IG represented a failure to cooperate with the OIG. At the end of his second interview, the OIG had specifically told Claypool and his attorneys that the OIG might need to speak with other witnesses about the billing records that the OIG had shown to, and

discussed with, Claypool. The OIG said that confidentiality was required to ensure witness integrity.

Despite that, Claypool sent Marmer a warning about what the OIG was asking. In an email to Marmer on the same afternoon that he released his letter to the press, Claypool told Marmer that, although he knew that he and Marmer should not be communicating about the OIG's investigation, he still wanted to give Marmer, as Claypool wrote, a "heads up" about the letter. Claypool conveniently concluded in his email that, since the letter was public, there was no problem if Marmer saw it. Thus, Claypool failed to cooperate with the OIG by refusing to honor the OIG's request to keep the OIG interviews confidential while the investigation was pending.

In any event, the OIG had already scheduled a second interview with Marmer when Claypool released his letter, so the actual effect was to improperly give Marmer a "heads up" that the OIG was asking about Franczek's bill — and, more importantly, that the OIG possessed hard-document proof of exactly what had happened — before the OIG was able to re-interview Marmer about it.

15. Claypool also lied to the OIG when he stated that he was not aware that Franczek had written an opinion on the matter when he and Franczek spoke about Franczek's opinion in June 2016. Claypool told the OIG that someone had informed him only much later that Franczek had written an opinion, which he described as "enraging." Claypool even said that the news that Franczek had written an opinion was a complete surprise to him.

The evidence, however, confirms Franczek's account that he had a copy of a written opinion with him on June 6, 2016, when he spoke to Claypool — and that Claypool deliberately refused to accept it. Among other supporting evidence is a statement from Law Department attorney Moriarty who told the OIG that Franczek talked to him right after Franczek's meeting with Claypool. Moriarty told the OIG that Franczek had said that Claypool was angry and refused to accept the memorandum.

In addition, an email shows that a draft of Franczek's memo was sent to Moriarty by Franczek at 8:57 a.m. on June 6, 2016. In that email, Franczek asked Moriarty to let him know if there was anything he "violently disagree[d]" with because he was meeting with Claypool at 11:30. That email, by itself, shows that Franczek was planning to give the opinion letter to Claypool at the meeting. And shortly after the meeting between Claypool and Marmer that day, Franczek sent Moriarty an email that reads, "I think I am off the xmas card list."

When the emails, Franczek's account, Moriarty's account, Franczek's opinion letter, Claypool's anger with Franczek, and Claypool's other proven lies are considered together, it is clear that Claypool deliberately refused to accept Franczek's written opinion — which he was not happy about — and lied about it to the OIG.

16. Claypool also improperly refused to pay the \$7,080 bill that Rocks's firm, Jackson Lewis, had submitted for its work on the Marmer ethics question.

First Deputy General Counsel Douglas Henning told the OIG that he was at a meeting with Claypool and people from the press office, when Claypool learned of Rocks's bill. Claypool took the position at that meeting that he had never ordered the work, so CPS should not pay for it. Henning told the OIG that, based on those statements by Claypool, he made sure that the Jackson Lewis invoice was not paid. Claypool also said that he had a conversation with Jackson Lewis attorney James Daley during which Claypool advised that CPS would not be paying the bill because he had never asked for the work. For his part, Daley denied ever having that conversation with Claypool. In any event, it is clear that the refusal to pay the bill happened on Claypool's prompting and only after there were public questions about Marmer's involvement in the school funding litigation — and that it almost certainly happened once the OIG was looking into the situation.

Based on the totality of the evidence, it is more likely than not that Claypool's refusal to pay the Jackson Lewis bill represented a further attempt by Claypool to minimize the weight and importance of Rocks's opinion by making it seem like the opinion was never ordered and was, therefore, somehow informal — a proposition that is against the manifest weight of the evidence in this case.¹

17. The OIG discovered that Chief Internal Auditor Andrell Holloway and Doug Henning — who both followed Claypool to CPS from the CTA — were added to the Ethics Committee and that Senior Assistant General Counsel Andrew Slobodien was removed from it in the middle of this investigation. Marmer told the OIG that he was responsible for the changes.

