☐ Small Claims ☐ County Court ☒ District Court ☐ Probate Court ☐ Juvenile Court ☐ Water Court Jefferson County, State of Colorado 100 Jefferson County Parkway Golden, Colorado 80401	DATE FILED: December 21, 2016 2:13 PM CASE NUMBER: 2016CV30561 ▲ COURT USE ONLY ▲
Plaintiffs: ALEX MCDANIEL, an individual, and JOANNE MCDANIEL, an individual, v. **Defendants:** SOUTH JEFFCO MONTESSORI CHARTER SCHOOL, INC. d/b/a MONTESORRI PEAKS ACADEMY, a Colorado public charter school and nonprofit corporation.	Case Number: 2016CV30561 Division 3 Courtroom 4F

ORDER: CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross motions for summary judgment.[1] After considering the motions and related pleadings, relevant portions of the case file, and applicable legal authority, the Court enters this order.

I. UNDISPUTED FACTS[2]

1. This case arises out of allegations that Defendant South Jeffco Montessori Charter School, Inc., known as Montessori Peaks Academy ("MPA"), violated the Colorado Open Meetings Law ("COML") and the Colorado Open Records Act ("CORA") at a series of meetings in the spring of 2015.

[1] The cross-motions for summary judgment were presented in four pleadings: (1) Opening Brief of Defendant (August 19, 2016) ("Defendant's Motion"); (2) Plaintiffs' Motion for Summary Judgment and Response in Opposition to Defendant's Opening Brief (September 9, 2016) ("Plaintiffs' Motion"); (3) Reply Brief of Defendant (September 23, 2016) ("Defendant's Reply"); and (4) Plaintiffs' Reply in Support of Motion for Summary Judgment (October 4, 2016) ("Plaintiffs' Reply").

[2] The parties stipulated to most, if not all, of the material facts. *See* Stipulated Statement of Facts (August 2, 2016). The parties further stipulated that in "identifying beliefs, intentions or other states of mind of any individual or party, the parties stipulate to the state of mind but do not stipulate to whether the state of mind was or is correct or not, or was or is reasonable or not." *Id.* Finally, the parties agreed that the Court may decide this case in its entirety on these facts. *Id*

The Parties

2. Plaintiffs Alex McDaniel and Joanne McDonald ("Plaintiffs") are married and reside in Littleton, Colorado. They are the parents of two daughters, Aurora (12 years old) and Bella Nova (10 years old).

3. MPA is a Colorado nonprofit corporation with its principal place of business in Littleton, Colorado. MPA is a public charter school in and authorized by the Jefferson County School District ("District"). MPA was chartered by the District in 1996 and opened in 1997.

4. As a charter school, MPA is organized as a Colorado nonprofit corporation and governed by a board of directors ("Board"). The Board is a "local public body" under COML.

5. MPA provides programs for children from preschool (age three) through sixth grade. MPA's enrollment for the 2009-10 school year totaled approximately 457 students. The enrollment for the 2014-15 school year rose to approximately 550 students. Including all casual, part-time, substitute, and full-time regular staff, MPA had approximately 64 employees for the 2009-10 school year and 76 employees for the 2014-2015 school year.

The Genesis of the Parties' Dispute

6. Plaintiffs enrolled Aurora at MPA in August 2009 and Bella Nova at MPA in August 2011.

7. In December 2014, Mrs. McDaniel complained to MPA Principal Charlotta Weaver ("Principal Weaver") about Shannon Aasheim, a teacher at MPA. The parties have continued to disagree about the factual details of this complaint. Regardless, Aasheim stated that she was discontinuing all parent volunteering in the upper elementary classroom (grades 4, 5 and 6). Still later, Aasheim made exceptions for certain parents. But Mrs. McDaniel was not allowed to serve as a volunteer. Plaintiffs believe that these actions were targeted at Mrs. McDaniel. Aasheim disagrees.

8. Plaintiffs raised these issues with Principal Weaver and Board Officers Scott Cromwell and Shiloh Sword (then Board President and Vice-President, respectively). Sword is the current Board President. She began serving in this capacity in March 2015. She was formally elected to succeed Cromwell in April 2016.

