

<p><b>DISTRICT COURT, TELLER COUNTY, COLORADO</b>  Court address: <b>101 West Bennett Ave., P.O. Box 997, Cripple Creek, CO 80813</b>  Phone Number: <b>(719) 689-7360</b></p>	<p>DATE FILED: September 16, 2022 9:54 AM  CASE NUMBER: 2022CV30023</p>
<p>ERIN O'CONNELL,  Plaintiff,</p> <p>Vs</p> <p>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.</p>	<p style="text-align: center;"><b>Court Use Only</b></p> <hr/> <p>District Court Case Number:  <b>2022CV30023</b>  Division <b>11</b></p>
<p><b>ORDER RE: PLAINTIFF'S MOTION FOR CONTEMPT</b></p>	

THIS MATTER came before the Court on September 2, 2022 for a Contempt Hearing against Defendant Woodland Park School District Board of Education ("Board") and Chris Austin, David Illingworth, Suzanne Patterson and David Rusterholtz in their official capacities as Board members. Plaintiff was represented by Mr. Maxfield, Defendants by Mr. Carlson. I have considered the testimony of the witnesses, prior April 29, 2022 Order, admitted exhibits, statements of counsel, the applicable law and FIND and ORDER as FOLLOWS:

BACKGROUND AND HISTORY

This Court granted a preliminary injunction against the Defendants on April 29, 2022. That Order found Defendants had violated the Colorado Open Meetings Law ("OML") on January 26, 2022 by posting an agenda item titled "BOARD HOUSEKEEPING". The Court found it was a conscious decision to hide a controversial issue regarding Merit Academy ("Merit"), a related Memorandum of Understanding with Merit Academy and the intent to make Merit a charter school. The Order contained the following language:

A preliminary injunction is GRANTED. The Defendant shall comply with the OML by clearly, honestly and forthrightly listing all future Agenda items regarding Merit Academy. Perhaps something as simple as “Merit Academy Charter School Application”. The Board is further enjoined from “rubber stamping” any Board decision that does not comply with the notice requirements of the OML.

### ALLEGATION OF CONTEMPT BY PLAINTIFF

Plaintiff (“O’Connell”) alleges Defendants violated the April 29, 2022 Order for the May 4, 2022 Board Meeting by posting an Agenda that did not comply with the OML. The Agenda included an item listed as follows:

- ii. Information
  - a. Feasibility Study Presentation by Executive Director of Technology & Operations, Miles Tuttle, followed by BOE Q & A with Cooperative Strategies.

Plaintiff alleges the feasibility study was prepared by private entity Cooperative Strategies concerning the feasibility of Merit Academy sharing space with the Woodland Park Middle School. Plaintiff asserts the failure to mention Merit Academy violated the April 29<sup>th</sup> Order and requests the Board and members be found to be in remedial contempt, and that the Court nullify the May 4<sup>th</sup> decision and requests the Board to properly list the Agenda and redo or revote on all Merit Academy issues. Plaintiff admits it may not change anything, but the Board must comply with the law.

### POSITION OF DEFENDANTS

Defendants assert that both O’Connell and the public knew exactly what the Feasibility Study was, the Agenda was clear, honest, and forthright, and the Motion should be denied.

### APPLICABLE LAW

Indirect contempt is governed by C.R.C.P. Rule 107. The burden of proof for remedial contempt is by a preponderance of the evidence. To prove something by a “preponderance of the evidence” means to prove that it is more probably true than not. C.R.S. 13-25-127(1) and CJI-Civ. 3:1 (CLE ed. 2019).

The elements of remedial contempt are that the contemnor was subject to a court order, did not comply with a lawful order of the court; knew of the order; failed to obey the order, has the present ability to comply with the order. *In re the*

*marriage of Cyr and Kay*, 186 P.3d 88 (Colo. App. 2008). Once a prima facie showing is made by the moving party the burden shifts to the alleged contemnor to prove inability to comply with the order. *In re the Marriage of Lamutt*, 881 P.2d 445 (Colo. App. 1994).

In determining whether an Agenda item is a “full” notice within the meaning of the OML the Colorado Supreme Court applied an objective standard, meaning that a notice should be interpreted in light of the knowledge of an ordinary member of the community to whom it is directed. *Darien v. Town of Marble*, 181 P.3d 1148 (Colo. 2008).

The Colorado Supreme Court has declined to impose a precise Agenda requirement because it would unduly interfere with the legislative process. The court in *Marble*, found that Colorado has adopted a flexible standard that would take into account the interest in providing access to a broad range of meetings at which public business is considered as well as the public body’s need to conduct its business in a reasonable manner.

#### STIPULATED FACTS AND EXHIBITS

Counsel stipulated that the Board Agenda for 5/4/22 was publicly posted and sent by email to O’Connell on 4/28/22 and the Agenda was approved by the Board at its 5/4/22 meeting. Stipulated Exhibits A through M were admitted as well as Defendants’ Exhibits O, P and S.

#### FINDINGS OF FACT

The May 4, 2022 Board Agenda did not mention Merit. The Feasibility Study admitted as stipulated Exhibit L was prepared by Cooperative Strategies to review the feasibility of Merit sharing space with the middle school.

Board members, Rusterholtz, Illingworth, Patterson and Austin all testified they were aware of the April 29, 2022 Order prior to the May 4<sup>th</sup> Board meeting.

The Board minutes from the May 4<sup>th</sup> Special Meeting approved the Agenda as written. The minutes demonstrate the Feasibility Study was presented and discussed by the Board. Merit Academy is mentioned in the EXECUTIVE SESSION portion of the minutes as discussing specific legal questions concerning the proposed term of a charter contract with Merit Academy and Facilities Use Agreement.

