

<p>DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	
<p>THE DENVER POST, STATES NEWSROOM DBA COLORADO NEWSLINE, NEXTAR MEDIA GROUP, KUSA 9NEWS TEGNA, THE DENVER GAZETTE AND COLORADO POLITICS, & CHALKBEAT COLORADO, Plaintiffs,</p> <p>and</p> <p>MOVIMIENTO PODER, a nonprofit corporation, Plaintiff-Intervenor,</p> <p>v.</p> <p>STACY WHEELER, in her official capacity as records custodian, for Denver Public Schools, Defendant.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Plaintiff-Intervenor: Eric Maxfield, #29485 Eric Maxfield Law LLC 3223 Arapahoe Avenue, Suite 300 Boulder, Colorado 80303 303-502-7849 Eric@ericmaxfieldlaw.com</p> <p>Katherine Dunn, Esq. <i>pro hac vice</i> application filed concurrently Advancement Project 1220 L. St. NW Suite 850 Washington, DC 20005 202-728-9557 kdunn@advancementproject.org</p>	<p>Case No: 23CV31265</p> <p>Division</p>

**COMPLAINT AND APPLICATION FOR ACCESS TO EXECUTIVE SESSION
RECORDING OR ALTERNATIVELY FOR *IN CAMERA* REVIEW AND ORDER OF
PRODUCTION UNDER § 24-72-204(5.5), C.R.S.**

Plaintiff-Intervenor Movimiento Poder respectfully submits this Complaint and Application for Access to Executive Session Recording or Alternatively for *In Camera* Review and Order of Production under § 24-72-204(5.5), C.R.S. against Defendant Stacy Wheeler, in her official capacity as records custodian for Denver Public Schools (referred to herein as “DPS”). Plaintiff-Intervenor files an Application to Intervene with this Complaint and Application, and also a Request for Entry of Appearance *pro hac vice* by counsel Katherine Dunn of Advancement Project.

Plaintiff-Intervenor Movimiento Poder alleges as follows:

Introduction

1. Plaintiff-Intervenor Movimiento Poder, a nonprofit corporation registered in Colorado with a mission to ensure that all students, regardless of race, income, or immigration status, have safe, healthy, and equitable learning environments, has an interest in the public policy making of the DPS Board of Education (“the Board”). Movimiento Poder has a particular interest in the public business of DPS’ decision-making on school safety policies and on whether to deploy armed police officers at DPS high schools.

2. Movimiento Poder – formerly known as Padres y Jóvenes Unidos – began organizing in Southwest Denver in 1993 because students and families did not have access to quality education. Since that time, Movimiento Poder has worked to make significant improvements for young people in Denver Public Schools through the District’s public policy making process. They worked to achieve implementation of restorative justice practices in the district in 2005, a new student discipline code in 2008, and the first Memorandum of Understanding with the Denver Police Department in 2012. *See* Padres y Jóvenes Unidos, *Community Accountability Report Card, Toward Ending the Schoolhouse-to-Jailhouse-Track in Denver Public Schools, 2012-13*:

https://issuu.com/padresunidos/docs/2013_dps_report_card_final_web_-_en.

3. In 2020, Movimiento Poder worked to achieve a resolution passed – in an open meeting – by the Denver Public Schools Board of Education (“the Police Free Schools resolution”) committed to removing police from schools. The data and lived experiences of young people, including Movimiento Poder members, show why this resolution was necessary, as Black, Latine, and other students of color were disproportionately arrested by police in

schools. *Denver Public School Board Resolution* (June 11, 2020).

[https://go.boarddocs.com/co/dpsk12/Board.nsf/files/BQGUND783ACE/\\$file/Board%20Resolution%20re%20SROs_6.11.2020.pdf](https://go.boarddocs.com/co/dpsk12/Board.nsf/files/BQGUND783ACE/$file/Board%20Resolution%20re%20SROs_6.11.2020.pdf).

4. In 2021, the Board unanimously approved Executive Limitation Police 10.10 (EL 10.10) which states, “[t]he Superintendent will not staff schools with school resource officers or the consistent presence of security armed with guns or any other law enforcement personnel.”

5. Throughout the implementation of the Police Free Schools resolution, Movimiento Poder has worked to ensure the process for defining school safety is community-driven and that it does not continue to criminalize and harm students of color.

6. On March 23, 2023, the DPS Board met in executive session for over four-and-a-half hours. They entered this executive session by unanimous vote on a motion to 1) discuss matters required to be kept confidential under federal or state law or rules or regulations, 2) discuss specialized details of security arrangements or investigations, and 3) discuss individual students. When the Board exited the executive session, Board President Xóchitl Gaytán read into the record a Memorandum detailing the Board’s decision to “hereby suspend board policy EL-10.10 and its Proclamation Regarding Gun Violence Prevention, through June 30, 2023,” and directed Superintendent Dr. Alex Marrero to “develop a systemic Long-term Safety Operational Plan in consideration of EL-11 and in accordance with Safety Ends Policy 4.” The Memorandum further directed Dr. Marrero to work with the mayor to fund “as many as two” armed police officers at all high schools in the District for the remainder of the year.

