

RECEIVED

FEB 14 2022

RECEIVED FOR FILING
KITSAP COUNTY CLERK

FEB 14 2022

SKSD SUPT. OFFICE

DAVID T. LEWIS III

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

JEFFREY DAILY,

Petitioner,

vs.

SOUTH KITSAP SCHOOL BOARD,

Respondent.

Case No.: 22-2-00208-18

NOTICE OF APPEAL OF THE
SOUTH KITSAP SCHOOL
BOARD'S DECISION AND
FAILURE TO ACT (CLERK
ACTION REQUIRED)

I. NOTICE OF APPEAL

COMES NOW the Petitioner, JEFFREY DAILY, by and through his attorneys SARAH LIPPEK & BRANDT KREITZBERG, whose mailing address is 650 South Orcas Street, Suite 206, Seattle, Washington, 98108, and hereby gives notice that he seeks appeal of the (1) failure to act of South Kitsap School Board and (2) a decision of that Board; pursuant to RCW Chapter 28A.645.

Furthermore, upon receipt of this document, the petitioner requests assignment to a visiting judge under KCLCR 40(1)(B), scheduling of a special setting hearing due to the length and nature of the appeal under KCLRALJ 77(K)(9), and respectfully, the petitioner requests this Court to consider expeditious review under RCW 28A.645.030.

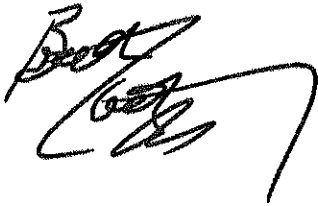
NOTICE OF APPEAL OF THE SOUTH KITSAP SCHOOL BOARD'S DECISION AND FAILURE TO ACT (CLERK ACTION REQUIRED) - 1

Law Offices of Sarah Lippek PLLC
650 South Orcas Street, Suite 207,
Seattle, Washington 98108
(206) 913-5767;
Fax

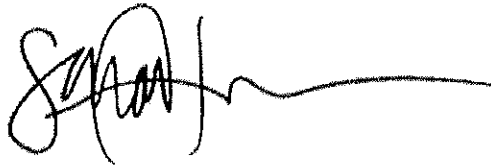
1
2 This Appeal is timely filed with the proper court, and timely filed with the Secretary
3 of the Board for South Kitsap School District.
4

5 RESPECTFULLY SUBMITTED this 14th day of February, 2022:

6 Law Offices of Sarah Lippek, PLLC
7

8 
9
10
11

12 Brandt Kreitzberg WSBA #49629
13 Attorney for the Defendant

8 
9
10
11

12 Sarah Lippek, WSBA #46452
13 Attorney for the Defendant

14
15
16
17 **II. PARTIES AND COUNSEL**

18 **A. Counsel for Petitioner Jeffrey Daily**

19 Sarah Lippek
20 Law Offices of Sarah Lippek
21 650 South Orcas Street, Suite 207,
22 Seattle, Washington, 98108
23 Lippek@protonmail.com

24 Brandt Kreitzberg
25 Law Offices of Sarah Lippek
26 650 South Orcas Street, Suite 207
27 Seattle, Washington, 98108
28 BKreitzberg@loospllc.com

1 **B. Counsel for Defendant South Kitsap School District Board**

2 Duncan K. Fobes
3 Patterson Buchanan Fobes & Leitch
4 1000 Second Ave, 30th Floor, Seattle, WA, 98104

5 **III. JURISDICTION AND VENUE**

6
7 Jurisdiction is conferred upon this Court by RCW 2.08.010 and RCW 28A.645 which
8 grants that "any person... aggrieved by any decision or order of any school official or
9 board,... may appeal the same to the superior court of the county in which the school
10 district... is situated." RCW 28A.645.010(1).

11
12 Venue is proper in Kitsap County Superior court pursuant to RCW 4.12.020 and/or
13 RCW 4.12.025 because the South Kitsap School Board operates in South Kitsap
14 County at 2689 Hoover AVE SE, Port Orchard, WA 98366, and because Petitioner
15 resides in South Kitsap County school district in South Kitsap County, Washington
16 State.