The February Board Meeting

9. A regularly scheduled meeting of the Board was set for February 17, 2015 (the "February Board Meeting"). On or about February 14, 2015, Cromwell sent Plaintiffs an invitation to an executive session scheduled for the February Board

Meeting, with a subject titled "Personnel Matter CRS 24-6-402 4(f), Review Classroom Volunteering Conflict."

10. The agenda for the February Board Meeting listed four separate "executive sessions," only three of which are at issue here: [3]

> 7. Executive Session: Personnel Matter CRS 24-6-402 4(f), Discuss MPA Waiver to the Jeffco Board Policy GBEA, Staff Conflict of Interest for Montessori Peaks Academy
>
> 8. Executive Session: Personnel Matter CRS 24-6-402 4(f), Review Classroom Volunteering Conflict
>
> 9. Executive Session: Investigation CRS 24-6-402 4(d)

11. The Board did not post minutes of the February Board Meeting until around March 18, 2015.

The February Board Meeting – Executive Session Agenda Item #7

12. The Board did not take a roll call vote to approve the motion to enter into ES#7 at the February Board Meeting. However, the Board did act unanimously to enter that executive session.

13. ES#7 was electronically recorded as required by COML. This recording was maintained for 90 days, and destroyed on the 91st day after this executive session.

14. Following this executive session, the Board took action to approve a "waiver" to be submitted to District for approval. The waiver concerned a single employee, Dave Weaver. Dave Weaver believed the form of the motion to go into executive session had allowed the public to infer his identity and consented to his name being used in public session following the executive session. Dave Weaver retired in 2015, and his wife, Principal Weaver, retired in 2016. The waiver no longer applies to any employee or has any other effect on MPA operations.

The February Board Meeting – Executive Session Agenda Item #8

15. The parties disagree as to whether the Board voted to approve a motion to enter into ES#8 at the February Board Meeting. No vote is recorded in the minutes. The parties agree that to the extent a vote occurred, it was not by roll call.

[3] The Court refers to the three executive sessions by their numbered designation on the agenda, *i.e.*, "ES#7," "ES#8" and "ES#9."

16. ES#8 was electronically recorded as required by COML. This recording was maintained for 90 days, and destroyed on the 91st day after this executive session.

17. ES#8 was called to review Plaintiffs' concerns for their children and with their children's teachers and principal. Plaintiffs attended this executive session.

18. No action was taken by the Board following this executive session aside from referring the matter to Principal Weaver.

The February Board Meeting – Executive Session Agenda Item #9

19. The parties disagree as to whether the Board voted to approve a motion to enter into ES#9 at the February Board Meeting. No vote is recorded in the minutes. The parties agree that to the extent a vote occurred, it was not by roll call.

20. ES#9 concerned a suggestion of misconduct by a teacher. Sword, the then Vice-President of the Board, believed that providing any further detail regarding this session would create a significant risk that the identity of the employee who was the subject of this session would become public.

21. ES#9 was electronically recorded as required by COML. This recording was maintained for 90 days, and destroyed on the 91st day after this executive session.

22. No action was taken by the Board following this executive session.

23. Believing that this session concerned an investigation into Principal Weaver, Plaintiffs emailed Cromwell and Sword on or about March 2, 2015 to inquire into the status of this investigation.

Plaintiffs' Continued Complaints

24. Plaintiffs believe that Principal Weaver, MPA teachers, and members of the Board treated Plaintiffs and their children less favorably in 2015 because they challenged or questioned actions of Principal Weaver and the Board. MPA believes that its administration, teachers and Board did not treat Plaintiffs adversely and took no adverse action against any child based on parental behavior.

25. Plaintiffs made their concerns public no later than May 7, 2015, when they announced them at a meeting of the District Board. By the time of the May 19, 2015 Board Meeting, Plaintiffs had complained to District that, *inter alia*, MPA had treated their children less favorably than others. MPA was required to respond to this complaint. As of May 19, 2015, the District had not rendered a decision.

26. The District Board rendered a decision on May 26, 2015.

The May Board Meeting – Executive Session Agenda Item #12

27. On or about May 14, the Board posted the agenda for a regularly scheduled Board meeting to be held on May 19, 2015 ("May Board Meeting"). This meeting followed election of new Board directors and was the only meeting that both outgoing and incoming Board directors would attend.

28. The May Board Meeting agenda identified one executive session, agenda item 12: "Executive Session CRS 24-6-402(4) – 'discussion of individual students where public disclosure would adversely affect the person or persons involved.'"[4] Sword, the recently-elected President of the Board, believed that adding additional detail to the description of that session would create a significant risk of revealing to the public the identity of the children who were the subject of this session.