7. After reading the Memorandum to the public, the Board called for a motion to approve item 3.01, which was then moved and seconded by Board members Auon’tai Anderson and Carrie Olson, respectively. There was no public discussion of any kind prior to the Board’s unanimous vote to approve the Memorandum – suddenly reversing its policy preventing school police, or School Resource Officers, in the District that has been in place since 2020. The Board then adjourned.

8. The DPS Board failed to provide an adequate announcement with adequate detail as required to enter into executive session under Colorado Open Meetings Law (COML), and additionally violated the COML by adopting, in executive session, a proposed policy, position, resolution, or formal action.

9. Movimiento Poder requested the recording of the unlawful executive session, and this request was denied. Under the Colorado Open Records Act (CORA), the recording should be opened to inspection, or, alternatively, the Court should review the recording *in camera* to examine whether the executive session was conducted within the limitations proscribed by the COML. Movimiento Poder asks this Court to declare that records created, kept, or maintained by Defendant, namely the March 23, 2023 District executive session recording, are Defendant’s

public record subject to disclosure under CORA, that such records shall be open to inspection, and to award Movimiento Poder its costs and reasonable attorney's fees.

10. In the event the Court finds that Defendant did not comply with the notice requirements of the COML, the Court should find the Board's approval of the Memorandum invalid under § 24-6-402(8), C.R.S.

Parties, Jurisdiction and Venue

11. Plaintiff-Intervenor Movimiento Poder is a nonprofit corporation registered with the Colorado Secretary of State, in good standing, with registered agent Executive Director Elsa Bañuelos.

12. Movimiento Poder is a "person" under CORA, § 24-72-202(3), C.R.S., and it made a request for the March 23, 2023 executive session recording made at the DPS Special Board Meeting that date, and as such, has standing to bring a claim for access to records under CORA.

13. Plaintiff Movimiento Poder is a resident of Denver County, Colorado, with its agent's address at 1000 S Grove St, Denver, CO 80219.

14. Movimiento Poder is a Denver, Colorado-based grassroots organization, led by working-class Latine immigrants, youth, women, and families, that works to ensure that all students, regardless of race, income, or immigration status, have safe, healthy, and equitable learning environments. Movimiento Poder uses community organizing, leadership development, and civic engagement to accomplish its mission.

15. Defendant Stacy Wheeler is the custodian of records for the Denver Public School District. The District is an institution or political subdivision of the State in Denver County with a place of business at 1860 Lincoln St, Denver, CO 80203.

16. The March 23, 2023 recording of the DPS Board executive session was made, maintained, and kept by DPS. *See* § 24-72-202(6)(a)(I), C.R.S.

17. This Court has jurisdiction under article VI, section 9(1) of the Colorado Constitution and under § 24-6-402(9)(a) and § 24-72-204(5.5), C.R.S. of the Colorado Open Meetings Law (COML) and Colorado Records Act (CORA).

18. Venue is proper in the Judicial District Court for Denver County pursuant to C.R.C.P. 98(b)(2) and (c)(1) and under §§ 24-6-402(9)(a); 24-72-204(5), C.R.S.

Allegations

19. On March 23, 2023 at its special meeting, noticed as “Board of Education Special Meeting and Executive Session,” at about 10:20 a.m., the DPS Board entered executive session on a unanimous vote upon a motion to discuss:

...[M]atters required to be kept confidential by federal or state law or rules and regulations as authorized by C.R.S. § 24-6-402(4)(c), Discussion of specialized details of security arrangements or investigations as authorized by C.R.S. § 24-6-402(4)(d), and Discussion of individual students where public disclosure would adversely affect that person or persons involved as authorized by C.R.S. § 24-6-402(4) (h). **Exhibit A; Exhibit B.**

20. The Board recorded the executive session per § 24-6-402(2)(d.5)(II)(A), C.R.S.

21. The Board exited executive session at about 2:53 p.m. **Exhibit B.**

22. At 3:08 p.m. the special public meeting resumed. *Id.*

23. Immediately upon reconvening the public portion of the meeting, Board President Xóchitl Gaytán entered a Memorandum into the record directing deployment of armed police officers at all high schools in the District for the remainder of the year. **Exhibit C.**

24. The Memorandum detailed the Board’s decision to suspend board policy EL-10.10 and its Proclamation Regarding Gun Violence Prevention, through June 30, 2023, and directed Superintendent Dr. Alex Marrero to develop a systemic Long-term Safety Operational Plan in consideration of EL-11 and in accordance with Safety Ends Policy 4. *Id.*

25. The Memorandum directed Superintendent Dr. Alex Marrero to work collaboratively with Mayor Michael B. Hancock and other elected officials to offer and externally fund as many as two armed police officers – as well as additional mental health professionals – at all high schools for the remainder of the 2022-23 school year. *Id.*

26. After reading the Memorandum to the public, the Board called for a motion to approve item 3.01, which was then moved and seconded by Auon’tai Anderson and Carrie Olson, respectively. **Exhibit B.**

27. There was no public discussion of any kind in the open portion of the meeting prior to the Board’s unanimous vote to approve the Memorandum. *Id.*

28. After the Board’s vote to approve the Memorandum, the Board then adjourned. *Id.*

29. The Board, in its executive session on March 23, 2023, discussed the Memorandum.

30. The Board's agenda for the meeting did not notice discussion of the Memorandum in executive session. **Exhibit A.**

31. The Board's motion to enter executive session on March 23, 2023 did not describe the subject matter of the Memorandum as grounds for entering executive session. **Exhibit B.**

32. The only reasonable conclusion to draw from the Board's over four-and-a-half-hour executive session, followed by a reading and adoption of the Memorandum in open session with no discussion, is that the Board took a straw poll on the Memorandum in the March 23, 2023 executive session on the Memorandum.