17
18
19 **IV. ISSUE**

20 At issue is the refusal by the South Kitsap School District Board (hereinafter
21 referred to as the "Board") to delay the award of a contract for pool modernization to
22 the contractor Christensen, Inc. This refusal was manifest in the vote held by the
23 school board directors by a majority of votes against a motion properly brought by
24 Director Jeff Daily to delay the contract award during the board's special meeting
25 held on January 19, 2022.
26
27

1 Additionally, the Board has a long history of limiting public access and participation
2 in public meetings which limits the ability of the public to be informed about the
3 business of the Board. That does not inherently mean that all the decisions the
4 Board are making are wrong, but it does impair the ability of the public to hold the
5 Board accountable.
6

7 8 9 V. BACKGROUND

10 Petitioner Mr. Daily was democratically elected as a representative of the people of
11 South Kitsap County to serve as a member of the South Kitsap School Board by a
12 majority vote in 2019. He entered office in 2020 and immediately sought to fulfill his
13 campaign promises - to bring fiscal responsibility and public transparency to the
14 South Kitsap County School Board.
15

16 Mr. Daily takes to heart that he is serving at the behest of his constituents, and, to
17 that end, it is of the utmost importance to Mr. Daily that the process remains open
18 and the public is readily and forthrightly informed of the decisions made by the board,
19 as well as the reasoning behind those decisions. Without that transparency, Mr. Daily
20 knows that the voice of the people is stifled.
21

22 Of particular concern to Mr. Daily are the financial dealings of the School Board. He
23 respects the vote of the people and the trust they have put into the School Board to
24 make the improvements to the district that were approved when they voted in favor
25 of the capital levy project in 2018, which included most importantly the pool
26
27

1 modernization project. Mr. Daily is greatly concerned with the possibility that the
2 Board has been failing to keep the public abreast of these projects and, without
3 public discussion or public meetings, projects publicly approved as part of the
4 capital levy project have, unbeknownst to the public, fallen by the wayside.

6 The Board has a long-established history of actions and decisions adverse to the will
7 of the South Kitsap School District voters, and in conflict with the voters' requests
8 and demands they have clearly articulated by their voting decisions.

10 Mr. Daily is striving to put right what once went wrong and hopes the board will
11 again begin to follow its own lists of prioritized projects that it has seemingly
12 abandoned, or, at the very least, hold the proper public meetings so the public
13 understands what occurred and can bring that information with them when next
14 they vote for members of the board.

17 VI. ALLEGATIONS OF MISCONDUCT

18 The purpose of the OPMA is to permit the public to observe all steps in the making
19 of government decisions.¹

21 A. The School Board failed in its duty of due diligence in practicing fiscal 22 accountability.

25
26
27 *Cathcart v. Andersen*, 85 Wn.2d 102 (1975)
28 NOTICE OF APPEAL OF THE SOUTH KITSAP SCHOOL
BOARD'S DECISION AND FAILURE TO ACT (CLERK
ACTION REQUIRED) - 5

1 During a special session of the Board on January 19th, 2022, a motion was brought
2 on whether to award a contract for pool modernization to Christensen, Inc. The
3 contract was to repair, refurbish and remodel the South Kitsap School District
4 Community Pool. In the middle of December 2021, Petitioner had requested a copy
5 of the document detailing the bid made by each company, but it was not until after
6 the special session on January 19th, 2022, that Petitioner was finally provided a
7 copy of that document. Despite the fact that all members of the Board had yet to be
8 made aware or had an opportunity to discuss the bids submitted by various
9 companies, the majority of the board voted in favor of granting the contract to
10 Christensen, Inc. With no means for all board members to review the project bid
11 proposals prior to voting, the Board was unable to make a well-informed choice
12 between bidders. Additionally, the vote was taken without public comment. By
13 voting to approve the contract in such a circumstance, the Board failed in its duty of
14 due diligence in practicing fiscal accountability and acting in a reasonable and
15 responsible manner.
16
17
18
19
20

21 **B. The Board failed to act openly and inform the public about essential**
22 **elements of the pool modernization project.**
23
24
25
26
27