29. The Board voted on and approved the motion to enter into ES#12 at the May Board Meeting. The vote was taken by each director being given the opportunity to say "yes" or "no," with members of the public present being able to observe those individual responses and the vote then being recorded in the minutes by identifying each director's vote by name.

30. All votes taken by the Board since the May Board Meeting have been taken and recorded by identifying the directors who voted in favor, against, or abstained on each motion. The intention of the current President of the Board is that this voting practice will be permanent.

31. ES#12 was not recorded. No action was taken by the Board following this executive session.

32. MPA has disclosed in response to this litigation that ES#12 concerned the District's investigation of allegations regarding MPA's treatment of Plaintiffs' children. The day after the meeting, on May 20, 2015, Principal Weaver and the Board sent an e-mail addressed to "MPA Parents." Plaintiffs did not receive this e-mail.

33. On or about June 17, 2015, the May Board Meeting minutes were posted.

Plaintiffs' CORA Requests

34. Plaintiffs suspected that their daughters were the subject of ES#12. As a result, on July 21, 2015, Plaintiffs filed a CORA request with the Board.

35. On July 23, 2015, the Board responded by e-mail. The Board provided the minutes of the public session of the May Board Meeting along with an audio recording taken for the purposes of assisting in preparation of minutes.

[4] The Court refers to the executive session of the May Board Meeting as "ES#12."

36. In a follow-up letter to the Board, Plaintiffs asked for MPA to stipulate that their family was not the subject of the session. They believed that the session could have concerned other students, so they were content to receive a stipulation and not an identification of which students were the subject of the session. At that time, the Board declined to so stipulate or to reveal which students were the subjects of this session.

37. On July 30, 2015, Mr. McDaniel filed a second CORA request with the Board. MPA replied to the request.

The Litigation

38. Plaintiffs filed this case on April 5, 2016. MPA answered on July 8, 2016. The parties later stipulated that the case should be resolved by using a stipulated set of facts for cross-motions for summary judgment.

39. Plaintiffs assert four claims:

- Claim 1 – Violations of COML for failure to sufficiently identify executive sessions;
- Claim 2 – Violations of COML for use of executive sessions for improper purposes;
- Claim 3 – Violations of COML for destruction of electronic recordings of executive sessions; and
- Claim 4 – Declaratory judgment that the Board must comply with the meeting requirements of C.R.S. § 22-32-108.

They request the following relief: (1) an order awarding them their attorneys' fees in prosecuting this action under C.R.S. § 24-6-402(9); (2) an injunction requiring the Board to comply with COML; and (3) a declaration that C.R.S. § 22-32-108 applies to the Board.

40. MPA disputes all claims and the relief sought. MPA argues that the case is not justiciable and Plaintiffs' claims lack merit.

II. RELEVANT LEGAL AUTHORITY

Summary Judgment

41. Summary judgment is appropriate when the pleadings, affidavits, depositions or admissions establish that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002). The opposing party is entitled to the benefit of

all favorable inferences that may be drawn from the undisputed facts, and all doubts as to the existence of a triable issue of fact must be resolved against the moving party. *Id.*

42. The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Cont'l Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). When a party moves for summary judgment on an issue on which that party would not bear the burden of persuasion at trial, the moving party satisfies its initial burden by demonstrating to the court that there is an absence of evidence in the record to support the non-moving party's case. *Sanderson v. American Family Mut. Ins. Co.*, 251 P.3d 1213, 1216 (Colo. App. 2010).

43. If the moving party meets its burden, the non-moving party must demonstrate by relevant and specific facts that a real controversy exists. *Knittle v. Miller*, 709 P.2d 32, 35 (Colo. App. 1985); *Feeney v. Am. West. Airlines*, 948 P.2d 110, 111 (Colo. App. 1997). An adverse party may not rest upon mere allegations or denials in its pleadings, but rather must set forth specific facts through affidavits or discovery responses demonstrating the existence of a genuine issue for trial. *Id.* A genuine issue of material fact cannot be raised by counsel simply by the means of argument. *Hunter v. Mansell*, 240 P.3d 469, 476 (Colo. App. 2010). If the nonmoving party fails to establish a genuine issue for trial, then summary judgment may be entered in favor of the moving party if the moving party has met its ultimate burden of persuasion. *Sanderson*, 251 P.3d 1213.

