

DIRECTOR, DIVISION OF LABOR  
DEPARTMENT OF LABOR AND EMPLOYMENT  
STATE OF COLORADO

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**PETITIONER’S RESPONSE IN OPPOSITION TO RESPONDENT’S REQUEST FOR INTERVENTION**

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DENVER CLASSROOM TEACHERS ASSOCIATION,

Petitioner,

v.

DENVER PUBLIC SCHOOLS, SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,

Respondent.

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The Petitioner, Denver Classroom Teachers Association (“DCTA” or “Association”), through counsel, hereby responds to the Respondent’s (“School District” or “DPS”) Request for Intervention (“Request”) as follows:

**Introduction**

This matter involves a labor dispute between two parties whose contractual relationship goes back decades. It is a relationship that has endured through challenging times, and has historically been built on a mutual trust and respect that is, at this time, in a state of disrepair. However, neither the Director of the Division of Labor Standards and Statistics (“DLSS”) (hereafter referred to as the “Director”), nor the Executive Director of the Colorado Department of Labor (“CDLE”) (hereafter referred to as the “Executive Director”), nor even the Governor can mend the broken relationship that currently exists between the parties. Only DCTA and DPS can repair their relationship, and that process will begin once they reestablish mutual respect through the bargaining process.

The narrow issue presented here is whether it would be appropriate for the Director to intervene in this case. In making that determination, the Director must examine the totality of the circumstances, which DCTA maintains will lead to the only fair and logical conclusion in this case—that intervention is inappropriate under these circumstances.

The DCTA bargaining unit, which is comprised of 5,700 teachers and specialized service providers (“SSPs”), including licensed nurses, has spent years attempting to come to agreement

with DPS on a fair and comprehensible salary schedule. DCTA members are in a precarious situation, having voted overwhelmingly to authorize a strike, and yet continuing to work under the oppressive scrutiny of an employer whose heavy-handed attempts to intimidate and discourage them from exercising their legal right to participate in a work stoppage grows more intense by the day. For that reason, and for the reasons more fully set forth herein, DCTA urges the Director not to intervene, and to issue a forthwith order freeing the educators to exercise their right to strike.

### **Discussion**

When faced with a dispute between an employer and its employees concerning conditions of employment, wages, or hours, the Director may intervene, but only if (a) both the employer and employees request such intervention; or (b) the Executive Director determines the dispute “affects the public interest.” Colo. Rev. Stat. § 8-1-125(1) (2018).

The “chief purpose of the exercise of the director’s jurisdiction under the Industrial Relations Act is to avoid the necessity of resorting to strikes, lockouts, boycotts, blacklists, discriminations, and legal proceedings in matters of employment.” *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 841 P.2d, 237, 248 (Colo. 1992) (internal quotations omitted). If the Director elects to assert jurisdiction, he or she “must promote the voluntary arbitration, mediation, or conciliation of the dispute.” *Id.* During the time that the Director has jurisdiction over the dispute, the parties are required to maintain the status quo. *Id.*

In light of these principles, the following reasons—individually and collectively—illustrate why intervention is not appropriate in this case:

#### **I. DCTA contests the request for intervention.**

DCTA is appreciative of the time, resources, and energy the Director and others have dedicated to monitoring this labor dispute. However, based on the extensive bargaining history underlying this dispute, along with the numerous and various unsuccessful attempts at reconciliation the parties have employed thus far, DCTA believes that intervention in this matter would be futile.

##### *A. The parties remain far apart on substantial issues.*

The parties have been negotiating ProComp 2.0 (“Agreement”) since 2013. Over these five years, when they were unable to agree on meaningful changes to the Agreement, the parties agreed to short durational extensions and thereby preserved the status quo. Both sides acknowledge that they have been in intensive negotiations concerning ProComp 2.0 for the last fourteen months. During that period, they have engaged in “interest-based bargaining” with guidance from a federal mediator, and more recently, have participated in formal mediation, facilitated by former Executive Director of the CDLE Jon Numair.

