IN THE MATTER OF A FACT FINDING BETWEEN: **JEFFCO EDUCATION SUPPORT PROFESSIONALS ASSOCIATION** **and** **JEFFERSON COUNTY SCHOOL DISTRICT** _____ Erik G. Bradberry, #49894 Colorado Education Association 1500 Grant Street Denver, CO 80203 303-837-1500 (office) 303-861-2039 (fax) ebradberry@coloradoea.org *Attorney for JESPA*	Case No. _____

RESPONSE IN OPPOSITION TO SCHOOL DISTRICT'S MOTION FOR ARBITRATION TO BE HELD IN CLOSED SESSION

The Jeffco Education Support Professionals Association ("JESPA" or "Association"), by and through counsel, hereby responds in opposition to the Jefferson County School District's ("School District's" or "District's") Motion for Arbitration to be Held in Closed Session ("Motion") as follows:

I. INTRODUCTION

Since 2014, when voters approved a ballot measure known as Proposition 104, Colorado has placed a special emphasis on the public nature of collective bargaining between school districts and unions. Unlike all other public bodies in the state, school districts are required to bargain with unions in public any time they gather to discuss a collective bargaining agreement. Yet, the School District here advances the dubious assertion that fact finding—which itself is

part of the bargaining process—is somehow exempt from the letter and spirit of Colorado's Open Meetings Law, §§ 24-6-401 *et seq.*, C.R.S. ("OML"). As discussed in further detail below, the District is mistaken.

II. THE COLLECTIVE BARGAINING AGREEMENT

The current iteration of the Parties' collective bargaining agreement ("CBA") came into effect on September 1, 2019, and it expires on August 31, 2025. Although it is a multi-year agreement, the Parties bargain every year over, among other terms each might bring to the table, wage proposals. Predictably, bargaining is a topic covered in detail by the CBA. (CBA, Art. 3.) For example, the contract provides a timeline for negotiations (Art. 3-2-4); a procedure for adopting agreements (Art. 3-3); and a process by which the Parties resolve an impasse if they arrive at one (Arts. 3-4, -5, and -6). Specifically, the CBA contains a two-step process to resolve an impasse in bargaining—the first step is mediation, and if that fails to bring about a settlement, the Parties proceed to fact finding. (*Id.*)

Unlike mediation and fact finding, which are contained in Article 3 because they are part of the collective bargaining process, the CBA's arbitration provisions are codified in Article 12, which defines the grievance procedure. (*See* CBA, Art. 12-2.)

Fact finders and all others who interpret the CBA are required to do so in a manner that complies "with the Constitution and laws of the United States and the State of Colorado." (CBA, Art. 3-1-4.) Consistent with this mandate, a fact finder tasked with resolving a bargaining impasse has the authority "to hold meetings, make procedural rules, and set the dates and times

for meetings, which will be conducted in closed sessions, except as required by law." (*Id.* at Art. 3-6-2 (emphasis added).)[1]

III. THE OPEN MEETINGS LAW

In Colorado, "the formation of public policy is public business and my not be conducted in secret." § 24-6-401, C.R.S. To that end, meetings of any "local public body … at which any public business is discussed … are declared to be public meetings open to the public at all times." § 24-6-402(2)(b), C.R.S.

The OML codifies the public's keen interest in making sure that bargaining between school districts and unions takes place in the light of day. For example, the OML does not allow school boards to skirt their transparency obligations by sending school administrators to negotiate with unions on their behalf. To foreclose that possibility, the OML provides that "in order to assure school board transparency [the term] 'local public body' shall include members of a board of education, school administration personnel, or a combination thereof who are involved in a meeting with a representative of employees at which a collective bargaining agreement is discussed." § 24-6-402(1)(a)(II), C.R.S. (emphasis added).

The OML broadly defines "meeting" to mean "any kind of gathering, convened to discuss public business[.]" *Id.* at 402(1)(b). Consequently, any time three or more school district board members and/or administrative personnel convene to discuss a collective

[1] The CBA contains identical language regarding the authority of a mediator: "The mediator will have the authority to hold meetings, make procedural rules, and set the dates and times for meetings, which will be conducted in closed sessions, except as required by law." (Art. 3-5-1.) In December 2020, when the Parties mediated the instant impasse, they did so in private, which was (at least arguably) permissible because they did not discuss their bargaining impasse with each other; rather, each discussed the impasse privately with the mediator.

bargaining agreement with union officials, the gathering must be open to the public at all times. § 24-4-402(1)(a)(II), (1)(b), and (2)(b), C.R.S.