33. The Board's public vote on the Memorandum was a rubber stamp of the straw poll that took place in executive session.

34. The Board, in its executive session on March 23, 2023, discussed communications between Denver Mayor Michael B. Hancock and Superintendent Marrero regarding "the creation of an executive order to address school safety". **Exhibit D** (a March 29 memorandum noting that, following the March 23, 2023 executive session, "VP Anderson disclosed information divulged to the board in the Executive Session that took place on Thursday 03/23/2023. Specifically, naming the Mayor's private communication with the Superintendent regarding the creation of an Executive Order to address school safety.")

35. The Board's agenda for the meeting did not notice discussion of the communications regarding the creation of an executive order to address school safety. **Exhibit A.**

36. The Board's motion to enter executive session on March 23, 2023 did not describe the subject matter of the creation of an executive order to address school safety as grounds for entering executive session, or did not do so with as much detail as possible without compromising the purpose for which the executive session was called. **Exhibit B.**

Request for Records

37. Movimiento Poder made the following records request to Defendant on April 6, 2023:

I request a copy of the following government record:

Recording of the March 23, 2023 Board of Education Special Meeting and Executive Session. **Exhibit E.**

Response to Request for Records

38. On April 6, 2023, Defendant responded to Movimiento Poder's request for the recording of the March 23, 2023 executive session:

The district is responding to your 4/6/2023 records request concerning a recording of the Executive Session during 03/23/2023 School Board meeting. Denver Public Schools is in possession of records responsive to your request that are not subject to disclosure pursuant to the Colorado Open Meetings Act, CRS 24-6-402(2)(d.5)(I)(D), or the Colorado Open Records Act, 24-72-204(1)(a).

39. The reference to § 24-72-204(1)(a) in Defendant's response is a reference to CORA stating that the records are closed to inspection because "[s]uch inspection would be contrary to any state statute." The response does not identify the statute that is at issue requiring closure.

40. Defendant DPS made, maintained, or kept the requested record.

41. The requested record is a public record.

42. Defendant denied Movimiento Poder the right to inspect the requested records.

43. The Defendant's ground for denial of records inspection does not justify closure of the records.

Colorado Open Meetings Act

44. The policy underlying the state's Sunshine Law, or COML, is that "the formation of public policy is public business and may not be conducted in secret." § 24-6-401, C.R.S.; *see also Gumina v. City of Sterling*, 119 P.3d 527, 530 (Colo. App. 2004).

45. The COML, § 24-6-402(2)(b), C.R.S., requires that "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."

46. Under the COML, § 24-6-402(2)(c)(I), "Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public."

47. Under the COML, § 24-6-402(4), C.R.S., an executive session may be held:

[U]pon the announcement by the local public body to the public of the topic for discussion in the executive session, including specific citation to this subsection (4) authorizing the body to meet in an executive session and 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, and the affirmative vote of two-thirds of the quorum present, after such announcement, may hold an executive session only at a regular or special meeting and for the sole purpose of considering any of the following [enumerated] matters; except that no adoption of any proposed policy, position, resolution, rule, regulation, or formal action, except the review, approval, and amendment of the minutes of an executive session recorded pursuant to subsection (2)(d.5)(II) of this section, shall occur at any executive session that is not open to the public.

48. The COML expressly prohibits a local body from adopting “any proposed policy, position, resolution, rule, regulation, or formal action” during an executive session. *See* 24-6-402(4), C.R.S.

49. Under the COML, a public body may conduct an “executive session,” *i.e.*, a closed-door meeting, only if it “strictly complies” with the requirements for announcing and conducting such a session. *See* §§ 24-6-402(3)(a); (4), C.R.S; *see also Gumina*, 119 P.3d at 532. If an executive session is not convened properly in accordance with these requirements, then the meeting and the recorded minutes are open to the public. *Id.* at 530 (City council’s failure to “strictly comply” with the requirements of the statute rendered its meeting open and the terminated city employee had the right to inspect the minutes); *Zubeck v. El Paso County Ret. Plan*, 961 P.2d 597, 600 (Colo. App. 1998).

50. Under the COML at § 24-6-402(8), C.R.S., “No resolution, rule, regulation, ordinance, or formal action of a state or local public body shall be valid unless taken or made at a meeting that meets the requirements of subsection (2) of this section.”

51. Under the COML at § 24-6-402(9)(b), C.R.S., “In any action in which the court finds a violation of this section, the court shall award the citizen prevailing in such action costs and reasonable attorney fees.”