In addition to receiving assistance during their formal negotiations, the parties have jointly and separately engaged experts to study, among other topics, the incentives that remain a sticking point in this impasse. DPS' steadfast insistence on incentivizing teachers differently than other Colorado school districts is contrary to the findings of studies conducted by both parties. Ever since the adoption of ProComp 2.0, studies have consistently found that teachers are not motivated by unpredictable "bonuses", and such bonuses do not reduce teacher turnover. Rather, teachers are more likely to continue teaching in a school district when they have the ability to earn a livable wage, and when they can accurately forecast their future earnings. Notwithstanding the studies showing that incentives of the sort DPS insists upon do not work, DCTA has demonstrated a willingness to find a middle ground on this issue by, for example, agreeing on incentives aimed at recruiting teachers to "hard-to-fill" positions. DPS, meanwhile, has never—through all of the parties' lengthy bargaining sessions—indicated a willingness to deviate from its ineffective approach to motivating and retaining its teachers.

And so after five years of continuous bargaining, with the efforts of highly trained, skilled, and respected mediators, and with the benefit of multiple in-depth studies, expansive gaps on fundamental monetary and philosophical issues remain. For example, DCTA proposes simplifying the compensation scheme by adopting a salary schedule similar to schedules already adopted by every other school district in this state. DCTA's goal is to have a fair, predictable and transparent salary schedule with attainable standards that allow teachers to achieve salary advancements over reasonable time periods. DPS, meanwhile, insists on adopting a novel salary schedule that imposes rigid barriers to salary advancement. Such barriers to advancement include, but are not limited to, requiring the successful completion of a Master's program or earning National Board Certification in order to move from the second to third lanes of their proposed salary schedule. Teachers know that these accomplishments are time-consuming and are undertaken at substantial personal cost to those who are able to pursue them. While the monetary issue remains unresolved, the philosophical difference behind the salary schedules is preventing the parties, as it has for many months, from reaching agreement on a new compensation scheme. In its Request, the District was clear that it has no intentions of joining the scores of other school districts that pay their teachers according to schedules similar to the one proposed by DCTA.

Significantly, the parties may be further apart now than they were during their last bargaining session. Late last week, on January 24, 2019 at 5:00 pm, the School District adopted a completely different financial model and applied new assumptions to it after nearly fifteen months of engaging with DCTA in negotiations that were rooted in using models that both sides had mutually agreed were reliable. In doing so, the School District effectively unraveled what progress had been achieved to that point, and further fractured an already-strained relationship between the parties.<sup>1</sup>

*B. Asserting jurisdiction and maintaining the status quo would be an endorsement of DPS' recent abusive tactics.*

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<sup>1</sup> The District made this substantial change without notifying DCTA.

There is a natural imbalance of power inherent in most employer-employee relationships, and this relationship is no exception. In DPS, as with all public school districts in Colorado, the administration controls the flow of resources and has the authority to issue directives to teachers and other ground-level workers. DCTA, a labor union with a rich and lengthy history, is well aware that employers in this country and others have often exploited that power differential, especially when faced with the prospect of a work stoppage, to intimidate the workforce and instill fear about what might happen to those who dare walk a picket line. Unfortunately, since it received DCTA's Notice of Intent to Strike, DPS has resorted to shameful intimidation tactics against its own workers. For example:

*Threats to Immigrant Teachers*

DPS, a school district with a diverse student body, recruits and employs teachers from both inside and outside the United States. Many of those who come to teach in DPS from outside the U.S. work pursuant to H-1B visas. Federal regulations that govern H-1B visa-holders could not be more clear that if an H-1B worker participates in a strike, he or she “shall not be deemed to be failing to maintain his or her status based solely” on that participation. 8 C.F.R. § 214.2(h)(17)(iii).