1 The Purpose of the OPMA is to “create important and powerful tools enabling the
2 people to inform themselves about their government[.]”² This is accomplished in a
3 strongly worded statement where the legislature declares its intent by requiring
4 that public agencies conduct their deliberations openly and by insisting that the
5 people “remain informed so that they may retain control over [the public agencies]
6 they have created.”³ By acting with ignorance regarding the costs and companies
7 involved in bidding for the pool modernization project during the special session on
8 January 19th, 2022, the Board deprived the public of their chance to be informed.
9
10 Without a prior public meeting, the public was denied the opportunity to hear
11 discussion by the Board members of their concerns over costs and the merits and
12 demerits of each of the companies involved in the bidding process. Between when
13 the project was initially given support in 2020 and when the project was approved
14 on January 19th, 2022, the estimated budget requirements for the project nearly
15 doubled from \$5.2 million dollars to \$10.5 million.⁴ Such an increase in cost is no
16 trivial matter. Without this knowledge, the public could not be properly informed
17 about essential issues regarding the pool modernization project, in violation of the
18 OPMA. The right to be informed is an essential component of the Open Public
19
20
21
22
23
24
25

26 <https://www.atg.wa.gov/Open-Government-Resource-Manual/Chapter-3>
27 See RCW 42.30.010
28 See Exhibit A (attached)

1 Meetings Act (OPMA) and is required for the public to hold public officials
2 accountable and ensure that elected officials are acting on their behalf.⁵

3
4
5 **C. The School Board did deny the county constituents full participation by**
6 **violating the spirit of the OPMA and limiting public comment through**
7 **prior restraint.**

8 The OPMA does not require the Board to allow public comment at a public
9 meeting.⁶ However, when the school board decided to allow public comment, as the
10 Board has, they created a “limited public forum.”⁷ As a result, the Board can place
11 reasonable and viewpoint-neutral “place, time and manner” restrictions on speech if
12 there is a legitimate and compelling government interest.⁸ However, the Board has
13 gone too far in issuing new rules that are being used to improperly stifle public
14 participation and limit speech that is contrary to the desires of the Board.

15 As of February 11, 2021, the Board imposed new requirements that restrict the
16 public’s ability to provide comment during public meetings; one of the novel
17 requirements necessitates that individuals provide their “legal name, contact
18 information, and topic” they wish to speak about as a condition of participation.⁹
19
20

21
22
23
24 See *RCW* 42.30.010

25 <https://www.atg.wa.gov/Open-Government-Resource-Manual/Chapter-3>

26 *Steinburg v. Chesterfield Cty. Planning Comm’n*, 527 F.3d 377 (4th Cir. 2008). Local Government bodies can limit
27 speech to certain topics (such as agenda items) and timeframes as long as such restrictions are not unreasonable and
28 as long as the restriction is not based on disagreement with a speaker’s viewpoint.

29 *Id.*

30 See Public Comment: 2/11/2021 UPDATE to public comment process, South Kitsap School District,
31 <https://www.skschools.org/school-board/board-meetings> (last visited Jan. 29th, 2022).

1 Such conditions violate both the spirit of the OPMA and sacred First Amendment
2 rights on which the nation was founded.

3
4 *i. The requirements for participation in public comment
5 instituted by the Board are in violation of the spirit of the
6 OPMA.*

7 A core component of the OPMA is that all meetings shall be open to any member of
8 the public.¹⁰ This is given priority above all else as can be seen by the fact the act
9 does not allow attendance to be limited or discouraged by requiring people to “sign
10 in, complete questionnaires, or establish other conditions to attendance.”¹¹ Being
11 open to the public is so important that even people who are not subject to the
12 jurisdiction of the agency conducting the meeting must be allowed to attend.¹²

13 Clearly, the intent is to provide the public full access to public meetings. However,
14 in requiring registration to speak at a public meeting when the OPMA clearly
15 prohibits registration for participation, the Board is violating the very essence of the
16 OPMA. Citizens should not in any way be dissuaded from being informed and
17 participating in public agencies.
18

19
20 *i. The requirements for participation in public comment
21 instituted by the Board are in violation of the right to Free
22 Speech enshrined in the First Amendment of the constitution of
23 the United States.*

24
25
26 ⁰ See RCW 42.30.040

27 ¹ *Id.*

28 ² <https://www.atg.wa.gov/Open-Government-Resource-Manual/Chapter-3>

1 While a sign-in requirement is not inherently wrong under the OPMA since it “does
2 not restrict attendance, only participation”,¹³ the same is not true when a legal
3 name is required as is being done by the Board at present. Requiring individuals to
4 provide their legal name in order to participate violates the First Amendment right
5 of the public to speak anonymously,¹⁴ and it has long been established that
6 requiring registration to make a public speech is “generally incompatible with an
7 exercise of the right of free speech[]”.¹⁵
8
9