Colorado Open Meetings Law

44. COML requires local public bodies to conduct meetings in public. C.R.S. §§ 24-6-401, 402.

45. The General Assembly has declared "that the formation of public policy is public business and may not be conducted in secret." *Arkansas Valley Publishing Company v. Lake County Board of County Commissioners*, 369 P.3d 725, 726 (Colo. App. 2015). "The intent of the Open Meetings Law is that citizens be given the opportunity to obtain information about and to participate in the legislative decision-making process." *Gumina v. City of Sterling*, 119 P.3d 527, 531 (Colo. App. 2004). "All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." C.R.S. § 24-6-402(2)(b); *see also Arkansas Valley*, 369 P.3d at 726.

46. Local public bodies may convene in executive session, which is not open to the public. *Gumina*, 119 P.3d at 531. This is an exception to the general rule of open meetings. *Id.* "The statute provides a list of topics that may be considered at an executive session." *Id.*; *see* C.R.S. § 24-6-402(4(a)-(h). This list is an exhaustive list, and executive sessions may not be convened except for these enumerated purposes. *See Hanover School Dist. No. 28 v. Barbour*, 171 P.3d 223, 228 (Colo. 2007) ("section 24-6-402(4) provides a list of topics that may be considered at an executive session").

47. In order to validly convene an executive session, a local public body must announce to the public: (1) the topic of discussion in the executive session – including a specific citation to the enumerated topics provided by § 24-6-402(4); and (2) identify "the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized." C.R.S. § 24-6-402(4). Two-thirds of the present quorum must vote in favor of entering the executive session. *Id.* The requirements for convening an executive session must be strictly complied with for an executive session to be valid. *Gumina*, 119 P.3d at 530. If a local public body does not follow the statutory requirements for calling an executive session, the meeting will not be considered an executive session, and instead is considered an open meeting. *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597, 601 (Colo. App. 1998) (finding that the district court erred by allowing minutes to be redacted despite concluding that the defendant was a local public body which had not validly entered executive session).

48. COML requires executive sessions of local public bodies to be electronically recorded. C.R.S. § 24-6-402(2)(d.5)(II)(A) ("Discussions that occur in an executive session of a local public body shall be electronically recorded."). These electronic recordings "shall be retained for at least [90] days after the date of the executive session." *Id.* § 24-6-402(2)(d.5)(II)(E).

49. CORA requires "all public records shall be open for inspection by any person at reasonable times, except . . . as otherwise specifically provided by law." *Id.* §§ 24-72-200.1 to 206. Custodians of public records must allow any person to inspect records that are open to the public. *Id.* § 24-72-204(1). Individuals seeking access to the recordings of executive sessions of local public bodies may apply "to the district court for the district wherein the records are found" and "show grounds sufficient to support a reasonable belief" that the local public body discussed matters not enumerated in COML. *Id.* § 24-72-204(5.5)(a). CORA does not make reference to the requirement that electronic recordings "be retained for at least 90 days."

50. COML provides that "any person denied . . . any of the rights that are conferred on the public by [COML] has suffered an injury in fact" and has standing in a suit challenging the denial. *Id.* § 24-6-402(9)(a). "There is no requirement that the violation be knowing or intentional." *Zubeck*, 961 P.2d at 601-02. If a court finds a violation of COML, then a party prevailing in such an action shall be awarded reasonable attorney fees and costs. C.R.S. § 24-6-402(9)(b); *see also Arkansas Valley*, 369 P.3d at 729.

51. If a local public body does not convene an executive session properly, "then the meeting and the recorded minutes are open to the public." *Gumina*, 119 P.3d at 531 *(citing Zubeck*, 961 P.2d at 601). COML also invalidates any "resolution, rule, regulation, ordinance, or formal action" that is made or taken at a meeting that does not meet the requirements of the act. C.R.S. § 24-6-402(8).

Declaratory Judgment

52. Under the Uniform Declaratory Judgments Law, district courts have the "power to declare rights, status, and other legal relations whether or not further relief is claimed." C.R.C.P. 57(a); C.R.S. §§ 13-51-101 to -115. The legislature has declared that the act "is to be liberally construed and administered." C.R.S. § 13-51-102. A "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." C.R.S. § 13-51-110.

