

DISTRICT COURT, TELLER COUNTY, COLORADO 101 W. Bennett Ave. Cripple Creek, Colorado 80813 (719) 689-7360	
ERIN O'CONNELL, Plaintiff, v. WOODLAND PARK SCHOOL DISTRICT BOARD OF EDUCATION and CHRIS AUSTIN in his official capacity as Board Member; GARY BROVETTO in his official capacity as Board Member; DAVID ILLINGWORTH II in his official capacity as Board Member; SUZANNE PATTERSON in her official capacity as Board Member; DAVID RUSTERHOLTZ in his official capacity as Board Member, Defendants.	
Attorney for Plaintiff: Eric Maxfield, #29485 Eric Maxfield Law LLC 3223 Arapahoe Avenue, Suite 300 Boulder, Colorado 80303 303-502-7849 Eric@ericmaxfieldlaw.com	Case No: Division
<p style="text-align: center;">VERIFIED COMPLAINT</p>	

Plaintiff, Erin O’Connell, respectfully submits this Verified Complaint against Defendants, Woodland Park School District Board of Education (“Board”) and Chris Austin, Gary Brovotto, David Illingworth, II, Suzanne Patterson, and David Rusterholtz, in their official capacities as Board members, for violation of the Colorado Open Meetings Law.

INTRODUCTION

The Colorado Open Meetings Law (COML) provides that “the formation of public policy is public business and may not be conducted in secret.” § 24-6-401, C.R.S. The Board considered, debated, and voted to agree to a Memorandum of Understanding (“MOU”) with Charter School Merit Academy under a public agenda topic titled “BOARD HOUSEKEEPING” at its January 26, 2022 special meeting. The Board took this action after manufacturing a “walking quorum” prior to the special meeting by holding two one-on-one non-noticed, non-public meetings among a quorum of Board members wherein they discussed the MOU. The Board’s attorney, Brad Miller, during the January 26, 2022 special meeting, advised the Board that two members can assemble and “be sneaky and in private and secretive” for any reason. Such conduct circumvents the Open Meetings Law requirement of transparency in the conduct of public business. The Board, on or about February 8, 2022, noticed the same vote for its next regular meeting under the heading “ACTION ITEMS”, “Re-approval of MOU with Merit Academy”. At that February 9, 2022 meeting the Board was invited by Superintendent Mathew Neal to engage in discussion of this action item, but engaged in none, instead voting to “re-approve” the MOU with Charter School Merit Academy. The conduct of the Board violates the requirements of the Colorado Open Meetings Law that Notice be adequate, and the Board deliberate in public, while providing the

public the opportunity to observe contemporaneously in order to hold accountable its elected public officials. The Board apparently attempted to cure its first violation, but instead reinforced the secrecy of its proceedings with a rubber stamp vote. This suit does not address the substance of the policy of agreeing to an MOU. Instead, it is exclusively regarding the process by which important public policies—directly affecting some 2,000 students enrolled in Woodland Park Schools, and their families—is made. That process is governed by the clear and unambiguous Colorado Open Meetings Law (COML), requiring that any time three or more members of a “local public body,” like the Board, discuss public business “in person, by telephone, electronically, or by [any] other means of communication” they must notify the public in advance and allow the public to observe that discussion in real time. § 24-6-402(2)(b), C.R.S.

Colorado’s Supreme Court ruled that “the [Colorado Open Meetings Law] prohibits bad-faith circumvention of its requirements.” *Darien v. Town of Marble*, 181 P.3d 1148, 1155 (Colo. 2008). Although no Colorado appellate court has directly addressed the so-called “walking quorum” issue, the *Darien* ruling should be read as disallowing the intentional avoidance of the quorum requirement by conducting “serial meetings” of less than three-at-a-time, a practice that has also been called a “constructive quorum.” Numerous courts in other states have found these actions in violation of open meetings laws.¹ Furthermore, it is clear that once an unlawful secret