10 The fear that such registration could be used to stifle speech is being realized in the
11 public meetings conducted by the Board. The Board has used the new rule to
12 identify people wishing to speak by their legal name and preventing those
13 individuals whom the Board may disagree with from speaking during public
14 meetings.
15

16 A public agency such as the Board “cannot suppress expression simply because
17 public officials do not agree with a certain viewpoint.”¹⁶ Not only is it
18 unconstitutional but, by suppressing speech which the Board disagrees, the Board
19

20
21
22
23
24 ³ <https://www.atg.wa.gov/Open-Government-Resource-Manual/Chapter-3>

25 ⁴ *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (ordinance requiring those
26 intending to engage in door-to-door advocacy of a political or religious cause to obtain and, upon demand, display
27 permit, which contained one’s name, violated First Amendment protection accorded to anonymous pamphleteering
28 or discourse)

⁵ See *Thomas v. Collins*, 323 U.S. 516, 539 (1945)

⁶ *Planned Parenthood of S. New., Inc. v. Clark City Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991)

1 is effectively making decisions on “what is good for the people to know and what is
2 not good for them to know[]”¹⁷: the exact opposite of what is intended by the OPMA.
3

4
5 **D. Stakeholders.**

6 Not only is the board denying individuals the right to speak out of fear of dissenting
7 opinions, but the Board has added as a condition of attendance that only a
8 “stakeholder” be allowed to speak. A “stakeholder”, as decided by the Board in this
9 circumstance, is someone who owns property in school district boundaries, has
10 family that work in the district, or has children that attend schools in the district.
11
12 Once again, this goes against the essential premise of the OPMA which is to provide
13 access and accountability of the Board to the public.¹⁸ This is clear violation of the
14 OPMA. An agency may not place a “condition precedent” on attending a public
15 meeting.¹⁹ Additionally, this is a violation of the speakers’ right to be heard. Where
16 a person works, owns property, or sends their child to school is not a basis for
17 whether someone can exercise their constitutional right to free speech.
18
19
20

21 **E. The Board is discouraging attendance at public meetings by limiting**
22 **space.**
23

24
25
26 ⁷ See *RCW* 42.30.010

⁸ See *RCW* 42.30.010

27 ⁹ *Zink v. City of Mesa*, 17 Wash.App.2d 701, 487 P3d 902 (2021).

1 The Board discouraged attendance at public meetings my limiting space and
2 seating. While there is no requirement that the Board hold its meetings in a
3 location that would allow everyone to attend, “it seems clear that the courts would
4 discourage any attempt to deliberately schedule a meeting at a location that was too
5 small to permit full attendance[]”.²⁰ The Board, however, provides approximately
6 twenty seats and packs them together so tightly that one constituent wrote about
7 nearly falling onto another as she tried to take her seat because “things were so
8 tight”.²¹ Doing so is a clear attempt to limit public participation, a fact that was
9 recognized by the constituent who noted the clear message being sent by the Board
10 was that “[they] don’t want [the public] there.”²²
11
12
13
14

15 It is because of the extraordinary circumstances and heavy implications of this matter
16 that Petitioner Mr. Daily requests that this Court take speedy and decisive action,
17 not only to reverse the incorrect actions of the Board, but to insist that the Board once
18 again serve the people.
19
20

21 VII. BASES FOR APPEAL

22 Petitioner is entitled to relief pursuant to RCW Chapter 28A.645 because:
23
24
25

26 ²⁰ See <https://www.atg.wa.gov/Open-Government-Resource-Manual/Chapter-3>

27 ²¹ See *Exhibit B*

28 ²² *Id.*

- 1 1. The decision and final vote by the Board goes against the requirements of the
2 OPMA under RCW 42.30.
- 3
4 2. The current rules for participation in public meetings violate the spirit of the
5 OPMA under RCW 42.30.010.
- 6
7 3. The Board is violating the OPMA under RCW 42.30.010 by attempting to limit
8 public attendance at public meetings.
- 9
10 4. The current rules for participation in public meetings are being used in a
11 manner that improperly limits speech in violation of U.S. Cont. Amend I.
- 12
13 5. The need for the people to remain informed and retain their sovereignty over
14 the Board under RCW 42.30.010
- 15
16 6. The decision and final vote is arbitrary or capricious.
- 17
18 7. The decision and final vote is lacking due diligence and fiscal accountability.