The Woodland Park School District released a public statement acknowledging the April 29<sup>th</sup> Order on or before 5/1/22 (Exhibit A). Rusterholtz

testified he did not recognize the document but may have had some help writing it. Illingworth and Austin both testified they did not recognize the statement and had not seen it.

The Board also had an April 27, 2022 work session/Special Board Meeting. Agenda Item III.a was titled Feasibility Study Presentation by Executive Director of Technology and Operations, Miles Tuttle (Exhibit J). This was the same Feasibility Study discussed on May 4<sup>th</sup>. The April 27<sup>th</sup> meeting was held after the April 26<sup>th</sup> Preliminary Injunction Hearing and before the April 29, 2022 Order was issued.

School employee Logan Ruths denied a request from O'Connell for a copy of the Feasibility Study on April 28<sup>th</sup> because it was "work product". Miles Tuttle released the Feasibility Study to O'Connell's lawyer on May 4<sup>th</sup> at 1:29 p.m. before the 6 p.m. Board meeting that night. Dr. Neal, Transition School Superintendent, testified that on May 3<sup>rd</sup> he declined to release the Feasibility Study to O'Connell because he wrongly believed it was work product.

The Study was not released or made available to the public before May 4<sup>th</sup>, with the exception of O'Connell who made a CORA request. Dr. Neal provided the Feasibility Study to the Board and Merit Academy prior to the April 27<sup>th</sup> meeting. Illingworth testified he received the Feasibility Study about six to seven hours before the April 27<sup>th</sup> Board meeting and action on the study was postponed because he did not have enough time to review it. In fact, a video of the April 27<sup>th</sup> Board meeting shows Illingworth commenting at length about the lack of time available to review the report prior to the meeting.

The April 27, 2022 Board minutes reflect that the Board did not have sufficient time to review the Feasibility Evaluation. The minutes reflect the following statement: "It was agreed that a special Board meeting be held on Wednesday, May 4, 2022 to be presented with the Feasibility Evaluation for Merit's use of the Middle School. MOTION CARRIED; VOTING AYE – Austin, Illingworth, Patterson, Rusterholtz."

Despite the stated intent on April 27<sup>th</sup> by the Board to postpone discussion of the Feasibility Study of Merit's use of the Middle School until the May 4<sup>th</sup> meeting, Merit Academy or its use of the Middle School was not listed on the May 4<sup>th</sup> Agenda.

Rusterholtz testified that he had numerous meetings with people on both sides of the Merit issue and that people representing both sides of the issue attended Board meetings. There had been extensive community discussion of the issue on social media, Facebook and the local papers. He wrote the April

27<sup>th</sup> Agenda before he received Judge Sells' Order. Austin testified he had discussions with community members about Merit and had no reason to believe the Board was trying to conceal the issue on the May 4<sup>th</sup> Agenda.

Illingworth testified he believed the community understood what the Feasibility Study was because it was the only Feasibility Study we had, and the Board had been talking about it for some time. He said at a March 30<sup>th</sup> Board meeting the focus shifted from Merit using the Columbine School, to the Middle School and about 100 people were present at the meeting. He also mentioned the large number of emails he received regarding Merit.

O'Connell testified she was a member of Facebooks concerned parents and an ordinary member of the community would not know what the Feasibility Study presentation on the May 4<sup>th</sup> Agenda was about. She could assume but did not clearly know what the special meeting Agenda meant. She relies upon the Agenda to determine whether to attend or watch a school Board meeting.

### DISCUSSION AND CONCLUSION

I find by a preponderance of the evidence that the Board and individual members were subject to the April 29<sup>th</sup> Order and had knowledge of the Order prior to the May 4<sup>th</sup> Board meeting. The Board chose not to follow the suggestion of listing Merit Academy Charter School Application or future school Board meeting agenda items to comply with the Order.

Despite the lack of clearly stating the exact nature of the May 4, 2022 Agenda, the issue is whether they are guilty of remedial contempt? The Board pointed out that subsequent Agendas for May 16<sup>th</sup>, May 18<sup>th</sup>, May 19<sup>th</sup> and June 1<sup>st</sup> all clearly mention Merit Academy.

Both counsel agree that the Colorado Supreme Court case of *Marble v. Darien*, controls. Compliance with the OML require an objective standard, meaning that notice should be interpreted in light of the knowledge of an ordinary member of the community to whom it is directed.

The issue of the Woodland Park School District Chartering Merit Academy has been a significant public issue in Teller County for some time. The April 29, 2022 Order reflects some of that history and that it was a school Board campaign issue for some of the current Board members. It has been a divisive issue in the community as testified to by the Board members.

Merit Academy has been a discussion at many Board meetings and there was public discussion of the Feasibility Study of Merit using the Middle School at

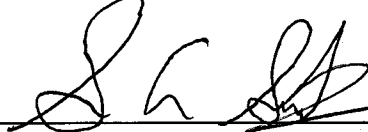
the April 27<sup>th</sup> meeting and the issue was tabled until May 4<sup>th</sup>. I find that the Board was not completely forthright and transparent with their Agenda posting, and the school district wrongly chose to keep the Feasibility Study from the public.

However, under the objective standard articulated by the Supreme Court, I am compelled to find that an ordinary member of the Woodland Park School District or person in Teller County would understand that Merit Academy and/or the issue of sharing space at the Middle School or at some school facility was a likely candidate for discussion under the topic Feasibility Study presentation by Executive Director of Technology and Operations, Miles Tuttle, followed by BOE Q & A with Cooperative Strategies.

Applying the above, I FIND the Defendants did not violate the OML and are not in remedial contempt by the posting of the May 4, 2022 Agenda. The Motion for Contempt is DENIED.

SO ORDERED this 16~~th~~ day of September, 2022.

BY THE COURT

  
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Scott A. Sells, District Judge