EL PASO COUNTY DISTRICT COURT, STATE OF COLORADO 270 South Tejon St. Colorado Springs, CO 80903 719-452-5000	DATE FILED: April 15, 2020 3:58 PM FILING ID: E8FA0350A0213 CASE NUMBER: 2019CV32570
Plaintiff: **MELANIE KNAPP** v. Defendant: **BOARD OF EDUCATION, ACADEMY DISTRICT TWENTY**	◄ Court Use Only ►
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DEFENDANT BOARD OF EDUCATION OF ACADEMY DISTRICT TWENTY'S REPLY IN SUPPORT OF ITS RULE 56(h) CROSS-MOTION FOR DETERMINATION OF A QUESTION OF LAW

Defendant Board of Education of Academy District Twenty ("Board"), by its attorneys Catherine A. Tallerico, Johnathon D. Intolubbe-Chmil, and Brian L. Allard of the law firm Lyons Gaddis, P.C., hereby submit its Reply in Support of its Rule 56(h) Cross-Motion for Determination of a Question of Law, stating as follows:

INTRODUCTION

This Court should grant Defendant's Rule 56(h) Cross-Motion for Determination of a Question of Law as there is no genuine issue of material fact and Defendant is entitled

to judgment as a matter of law. In Plaintiff's Response to Defendant's Rule 56(h) Cross-Motion for Determination of Question of Law, she flatly declined to address Defendant's question of law, which should be answered in the affirmative.

> Pursuant to the current language of the Colorado Open Meetings Law and Colorado Open Records Act, does a local public body have the discretion to make public one or more finalists in a chief executive search?

Instead, Plaintiff wrongly focuses on a non-binding Denver Court Order which is being appealed (see attached as **Exhibit G**, Notice of Appeal). That Denver Court Order improperly adds language and requirements to the statutes and does not conform to the stipulated facts in this matter. Additionally, Plaintiff misconstrues the language of the Colorado Open Records Act ("CORA") and the Colorado Open Meetings Law ("COML"), discounts the statutory discretion provided to Boards in picking a finalist or finalists, and overlooks the plain text and express changes made to the statutes over the years. She has therefore failed to demonstrate that Defendant is not entitled to judgment as a matter of law. As a result, this Court should issue an Order granting Defendant's Rule 56(h) Cross-Motion for Determination of a Question of Law.

ARGUMENT

I. The Denver District Court Order, as recently appealed, is not binding on this Court.

A trial court is not bound by the decisions of other trial courts. Trial courts must generally only follow the decisions that it makes under the same facts with the same parties. *See People ex rel. Gallagher, In & For Eighteenth Judicial Dist. v. Dist. Court In & For Arapahoe Cty.,* 666 P.2d 550, 553 (Colo. 1983). The current case is not filed in the Denver Court and does not involve the Daily Camera, the Board of Regents of the

University of Colorado (Board of Regents), or appointment of a university president. Therefore, this Court is not obligated to follow that Court's Order.

In its Rule 56(h) Cross-Motion for Determination of a Question of Law, Defendant requested - in a footnote - that this Court take judicial notice of the case, *Prairie Mountain Publications, LLP d/b/a Daily Camera v. the Board of Regents of the University of Colorado*, 2019CV33759, to ensure that it was aware of other similar pending litigation, litigated by the same attorneys representing Plaintiff. Defendant nonetheless respectfully disagrees with the recent Order issued by the Denver Court in that case, as does the Board of Regents, based upon their appeal. The Denver Court's Order improperly adds language and requirements to the statutes and fails to address the factual circumstances of this case. In particular, nowhere in the CORA or COML is the language "final round of competition" subject to public disclosure found, as the Denver Court sets out.

> In sum, the statutes provide that the finalists are the members of the final group of applicants or candidates. A finalist is someone who competes in the *final round of competition*. Plaintiff's Exhibit 17 pg. 8 (emphasis added)

However, COML simply states that "[t]he state or local public body shall make public the list of all finalists under consideration for the position of chief executive officer no later than fourteen days prior to appointing or employing one of the finalists to fill the position." § 24-6-402 (3.5) C.R.S. CORA also defines a "finalist" as "an applicant or candidate for an executive position as the chief executive officer of a state agency, institution, or political subdivision or agency thereof who is a member of the final group of applicants or candidates made public pursuant to section 24-6-402(3.5)" § 24-72-204 (3)(D)(XI)(A) C.R.S. Accordingly, as currently written, the statutes permit a Board to

disclose the individual or individuals under consideration for an executive position to the public fourteen days before hire. That is it. The statutes make absolutely no mention of a "final round of competition" as the Denver Court Order wrongly interjects.