Notwithstanding that clarity, DPS threatened its immigrant teachers, whom they recruited, by threatening to report them to immigration officials if they chose to participate in a strike. Specifically, the School District informed principals that if “teachers on H or J visas . . . choose to strike, they are allowed to do so, but we need to be informed as soon as possible as we are required to report that to immigration and the US Department of State.” **Exh. 1**, *Email to principals from HR School Partner Taylor Tancik*. That purported requirement is a fabrication—employers need only report the existence of a strike, not the identity of those who participate. 20 C.F.R. § 655.733(a)(1). Moreover, the report is made to the U.S. Department of Labor, not to “immigration”, which is commonly understood to mean Homeland Security or ICE. The reference to “immigration” made DPS’ statement more intimidating, and the resulting waves of fear had a predictably chilling effect on all teachers, particularly those employed pursuant to H and J visas.<sup>2</sup>

DPS’ email to principals also stated that if visa teachers “have a pending case, this could impact the decision on the case.” *Id.* This is an apparent reference to the “legal permanent residency”, or “LPR” process, whereby one may become a legal permanent resident of the United States. To do so, the person seeking LPR status must first have her employer file a visa petition with U.S. Citizenship and Immigration Services (“USCIS”) on her behalf. The petition does not confer legal immigration status, but provides an H1-B visa that permits residency throughout the pendency of the petition. Important here, the employer can withdraw its petition

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<sup>2</sup> The School District apologized “for any anxiety that was caused by this error” after these threats were reported in the media. **Exh. 2**, “DPS Threatened to Report Striking Teachers to Immigration” (<https://www.9news.com/article/news/local/next/dps-threatened-to-report-striking-teachers-to-immigration/73-691d2a45-db79-43a9-91fd-6cbcf879bf72>) Jan. 24, 2019; **Exh. 3**, “Denver Public Schools Apologizes for Letter that said Striking Teachers on Visas Could be Reported to Immigration” Denver Post, Jan. 25, 2019.

at any time and without providing any reasons for its decision to do so. *See* 8 C.R.R. 205.1(a)(3)(iii)(C). Thus, employees pursuing LPR status are especially dependent on and vulnerable to their employer, and would be justifiably wary of taking any action that the employer might view as antagonistic. DPS' after-the-fact apology and attempt to rescind its harmful, divisive statement does little, if anything, to repair the lasting effect of the message, the tenor of which could not be further from the "good faith" and "transparency" the District purportedly values.

### *Warnings of Corrective Action for School Nurses*

Like most Colorado school districts, DPS is unable to employ enough full-time licensed nurses to fill each of its schools. Given that reality, and pursuant to state laws and regulations governing nurses, most—if not all—of the School District's licensed nurses delegate their authority to perform nursing tasks to non-licensed school personnel. Most commonly, this involves tasks such as dispensing medication to students.

Nurses are not required to delegate, Colo. Rev. Stat. §12-38-132(1) (2018), but if they choose to, they have an ongoing responsibility to assess—among other factors—whether "adequate supervision" over the person to whom they have delegated is feasible. 3 CCR 716-1. If the nurse is unable to provide such supervision, the nurse should withdraw the delegation.

Many DPS nurses have reasonably concluded that if they go on strike, they will not be able to adequately supervise their delegates, as they would be engaging in a work stoppage. And yet, in a recent communication DPS falsely informed its nursing employees that there are only two "lawful rationale" for withdrawing a delegation, and warned that "[a]ny nurse who withdraws delegation without a lawful rationale may be subject to corrective action." **Exh. 4**, *Email to school nurses from nursing supervisors Ellen Kelty and Kathrine Hale* (privileged communication alerting counsel to this email has been redacted).