Relying on the OML's sweeping language to ascertain the General Assembly's intent, courts have identified that "the mandate of the Open Meetings Law is clear: in Colorado, public bodies must conduct public business openly and not in secret." *Weisfield v. City of Arvada*, 361 P.3d 1069, 1073 n.3 (Colo. App. 2015). So serious is the OML's mandate of transparency that it provides a right of action when public bodies deprive citizens of the opportunity to observe public business in action. § 24-6-402(9); *see also Weisfield* at 1073 (the OML "creates a legally protected interest on behalf of Colorado citizens in having public bodies conduct public business openly in conformity with its provisions.").

IV. ARGUMENT

A. JESPA Members and the Public Have a Constitutional Right to Observe the Fact Finding Hearing

Both JESPA's membership, as well as the public at large, have a constitutionally protected interest in observing—but not necessarily participating in—these proceedings. In the seminal case of *Richmond Newspapers*, *Inc. v. Virginia*, 448 U.S. 555 (1980), the Court recognized that the public and the press enjoy a First Amendment right to access and observe criminal trials. The right of access is grounded in the value of assuring freedom of communication on matters relating to the functioning of government. *Id.* at 575. The same right of access also applies to civil trials, administrative hearings, deportations, and municipal planning meetings. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695 (6th Cir. 2002) (providing case citations). The right of access also extends to government documents. *Cal-Almond, Inc. v. U.S. Dep't. of Agriculture*, 960 F.2d 105, 109 (9th Cir. 1992).

As with any other right, the right of access is not unlimited. In criminal cases, for example, in deciding whether to curb public access, courts look to whether a proceeding has historically been open to the press and public, and whether public access plays a significant role in the function of the process in question. *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *see also N.Y. Civil Liberties Union v. N.Y.C. Trans. Auth.*, 684 F.3d 286, 290 (2d Cir. 2012).

Here, the public has a strong interest in understanding how the School District proposes using its funds—which include millions of dollars in taxpayer contributions—to pay JESPA bargaining unit members' wages. Those bargaining unit members have an even more compelling interest in observing these proceedings, which bear directly on their livelihoods. In Colorado, particularly since 2014, bargaining between school districts and unions has been open to the public and union members. In particular, JESPA bargaining sessions, including those leading to the impasse underlying this case, have been open for public consumption. During the present pandemic, observers have not posed any threat of disruption to bargaining sessions, as they monitor the proceedings via live online streaming.

B. Fact Finding Arises Out of the CBA's Bargaining Provisions, Not the Grievance Procedure

Unlike the arbitration of grievances under Article 12 of the CBA, which generally fall into the category of "rights" arbitration, this fact finding is an "interest" dispute. Arbitration of interest disputes is more an "instrument of collective bargaining" than "a process of adjudication." *Elkouri & Elkouri*, How Arbitration Works (BNA, 8th ed), Ch. 22.1. "Interest arbitration is a method by which an employer and union reach agreement by sending the disputed issues to an arbitrator rather than by settling them through collective bargaining and economic

force." *Id.* (citing *Silverman v. Major League Baseball Players Relations Comm., Inc.*, 67 F.3d 1054, 1062 (2d Cir. 1995)). Wage issues, unsurprisingly, constitute the most common subject of interest arbitration. *Id.*; *see also* at Ch. 18, "Remedies in Arbitration."

The issues in this dispute concern wages and the scope of the JESPA bargaining unit. The Parties have discussed both issues at numerous bargaining sessions, which were open to—and observed by—members of the public. Obviously, traditional bargaining failed to bring about a settlement on these topics, and now the Parties have enlisted the help of the Fact Finder to help them reach an agreement.

The fact that Parties failed to agree about wages and the scope of the bargaining unit at the negotiating table does not somehow relieve the School District of its obligation to continue discussing them in public. If it did, school districts interested in negotiating under an invisibility cloak would be incentivized to quickly declare impasse in order to reach private fact finding, where they could present bargaining proposals free from public scrutiny. Such an obvious end around the OML is not what the voters and General Assembly intended with the adoption of Proposition 104 and the related amendments to the OML.