¹ Ironically, Jackson Lewis considers the bill to have been paid. As discussed more fully below, due to a subsequent and apparently mistaken overpayment from CPS in January 2017 for a separate invoice, Jackson Lewis wound up crediting the work as being paid when Claypool and Henning believe it was not paid.

The timing of those changes is problematic because they were made in the middle of the investigation into an issue that squarely involved Marmer's and Claypool's disagreement with the Ethics Committee.

Gomberg, the *de facto* chair of the committee, told the OIG that she was not involved in the changes, which were more or less presented to her as a *fait accompli*. Even more troubling, the changes apparently came right after the IG briefed the Board in closed session about the previous negative opinion of the Ethics Committee. Claypool and Henning were at that meeting. The IG had asked Claypool to leave that meeting so he could brief the Board in private. Claypool refused. Accordingly, because he heard what the IG told the Board, Claypool clearly knew that the opinion of the Ethics Committee was central to the investigation. Claypool denied having any part in the changes.

Nonetheless, in the face of the timing and overall circumstances, the OIG cannot eliminate the possibility that the real motive for the personnel changes, which Marmer has taken credit for, was to create an Ethics Committee more deferential to Claypool and Marmer. In short, the public perception is horrible. It looks like the changes were retaliatory and designed to lessen the independence of the committee. That alone should have warranted delaying any changes until after the OIG investigation was complete. Accordingly, at a minimum, the changes to the Ethics Committee represent a critical error in judgment. And Marmer has taken credit for them.

RECOMMENDATIONS

Based on the extensive evidence in this case, the OIG is recommending the termination of Forrest Claypool's employment.

The OIG stops short of finding that this is necessarily a termination-level case for Marmer. As discussed further below, the OIG is recommending that the Board discipline Marmer in an appropriate manner, which might include, for example, a "first and final" warning, a lengthy suspension or even termination (if the Board decides that is warranted).

Please be aware that the OIG is not making these recommendations lightly.

As the OIG stated in its June 23, 2017, Interim Summary Report, the OIG does not believe that Marmer stood to benefit financially from the contract with Jenner & Block and, of course, the underlying Code of Ethics violation would have been much worse if that had been the case.

Marmer and Claypool told the OIG that they disagreed with what the internal CPS attorneys told them because they believed the internal lawyers were reading the Code of Ethics too literally. They believed that because Marmer was not going to gain financially from the contract, his supervision of Jenner & Block's work simply should not be prohibited. In short, they refused to believe that the Code of Ethics not only prohibited improper financial gain, but even the appearance of a less-than-arms-length arrangement (in other words, the appearance of impropriety). If Claypool and Marmer had simply come forth and told the Board and the public that they disagreed with the Ethics Committee, the Board could have weighed in with a proper remedy (e.g., voting for an exception, amending the Code of Ethics, removing Marmer from his supervisory role, etc.). If that had happened, this matter probably would not have involved discipline.

Instead, Claypool and Marmer searched for an exonerating opinion. Of course, Claypool took a series of actions to minimize the further negative attorney opinions he received along the way. It is that approach that was fundamentally deceptive — the idea that Claypool could present Eaton's opinion as the only one, when it failed to even address the dispositive issue of the "business relationship" in the first place. Although Claypool's actions in this regard were deceptive, the OIG is not certain that this would have been a termination case if the conduct had stopped there and Claypool had come clean about what had happened at that point.

The decision by Claypool to alter billing records while the OIG investigation was ongoing — and after Claypool told the public that he was happy to "walk the OIG through the process" — escalated this to a full-blown cover-up and, thus, a termination case for him. The fact that Claypool took steps designed to hide Franczek's opinion on the CPS billing system, which occurred at the opening stages of the OIG investigation and while under heavy press scrutiny, makes this misconduct very serious indeed. It goes without saying that if any line employee had done that much, he or she would be fired.

Inexplicably, Claypool pushed the matter beyond all bounds when he chose to lie through two separate OIG interviews about his dealings with Franczek. In particular, and as discussed in the Final Summary Report, Claypool's repeated and unequivocal denials that he had asked Franczek to make changes to the bill — even after being shown documents that put him at the epicenter of the changes — are not remotely credible. The matter was important enough for him to defend his actions in the open letter to the *Sun-Times* that he penned just 11 days before asking for the changes, but he would have the Board and everyone believe now that he cannot remember handing billing records to Franczek, or having them returned to him and labeled "For Forrest Claypool's Eyes Only." When all the evidence is considered together, it is

clear that Claypool lied to the OIG, even after being shown documents that proved his actions. On top of that, he failed to cooperate with the OIG when he handed his November 17, 2017, letter to the press, thereby giving Marmer an improper “heads up” to what the OIG was asking.