III. ANALYSIS

53. The Court addresses the justiciability and/or mootness of Plaintiffs' claims. The Court then addresses each of Plaintiffs' four claims.[5]

Are the Claims Justiciable and/or Moot?

54. As to the first three claims, MPA argues that they are not "justiciable." At the four executive sessions at issue, no action was taken and all of the recordings have been destroyed. Therefore, MPA argues that there is no remedy available and as a result the claims are not justiciable.

55. MPA has not cited any authority or defined the concept of justiciability. Whether a case is justiciable refers to whether a case is "appropriate or suitable for review by a court." *See e.g.*, BLACK'S LAW DICTIONARY, (10th ed. 2014), justiciability. "Power vested in the judicial branch of Colorado government flows primarily from Article VI, section 1, of the Colorado Constitution." *Board of Directors, Metro Wastewater Reclamation Dist. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 105 P.3d 653, 655-56 (Colo. 2005). In exercising that power, "courts limit their inquiry to the resolution of actual controversies based on real facts." *Id.* "In the separation of powers design of Colorado government, courts limit their exercise of judicial power through jurisprudential doctrines that include standing, mootness, and ripeness, to establish parameters for the principled exercise of judicial authority." *Id.*

56. The Court finds that the first three claims are justiciable and properly before the Court. There has been and remains a genuine dispute about whether MPA violated COML. This dispute has not been resolved and can only be resolved by this Court. COML also gives standing to a complaining party and directs the Court to find injury in fact. C.R.S. § 24-6-402(9)(a). If the Court finds a violation of COML, then the party prevailing shall be awarded reasonable attorney fees and costs. *Id.* § 24-6-402(9)(b); *see also Arkansas Valley*, 369 P.3d at 729.

[5] MPA is a charter school organized as a Colorado Non-profit and governed by the Board. The parties have stipulated and the Court agrees that the Board is considered a "local public body" under COML. As such, the Board is subject to COML.

57. The Court also rejects MPA's argument that there is no remedy, and therefore no justiciable claim. First, the above-referenced analysis establishes the need to resolve the dispute and provide a statutory remedy. Second, accepting MPA's argument would condone improper behavior – a board could violate COML but be immune from any liability or consequences. This result is contrary to the purpose of the statute. Finally, COML "provides a mechanism for enforcement by private citizens" such as Plaintiffs. *Weisfield v. City of Arvada* , 361 P.3d 1069, 1072 (Colo. App. 2015); *see also Van Alstyne v. Hous. Auth. Of City of Pueblo*, 985 P.2d 97, 100 (Colo. App. 1999) (citizens who pursue claims under COML are "private attorneys general, who, through the exercise of their public spirit and private resources, caused a public body to comply with the Open Meetings Law").

58. As to the final claim for declaratory judgment, MPA argues that it is moot because the Board has recorded the individual votes of the board members since May 19, 2015. The Board intends this practice to be permanent. Further, MPA claims that the declaratory judgment request is moot because the abstract disagreement on whether MPA has a "board of education" does not give the parties an ongoing justiciable controversy. Plaintiffs disagree.

59. The Court disagrees and finds that the final claim is not moot. "A defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice." *United Air Lines, Inc. v. City and County of Denver*, 973 P.2d 647, 652 (Colo. App. 1998). "This is so because there is no certainty that the defendant will not resume the challenged practice once the action is dismissed, thereby effectively defeating the court's intervention in the dispute." *Id.*; *see also Denver Post Corp. v. Stapleton Development Corp.* 19 P.3d 36, 38 (Colo. App. 2000) (finding that even if defendant had voluntarily complied with CORA, it would not necessarily moot the claim). There remains a dispute between the parties as to whether C.R.S. § 22-32-108 applies to the Board. Even though the Board intends to record the individual votes of board members, there remains a dispute as to the legal requirements of meetings by the Board. Claim 4 is justiciable and properly before the Court.

Claim 1: Did MPA Violate COML by Failing to Sufficiently Identify the Executive Sessions?

60. Claim 1 alleges that three of the four executive sessions, ES#7, ES#9 and ES#12, were not sufficiently identified and described as required by COML.

