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CC: Caryn Gibson, Superintendent
Jan Tuin, Board Chair
Dan Burke, Board Vice Chair
Linda Ewing, Board Member
Ron Germann, Board Member
Beth Suppes, Board Member

FROM: Chris Mochulsky
Attorney for Delta County Citizen Report

**NOTICE OF DELTA COUNTY BOARD OF EDUCATION OPEN MEETING LAW VIOLATIONS AND COLORADO
OPEN RECORD ACT VIOLATIONS AND DEMAND TO CURE – NOTICE OF INTENT TO SUE PURSUANT TO
C.R.S. § 24-10-109**

June 7, 2021

Dear Mr. Skarka,

My name is Chris Mochulsky, and I am writing on behalf of Delta County Citizen Report (“DCCR”) concerning Colorado Open Meetings Law violations by the Delta County Board of Education (the “Board”) in relation to the Board’s Resolution 2021-15 (the “Resolution”) on Comprehensive Human Sexuality Education.

A. Background

On May 31, 2019 the General Assembly signed HB 19-1032 (the “Act”) Comprehensive Human Sexuality Education (“CHSE”) into law. The Act gives local education boards the option to implement comprehensive human sexuality education in their school districts and receive grant money to do so.

Soon after the Act was signed, the Board created a task force to look into curriculum and make recommendations regarding CHSE. After two presentations by Sam Cox, Director of Academic Curriculum, on January 7, 2021 and April 8, 2021, the task force recommended the “3 Rs curriculum” – rights, respect, and responsibility. The Board agreed to develop a community survey and discussion forums to gather public input.

On April 15, 2021, during the regular meeting, the minutes reflect that:

Mr. [Jan] Tuin, [Board Chair], shared that the House Bill was passed in 2019 and that a group of people came to the Board to implement the sexual health curriculum. A committee was created to give insight, *that there is no decision being made to CSHE*, and that Board needs more public input. He shared that the School District lawyer is putting together an explanation of the House Bill for the Board and they may create a survey for community input. It was shared *that no decision regarding CSHE will be made* until the Board researches information and that the Board will follow policy which states community forums will be held.

(emphasis added).

The following day, April 16, 2021, school staff posted an update on its Facebook page stating:

An update with regards to [CHSE]. A little over a year ago, Delta County School District was approached by a few individuals asking to implement [CHSE] that aligns with House Bill 19-1032. The School Board did not feel they had enough information so they formed a task force to study the needs, and recommend a possible CHSE curriculum that was standard based. *The School Board has decided NOT to adopt a CHSE curriculum at this time.* The School Board has decided to have the District's attorney draft a "one-pager" explaining the District's options and then share that information with the communities of Delta County. The Board would also like to survey the community in the next few months to determine if the School District should provide a standards-aligned CHSE curriculum that aligns with House Bill 19-1032 and State standards. After the results are collected, School District leadership and the school Board will determine the next steps.

(emphasis added).

On May 6 and May 14, 2021, the Board conducted two executive sessions under C.R.S. § 24-6-402(4)(b) to receive legal advice on an unknown topic. Then, on May 20, 2021, the Board voted on Resolution 2021-15, which resolved to not pursue CHSE.

In an email response to a concerned citizen, school board member Linda Ewing wrote, "[t]his [CHSE] curriculum has never been approved by any of us. There are people who would like this particular curriculum but, as a Board, we are only researching as we should anything. There were just those who panicked, which has made us make decisions quicker than planned." This email, obtained through a CORA request, is dated May 20, 2021 at 1:32 PM, four and a half hours before school board members convened at a regular meeting to hear constituent comments and conduct board business, and ultimately, vote on a resolution concerning CHSE. In another email around this same time, school board chair Jan Tuin assured another citizen "... we are planning to get community feedback before taking any further steps [on CHSE]."

Prior to the May 20, 2021 meeting, there was no notice to the public that CHSE would be discussed during that meeting let alone notice that a final decision on CHSE would be reached. The agenda that was posted online – and is still online – states that there would be a "School Board Statement." Later, the Board tried to course-correct, and stated that they posted a new agenda 24-hours prior to the meeting at the school district office that changed "School Board Statement" to "Resolution 2021-15." Even if that were true – that the Board posted two different agendas in two different locations – the words "Resolution 2021-15" do not even remotely suggest that the resolution concerns CHSE.

Further, at the May 20, 2021 meeting, public participation was severely limited. The venue at which the meeting was conducted was too small to fit those of the public that wanted to participate, and members of the public had to sign in and secure a ticket in order to participate. Access to the building was then locked and security was placed in front of the doorways. While a live stream was offered, members of the public were not invited to participate or include comments.

B. Open Meetings Law Violations:

1. Violation of C.R.S. § 24-6-402(4)

The Board violated C.R.S. § 24-6-402(4) on May 6 and May 14, 2021 when it held executive sessions without announcing the topic for the executive sessions. C.R.S. § 24-6-402(4) requires “announcement by the local public body to the public of the topic for discussion in the executive session.”

Colorado courts have held that failure to provide any information beyond the statutory citation authorizing an executive session for “legal advice” does not comply with Colorado Open Meeting Law’s requirement of identifying a particular matter in as much detail as possible without compromising the purpose for which an executive session was called. *Guy v. Whitsitt*, 569 P.3d 546, 553 (Colo. App. 2020).