¹ See, e.g., *Del Papa v. Board of Regents*, 956 P.2d 770 (Nev. 1998) (holding that a meeting subject to the state open meetings law occurs when a quorum of a public body uses “serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power.”); *State ex rel. Cincinnati Post v. Cincinnati*, 668 N.E.2d 903 (Ohio 1996) (holding that a city manager’s series of three back-to-back meetings with groups of council members to discuss a proposal for a new sports stadium violated the state open meetings law); *Hickel v. Southeast Conference*, 868

discussion of public business among three or more members of a local public body has taken place (even if no decision is made), that violation of the law cannot be cured by subsequent corrective action. Even assuming such conduct could be cured, in this circumstance, the purported cure was ineffective because the Board failed to demonstrate any discussion in its intended “transparent” meeting, continuing to deprive the public of the opportunity to observe the Board’s conduct of public business.

Any decision made outside a duly noticed and open public meeting cannot be “cured” thereafter by the mere “rubber stamping” of an earlier (1/26/22), unlawful decision, as was the case with the Board’s public meeting on February 9, 2022. The Board and its Members circumvented and failed to follow the COML, and the Court should therefore find violations of the COML, should enjoin the Board to require compliance with the COML, and should invalidate the decision taken in violation of the COML.

PARTIES

1. Plaintiff Erin O’Connell is a resident of Teller County, Colorado, residing at 761 Sunnywood Place, Woodland Park, CO 80863.
2. Ms. O’Connell is a citizen of Colorado.

P.2d 919 (Alaska 1994) (holding that the state statute was violated when “board members had one-on-one conversations with each other, in which they discussed reapportionment affairs and districting preferences, and solicited each other’s advice”); *Stockton Newspapers, Inc. v. Redevelopment Agency*, 214 Cal. Rptr. 561 (Cal. App. 1985) (holding that a series of one-to-one telephone calls violated the state open meetings law); *Hitt v. Mabry*, 687 S.W.2d 791 (Tex. App. 1985) (holding that decisions reached by a school board by way of private, informal telephone polls or conferences by board members violated the state open meetings law). Cf., *Regents of Univ. of Cal. v. Superior Court*, 20 Cal. 4th 509, 538-39 (Cal. 1999).

3. Ms. O'Connell is a parent of three children in the school district.

4. Defendant Woodland Park School District Board of Education is a local public governmental body in Teller County with a place of business at 155 Panther Way, Woodland Park, Colorado, 80863.

5. The Woodland Park Board of Education Members are:

a. Chris Austin

b. Gary Brovetto

c. David Illingworth, II, Esq. (Deputy District Attorney, 4th Judicial District)

d. Suzanne Patterson

f. David Rusterholtz

JURISDICTION AND VENUE

6. Jurisdiction is proper in this Court pursuant to § 24-6-402(9), C.R.S.

7. Venue is proper in the Judicial District Court for Teller County pursuant to C.R.C.P. 98(b)(2) because all defendants are public officials and a local public body whose actions giving rise to this Verified Complaint occurred in Teller County.

GENERAL ALLEGATIONS

8. Board members Gary Brovetto, David Illingworth, II, Suzanne Patterson, and David Rusterholtz were newly elected to the Woodland Park School District Board of Education on November 3, 2021, and sworn in to join incumbent Chris Austin on November 19, 2021.

9. At the regular meeting of the Board on December 8, 2021, the Board voted David Rusterholtz as Board President, David Illingworth, II as Board Vice President, and Chris Austin as Secretary.

10. At the regular meeting of the Board on December 8, 2021, Vice President Illingworth stated that he would like the Board to charter Merit Academy.