61. Section 24-6-402(4) clearly sets out the requirements for a local public body to enter into a valid executive session. These requirements include both: (1) a citation to the specific provision of the statute allowing a local public body to enter into an executive session; "**and** [(2)] identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized." C.R.S. § 24-6-402(4) (emphasis added). The Court now analyses the description of each session.

62. ES#7 was described as "Executive Session: Personnel Matter 24-6-402 4(f), Discuss MPA Waiver to the Jeffco Board Policy GBEA, Staff Conflict of Interest for Montessori Peaks Academy." Plaintiffs claim that this description is not adequate because it does not include the staff member implicated by the waiver. There was no need to preserve the confidentiality of the staff member's identity because the conflict of interest, and therefore the subject of the waiver, was publicly known. The staff member – Weaver – was known to be the husband of Principal Weaver. Plaintiffs contend that the identity of Weaver was required in the description in order to meet the statutory requirement of "as much detail as possible without compromising the purpose for which the executive session is authorized."

63. The Court concludes that ES#7 was described in sufficient detail and complied with the statute. The description explained that an executive session was necessary to discuss a personnel matter involving a possible waiver of a conflicts of interest rule. It did so without compromising the purpose for which the executive session was authorized – a discussion about a potential conflict and the Weavers. Any further description was not required and would have disclosed matters most appropriate for executive session. In so finding, the Court takes a reasoned reading of the statutory requirement to provide detail. A local public body must be allowed some reasonable discretion when providing detail to assure the purpose of executive sessions is not compromised. The Board's actions relating to ES#7 did not violate the statute.

64. ES#9 was described as "Executive Session: Investigation CRS 24-6-402 4(d)." Plaintiffs argue that the word "investigation" is not adequate under the statute because it does not provide any identification of the particular matter to be discussed.

65. The Court finds that MPA's description of ES#9 violated C.R.S. § 24-6-402(4). In announcing the executive session, the Board simply cited to subsection 4(d) and quoted a single word from that subsection ("investigation"). The Board did not include the particular matter to be discussed and did not strictly comply with the requirements for convening an executive session. MPA attempts to excuse its obligations by arguing that this session concerned a session of misconduct by a teacher and the Board feared that the identity of the teacher would become public. Without more facts and details, these conclusory facts are not sufficient to excuse the Board's obligation under the statute. Any number of descriptions, *e.g.* "investigation of teacher misconduct," may have been appropriate and would not have compromised the purpose for which the executive session was authorized. The Board's actions relating to ES#9 violated the statute.

66. ES#12 was described as "Executive Session CRS 24-6-402(4) – 'discussion of individual students where public disclosure would adversely affect the person or persons involved.'" Plaintiffs claim that because the description does nothing more than cite the statute, and quote the language of the specific statutory safe-harbor, there was not sufficient detail to validly enter an executive session.

67. Like ES#9, Court finds the MPA's description of ES#12 violated C.R.S. § 24-6-402(4). In announcing the executive session, the Board simply cited to subsection 4(f) and quoted the statutory language ("discussion of individual students where public disclosure would adversely affect the person or persons involved"). The Board did not include the particular matter to be discussed and did not strictly comply with the requirements for convening an executive session. MPA attempts to excuse its obligations by arguing that this session risked revealing the identity of the students involved. Without more facts and details, such conclusory facts are not sufficient to excuse the Board's obligation under the statute. Any number of descriptions, *e.g.* "investigation of student misconduct," may have been appropriate and would not have compromised the purpose for which the executive session was authorized. The Board's actions relating to ES#12 violated the statute.

68. In sum as to Claim 1, the Court finds that MPA violated COML as to ES#9 and ES#12 by not sufficiently identifying the particular matter to be discussed at this single executive session. Summary judgment is entered in favor of Plaintiffs on their first claim as to ES#9 and ES#12.

Claim 2: Did MPA Violate COML by Holding ES#9 Because It Was Not Held for a Proper Purpose?

69. Claim 2 alleges that ES#9 was not conducted for a proper purpose, and was held in violation of COML. As noted above, the agenda simply stated "Executive Session: Investigation CRS 24-6-402 4(d)." Section 24-6-402(4) allows the Board to hold executive session for:

> [s]pecialized details of security arrangements or investigations, including defenses against terrorism, both domestic and foreign, and including where disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law.

The purpose of ES#9 was MPA's investigation into a suggestion of misconduct by a teacher. Very few details about the session have been provided, and the parties do not appear to dispute the facts any further.