Colorado Open Records Act

52. The General Assembly has declared that it is the "public policy of the state that all public records shall be open for inspection by any person at reasonable times, except as provided herein or as otherwise specifically provided by law." § 24-72-201, C.R.S.

53. According to CORA at § 24-72-204(5.5)(a), C.R.S.,

Any person seeking access to the record of an executive session meeting of a state public body or a local public body recorded pursuant to section 24-6-402 (2)(d.5) shall, upon application to the district court for the district wherein the records are found, show grounds sufficient to support a reasonable belief that the state public body or local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402 (3) or (4) or that the state public body or local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of section 24-6-402 (3)(a) or (4). If the applicant fails to show grounds sufficient to support such reasonable belief, the court shall deny the application and, if the court finds that the application was frivolous, vexatious, or groundless, the court shall award court costs and attorney fees to the prevailing party. If an applicant shows grounds sufficient to support such reasonable belief, the applicant cannot be found to have brought a frivolous, vexatious, or groundless action, regardless of the outcome of the *in camera* review.

54. According to CORA at § 24-72-204(5.5)(b)(I), C.R.S.,

Upon finding that sufficient grounds exist to support a reasonable belief that the state public body or local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402 (3) or (4) or that the state public body or local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of section 24-6-402 (3)(a) or (4), the court shall conduct an *in camera* review of the record of the executive session to determine whether the state public body or local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402 (3) or (4) or adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of section 24-6-402 (3)(a) or (4).

55. According to CORA at § 24-72-204(5.5)(b)(II), C.R.S.,

If the court determines, based on the *in camera* review, that violations of the open meetings law occurred, the portion of the record of the executive session that reflects the substantial discussion of matters not enumerated in section 24-6-402 (3) or (4) or the adoption of a proposed policy, position, resolution, rule, regulation, or formal action shall be open to public inspection.

56. A prevailing “applicant” or plaintiff under the COML or the CORA is entitled, as of right, to recover all reasonable attorney’s fees and costs incurred in litigating the matter. *See* § 24-6-402(9)(b), C.R.S.; § 24-72-204(5), C.R.S.; *Van Alstyne v. Housing Auth.*, 985 P.2d 97, 99-100 (Colo. App. 1999).

Claims for Relief

Violation of the Colorado Open Meeting Law and Colorado Open Records Act, §§ 24-6-402(2)(b), 24-6-402(2)(c)(I), 24-6-402(2)(d.5)(II)(A), 24-6-402(2)(d.5)(II)(C), § 24-6-402(4), 24-72-203, and 24-72-204(5.5), C.R.S.

57. Plaintiff-Intervenor incorporates all other allegations in this complaint as if fully set forth herein.

58. Defendant DPS did not properly notice the executive session held on March 23, 2023 at its special meeting as required by § 24-6-402(2)(d.5)(II)(A), C.R.S.

59. Defendant DPS did not properly move into executive session held on March 23, 2023 at its special meeting as required by § 24-6-402(4).

60. The DPS Board, in its executive session on March 23, 2023, discussed communications between Denver Mayor Michael B. Hancock and Superintendent Marrero regarding “the creation of an executive order to address school safety”, and such communications were not properly noticed for the meeting nor were they in the motion to enter executive session in as much detail as possible without compromising the purpose for which an executive session was called.

61. The Board’s motion to enter executive session on March 23, 2023 did not describe the subject matter of the discussion, creation, amendment, or adoption of an executive order to address school safety as grounds for entering executive session, or did not do so with as much detail as possible without compromising the purpose for which the executive session was called.

62. The Board, in its executive session on March 23, 2023, discussed the Memorandum, the Safety Ends Policy, and EL 10.10, although the Board’s agenda for the meeting did not notice these items.

63. Movimiento Poder has shown grounds sufficient to support a reasonable belief that the DPS Board engaged in substantial discussion of matters not enumerated in section 24-6-402(4), or that the DPS Board adopted a proposed policy, position, resolution, or formal action in the executive session, in violation of 24-72-204(5.5), C.R.S.

64. The grounds demonstrated by Movimiento Poder show that the DPS Board took a straw poll on the Memorandum that suspended board policy EL 10.10 in the March 23, 2023 executive session on the Memorandum. This was an impermissible vote to approve the Memorandum, in violation of §§ 24-6-402(2)(b), 24-6-402(2)(c)(I), 24-6-402(2)(d.5)(II)(A), 24-6-402(2)(d.5)(II)(C), § 24-6-402(4), 24-72-203, and 24-72-204(5.5), C.R.S.

65. The grounds demonstrated by Movimiento Poder show that the DPS Board's public vote on the Memorandum was a rubber stamp of a straw poll that took place in executive session, and because they were in violation of section (2) of the COML, the DPS Board's vote is not valid.

66. Plaintiff-Intervenor has suffered an injury in fact and has standing as set forth in §§ 24-6-402(9)(a), 24-72-203(1)(a), 24-72-203(3.5), and 24-72-204(5.5), C.R.S.

67. Defendant's closure of requested public records lacks justification and is in violation of the Colorado Open Records Act, § 24-72-204(5.5), C.R.S.