At every turn in this matter, Claypool kept making matters worse. And it appears that his decisions were driven by a clear desire to keep information harmful to his narrative from the Board, the OIG and the public.

What kind of signal would it send to CPS employees, parents and children if the CEO was allowed to change records as part of a cover up and keep his job? Why should CPS employees tell the truth in other investigations — as required under Board Rules — if repeated lies by the head of the administration are not decisively punished? Elaborate cover-ups are designed to hide improper behavior, not above-board actions, and that was clearly the case here, as evidenced by the pattern of attorney shopping, record changing and lies to investigators. Again, any other employee would be fired for such deliberate and protracted deception. Surely, the CEO must be held to the same — if not an even higher — standard. Of course, Claypool is a highly sophisticated government actor who surely should be expected to know the ethics rules. Even more critically, as the CEO, he sets the bar for how the entire organization acts and owns up to mistakes when they are inevitably made. The example Claypool has set here cannot be the standard of honesty and responsibility that the Board and citizens of Chicago accept. Sadly, the OIG is left with no recourse but to conclude that this is a termination case for Claypool.

The decision to remove Claypool is ultimately the Board’s. Pursuant to Board Rule 4-1(C):

The Board shall exercise all authority over the following employee matters, which authority is non-delegable under the Illinois School Code or which the Board has reserved to itself:

...

(3) To dismiss the Board Secretary, the Assistant Board Secretary, the Chief Executive Officer, the General Counsel, deputies and assistants general counsel, executive officers and officers upon majority vote of the full membership of the Board[.]

Please be advised that the OIG expects that it will put forth a recommendation for Claypool’s termination in an Inspector General Board Action Report in the near future.

For his part, Marmer has clearly displayed poor judgment. For starters, it is obvious that Marmer, as the one whose conduct was in question in the first instance, should not have been involved in the business of finding an outside opinion that cleared him. That fact alone suggests a biased search. And the sudden need to find the “gravitas” they found in Eaton appears to be nothing more than a decision to continue to search for an exonerating opinion. In addition, his admitted decision to make changes to the Ethics Committee in the middle of this investigation certainly raises the appearance of impropriety.

Of course, other acts by Marmer give rise to serious questions. For example, the OIG finds problematic his account of why he brought his concerns about Franczek’s bill to Claypool’s attention. He said that he objected to both the size of the bill and to the references to “CPS’s Code of Ethics” and to “ethics issues,” and even suggested that the bill was not up to his professional standards. When, however, his statement is compared to the bills of Rocks and Eaton — both of which contain almost identical entries and were for similar amounts — it seems that Franczek was not singularly out of step with the others. So, it is clear that Franczek did not do anything that the other attorneys had not done. Regardless, there is no proof that Marmer saw the bills of the other two attorneys, so the OIG cannot say for sure that Marmer would not have acted the same way if he saw them.

In the end, however, there is no proof that Marmer asked anyone to change any bills or records. The OIG also cannot conclude that Marmer (or Claypool) deliberately ordered Eaton to give an opinion that steered clear of the “business relationship” question. And there is no proof of any lies by Marmer to the OIG.

Nonetheless, Marmer violated the Code of Ethics by exercising “contract management authority” in the school funding litigation. Plus his involvement in the hunt for his own exonerating opinion was improper, and his changes to the Ethics Committee were misguided. Despite those actions, the evidence does not support a conclusion that Marmer’s efforts rose to the same level of cover-up committed by Claypool.

Accordingly, the OIG stops short of finding that this is necessarily a termination-level case for Marmer. The OIG is recommending that the Board discipline Marmer in an appropriate fashion, which might include, for example, a “first and final” warning, a lengthy suspension or even termination (if the Board decides that is warranted).