As mentioned above, Fact Finding is part of the CBA's bargaining provisions. Specifically, Fact Finding is a mechanism to resolve a bargaining impasse. The topics that arrive at Fact Finding are inevitably bargaining subjects concerning a collective bargaining agreement. Consequently, there can be no reasonable dispute that Fact Finding implicates the transparency concerns and requirements of the OML. *See* § 24-6-402(1)(a)(II), C.R.S. The arbitration of grievances under Article 12, by contrast, tend to arise from alleged violations of the CBA—i.e. they do not originate as subjects of collective bargaining, and they do not trigger the public

interest concerns codified in the OML. As such, whereas grievance arbitrations can—and routinely do—take place in private settings, a Fact Finding hearing may not.

C. Fact Finding is a "Meeting" Within the Meaning of the OML

It is difficult to imagine a broader definition of "meeting" than the one provided by the OML: "Meeting means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." § 24-6-402(1)(b), C.R.S. (emphasis added). Because the District cannot credibly argue the hearing in this case will not be a "gathering," it asserts that the Parties will not "'discuss' public business or anything else" over the course of the two-day hearing. (Motion, p. 2.) However, the District's emphasis on semantics is inconsistent with the intent of transparency woven throughout the OML. *Weisfield*, 361 P.3d at 1073 n.3. Moreover, to the extent the District argues the subjects the Parties will take up during Fact Finding are not "public business," it is obviously mistaken because the same topics (wages and the scope of the bargaining unit) have been "public business" for purposes of the OML during the many months of negotiations leading up to the hearing in this case.

D. A Private Fact Finding Hearing Exposes the School District to Costly and Time-Consuming Litigation

The District does not explain in its Motion why it prefers to conduct this Fact Finding in private. Ironically, however, doing so exposes the District to the time and cost involved in defending itself against potentially numerous lawsuits from citizen-plaintiffs seeking to enforce their rights under the OML. *See* § 24-6-402(9)(a), C.R.S. ("Any person denied or threatened with denial of any of the rights that are conferred on the public by this part 4 has suffered an injury in fact and, therefore, has standing to challenge the violation[.]").

The presumptive remedy for an OML violation is to void the event that unlawfully occurred in private. § 24-6-402(8); *see also Bd. of Cty. Comm'rs. V. Costilla Cty. Conservancy*

Dist., 88 P.3d 1188, 1193 (Colo. 2004). Consequently, if one or more plaintiffs were to succeed in their OML claims against the District, the remedy could (and likely would) be to invalidate the findings and recommendations of the Fact Finder, along with any Board of Education action taken in response to them. *Id.*

E. The OML Offers the School District One Avenue for Avoiding Public Scrutiny, but Not for the Reasons Articulated in its Motion

In the interest of exercising complete candor with the Fact Finder, JESPA recognizes that the OML affords the District an avenue for avoiding public scrutiny of its bargaining proposals. With regard to local public bodies, like school districts, the OML's transparency requirements are triggered when a quorum or—more pertinent here—"three or more members of any local public body," including school administration personnel, gather to discuss a collective bargaining agreement with union officials. § 24-6-402(1)(a)(II) and (2)(b), C.R.S. The Parties in this case have agreed that each side may have two advisory witnesses. The District has endorsed two advisory witnesses, David Bell and Nicole Stewart, both of whom are on its bargaining team for JESPA negotiations. The District's attorney in this case is <u>also</u> on the District's bargaining team for JESPA negotiations. Thus, the District stands to be represented at Fact Finding by three school administration officials, all of whom are on its bargaining team for JESPA negotiations. But the District cannot have its cake and eat it, too. If it wishes to skirt the OML's transparency requirements, it must decide which of its three bargaining representatives will not be present during the Fact Finding hearing.

V. CONCLUSION

For all of the above-stated reasons, JESPA respectfully requests that the Fact Finder DENY the School District's motion in its entirety. In the alternative, JESPA urges the Fact

Finder to ORDER the District to have two or fewer school administrative officials in the hearing room at all times.

DATED this 19th day of February 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO SCHOOL DISTRICT'S MOTION FOR ARBITRATION TO BE HELD IN CLOSED SESSION was submitted, via electronic mail, on February 19, 2021 to the following recipients:

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