68. Defendant's closure of requested public records lacks justification and is in violation of the Colorado Open Meetings Law at §§ 24-6-402(2)(d.5)(II)(A), 24-6-402(2)(d.5)(II)(C), § 24-6-402(4), C.R.S.

69. Plaintiff-Intervenor is entitled to the entry of a Declaration and Finding by this Court that the Defendant's conduct was in violation of the Colorado Open Meetings and Colorado Open Records Laws, §§ 24-6-402(2)(b), 24-6-402(2)(c)(I), 24-6-402(2)(d.5)(II)(A), 24-6-402(2)(d.5)(II)(C), § 24-6-402(4), 24-72-203, and 24-72-204(5.5), C.R.S.

70. Plaintiff-Intervenor is entitled to an Order requiring Defendant to open the executive session recording from March 23, 2023 to inspection and to provide a copy of the recording to Plaintiff-Intervenor.

71. In the alternative to the relief sought in ¶ 70, Plaintiff-Intervenor is entitled to an Order finding that it has shown sufficient grounds to support a reasonable belief that the DPS Board engaged in substantial discussion of any matters not enumerated in § 24-6-402(4), C.R.S., or that the DPS Board adopted a proposed policy, position, resolution, or formal action in the executive session, in violation of § 24-6-402(2)(b), § 24-6-402(2)(c)(I), or 24-6-402(4), and per § 24-72-204(5.5), C.R.S., is entitled to the Court conducting an *in camera* review of the record of the executive session to determine whether the local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402(4) or adopted a proposed policy, position, resolution, rule, regulation, or formal action in the executive session in contravention of section 24-6-402(4).

72. Plaintiff-Intervenor is entitled to its reasonable attorneys fees and costs of this action if it prevails. §§ 24-6-402(9)(b), and 24-72-204(5), C.R.S.

WHEREFORE, Plaintiff-Intervenor prays that this Court:

1. Enter an Order finding that Defendant violated the COML by failing to discuss public business in the public portion of the meeting, failing to take a vote on public business in the public portion of the meeting that is not a rubber stamp of a straw poll in executive session, failing to properly notice the meeting's open session or executive session by full agenda or adequate motion, and failing to describe the subject matter in as much detail as possible without compromising the purpose for which an executive session was called, in violation of §§ 24-6-402(2)(b), 24-6-402(2)(c)(I), § 24-6-402(2)(d.5)(II)(A),(C); § 24-6-402(4), and § 24-72-204(5.5), C.R.S.;
2. Enter an Order directing Defendant to release to Plaintiff-Intervenor the recording from its executive session held on March 23, 2023;
3. If the Court does not Order the executive session recording open to inspection, to enter an Order directing Defendant to provide to the Court, for *in camera* review, the recording so that the Court may determine if the executive session was properly noticed, moved, and if a discussion and vote occurred in executive session that is required to occur in public session;
4. Enter a declaratory judgment finding that the requested records are public records subject to disclosure and not exempt under CORA, and that they are subject to public access pursuant to Movimiento Poder's valid request under CORA;
5. Enter an order invalidating the decision to approve item 3.01 at the March 23, 2023 meeting adopting the Memorandum to deploy police to all District high schools;
6. Order such other further relief as the Court deems just and proper.

Movimiento Poder further requests its costs and reasonable attorney fees in bringing, filing, serving and litigating this civil action pursuant to § 24-6-402(9)(b); § 24-72-204(5), C.R.S.

Respectfully submitted this 4th day of May, 2023.

Attorneys for Plaintiff-Intervenor:

s/ Eric Maxfield
ERIC MAXFIELD, #29485
ERIC MAXFIELD LAW, LLC
3223 Arapahoe Ave., Suite 300
Boulder, CO 80303
Telephone: 303-502-7849

s/ Katherine Dunn
KATHERINE DUNN,
DC Bar #1782111
pro hac vice application filed
concurrently
Advancement Project
1220 L. St Suite 850
Washington, DC 20005
202-728-9557

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing COMPLAINT AND APPLICATION FOR ACCESS TO EXECUTIVE SESSION RECORDING OR ALTERNATIVELY FOR IN CAMERA REVIEW AND ORDER OF PRODUCTION UNDER § 24-72-204(5.5), C.R.S. was served on May 4, 2023, through the Colorado Court electronic filing system to:

Rachael Johnson, Esq.
Reporters' Committee for Freedom of the Press

Steven D. Zansberg, Esq.
LAW OFFICE of STEVEN D. ZANSBERG, L.L.C.