Along those same lines, the Denver Court Order is internally inconsistent. It wrongfully tries to reductively reason to the outcome desired by adding words and information not provided in the statutes. It jumps from the statutory language requirement of the public disclosure of a "final group" of the individual or individuals being considered, to adding the phrase "final round of competition" and attempting to tie it to the facts of the case by including the phrase "candidates interviewed." It then expands its view back out to the statutory language to wrongly state that "group" and "list" require more than one finalist.

> In sum, the statutes provide that the finalists are the members of the *final group* of applicants or candidates. A finalist is someone who competes in the *final round of competition*. Here, based on the stipulated facts, the six *candidates interviewed* by the Board of Regents are the members of the final group of candidates who competed in the final round of competition. Under the plain and ordinary meaning of the statutes, the *"group"* and *"list"* of finalists includes more than the sole applicant that the Board of Regents chose to disclose. Plaintiff's Exhibit 17 pg. 8-9 (emphasis added).

This type of reductive reasoning, by including words and phrase not found in the statutes, is entirely improper for statutory interpretation. It creates inconsistencies that cannot be followed. Citing none of the added language and phrases, the Denver Court Order concludes that the Board of Regents had to disclose all six individuals it *interviewed.*

> The Board of Regents has failed to show cause that it properly denied the Daily Cameras CORA request or the names and application material of the finalists for the University of Colorado President position. The Board of

> Regents shall therefore produce the list of names and application materials of the six candidates *interviewed* by the Board of Regents to the Daily Camera within 21 days of this Order.

Plaintiff's Exhibit 17 pg. 15 (emphasis added).

Nowhere in the statutes are Boards required to disclose the name of individuals they interview for executive positions. In fact, like explained below under heading IV, by requiring the disclosure of the individuals that the Board interviewed, it is incorrectly resurrecting mandates expressly taken out of the statutes over eighteen years ago. Further, the Denver Court Order unjustifiably criticized the Board of Regents for its failure to "refine or revise" its six candidates for the president position in apparent violation of COML.

> The Board of Regents asserts that, even if multiple finalists were contemplated by CORA, here there was only one, Mr. Kennedy. Therefore, there is no judicial standard that would allow "the Court to hold that all six candidates interviewed by the Board of Regents were finalists." Defendants Proposed Order at 7. The Court disagrees. To the extent this is a problem, it is one of the Board's making, and not this Court's, by virtue of the Board's failure to comply with CORA and COML. The Board could have further refined or revised the list of six, and still have had a "list of finalists," but it did not do so.

Plaintiff's Exhibit pg. 8.

While also being well outside the plain language of the statutes, a review of the stipulated facts in the current case shows that the Denver Court's standard is unworkable and leads to absurd results. In the current matter, Defendant "refined or revised" its list as the Denver Court discussed, but is still being challenged based on its arrival at a single qualified finalist. The standard announced by the Denver Court is elusive and fails to follow the plain language of the statute. Defendant narrowed down the candidates

multiple times throughout its search process, going from twenty-six qualified applicants down to five, then to four, three, and ultimately one. Stipulated Facts ¶¶ 8 & 10. But, even with these "refine[ments] or revis[ions]" Defendant has no way of knowing how to comply with the Denver Court Order. *See People v. Mosley*, 397 P.3d 1122, 1127 (Colo. App. 2011) ("statutory interpretation leading to an illogical or absurd result will not be followed"). The time at which the "revisions and refinements" reaches the triggering point for public disclosure as a finalist is not outlined in the Denver Court Order. The statute cannot be referenced in establishing the standard because the statutes do not include a minimum number of required finalists nor any reference to a "final round of competition."

If this Court were to follow the Denver Court Order, Boards would be left guessing on how they must "refine or revise" their list to come to a "final round of competition" to stay in compliance with CORA and COML. As the statutes are currently written, they clearly provide discretion to Boards to decide who the finalist or finalists are, prompting the fourteen-day disclosure requirement. There is no guessing or added language necessary for Boards. Finally, the Denver Court improperly reads in a requirement that the public must have an opportunity to evaluate the competition for executive positions.