Like their colleagues who were made to fear deportation, many nurses are now worried that a decision to exercise their right to strike would lead to severe negative consequences, such as being fired from their jobs or having their nursing licenses in jeopardy of being suspended or revoked if they comply with DPS' directive.<sup>3</sup>

### *Unreasonable and Unlawful Directives*

DPS principals have directed their teachers to inform them whether they intend to participate in a strike, and if so, to submit five days' worth of lesson plans for use during the strike. **E.g., Exh. 5**, *Email to teachers at CEC Early College from Principal Jamie Lofaro*. The purpose and effect of these directives could not be more apparent, and teachers who have received them find themselves in a predictably impossible situation: if they tell their principals they plan to strike, they fear retaliation; if they refuse to disclose whether they intend to strike, they worry that they will be subject to corrective action. In addition to being an obvious attempt

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<sup>3</sup> DPS has not to date, issued an apology to its nurses.

to infringe on teachers' right to strike, this directive is puzzling because the School District has, at great expense, already secured, copied, and distributed hundreds—maybe thousands—of boxes of “canned” lesson plans for substitute teachers to follow in the event of a strike.

Whether in isolation or taken as a whole, each of these examples of DPS leveraging its position as the employer to instill fear and intimidate employees is part of the status quo that would be maintained were the CDLE to intervene in this dispute.

**II. Every purported impact on the public advanced by the School District was foreseeable to the legislature when it gave public employees, including teachers, a qualified right to strike.**

*A. The School District's “public interest” arguments have already been raised—and rejected—in a Colorado court.*

The Association, the School District, and the CDLE were in Denver District Court nearly 25 years ago, litigating a dispute very similar to the one presented here. In that case, then-Executive Director of the CDLE, John Donlon, with support from the School District, sought to enjoin DPS teachers from engaging in a strike. CDLE and DPS presented evidence that if teachers engaged in a strike, students would suffer “irreparable injuries.” Many of those “irreparable injuries” were substantially identical to the purported impacts listed by the School District in its Request. *See Request, pp. 4-7.*

Judge Larry Naves, who presided over the case, responded as follows:

I note that this alleged injury to children is all incident to the right to strike by teachers. I'm not trying to minimize the impact upon children and the community and upon teachers of a strike. The point I'm trying to make is, when the legislature decides to permit public employees, including teachers, to strike, these things are foreseeable. [The legislature] must have considered and known about the impact of a strike upon children, and they must have balanced that with the benefits of permitting public employees, such as teachers, to strike.

**Exh. 6**, Reporter's Transcript at p. 16, l. 4-14, *John J. Donlon, Exec. Dir. of the Dep't. of Labor and Employment, and Acting Director, Division of Labor v. Denver Classroom Teachers Ass'n. and Sch. Dist. No. 1 of the City and County of Denver*, Case No. 94-CV-5055 (Oct. 12, 1994).

Judge Naves continued:

It's just inconceivable that this was not foreseeable and that...our legislators don't go through some type of [balancing] process...[when they] make a decision of public policy like this.

And I mention that because to look at foreseeable actions or incidents of strikes and then to hold those incidents amount to irreparable injury is just inconsistent.

*Id.* at l. 15-21.

Here, the School District has not articulated any effect to the public interest that the legislature would not have anticipated when it gave teachers a qualified right to strike. Instead, it has merely recycled many of the concerns rejected by Judge Naves a quarter-of-a-century ago.

Nobody takes more seriously the sacred responsibilities of caring for and teaching Denver’s students than the teachers and specialized service providers, themselves. And, setting aside the School District’s dire forecast of severe consequences, experience over the last year—in this state and others—demonstrates that the District’s articulated concerns are extremely unlikely to come true.<sup>4</sup>

*B. Contrary to the School District’s implication, the Director does not have the statutory authority to enter a binding “final award” on the parties.*

DPS argues that because Colo. Rev. Stat. § 8-1-125 makes mention of a “final award” and because the parties have “only engaged in nonbinding mediation” there are stones left unturned in their overarching effort to resolve this dispute. Request, ¶¶ 24-25 (emphasis supplied). To the extent DPS believes the Director has the statutory authority to issue a binding award in this, or any other, labor dispute, it is mistaken.