Attorneys for Plaintiffs

And by email to:

Brent Case, Esq.
Jon Fero, Esq.
Semple, Farrington, Everall & Case, P.C.

jfero@semplelaw.com
bcase@semplelaw.com

Attorneys for Defendant

/s/ Eric Maxfield
Eric Maxfield

<p>DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	
<p>THE DENVER POST, STATES NEWSROOM DBA COLORADO NEWSLINE, NEXTAR MEDIA GROUP, KUSA 9NEWS TEGNA, THE DENVER GAZETTE AND COLORADO POLITICS, & CHALKBEAT COLORADO, Plaintiffs,</p> <p>and</p> <p>MOVIMIENTO PODER, a nonprofit corporation, Plaintiff-Intervenor,</p> <p>v.</p> <p>STACY WHEELER, in her official capacity as records custodian, for Denver Public Schools, Defendant.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Plaintiff: Eric Maxfield, #29485 Eric Maxfield Law LLC 3223 Arapahoe Avenue, Suite 300 Boulder, Colorado 80303 303-502-7849 Eric@ericmaxfieldlaw.com</p> <p>Katherine Dunn, Esq. <i>pro hac vice</i> application filed concurrently Advancement Project 1220 L. St. NW Suite 850 Washington, DC 20005 202-728-9557 kdunn@advancementproject.org</p>	<p>Case No: 23CV31265</p> <p>Division</p>

APPLICATION TO INTERVENE

Applicant Movimiento Poder (“MP”) respectfully submits this Application to Intervene as a Plaintiff against Defendant Stacy Wheeler, in her official capacity as records custodian for Denver Public School District (“DPS”). Plaintiff-Intervenor seeks to intervene in the above-captioned matter as a matter of right under C.R.C.P. 24(a)(2), or alternatively permissively, under C.R.C.P. 24(b)(2).

[Certification of conferral: Counsel for Applicant conferred with Plaintiffs and Defendant. Plaintiffs do not object to intervention, and Defendant objects.]

Standard of Review

C.R.C.P. 24(a) provides for intervention as of right. Under C.R.C.P. 24(a): "Upon timely application, anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *See* C.R.C.P. 24(a)(2).

Hence, to intervene as a matter of right, an applicant must show that: (A) the applicant claims an interest in the subject matter of the litigation; (B) the disposition of the case may impede or impair the applicant's ability to protect that interest; and (C) the interest is not adequately represented by existing parties. C.R.C.P. 24(a)(2); *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

The legal concept of intervention is based upon the right of a litigant to protect itself from the consequences of an action in which the litigant has an interest, or by the result of which it may be bound. *See Mauro v. State Farm Mut. Auto. Inc. Co.*, 410 P.3d 495, 498 (Colo. App. 2013). The Rule governing intervention should be liberally construed, "to allow, when possible and compatible with efficient and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level." *See Feigin*, 19 P.3d at 26.

Courts have the discretion to permit intervention as an alternative to intervention as a matter of right. Rule 24(b) of the Colorado Rules of Civil Procedure provides in relevant part: "Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common." In exercising its discretion to permit a party to intervene, courts must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties. *Moreland v. Alpert*, 124 P.3d 896, 904 (Colo. App. 2005) (citing *CF & I Steel, L.P. v. Air Pollution Control Div.*, 77 P.3d 933, 939 (Colo. App. 2003)). An applicant with a vital interest in the result of the suit should be granted permission to intervene as a matter of course. *Roosevelt v. Beau Monde Co.*, 384 P.2d 96, 101 (Colo. 1963).

Argument

I. The Court should grant the Applicant Intervention as a Matter of Right.

A. Intervenor Movimiento Poder has an interest in the subject matter of the litigation.

1. MP's interest is in the policy decision of the Board at its March 23, 2023 special meeting, and in the recording of the executive session, which it requested on April 6, 2023.

a. MP has a demonstrated and abiding interest in the policy at issue in the Board’s March 23, 2023 special meeting.

Movimiento Poder is a Denver, Colorado-based grassroots organization, led by working-class Latine immigrants, youth, women, and families, that works to ensure that all students, regardless of race, income, or immigration status, have safe, healthy, and equitable learning environments. Movimiento Poder (MP) uses community organizing, leadership development, and civic engagement to accomplish its mission.

For three decades, MP – formerly known as Padres y Jóvenes Unidos – has worked to eliminate barriers to this vision and ensure that every child has access to a safe, nurturing environment where they can thrive. MP began organizing in Southwest Denver in 1993 because students and families did not have access to quality education. Since that time, MP has worked to make significant improvements for young people in Denver Public Schools. They worked to achieve implementation of restorative justice practices in the district in 2005, a new student discipline code in 2008, and the first Memorandum of Understanding with the Denver Police Department in 2012.

In 2020, during the racial uprisings following the murder of George Floyd, MP worked to achieve a resolution passed by the Denver Public Schools Board of Education (“the Police Free Schools resolution”) committed to removing police from schools. The data and lived experiences of young people, including MP members, show why this resolution was necessary, as Black, Latine, and other students of color were disproportionately arrested by police in schools, and an overwhelming majority of students surveyed reported they would prefer money spent on policing to be reinvested to increase access to supports like mental health resources.

Denver Public School Board Resolution, June 11, 2020:

[https://go.boarddocs.com/co/dpsk12/Board.nsf/files/BQGUND783ACE/\\$file/Board%20Resolution%20re%20SROs_6.11.2020.pdf](https://go.boarddocs.com/co/dpsk12/Board.nsf/files/BQGUND783ACE/$file/Board%20Resolution%20re%20SROs_6.11.2020.pdf); *Local and National Support Grows in Advance of Denver*

Public Schools Vote to End Contract with Denver Police Department, June 11, 2020:

<https://advancementproject.org/news/local-and-national-support-grows-in-advance-of-denver-public-schools-vote-to-end-contract-with-denver-police-department/>.