19
20
21
22
23
24
25
26
27
28

**VIII. REQUESTING LEAVE TO MOVE FOR TRO/PRELIMINARY
INJUNCTION**

Petitioner is aware that an emergency temporary injunction would normally be pursued in a separate *ex parte* action, and he will be initiating that procedure if necessary. However, for the sake of judicial efficiency and consolidation of related matters, Petitioner wishes to give this Court opportunity to hear the motion. If granted leave, Petitioner Mr. Daily will note a hearing before this Court requesting an emergency temporary injunction staying the awarding of the pool modernization

1 contract. Given the persistent pattern of misuse of procedure and violations of the
2 Open Public Meetings Act, Petitioner Mr. Daily, he has legitimate concern that the
3 filing of the instant action is the only way to protect the ability of the public to ensure
4 the Board is acting on their behalf.
5

6
7 **a. The standard for preliminary injunction has been met.**

8
9 When determining if preliminary injunctive relief is appropriate, the court analyzes
10 whether the moving party: (1) Has a clear legal or equitable right and (2) Has a well-
11 grounded fear of immediate invasion of that right by the one against whom the
12 injunction is sought, and further must find that (3) That the acts complained of are
13 either resulting in or will result in actual and substantial injury to the moving party
14 and his constituents.²³
15

16 When deciding if a party has a clear legal or equitable right, the court examines the
17 likelihood that the moving party will prevail on the merits.²⁴ While the trial court
18 must reach the merits of purely legal issues for purposes of deciding whether to grant
19 or deny the preliminary injunction, it may not adjudicate the ultimate merits of the
20
21
22
23

24
25 ²³ Rabon v. City of Seattle, 135 Wn.2d 278, 284, 957 P.2d 621 (1998); citing Tyler Pipe Indus., Inc. v. Department
26 of Revenue, 96 Wash.2d 785, 792, 638 P.2d 1213 (1982), reversed on unrelated grounds. See also Kucera v.
27 Department of Transp., 140 Wn.2d 200, 209 (2000).

28 ²⁴ Rabon, 135 Wn.2d at 285 (citing Washington Fed'n of State Employees Council 28 v. State, 99 Wn.2d 878, 888,
665 P.2d 1337 (1983)).

1 case.²⁵ A TRO is intended to preserve the status quo until the court can hear an
2 application for a preliminary injunction.²⁶

3
4 In this instance, Petitioner Mr. Daily has a clear legal and equitable right to hold the
5 office to which he was elected. That right was granted by the highest authority of the
6 land: the people.

7 The people of the district that elected Mr. Daily should not have their will infringed
8 upon by the improper avoidance and violations of our state's Open Public Meeting
9 Act, which provides for and protects their sovereignty over the agencies which serve
10 them.
11

12 Petitioner Mr. Daily has a well-grounded concern that the Board are not acting openly
13 nor conducting their deliberations on an open manner thus denying the South Kitsap
14 School District Voters their right to be involved in the decisions of the board. The
15 people, through Mr. Daily, insist that their right to retain control over the Board is
16 recognized.
17

18 If the acts complained of are allowed to stand it will result in actual and substantial
19 injury to Petitioner and his constituents. If the Board is allowed to continue
20 subverting the intent of the OPMA, Mr. Daily will be unable to serve his constituency
21 consistent with the platform under which he ran, the result being he will likely lose
22
23
24

25
26
27 ²⁵ Rabon, 135 Wn.2d at 285.

²⁶ State ex rel Pay Less Drug Stores v. Sutton, 2 Wn.2d 523, 530, 98 P.2d 680 (1940).

1 his position on the board. More importantly, if the Boards actions are allowed to stand,
2 the voters who elected Mr. Daily will continue to be subservient to those they elected
3 to serve.
4

5
6 For these reasons, a preliminary injunction is appropriate. The issues will of course
7 be briefed fully if leave is granted.
8

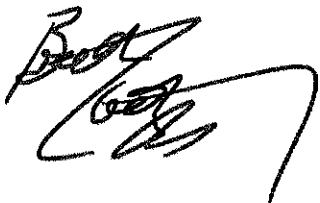
9
10 WHEREFORE, Petitioner asks the Court for judgment:
11