> Not only was the public deprived of the opportunity to compare Mr. Kennedy to his competitors, but just as importantly, the public could not evaluate the Board's performance in selecting Mr. Kennedy as the only finalists when information regarding his Competition was kept secret.

Plaintiff's Exhibit 17 pg. 14.

COML only requires that there be public notice before a finalist is offered appointment or employment. § 24-6-402 (3.5) C.R.S. There is simply no requirement that the public weigh in and compare the competition as called for by the Denver Court. As a

result, Defendant, with all due respect, disagrees with the appealed Denver Court Order, and asserts this Court should not follow it.

II. The Terms "finalist," "list," "group," "member," and "one of" were not ignored by the Defendant; they are simply not vital to the Disclosure Requirements of the Statutes.

Plaintiff's focus on the terms "list" and "one of" in COML and "group" and "member" in CORA is misplaced. Defendant in no way reads these terms out of the statutes or makes them superfluous. Rather the statutes plainly require that a Board disclose the individual or individuals it is considering for an executive position fourteen days before hire. That is all. Put simply, the use of the plural is reasonably read to include the singular as opposed to excluding it. The standard is one of reasonable discretion based on the circumstances of the search and the qualifications of the applicants. Plaintiff's added requirements based on these terms leads to absurd and illogical results.

Plaintiff completely ignores the fact that the only triggering point for disclosure by the Board is the fourteen days before hire. The plain language of the disclosure requirement cannot be read to include a minimum number of finalists nor a "final round of competition" standard. The use of plural terms within the entire statutory framework does not change the limited public disclosure requirement. Furthermore, neither CORA nor COML require any level of competition. The determination of how a governing body narrows the list of candidates is entirely left to their discretion. There is no requirement to hold interviews at all let alone interviews made available to the public. Plaintiff is ignoring the plain language of the statute by inferring that any such requirements exist.

Absent specific direction to the contrary, the terms "list," "group," or "member," can be reasonably read to include instances in which only one individual meets the qualifications to be on a list or a member of a group. Contrary to Plaintiff's provided definition, "group" means "a number of individuals assembled together or having some unifying relationship." Merriam-Webster Dictionary http://www.merriam-webster.com/dictionary/group (accessed April 8, 2020). Under this definition, the word "a" and phrase "unifying relationship" permit there to be a group of one. "A" number could include one. Likewise, if the "unifying relationship" results in there being one individual or thing in a group, it is still considered a group. For example, if a business has an open position and receives three applications, two of which have college degrees and one having a high school diploma, the unifying relationship would be the level of education.

The two applicants with college degrees would be grouped together and the one applicant with a high school diploma would be in a group of his or her own. This outcome, of a group of one, is in line with the definition of group. The same is true for the CORA and COML statutes. The unifying relationship is who the Board considers to be a finalist, which could be one individual. The Board is not required to choose more than one individual for public disclosure. Similarly, except for the situation where there are only three candidates that apply for an executive position, which is not the case here, the statutes do not require a certain number of individuals be disclosed. It is up to the Board to decide the individual or individuals it wants to make public.

Finally, Plaintiff's statutory analysis is flawed. Courts must read singular nouns in the plural and plural nouns in the singular. *People v. Crawford*, 230 P.3d 1232, 1235

(Colo. App. 2009) (a Colorado statute *requires* that we read singular nouns to include their plural form and plural nouns to include their singular form); § 2-4-102 C.R.S. There is no leeway as Plaintiff claims. How else is the legislature supposed to write statutes broad enough that they address all the various circumstances and purposes they are meant to cover? *See Colorado State Bd. of Accountancy v. Paroske*, 39 P.3d 1283, 1285-87 (Colo. App. 2001) (finding that the state accountancy laws required a solo practitioner to register as an accountant, even though the statutes were written in the plural). Here, the terms in COML and CORA can be read in the singular as the legislature specifically gave the power to Boards to decide the finalist or finalists they choose for public disclosure fourteen days before hire. To read in anything more would be to improperly add language to the statutes in contradiction to their express language.