Indeed, that is exactly what then-Executive Director John Donlon attempted to do in 1994 when he attempted to impose a “final order” in the form of a collective bargaining agreement on the same parties to this dispute. Judge Naves found that neither Title 8 nor the Supreme Court’s holding in *Montezuma-Cortez* authorized such an act:

In summary, there’s nothing in the statutory scheme of the Industrial Relations Act that, one, permits the director to engage in binding, compulsory arbitration, and, two, that prohibits the DCTA from resorting to a strike after the Director terminates his jurisdiction.

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<sup>4</sup> In the last twelve months, teachers in a number of states, including West Virginia, Arizona, California, and Colorado have been compelled to go on strike. As the then Director elected not to intervene in the labor dispute between Pueblo teachers and Pueblo City Schools during the 2017-18 school year—teachers and paraprofessionals there went on strike for one week in May 2018. After less than a full week on strike, both employee groups obtained favorable concessions from the school district, and both came away with new collective bargaining agreements. Importantly, no students, parents, teachers, police officers, businesses, or anyone else suffered any enduring consequences from of the strike. To the contrary, members of the community banded together in a strong demonstration of support for and solidarity with their teachers. DCTA strongly suspects, and polling data supports, the same will be true if Denver teachers strike.

Reporter’s Transcript, *supra*, at p. 14, l. 19-24.

A review of the parties’ extensive history of non-binding arbitration reveals that employing such an approach here would, quite frankly, amount to a waste of time and resources. Multiple DPS Boards of Education, over many decades, have proven consistent on at least one point—and that is that the School District inevitably rejects non-binding arbitration awards that favor the union, while only accepting awards issued in its favor. As the Director cannot compel an agreement and because DPS has entrenched itself in its position, it is evident that intervention would be futile, and that non-binding fact-finding or arbitration would do nothing more than achieve the School District’s desired outcome of further delay.

**III. The School District’s “public interest” concerns are undermined by the overwhelming public support for Denver’s teachers.**

In its Request, DPS argues that a strike might create a “financial hardship” for families, and speculates that it “will also substantially affect the public interest by negatively impacting the community as a whole.” Request, ¶¶ 12.M and 15. The School District even posits, “[u]nstructured time absent supervision will increase the likelihood that students [will] make choices that are damaging to both their own and the community’s health, safety, and future well-being.” *Id.* at ¶ 15.

First, DCTA rejects the assertion that students are likely to seize the opportunities created by school closures to commit crimes in, or otherwise damage, their communities—teachers know their students too well to support such an outrageous claim.

Second, recent and reliable studies reveal strong public support for teachers and their right to strike. **Exh. 7, *Harstad Strategic Research, Inc. Study*, Jan. 7-10, 2019.** According to the Harstad study, which polled a representative sample of over 600 Denver voters just two weeks ago, 82% of all voters sided with teachers, over the School District, in the instant labor dispute. *Id.*, p. 2. That percentage was even higher among DPS parents, 89% of whom sided with teachers. *Id.* Similarly, 62% of all voters favored a strike, with 69% of DPS parents saying they would support a strike. *Id.*

Perhaps even more telling is what happened when negotiations stalled and ProComp 2.0 expired. Thousands of DCTA members—those whose lives and careers are most directly impacted by the status quo that exists between the School District and its teachers—answered the question whether they would authorize a strike. *And 93% affirmatively stated that they would.*

**Conclusion**

WHEREFORE, the Denver Classroom Teachers Association respectfully renews its request that the Director refrain from exercising jurisdiction over this dispute. Additionally, in light of the School District’s increasingly hostile efforts aimed at discouraging employees from



exercising their statutory right to strike, DCTA encourages the Director to expeditiously issue an order refusing jurisdiction.

DATED this 28th day of January, 2019.

Respectfully submitted,

*/s/ Erik G. Bradberry*

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## CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2019, a true and correct copy of the foregoing PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S REQUEST FOR INTERVENTION was served via electronic mail to the following:

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