On May 6 and May 14, 2021, the Board conducted two executive sessions without providing any information beyond the statutory citation authorizing an executive session for “legal advice.” As such, both of those executive sessions are in direct violation of the Colorado Open Meetings Law. See *Whitsitt*, 569 P.3d at 553.

2. Violation of C.R.S. § 24-6-402(2)(c)(I)

The Board violated C.R.S. § 24-6-402(2)(c)(I) when it failed to post notice that CHSE would be discussed at the May 20, 2021 meeting. C.R.S. § 24-6-402(2)(c)(I) requires “full and timely notice,” and notice “shall include specific agenda information where possible.”

In determining whether the notice at issue is “full,” courts in Colorado apply “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.” *Town of Marble v. Darien*, 181 P.3d 1148, 1152 (Colo. 2008).

No ordinary member of the public would interpret either “School Board Statement” or “Resolution 2021-15” to mean either a statement on CHSE or a resolution on CHSE.¹ That is further evinced by the immediate confusion of the public when they found out that “School Board Statement” meant a resolution on CHSE. Despite the Board knowing that they would be voting on a resolution regarding CHSE, they did not put it on the agenda.

Under the Colorado Supreme Court’s “objective standard,” the Board’s notice – both “School Board Statement” and “Resolution 2021-15” – was not “full” as it would not, and did not, provide an ordinary member of the community with any indication that CHSE would be discussed at the May 20, 2021

¹ The agenda posted online still reads “School Board Statement,” while the Board alleges that posted a *different* agenda 24-hours before the meeting at the district office that reads “Resolution 2021-15.” Both agendas fail to give full notice that CHSE was going to be at issue. Further, both agendas add to the confusion as to what would actually be addressed at the May 20, 2021 meeting.

meeting. As such, the vote on the Resolution 2021-15 is in direct violation of the Colorado Open Meetings Law because full and timely notice was not given to the public.

3. Violation of C.R.S. § 24-6-402(2)(b)

The Board violated C.R.S. § 24-6-402(2)(b) when it closed the May 20, 2021 meeting to the public. C.R.S. § 24-6-402(2)(b) states that “[a]ll 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.*” (emphasis added).

The Board closed the May 20, 2021 meeting to the public and seemingly only hand-picked opponents of CHSE to sign in early and receive “tickets” to participate at the meeting. That is a direct violation of the Colorado Open Meetings Law which requires meetings to be open to the public at all times.

4. Violation of C.R.S. § 24-6-401, et seq.

The Board violated the Colorado Open Meetings Law, C.R.S. § 24-6-401, *et seq.*, when it made a decision on CHSE outside of public view and in secret. On April 16, 2021, the Board stated on its Facebook page that it “has decided NOT to adopt a CHSE curriculum at this time.” That indicates that the Board made a decision on CHSE prior to the May 20, 2021 meeting, and outside of a public meeting with no public input. Therefore, the May 20, 2021 meeting merely served to rubberstamp the decision made by the Board in secret and shared on their Facebook page on April 16, 2021.

C.R.S. § 24-6-401 states that “formation of public policy is public business and may not be conducted in secret.” C.R.S. § 24-6-402 then lays out the procedures a local public body must follow to ensure that decisions on public policy are not made in secret. The Board very clearly made its decision as early as April 16, 2021, and did so in secret and outside of public view, and then rubberstamped that secret decision on May 20, 2021. Therefore, the April 16, 2021 decision on CHSE, and the subsequent May 20, 2021 vote on CHSE, are in direct violation of the Colorado Open Meetings Law.

C. Colorado Open Records Act Violations

On May 24, 2021, DCCR submitted a Colorado Open Records Act (“CORA”) request to the Board requesting all communications on the topic of CHSE from the public to the school board and staff, all communications between school board members on the topic of CHSE, and all communications between school board members and the district’s attorney on the topic of CHSE. DCCR inquired about the Board’s CORA policy to obtain those records, and the Board indicated that it did not have a CORA policy or procedure.

While the Board provided DCCR with most of what it requested, it failed to provide *all* documents that fell within the request, and the Board did not state a specific ground for denial for not providing all the documents. C.R.S. § 24-72-203 requires that “all public records shall be open for inspection.” Withholding certain public records, without stating a ground for denial, is in direct violation of CORA.

D. Remedy

To remedy the multiple Open Meetings Law violations, DCCR demands that the Board:

1. Rescind Resolution 2021-15 and re-agenda that resolution with full and timely notice to the public, including the topic of the resolution.
2. Make the topics of the executive sessions held on May 6 and May 14, 2021 available to the public.
3. Ensure an adequate public forum for the public to participate in a meeting regarding CHSE so that the meeting is open to the public.

If the Board does not take the foregoing actions to remedy its Open Meetings Law violations within 14-days of receipt of this Notice, DCCR will file legal action requesting that the Board cure its Open Meetings Law violations and seek attorney's fees pursuant to C.R.S. 24-6-402(9).

Additionally, to ensure that the foregoing Open Meetings Law and Colorado Open Records Act violations do not occur again, DCCR requests that:

1. The Board adopt an Open Meetings Law Resolution. See Ex. A.
2. The Board adopt an Official CORA policy.

Sincerely,



Chris Mochulsky

Attorney for DCCR