

November 30, 2009

The Honorable Andrea Merida
Denver Board of Education
900 Grant St.
Denver, CO 80203

RE: "Lame duck" authority of school board members

Dear Ms. Merida:

You have asked me whether the Denver Board of Education, as constituted before the November 3, 2009 election, may act on a series of policy matters tonight rather than swear in newly elected members and allow them to make such decisions. The answer is that the "old board" cannot act in this manner, and its attempt to do so will likely be treated as void.

Effective today, all members elected on Nov. 3 are entitled to be members of the Denver School Board. On or before November 27, the Denver Clerk & Recorder delivered to the district's designated election officer the certificates of election establishing that Mary Sewall, Nate Easley, stating that you were the validly elected successors to office. *Cf. Uzzell v. Anderson*, 89 P. 785, 786 (Colo. 1906) (where a statewide initiative eliminated a county, the offices of that county's commissioners "terminated immediately upon canvas of vote"). The district cannot withhold the oath of office in order to deprive you of that entitlement to office.

Courts that have looked at a scenario like this one have – to put it mildly – frowned on last-ditch exercise of authority. Where an "old board" tried to execute an employment contract for a new superintendent four days before a new board came into office for a consolidated district, the Colorado Supreme Court struck the contract down. *Achenbach v. School District No. RE-2*, 491 P.2d 57 (Colo. 1971). The district's authority to act during "the 'lame duck' period of time" was limited to the administrative purposes specified by statute. *Id.* at 58. The district was not entitled to act on matters of policy – in that case, hiring a new superintendent. There is no reason to think that the broad policy questions to be addressed tonight would be viewed any differently.

Sincerely,



Mark G. Grueskin

MGG/aak