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December 31, 2015

VIA EMAIL (cmurray@bhfs.com)

Christopher Murray
Brownstein Hyatt Faber Schreck
410 17th St #2200
Denver, CO 80202

RE: McDaniel's Open Records and Open Meetings Demands

Dear Mr. Murray:

Please accept this as the response of Montessori Peaks Academy (the School, MPA) to your letter of November 25, 2015. I was initially hopeful that through this correspondence we could find some resolution of this matter for both the School and the McDaniels. As I explained by earlier email that thought was damaged, if not eliminated, by Mr. McDaniel's decision to make CORA requests timed to cause maximum inconvenience before the holidays on every Jefferson County School District charter school. We can only conclude Mr. McDaniel has no intention of settling anything, but intends to harry the School and anyone associated with it. We respond accordingly.

School Districts versus Charter Schools

First, you repeatedly cite to plainly inapplicable law. Specifically, the "roll call vote" requirement you allude to applies to Boards of Education, not charter schools. That statute begins: "Regular meetings of the board of education of a school district ..."[1] As this reflects, boards of education run school districts. MPA is not a school district. MPA does not have a board of education. Where boards of education come into existence through specific procedures set out in Article 30 of Title 22, charter schools are created through an entirely different procedure under Article 30.5. Of the 200 charter schools in operation, I would hazard that a rather small minority uses roll call votes, and that has been true for over 20 years. That is not because the law is ignored. It is because the law you cite to does not apply, and quite clearly never has.

Charter schools boards are organized (excepting a few grandfathered under earlier law) as "a nonprofit corporation pursuant to the 'Colorado Nonprofit Corporation Act', articles 121 to 137 of title 7, C.R.S., which shall not affect its status as a public school for any purpose under

[1] C.R.S. § 22-32-108(1). Subsection (6) contains the "roll call" requirement.

Colorado law."[2] Thus, the basic voting requirements for a charter school board are those for directors of a Colorado nonprofit corporation. And those do not include "roll call" votes. To be sure, because a charter school is a "public school" it is also a "local public entity" as defined in the Open Meetings Act.[3] But the additional rules specific to "boards of education" (such as roll call voting under C.R.S. § 22-32-108(6)) do not apply to charters, and never have. There is also no statutory requirement to record the moment an executive session begins and ends (though this is a common practice). And in each of these cases, members of the public were present and able to observe when the Board began and ended its executive session. There was no lack of transparency to the MPA community, which is not what any of this is about.

Simply, your attempt to impose "board of education" meetings laws on charter school board practice is legally frivolous.

Factual Issues

I am not going to rehash factual issues in detail, as I suspect MPA and the McDaniels will never reach agreement on the facts. I do want to point out three things:

- The McDaniel's allegations were investigated at length by the Jefferson County School District administration, which found the bulk of the allegations not proved, when not entirely groundless.

- At a meeting of the MPA Board Mr. McDaniel appeared with what looked to be a firearm concealed beneath his jacket. Given the number of active shooter incidents in schools in recent years— and that MPA itself is but a short distance from Columbine High School — teachers and others at the meeting were understandably terrorized. A security guard took Mr. McDaniel aside. The security guard determined that Mr. McDaniel was not armed. The obvious conclusion, drawn by those who observed this event, was that Mr. McDaniel was intentionally trying to give the impression he was armed in order to intimidate people at the meeting. I would hope you might understand that a parent simulating having a firearm in a public elementary school in the Columbine area for purposes of bullying was viewed by MPA as outrageous conduct.

- To pick but one illustrative example from your list, the allegation that two adults conspired to "stare" at an elementary school child as a form of harassment is little short of ludicrous. Both adults in the classroom noticed the child "staring" at the

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[2] C.R.S. § 22-30.5-104(4).