- 12 1. Nullifying the final vote by South Kitsap School Board and reverse the
13 awarding of the pool modernization project contract approved on January 19th,
14 2022.
15
- 16 2. Requiring the South Kitsap School Board to, within 30 days, put on the agenda
17 and the pool modernization project at an open public meeting.
18
- 19 3. Requiring the South Kitsap School Board to address all further reallocation of
20 approved capital project levy funds at open public meetings.
21
- 22 4. Requiring the South Kitsap School Board to provide adequate space and
23 seating at public meetings once in person meetings resume.
24
- 25 5. Requiring the South Kitsap School Board to postpone further action until it
26 can act in accordance with the OPMA.
27

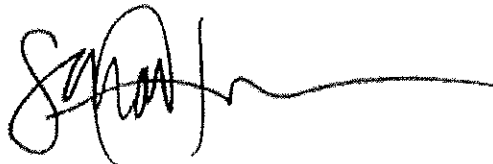
6. Requiring the South Kitsap School Board to remove any and all requirements for attendance and/or participation in public meetings based on a person's status as a "stakeholder."
7. Finding that the Board acted with prior restraint and require the board to allow public comment in keeping with well-established law under the First Amendment of the United States Constitution.
8. Invalidating the current requirements required by the Board for public participation at open meetings, including providing a legal name and address.
9. Granting leave to the petitioner to make a motion, and set a hearing before this court, for a preliminary injunction to nullify the pool modernization contract between South Kitsap School District and Christensen, Inc.
10. Awarding costs and reasonable attorney fees to the Petitioner upon submission of a motion for costs and fees, and allowing a hearing of that motion.
11. Awarding any further relief this Court deems proper.

RESPECTFULLY SUBMITTED this 14th day of February, 2022:

Law Offices of Sarah Lippek, PLLC



Brandt Kreitzberg WSBA #49629
Attorney for the Defendant



Sarah Lippek, WSBA #46452
Attorney for the Defendant

NOTICE OF APPEAL OF THE SOUTH KITSAP SCHOOL BOARD'S DECISION AND FAILURE TO ACT (CLERK ACTION REQUIRED) - 17

Law Offices of Sarah Lippek PLLC
650 South Orcas Street, Suite 207,
Seattle, Washington 98108
(206) 913-5767;
Fax

EXHIBIT A

Budget Review

ORIGINAL POOL BUDGET

Construction	\$4,560,000.00
Contingency/A&E/Permits 15%	\$684,000.00
Total Pool Budget	\$5,244,000

CURRENT POOL BUDGET

Budget Item	Cost (includes tax)
Estimated Pool Construction Cost	\$8,014,000
A&E + Permits	\$1,300,000
Owner Furnished Items	\$300,000
Construction Contingency 10%	\$801,400
Total Budget	\$10,415,400

Variance from Original Budget	\$5,171,400
ESSR Reimbursement	-\$2,000,000
Budget Variance To Be Covered After ESSR Funds Applied	\$3,171,400

1 EXHIBIT B

2 From: [REDACTED]@gmail.com>
3 Date: Thu, May 7, 2020 at 11:22 AM
4 Subject: Re: Lead Question
5 To: [REDACTED]@skschools.org>

6 Hi [REDACTED]

7 Thanks so much for the update. I was just thinking of you as I got on here.
8 I'm very happy about this news on lead, as it is a forefront issue to me.

9 I did get some update from Dave and Jeff about the land purchase and purpose. I recall that you, like me, are
10 very concerned about bridging that gap with children that have and the have nots. There can be all the
11 opportunities in the world for kids but without their health, they can't be ready to learn.
12 I don't know what the education system will morph into over this time but the addition of support for kids that
13 have mental health issues cannot ever be a bad thing. Years ago I worked in adolescent mental health and
14 these issues are stubborn when it comes to progress, yet we have a responsibility not just to our own children.

15 Where I do line up with Dave and Jeff is that the community needs to have comment during Board meetings.
16 Last meeting I attended, I would guess there to be 20 chairs for the community and other staff in attendance
17 there for awards. I nearly fell into my chair and into a man as I got seated, things were so tight.
18 What does this seating say about welcoming the public? It says you don't want them there.
19 My next drive is to see goals that can be measured, to include community in decisions made with the District.
20 You have a Board save Jeff, that in my humble opinion is fearful of the public's questions and comments.
21 You have the opportunity and I hope feel the duty, to lead this Board into being an open Board that fosters
22 trust. I missed last night's Board member opinion to close Board proceedings from public comment.
23 "Healthy" Board means an open Board. Differences build an enriched vision.

24 Thank you for your attention to my words and I am so pleased about a clinic!

25 [REDACTED]