70. Plaintiffs argue that an investigation into teacher misconduct does not fall within C.R.S. § 24-6-402(4)(d). They argue that subsection 4(d) only allows local public bodies to enter into executive sessions for the limited purpose of "[s]pecialized details of security arrangements or investigations." C.R.S. § 24-6-402(4)(d). This does not extend to every type of investigation. Because ES#9 did not involve safety, security, or criminal concerns there is no statutory basis for the executive session. They further argue that the statutory language of "including defenses against terrorism, both domestic and foreign, and including where disclosures of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law" limits subsection 4(d) to more serious matters

than non-criminal misconduct by an individual.

71. MPA argues[6] that investigations into employee misconduct falls within 4(d), and that the limitations Plaintiffs put on 4(d) are not logical. To read the statute as Plaintiffs read it would prevent the Board from effectively investigating allegations of misconduct by employees.

72. The Court agrees with MPA. Section § 24-6-402(4)(d) allows local public bodies to enter into executive sessions for the purpose of discussing "[s]pecialized details of . . . investigations." Subsection 4(d) can apply to investigations into employee misconduct beyond criminal misconduct. While subsection 4(f) directly includes personnel matters, subsection 4(d) is appropriate for investigations of personnel, in which the personnel in question are not yet aware of the investigation. The statute appears to distinguish between "security arrangements" and "investigations." C.R.S. § 24-6-402(4)(d). "Security" does not clearly modify "investigations." *Id.* Additionally, while the statute describes terrorism, the phrase "violation[s] of the law" is broader than criminal violations. For example, an individual can violate the law through a violation of the Colorado Open Meetings Law, and yet not have committed a criminal violation.

73. Here, the investigation of misconduct by a teacher falls within the statutory scope of an investigation "where disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law." The Court concludes ES#9 was conducted for a proper purpose.

74. In sum as to Claim 2, the Court finds that MPA did not violate COML because the session was held for a proper purpose. Summary judgment is entered in favor of MPA and against Plaintiffs on the second claim.

Claim 3: Did MPA Destroy the Electronic Recordings of the Executive Sessions in Violation of COML?

75. Claim 3 alleges that MPA violated COML by destroying the recordings of the three executive sessions of the February Board Meeting on the 91st day after the sessions were held.

76. Section 24-6-402(d.5)(I)(A) states that "discussions that occur in an executive session of a state public body shall be electronically recorded." Further, the recordings of such executive sessions "shall be retained for at least ninety days after the date of the executive session." C.R.S. § 24-6-402(d.5)(I)(E).

[6] MPA first argues that Plaintiffs have abandoned this claim because no facts in the Stipulated Facts support the claim. The Court disagrees with the abandonment argument. Plaintiffs have clearly articulated what they allege to be a violation of COML, using facts from the Stipulated Facts and attached exhibits. However, those facts do not meet Plaintiffs' burden of showing a violation of the subsection.

77. Plaintiffs argue the Board was on notice that they were concerned with the Board's use of executive sessions at the February Board Meeting before the 91st day after the session. Therefore, the Board should have preserved the recordings beyond the 90 day statutory requirement.

78. MPA disagrees and maintains it was not required to keep the electronic recordings beyond 90 days. It argues that there is only one way for a member of the public to potentially inspect such electronic recordings. The individual must apply to a court for access, the court will then conduct an in camera inspection of the recording. If the court determines that the executive session was not proper under C.R.S. § 24-6-402(4), the court then must direct the improper portion of the record to be available for public inspection. *See* C.R.S. §§ 24-6-402(2)(d.5)(II)(C), 24-72-204(5.5)(a). There is no obligation to preserve an executive session recording beyond 90 days unless a timely request is made.

79. According to the statute, MPA had a statutory obligation to retain the recordings for at least 90 days. There was no statutory obligation to retain beyond that time period. By retaining the recording for 90 days, MPA complied with its statutory obligation. Further, Plaintiffs have not established by a preponderance of the evidence that the Board was on notice that the electronic recordings were requested prior to their destruction. The Board was not on notice until the Plaintiffs email on July 30, 2015 (164 days after the executive sessions). The prior communications did not provide sufficient notice that the recordings must be preserved or were at issue.[7]

80. In sum as to Claim 3, the Court finds that MPA did not violate C.R.S. § 24-6-402(2)(d.5)(II)(E). Summary Judgment is entered in favor of MPA and against Plaintiffs on the third claim.