11. Merit Academy had, prior to December 8, 2021, applied to the Board to be chartered and its application was denied.

12. By December 9, 2021, chartering Merit Academy was Vice President Illingworth's immediate priority.

13. Vice President Illingworth emailed President Rusterholtz with the subject line: "Next week's agenda". The email began,

"Some ideas for next week's agenda. My idea is that chartering Merit [Academy] should be our immediate priority, but it might be good to move the ball forward on some other things. This is the flood the zone tactic, and the idea is that if you advance on many fronts at the same time, then the enemy cannot fortify, defend, effectively counter-attack at any one front. Divide, scatter, conquer."

14. The December 9, 2021 Illingworth to Rusterholtz email discussed chartering Merit Academy, and the email was not noticed or contemporaneously made public.

15. The December 9, 2021 Illingworth to Rusterholtz email then provided six numbered agenda ideas, none of which included the topic of chartering Merit Academy.

16. At the Board's December 15, 2021 special meeting, Vice President Illingworth shared his excitement about the discussion surrounding charter authorizing procedure.

17. At the Board's December 15, 2021 special meeting, members of the public commented on chartering Merit Academy.

18. At the Board's January 11, 2022 Work Session, the Board was provided with a review of the proposed process for the charter school transfer application process.

19. At the Board's January 12, 2022 regular meeting, Vice President Illingworth stated that his wife's service as a board member of Merit Academy and his service on the Woodland Park School Board do not pose a conflict of interest.

20. At the Board's January 12, 2022 regular meeting, Vice President Illingworth stated it is his legal obligation to vote on the approval of Merit Academy when the time comes, and that the law prohibits him to abstain from voting.

21. President Rusterholtz and Secretary Austin discussed approval of the MOU with Merit Academy on January 25, 2022. The discussion was not at a noticed or public Board meeting.

1/26/22 Special Board Meeting

22. Prior to the Board's January 26, 2022 Special Meeting, the Board posted an agenda Notice including the agenda topic "V. BOARD HOUSEKEEPING".

23. The Board's posted agenda for its January 26, 2022 Special Meeting included discussion and approval of an MOU with Merit Academy under the agenda topic, "V. BOARD HOUSE KEEPING," however, the agenda topic did not reference the Merit Academy MOU.

24. The Board's posted agenda for its January 26, 2022 Special Meeting included no detail of any kind with reference to the "BOARD HOUSEKEEPING" topic.

25. During the Board's January 26, 2022 Special Meeting, President Rusterholtz stated to Secretary Austin that they discussed on January 25, 2022 the purpose of the "BOARD HOUSEKEEPING" agenda item as addressing the MOU with Merit Academy.

26. President Rusterholtz and Secretary Austin discussed the MOU with Merit Academy matter on January 25, 2022 with a design of addressing the matter at the January 26, 2022 Special Meeting under the agenda topic “BOARD HOUSEKEEPING.”

27. At the Board’s January 26, 2022 Special Meeting Secretary Austin stated that he did not know what “board housekeeping” meant, and was not comfortable approving the agenda because it was not clear to him or clear to the public.

28. Secretary Austin perceived that the ambiguity of the posted agenda topic “BOARD HOUSEKEEPING” for the January 26, 2022 Special Meeting was intended to avoid inviting members of the public who were interested in the topic.

29. The Board’s attorney Brad Miller, responded to Secretary Austin at the January 26, 2022 Special Meeting that “granularity” beyond “BOARD HOUSEKEEPING” is not necessary for handling the MOU with Merit Academy.

30. The Board’s attorney Brad Miller, responded to Secretary Austin at the January 26, 2022 Special Meeting that it is not the duty of the Board to tell the public everything that is an issue before the Board.

31. Members of the public asked Secretary Austin prior to the Board’s January 26, 2022 Special Meeting what the “BOARD HOUSEKEEPING” agenda item included.

32. Secretary Austin informed inquiring members of the public what was intended to be under the “BOARD HOUSEKEEPING” agenda item: the MOU with Merit Academy.

33. Secretary Austin perceived that the agenda topic “BOARD HOUSEKEEPING” for the January 26, 2022 Special Meeting was perceived by the public as deceiving or hiding things from the public.