In 2021, the Board unanimously approved Executive Limitation Policy 10.10 (EL 10.10) which states, “[t]he Superintendent will not staff schools with school resource officers or the consistent presence of security armed with guns or any other law enforcement personnel.”

Throughout the implementation of the Police Free Schools resolution and EL 10.10, Movimiento Poder has worked to ensure the process for defining school safety is community-driven and that it does not continue to criminalize and harm students of color.

On March 23, 2023, the DPS Board met in executive session for over four-and-a-half hours. They entered this executive session by unanimous vote on a motion to 1) discuss matters required to be kept confidential under federal or state law or rules or regulations, 2) discuss specialized details of security arrangements or investigations, and 3) discuss individual students. When the Board exited the executive session, Board President Xóchitl Gaytán read into the record a Memorandum detailing the Board’s decision to “hereby suspend board policy EL-10.10 and its Proclamation Regarding Gun Violence Prevention, through June 30, 2023,” and directed Superintendent Dr. Alex Marrero to “develop a systemic Long-term Safety Operational Plan in consideration of EL-11 and in accordance with Safety Ends Policy 4.” The Memorandum further directed Dr. Marrero to work with the mayor to fund “as many as two” armed police officers at all high schools in the District for the remainder of the year.

After reading the Memorandum to the public, the Board called for a motion to approve item 3.01, which was then moved and seconded by Board members Auon’tai Anderson and

Carrie Olson, respectively. There was no public discussion of any kind prior to the Board's unanimous vote to approve the Memorandum – suddenly reversing its policy preventing school police, or School Resource Officers, in the District that has been in place since 2020. The Board then adjourned.

b. MP requested the executive session recording that is sought by Plaintiffs in this case.

Movimiento Poder made the following records request to Defendant on April 6, 2023:

I request a copy of the following government record:

Recording of the March 23, 2023 Board of Education Special Meeting and Executive Session.

On April 6, 2023, Defendant responded to Movimiento Poder's request for the recording of the March 23, 2023 executive session:

The district is responding to your 4/6/2023 records request concerning a recording of the Executive Session during 03/23/2023 School Board meeting. Denver Public Schools is in possession of records responsive to your request that are not subject to disclosure pursuant to the Colorado Open Meetings Act, CRS 24-6-402(2)(d.5)(I)(D), or the Colorado Open Records Act, 24-72-204(1)(a).

The reference to § 24-72-204(1)(a) in Defendant's response is a reference to CORA stating that the records are closed to inspection because "[s]uch inspection would be contrary to any state statute." The response does not identify the statute that is at issue requiring closure. Consistent with the requirements of § 24-72-204(5.5), C.R.S., MP can show grounds sufficient to support a reasonable belief that the state public body or local public body engaged in substantial discussion of any matters not enumerated in section 24-6-402 (3) or (4) or that the state public body or local public body adopted a proposed policy, position, resolution, rule, regulation, or formal action in

the executive session in contravention of section 24-6-402 (3)(a) or (4). Consequently, it is MP's position that the executive session recording should be opened to inspection.

It cannot be reasonably disputed that, due to MP's long standing policy interest and advocacy on the topic at hand in the March 23, 2023 Board meeting, along with its request for the recording from the executive session based on grounds that support a reasonable belief in misuse of the executive session, MP has an interest in the subject matter of the litigation.

B. The disposition of the case may impede or impair Movimiento Poder's ability to protect that interest.

The Plaintiffs in the case are all members of the press. Consistent with the role of the press, they seek to open the recording of the executive session to public inspection so that they may inform the public about events that are public business. *See, e.g.,* Colorado Newsline, *Why We're Suing Denver Public Schools*, <https://coloradonewsline.com/2023/05/02/why-were-suing-denver-public-schools/>. MP is likewise interested in open government. However, its interests are focused here on the policy issue at the March 23, 2023 Board meeting. MP's abiding interests are described above, and while the press might resolve the matter in its own narrower interest of opening the record, MP has a broader interest, including seeking findings and Orders by the Court, specifically:

1. That the Court enter an Order that Defendant violated the COML by failing to discuss public business in the public portion of the meeting, failing to take a vote on public business in the public portion of the meeting that is not a rubber stamp of a straw poll in executive session, failing to properly notice the meeting's open session or executive session by full agenda or adequate motion, and failing to describe the subject matter in as much detail as possible without compromising the purpose for which an executive session was called, in violation of §§ 24-6-402(2)(b), 24-6-402(2)(c)(I), § 24-6-402(2)(d.5)(II)(A),(C); § 24-6-402(4), and § 24-72-204(5.5), C.R.S.;

2. That the Court enter an Order directing Defendant to release to Plaintiff-Intervenor the recording from its executive session held on March 23, 2023;
3. That if the Court does not Order the executive session recording open to inspection, to enter an Order directing Defendant to provide to the Court, for in camera review, the recording so that the Court may determine if the executive session was properly noticed, moved, and if a discussion and vote occurred in executive session that is required to occur in public session;
4. That the Court enter a declaratory judgment finding that the requested records are public records subject to disclosure and not exempt under CORA, and that they are subject to public access pursuant to Movimiento Poder's valid request under CORA;
5. That the Court enter an Order invalidating the decision to approve item 3.01 at the March 23, 2023 meeting adopting the Memorandum to deploy police to all District high schools.