[3] See, C.R.S.§ 24-6-402(1)(a)(I).

parent volunteer (whose wife had disagreed with Mr. McDaniel). The teacher arranged for this volunteer to be out of the line of sight of the child, to try to stop this disturbing behavior. The teacher had also seen this same apparent attention-seeking behavior with this child before. The McDaniels then alleged the volunteer (who at this point could not see the child most of the day) was still "staring" at her. Our conclusion is the child was coached to make a false allegation of harassment.

We could no doubt go back and forth with allegations of misconduct at great length. I do not propose to do so as I believe dialogue with Mr. McDaniel has been repeatedly shown to serve no constructive purpose. Rather, I think it is important for you to know that your entire bullet list of alleged harassment of children is viewed by MPA as contrived; has already been investigated by a neutral third party and found wanting in substance; and that that your client has engaged in behavior that was abusive and, at times, bizarre.

Open Meetings Act

Separately, your letter claims violation of the Open Meetings Act. There are three meetings in question and most issues vary by meeting. On the one common issue: MPA has never used electronic recording as minutes (and is thus not subject to the section of the Open Meetings Act that requires continuation of such a practice). MPA uses recording solely as an aid to the secretary in preparing official written minutes. This permits the secretary to be a more meaningful participant, as a director, in board matters and allows a motion to correct minutes to be checked, if needed, against the recording. Once minutes are prepared and adopted the recording is erased. No recording exists of public sessions you identify.

The February 17 Investigative Session

First is the meeting concerning an "investigation" on February 17, 2015. As you note, the Act requires that motions include a description that is as specific as it can be without damaging the purpose of the executive session. The investigation in this case (which, incidentally, has nothing to do with the McDaniels) was one the Board found impossible to describe in any fashion that would not reveal who or what it concerned. Part of the problem is one of scale. Simply, identifying the class of persons being investigated, or underlying reasons, would have so radically narrowed the list of possible candidates for investigation that it would immediately prompt attempted (and likely successful) identification of the persons involved. To illustrate hypothetically: If the Jefferson County Board of Education announces it is investigating one of its 1,000s of teachers that does not destroy investigative integrity. If, on the other hand, a small rural charter with three teachers announces it is investigating a matter in which one teacher observed questionable behavior by another teacher, confidentiality is fully and immediately erased. The MPA case is not at either extreme, but much, much closer to the small rural school

example. And there is another problem.

Part of a board discussion of an investigation touches on when and how the target of the investigation is put on what form of notice. The issue is not just confidentiality related to the public as a whole, but integrity of the investigation in relation to its target. The judgment of the MPA board in this instance was that further details could not be revealed in the motion without placing the target and possibly the entire public on notice. To do so before an investigation begins is to destroy the integrity of the investigation.

It is, of course, true that the law you cite makes it possible for someone intent on harassing a public body to always claim a violation in relation to every executive session ever held by any public body. No matter how much detail one supplies (or doesn't), one can always assert that another bit of information would not compromise the executive session. I describe this statute as apparently requiring boards to walk up to the edge of a cliff, hang their toes over, and lean as far as they possibly can without falling. But if the question is "reasonable" protection of the purpose of an executive session, I believe one is allowed to be a step or two away from the cliff's edge. Here, the problem was effectively notifying the investigation's target (and likely the whole school) of who or what was involved. I believe the risk of compromising the investigation was palpable and the Board understandably declined to try to add meaningless or uninformative details for purpose of form. Simply, with this grounds for executive session the direction to supply specificity when the number of possible targets of investigation is very, very small requires erring on the side of not making an ensuing investigation futile.

The February 17 Personnel Session

The motion in this case supplied specificity. You are, however, again misinformed when you say this was about "policy" rather than a specific employee. The so-called policy issue in this case — a wavier granted to MPA — was actually a wavier granted for the benefit of a single employee, regulating how that employee would be evaluated. Colorado teacher evaluation law directs that teacher evaluations be kept strictly confidential.[4] Simply, the waiver and how evaluations had been handled under it could not be discussed without revealing details related to the history of the evaluation of that employee, by name. A "policy" is "[t]he general principles by which a government is guided . . . ."[5] And the office of a "waiver" of policy is to suspend the general rule (the policy) in some limited circumstance — in this case for one and only one employee. This was not a discussion of any "general principle," but of one teacher and that teacher's evaluations — making it absolutely a core "personnel" issue for Open Meetings purposes. And that you are making the exception for "policy" discussions entirely swallow the