34. At the Board’s January 26, 2022 Special Meeting, President Rusterholtz stated that he noted Secretary Austin’s concern regarding the lack of transparency in the Board Notice, but that the topic was written under the guidance of the Board attorney.

35. At the Board’s January 26, 2022 Special Meeting, Board Attorney Miller acknowledged Secretary Austin’s reservations about the inadequacy of the “BOARD HOUSEKEEPING” as proper Notice to the public.

36. At the Board’s January 26, 2022 Special Meeting, Secretary Austin voted against approving the agenda, which then passed 4-1 after all remaining members voted in favor.

37. At the Board’s January 26, 2022 Special Meeting, Board Attorney Miller told the Board that two board members can get together for any reason, including “to be sneaky and in private and secretive.”

38. At the Board’s January 26, 2022 Special Meeting, the Board engaged in a discussion of the MOU with Merit Academy.

39. At the Board’s January 26, 2022 Special Meeting, Secretary Austin stated that the Board had previously denied Merit Academy’s application, and indicated his expectation that certain portions of the application that had not been satisfactory under the original application would need to come into compliance before approval.

40. At the Board's January 26, 2022 Special Meeting, the Board was advised by its attorney that the MOU with Merit Academy was a proxy for Merit Academy charter approval.

41. At the Board's January 26, 2022 Special Meeting, the Board voted 5-0 in favor of agreeing to the MOU with Merit Academy.

1/27/22 Work Session

42. At the Board's January 27, 2022 Work Session, President Rusterholtz opened by apologizing for the lack of transparency on the January 26, 2022 Special Board Meeting agenda and the agenda item titled "BOARD HOUSEKEEPING."

2/9/22 Regular Board Meeting

43. Prior to the Board's February 9, 2022 regular meeting, the Board posted an agenda Notice including, "IX. ACTION ITEMS a. Re-Approval of MOU with Merit Academy."

44. At the Board's February 9, 2022 regular meeting Vice President Illingworth announced that his wife was stepping down from the Merit Academy Board for personal reasons, and not due to Vice President Illingworth's role or a change in the law regarding conflict of interest.

45. At the Board's February 9, 2022 regular meeting under the agenda item "Re-approval of MOU with Merit Academy," Superintendent Neal shared that even though the Memorandum of Understanding with Merit Academy had been discussed and approved in a previous meeting, the desire of the Board was to move forward with the application of the charter school and was being reapproved for full transparency.

46. At the Board's February 9, 2022 regular meeting under the agenda item "Re-approval of MOU with Merit Academy," no discussion of any kind, by any Board member, took place prior to a motion, second, and vote to unanimously agree to re-approve the MOU by a vote of 5-0.

FIRST CLAIM FOR RELIEF
For Declaratory Relief for Past Violations
of the Colorado Open Meetings Law

47. Plaintiff incorporates all other allegations in this complaint as if fully set forth herein.

48. Defendants engaged in discussion of public business (concerning the adoption of the MOU with charter school Merit Academy), and voted to enter into an agreement with Merit Academy in improperly noticed meetings (1/26/22 and 2/9/22) and without deliberating in a second public meeting and, instead, rubber stamping a prior, improper vote and decision, in violation of the Colorado Open Meetings Law.

49. As a result of their unlawful conduct, Defendants deprived Plaintiff, and the public, of their rights under the Colorado Open Meetings Law, to Notice and an opportunity to observe discussion.

50. Plaintiff has suffered an injury in fact and has standing as set forth in § 26-6-402(9)(a), C.R.S.

51. Plaintiff is entitled to the entry of a Declaration and Finding by this Court that the Defendants' conduct was in violation of the Colorado Open Meetings Law.