MP's interests and remedies sought in the litigation far exceed the scope of the Plaintiff's requested opening of the executive session to inspection. It is also relevant that the Plaintiffs here rely in their second claim for relief on:

Plaintiffs are informed and believe, based on the March 23 Memorandum, news reporting, and the March 29 Memorandum that DPS unlawfully adopted a position or resolution during the March 23 executive session, namely, to draft and approve the policy position set forth in the March 23 Memorandum.

MP, while likewise relying on this basis, will argue and prove that the proximity in time between the over four-hour executive session, the lack of agenda notice, lack of adequate executive session specificity, and the reversal of a critical policy without any debate or discussion demonstrate grounds on their own for opening the executive session recording, or alternatively for an *in camera* review.

Therefore, a disposition here on the Plaintiff's case may, through the resulting *res judicata* on a narrow issue regarding release of the executive session recording, bind MP in a manner that impedes or impairs its ability to seek the findings, declaratory judgment and

invalidation that it applies to seek here. Moreover, because the Rule governing intervention should be liberally construed, "to allow, when possible and compatible with efficient and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level," MP's claims should be heard together in the interests of efficient and fair resolution of the conflict between the parties. See *Feigin*, 19 P.3d at 26.

C. The interest of the Applicant is not adequately represented by existing parties.

MP's interests in the litigation, where it *is* congruent with the Plaintiffs' pending claims, is not adequately represented because, as explained more fully above in sections I(A) and (B), MP has as part of its mission "to ensure that all students, regardless of race, income, or immigration status, have safe, healthy, and equitable learning environments." MP seeks to protect its accomplishments, consistent with this mission, including the Board's 2021 unanimously approved Executive Limitation Policy 10.10 (EL 10.10) which states, "[t]he Superintendent will not staff schools with school resource officers or the consistent presence of security armed with guns or any other law enforcement personnel." This signature achievement in the interests of students was overturned behind closed doors and without MP being able to observe or attempt to impact the formulation of new policy.

The goals of MP's litigation here include improving the notice on agendas, improving motions to enter executive sessions, correcting misuse of executive sessions, and making sure that policy debates are held in broad daylight, not closed meetings. The press Plaintiffs are here seeking to secure only a portion of MP's goals, the opening of the executive session recording.

II. In the alternative, the Court should grant Applicant Permissive Intervention.

A. The application is timely.

The lawsuit was filed only five days ago, and no activity has yet occurred in the case.

B. Movimiento Poder's claim and the main action have a question of law or fact in common.

MP's claim and the Plaintiffs' claims cover some, but not all, identical ground. MP and the Plaintiffs each seek to secure opening of the executive session recordings. This falls under the same Open Records and Open Meetings laws, including § 24-72-204(5.5), and § 24-6-402(2)(d.5)(I)(C), C.R.S. The facts at issue involving the agenda, motion to enter executive session, activity in the executive session, and immediate reversal of a policy are in common between Plaintiffs' and Applicant's case.

C. The intervention will not unduly delay or prejudice the adjudication of the original parties.

The case was filed recently, the Defendant has not yet filed a pleading, and no delay or prejudice will accrue to the original parties.

Under C.R.C.P. 24(b) related to permissive intervention, an applicant with a vital interest in the result of the suit should be granted permission to intervene as a matter of course.

Roosevelt, 384 P.2d at 101. Here, MP easily meets the criteria for permissive intervention.

Conclusion

MP meets the standard for intervention of right and permissive intervention under C.R.C.P. 24(a) and (b), and the court should grant the Application and accept the filing of the Complaint.

Respectfully submitted this 4th day of May, 2023.

Attorneys for Plaintiff-Intervenor:

s/ Eric Maxfield

ERIC MAXFIELD, #29485
ERIC MAXFIELD LAW, LLC
3223 Arapahoe Ave., Suite 300
Boulder, CO 80303
Telephone: 303-502-7849

s/ Katherine Dunn

KATHERINE DUNN,
DC Bar #1782111
pro hac vice application filed
concurrently
Advancement Project
1220 L. St Suite 850
Washington, DC 20005
202-728-9557

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPLICATION TO INTERVENE was served on May 4, 2023, through the Colorado Court electronic filing system to:

Rachael Johnson, Esq.
Reporters' Committee for Freedom of the Press

Steven D. Zansberg, Esq.
LAW OFFICE of STEVEN D. ZANSBERG, L.L.C.

Attorneys for Plaintiffs

And by email to:

Brent Case, Esq.
Jon Fero, Esq.
Semple, Farrington, Everall & Case, P.C.

bcase@semplelaw.com
jfero@semplelaw.com

Attorneys for Defendant

/s/ Eric Maxfield
Eric Maxfield