[4] C.R.S. § 22-9-109.
[5] BLACK'S LAW DICTIONARY, 1317 (1968).

rule shielding discussions of a specific individual can only mean you are misconstruing the exception. Notably, the teacher in this case believed his confidentiality had been destroyed by the specificity in the motion calling the executive session. That is, he concluded that the board's more detailed motion had effectively violated his privacy and that his evaluations were being discussed was fully known to the public in attendance. He thus agreed to the ensuing public motion using his name. That is, this act of full "transparency" came as a result of the teacher's rueful consent after the attempt to respect his privacy failed precisely because the Board attempted to comply with the "specificity" rule in a school with fewer than 20 faculty. This event, obviously, illustrates the dilemma of small scale involved in the other two sessions.

The May 19, 2015, Session

It is generally not possible to name students without destroying the confidentiality that is supposed to attach to the executive session. Thus, I find it curious that you would allege a violation but then suggest we merely attest that the students were not the McDaniels. Surely, the remedy required by your theory is that we supply "specificity" — that is, student identities, even of children of another parent. A proposal that MPA's motion to go into executive session should have been to discuss children "other than the McDaniels" is not a credible theory of law. Or is there another form of specificity you suggest: perhaps identifying a problem behavior (so the McDaniels can guess the name of the student)? Or we could say the child was "blond" or "weighed less than 50 pounds." But that would not be meaningful specificity: it would add noise, not information.

Again, because of the School's size, your claim that the motion required more specificity that could help the audience understand the purpose of the session would, in this case, compromise the legally-protected confidentiality of students. In short, we do not believe a discussion of students that gives specificity by family, or grade, or type of behavior, or any other genuinely informative detail can fail to compromise confidentiality in a school with only 17 classrooms and where students are quite infrequently discussed at the Board level. And your suggested remedy all but concedes this point: asking for exclusion of only two students by name because, obviously, any genuinely informative specificity would risk identifying students.

We had originally considered taking you up on the idea that this issue and perhaps this matter could be settled in some fashion. Given your client's recent conduct that appears futile.

Lack of Action

In two of these three instances (the investigation and the discussion of students) it happens that the executive session did not result in any action taken by the MPA Board. Thus, there is no action to be undone. In the case concerning teacher evaluation, the action, a matter of public

record, was to make sure the ongoing evaluation process for a named teacher was handled appropriately. And the core action (granting the waiver) was taken separately by the Jefferson County School District Board of Education. Last, again, after the executive session discussion the teacher, who reasoned that his identity was now known, permitted his name to be used explicitly in the public motion. The event, in short, became entirely "transparent," in every substantive sense and rests on an "action" taken by a different public body.

No Recordings

Under the Open Meeting Act, the legislature required that some (but not all) executive sessions be recorded electronically. Among those not to be recorded are discussions concerning students. Thus, there never was a recording of the May executive session, as there was never supposed to be one, by law. The recordings that are required are to be preserved for 90 days. This is the window in which demands for production can be taken to court so a judge can hear the recording. That window is long past and recordings from almost a year ago no longer exist. No recording exists of any of these executive sessions. Thus, there is neither action to be undone nor recordings to be produced. I understand this does not prevent someone from filing harassing litigation. It does, I believe, underscore that the real point of this ongoing exercise in theatrics is not transparency but a campaign of vexatious behavior, and thus an appropriate occasion for a court to award of sanctions against both the McDaniels and their counsel.

Contractual Records

The records requested by the McDaniels for which your firm provided a check for costs are separately attached. There were no payments of any kind to Mr. Dougherty.

This letter is not written for purposes of settlement and in any litigation may be attached to our request for sanctions.

Sincerely,

William P. Bethke

cc (w/o attachments): Montessori Peaks Academy