SECOND CLAIM FOR RELIEF
For Injunctive Relief Barring Further Violations
of the Colorado Open Meetings Law

52. Plaintiff incorporates all other allegations in this complaint as if fully set forth herein.

53. Defendants have made clear that they believe they do not violate the Open Meetings Law when they collectively discuss public business by a walking quorum without public Notice or public observance of the discussion and vote, so long as they then have subsequent meetings addressing the topic. However here one such meeting resulted in a violation because it was held without public observance of discussion (1/26/22) due to lack of full and timely notice and the other resulted in a violation because it lacked full and timely notice and lacked any discussion (2/9/22).

54. Defendants, therefore, have indicated that they intend to continue the unlawful practice described above, unless enjoined from doing so by this Court.

55. Plaintiff, and all other members of the public, who have rights of Notice and observation of future “meetings” of the Board, will suffer irreparable injury if those future violations are not enjoined.

56. Plaintiff is entitled to the entry of both preliminary and permanent injunctive relief that precludes the Board member Defendants from further violations of the COML by holding walking quorums, providing inadequate Notice, discussing and making decisions in inadequately noticed meetings, and failure of the Board to deliberate in public, without rubber stamping prior, non-conforming decisions.

THIRD CLAIM FOR RELIEF
Invalidation of the Board's unlawful decision on 1/26/22 and 2/9/22
agreeing to a Memorandum of Understanding with Merit Academy
as Provided in the Open Meetings Law

57. Plaintiff incorporates all other allegations in this complaint as if fully set forth herein.

58. The Board's public vote in its Regular Meeting of February 9, 2022, to re-approve its earlier decision (1/26/22) to agree to a Memorandum of Understanding with Merit Academy did not "cure" the prior violation, but merely "rubber stamped" it. See *Walsenburg Sand & Gravel Co., Inc. v. City of Walsenburg*, 160 P.3d 297, 300 (Colo. App. 2007) (merely rubber-stamping in a public meeting an earlier-made unlawful decision does not "cure" the violation); *Van Alstyn v. Housing Auth.*, 985 P.2d 97, 101 (Colo. App. 1999).

59. Plaintiff is entitled to a Declaration and Finding by this Court that the Board's decision to join Merit Academy in a MOU, on January 26, 2022, and again on February 9, 2022, was in violation of the Colorado Open Meetings Law and is therefore null and void. § 24-6-402(9), C.R.S.; see also *Rogers v. Bd. of Trustees for Town of Fraser*, 859 P.2d 284, 286 (Colo. App. 1993) (termination of a town employee that was done outside of an open public meeting declared "null and void").

WHEREFORE, Plaintiff prays that this Court:

1. Enter an Order declaring that the serial gatherings of the Board to discuss and vote in inadequately noticed meetings and then holding a meeting to rubber stamp a past inadequately noticed meeting, without discussion, is in violation of the Colorado Open Meetings Law;

2. Enter an Order Preliminarily and Permanently Enjoining the members of the Board from committing any further similar violations of the Colorado Open Meetings Law, as they have indicated their intention of doing, by repeated conduct;
3. Enter an Order declaring that the decision made by the Board to engage with Merit Academy in an MOU was not made in compliance with the Colorado Open Meetings Law and is therefore null and void;
4. Enter an Order commanding Defendant to pay Plaintiff's reasonable attorney fees and costs incurred in bringing this action to enforce her and the public's rights under the Colorado Open Meetings Law, and compelling the Board to comply therewith; and
5. Order such other further relief as the Court deems just and proper.

VERIFICATION

I, Erin O'Connell, under penalty of perjury, certify that the factual statements contained in this Verified Complaint are true and correct to the best of my knowledge and belief.

Dated this 30th day of March, 2022.

s/ Erin O'Connell
Erin O'Connell

Respectfully submitted this 30th day of March, 2022.

Attorney for Plaintiff:

s/ Eric Maxfield

ERIC MAXFIELD, #29485

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing VERIFIED COMPLAINT was served on March 30, 2022, by email as follows:

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/s/ Eric Maxfield

Eric Maxfield