The OIG is further recommending that the role and function of the Ethics Committee needs to be strengthened and defined. At a minimum, the Ethics Committee should be formed with the consent of the Board. The Board should approve what the membership make-up of the committee should be. And appointments to the Ethics

Committee should be publicly approved at Board meetings. Accordingly, the OIG is recommending that the Board appoint a group to research the best practices for operating an Ethics Committee, and the group should recommend new rules based on that research. For instance, the rules should specify what happens when there is a disagreement about the interpretation of the Code of Ethics between the Ethics Committee and a CPS employee, or even a Board member. Once the exploratory work is done, the OIG expects that the Board would be able to incorporate the appropriate changes into the Code of Ethics so as to avoid situations like the one that led to this investigation. The OIG respectfully requests to be included in the process of developing and implementing those changes.

Finally, the OIG is not making any recommendations regarding Eaton. As stated above, the OIG cannot definitively conclude whether Eaton issued his opinion within narrowly tailored confines outlined by Claypool and Marmer, or Eaton somehow missed the mark on his own. And for reasons discussed at length in the Final Summary Report, the OIG has taken the view that because Eaton's representation ceased and the OIG was eventually allowed all the access it needed to complete the investigation, the question of interference by Eaton has fallen away and is moot.

FULL BOARD COOPERATION SINCE THE JUNE INTERIM REPORT

As is well known, the OIG publicly asserted at the December 7, 2016, Board meeting that this investigation was being obstructed by the improper assertion of the attorney-client and work-product privileges. The OIG followed up those assertions in its Interim Report to the Board on June 23, 2017. In that report, the OIG further asserted that Eaton, who then was representing the Board in the OIG's investigation, had a material self-interest stemming from the June 10, 2016, opinion that he had issued in this case. In June, the OIG recommended that the Board cease asserting the attorney privileges against the OIG and that Eaton's representation of the Board in the OIG investigation cease.

The OIG is pleased to report that the Board promptly acted on both of those recommendations. The Board removed Eaton's firm in July 2017. The Board members then hired McDermott Will & Emery to work out a limited waiver of the attorney-privilege issues. Once the limited waiver was executed on September 5, 2017, the OIG's investigation was able to be finished in a relatively timely and straightforward fashion.

The key information relating to the misconduct of the top executive and his chief legal officer were hidden behind the veil of attorney-client privilege and only saw sunlight once that veil was lifted. The critical information that makes this a

separation case for Claypool largely came after the Board ended its privilege assertions. It was only then that the OIG was able to talk to Rocks and Franczek and get their billing records — and then question Claypool and Marmer about them. Accordingly, this case should be understood by everyone as a textbook civics lesson on why OIG access to documents cannot be blocked on the grounds of attorney-privilege assertions.

Thus, the Board's decision to lift its objections to OIG access to attorney-client and work-product material represents a major step forward by the Board for the proposition that the OIG's oversight work is necessary and vital to the proper functioning of the school district. In fact, the OIG considers the successful resolution to the question of access to attorney-client and work-product privileged material in this case to be so significant that it should serve as a model of cooperation on this issue, not only for the Board and its OIG but also for other local governmental bodies and their OIGs. Of course, this OIG is also grateful for the limited waiver because it avoided the great expenditure of time and money that would have resulted if the OIG had to pursue the access-to-information question in court.

The sole points of caution are that the limited waiver worked out between the Board and the OIG is not binding on future investigations and, even if that tool is used again, it might prove to be inadequate in a future case.

There is some danger that such access will not always be granted in future investigations. Indeed, the OIG is somewhat concerned that the Board only entered into the limited waiver in this case because the OIG was able to advance it sufficiently — so as to illustrate the obvious public perception problems posed by the privilege assertions — before the obstruction stopped the case from advancing further. Thus, the OIG fears that similar access might not be granted if the case for OIG access to attorney-client-privileged material is not as straightforward (and convincing) at the start of a future investigation as it was at the opening stages of this one, which the OIG detailed to the Board in its June 2016 Interim Summary Report.

In addition, the OIG can envision a situation in the future in which potentially privileged material must be collected quietly or risk jeopardizing the entire investigation. That was not the case here, but it is something to keep in mind, with an eye toward hammering out an arrangement between the Board and the OIG that would ensure proper access to information when confidential collection of information is essential to investigations.

The OIG's concerns about future cases notwithstanding, the OIG is pleased with the cooperation it ultimately received from the Board and its current counsel in this case.

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In addition to the above material, the accompanying Final Summary Report details the evidence in this case and contains the OIG's analysis.

As always, if you have any questions, please feel free to contact me at (773) 534-

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