III. The Board has the Authority to Pick the Finalist(s) of its Choosing in Line with its Policy.

As CORA and COML are currently written, the public disclosure requirement for a finalist or finalists is left up to the Board. The Board's policy, CBB, and its constitutional and statutory mandates for picking a qualified superintendent, align with CORA and COML. The General Assembly being aware of the various public entities enabling statutes requirements for hiring qualified candidates, rightfully provided it with discretion to choose who to *disclose* to the public, so as not to interfere with how it does its business. This is not unfettered discretion as Plaintiff claims. It is a recognition by the General Assembly of the duties mandated on Boards across the state. In the present matter, the Board by its adopted policy regarding hiring a superintendent, and constitutional and statutory obligations it has under Colo. Const. Art. IX, § 15 and § 22-32-110 C.R.S and § 22-32-

109 C.R.S., to control instruction of the school through employment of quality personnel, met this requirement.

CORA and COML provide no mandate that the public weigh in on the candidate or candidates that the Board chooses to disclose for an executive position. The only requirement is that the individual or individuals under consideration for appointment or employment be made public fourteen days before hire. The Board policy, CBB, fits this requirement as the Board chooses who the finalist or finalists are subject to disclosure. There is no inconsistency between the policy and statutes. If the Board decides that one individual best fits the needs of the school and is the only candidate under consideration for employment, then that is the only person required to be publicly disclosed under CORA and COML.

IV. The Quantity of Citations to Legislative History in No Way Trumps the Clear and Plain Language of the Statutes and the Terms Expressly Removed by the General Assembly.

In an unfounded attempt to misdirect this Court from the express and plain language of the statutes, Plaintiff finally claims that its various citations to the legislative history is somehow controlling. However, as Defendant properly sets out in its Rule 56(h) Cross-Motion for Determination of Law, not only does the Court not need to read the legislative history as the express language is clear, but if it does so, the legislative history supports the Board's discretion to name a single finalist. When the General Assembly amended CORA and COML over eighteen years ago, it removed the language requiring disclosure of individuals being *interviewed* for a position, and provided the discretion to

Boards to determine whom to disclose. The trigger for disclosure now rests with the Board, fourteen days before hire.

The statements by the various legislators do not change this analysis. Those statements directly align with the changes made in the statutes in late 1990's and early 2000's. The statements focused on the public disclosure requirement, fourteen days before hire. *See* P. Resp. to Def. Rule 56(h) Cross-Motion for Determination of Question of Law pg. 11. None of the legislators' statements discussed specific numbers of individuals required for disclosure even when they used the term finalist in the plural and the Plaintiff's ignore that legislators specifically clarified that a single finalist could be named. Ex. 14 to Plaintiff's Motion, pgs. 7-8. As described above, there can be a list, group, or member containing one individual.

Plaintiff's final argument, that the Board must disclose the five individuals it *interviewed* for the superintendent position, because the legislator left in the terms "list," "group," and "member," constitutes an impermissible step back into the past. The General Assembly specifically took out the requirement that those interviewed for a position be disclosed to the public. That requirement had become unworkable for Boards, as they were no longer receiving qualified applicants. Plaintiff's Exhibit 14, pg. 3. As a compromise, the discretion is now left up to the Board per the statutes. Thus, Plaintiff is not entitled to the disclosure of the five individuals interviewed by the Board. The Board was correct in naming a single finalist.

CONCLUSION

This Court should grant Defendant's Rule 56(h) Cross-Motion for Determination of Law as there is no genuine issue of material fact and Defendant is entitled to judgment

as matter of law. Defendant's question of law was never addressed by Plaintiff and should be answered in the affirmative by this Court.

> Pursuant to the current language of the Colorado Open Meetings Law and Colorado Open Records Act, does a local public body have the discretion to make public one or more finalists in a chief executive search?

Plaintiff further has failed to show that the Defendant is not entitled to judgment as a matter of law. Her reliance on the recently appealed Denver Court Order is misplaced in that it is not binding on this Court. Defendant also respectfully disagrees with the Denver Court Order, as does the Board of Regents, in that it improperly adds language and requirements to the statues and does not fit within the stipulated facts of this case. Plaintiff further misinterprets the significance of terms found in CORA and COML, wrongly ignores how the Board's authority to pick a superintendent works within the statutes, and erroneously overlooks the plain text of the statutes and express changes made to them by the General Assembly. This Court should therefore grant Defendant's Rule 56(h) Cross-Motion for Determination of Question of Law.

Dated: April 15, 2020

LYONS GADDIS KAHN HALL
JEFFERS DWORAK & GRANT, PC

By: Catherine Tallerico
Catherine A. Tallerico

CERTIFICATE OF SERVICE

This is to certify that on April 15, 2020, a true and correct copy of the Defendant Board of Education of Academy District Twenty's Reply in Support its Rule 56(h) Cross-Motion for Determination of a Question of Law was e-filed and served via CCEF electronic system upon:

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