Claim 4: Should the Court Enter Declaratory Judgment that the Board (as a Charter School Board) is Subject to C.R.S. § 22-32-108?

81. Plaintiffs request the Court to declare that the Board subject to the requirements of C.R.S. § 22-32-108.

82. Article 32 of Title 22 provides for the powers and duties of school district boards. Section 22-32-108 governs meetings of the board of education. Boards of education, similarly to other local public bodies, may enter into executive sessions. However C.R.S. § 22-32-108 places further restrictions on such executive sessions. For example, a "board shall not make final policy decisions while in executive session." C.R.S. § 22-32-108(5)(a); *see Hanover School Dist.*, 171 P.3d. at 228. Boards of education must vote by roll call. C.R.S. § 22-32-108(6). Names of members are to be called alphabetically and board members must orally vote on each question. *Id.*

[7] The Court need not decide the question of whether a timely court action is the sole notice that would require a local public body to maintain electronic recordings of an executive session past 90 days.

83. Plaintiffs cite to the growing number of and expansion of existing charter schools in Colorado. This expansion includes a number of entities that oversee and manage multiple schools. Because these entities are acting as boards of education, their meetings should be regulated by the same statute as traditional boards of education. Plaintiffs also claim to have researched the proceedings of several charter schools and found that violations of COML around executive sessions are common. Therefore, there is a need for increased oversight of charter schools. Plaintiffs ask the Court to declare the Board subject only to C.R.S. § 22-32-108, not the remainder of Article 32. In particular, Plaintiffs claim that MPA should be required to use roll call voting procedures. They claim this would serve the public by promoting transparency.

84. MPA argues that because charter school boards and boards of education are distinct entities, C.R.S. § 22-32-108 only applies to boards of educations of school districts, not to the Board. Boards of education and charter school boards are created under different statutory procedures. *Compare* C.R.S. § 22-30.5-104(4) (charter schools) *with* C.R.S. §§ 22-30-101 to 128 (School District Organization Act of 1992). Additionally, boards of education have an entirely different set of powers and duties than the Board. *See* C.R.S. §§ 22-42-117(1), 22-32-111, and 22-31-103). Finally, Plaintiffs' public policy argument are wrong because, charter school boards are subject to direct review by the school district's board of education.

85. When interpreting a statute, a court must do so "in a way that gives effect to the General Assembly's purpose or intent in enacting it." *Free Speech Def. Comm. v. Thomas*, 80 P.3d 935, 936 (Colo. App. 2003). A court must begin with the plain language of the statute. *Id.* If the statute is unambiguous a court does not need to look any further. *Id.*

86. The Court concludes that C.R.S. § 22-32-108 does not apply to the Board. The parties agree that the board of directors of a charter school and a board of education have different powers and duties. Charter schools and the boards that regulate them are created and governed by Article 30.5. C.R.S. §§ 22-30.5-101 to 120. The statutory scheme clearly differentiates between charter school boards and boards of education. Further, it is plain from the statutory structure that the board of directors of a charter school, the Board, is distinct from a board of education subject to C.R.S. § 22-32-108. Therefore, the Court will not declare that the Board is subject to the meeting requirements of C.R.S. § 22-32-108, including the roll call voting procedure.

87. Finally, Plaintiffs' argument that public policy compels application of the statute to the Board is nothing more than a political question. Such a determination is constitutionally committed to the legislature not the judiciary. *See e.g., Colorado Common Cause v. Bledsoe*, 810 P.2d 201, 205 (Colo. 1991) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

88. In sum as to Claim 4, the Court rejects the declaratory judgment request as contrary to Colorado law. Summary Judgment is entered in favor of MPA and against Plaintiffs on the fourth claim.

IV. CONCLUSION

89. For the above reasons, the Court enters summary judgment in favor or Plaintiffs and against MPA on the first claim and enters summary judgment in favor of MPA and against Plaintiffs on claims two, three and four. Plaintiffs have not established any right to an injunction or declaratory judgment. This case is closed. If the parties seek to recover attorneys' fees and costs, on or before January 4, 2017, they must schedule an in-person conference with the Court.

December 21, 2016.

BY THE COURT:

Jeffrey R. Pilkington
District Court Judge