

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of

MICHAEL P. THOMAS,

Petitioner,

Index No. 100538/14

For an Order and Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,
and CARMEN FARIÑA, Chancellor of the New York
City Department of Education,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION

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Dated: New York, New York
May 17, 2014

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PRELIMINARY STATEMENT

Petitioner brought this Article 78 proceeding to challenge the determination of Respondent New York City Department of Education (“DOE”) that School Leadership Team (“SLT”) meetings are not open to the general public. Petitioner seeks declaratory judgment that SLT meetings are subject to the Open Meetings Law. If this proceeding is not brought in the proper form, petitioner respectfully requests the Court to make whatever order is required for its proper execution pursuant to CPLR § 103(c).

The gravamen of petitioner’s cause of action is that an SLT performs a governmental function because it has final decision-making authority in the development of a school’s Comprehensive Educational Plan (“CEP”). The CEP describes the goals for a school’s educational program, the instructional strategies and activities that will be used to achieve each goal, and the fiscal and human resources that will be required. It is of no import that the SLT is not responsible for developing the school-based budget. Chancellor’s Regulation A-655 provides that the principal must justify, and the superintendent must certify, that the budget is aligned with the CEP, thereby ensuring that the CEP will be implemented.

In enacting the Open Meetings Law, the Legislature declared that “[i]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner.” As stated by Thomas Jefferson, “the cornerstone of democracy rests on the foundation of an educated electorate,” and the development of educational programs, supported by public funds, should be open to the general public.

STATEMENT OF FACTS

Pursuant to Chancellor's Regulation A-655, every New York City public school must form a School Leadership Team (SLT) to ensure compliance with state and federal law and regulations concerning school-based management and shared decision-making. *See* Verified Pet. ¶ 7. The SLT is composed of parents, teachers, and administrators who are responsible for developing the school's Comprehensive Educational Plan ("CEP") that is aligned with the school-based budget. *See id.*

The three mandatory members of the SLT are the school's principal, the Parent Association/Parent-Teacher Association President, and the United Federation of Teachers Chapter Leader, or their designees. *See* Verified Pet. ¶ 8. Once the team is constituted, the SLT selects a Chairperson or Co-Chairpersons from its membership. *See id.* SLTs meet at least once a month during the school year, and meetings must take place on school or DOE premises. *See* Verified Pet. ¶ 9.

On or about March 17, 2014, petitioner requested permission from the SLT Chairperson and the three mandatory members of the SLT to attend the next meeting of the SLT at Intermediate School 49 Berta A. Dreyfus ("I.S. 49"), a middle school located in Staten Island. *See* Verified Pet. ¶ 10. In an email dated March 18, 2014, the SLT Chairperson, Victoria Trombetta, invited petitioner to attend the SLT meeting on April 1, 2014 at 4:00 p.m. *See* Verified Pet. ¶ 11.

The next day, however, the SLT Chairperson informed petitioner by email that he would not be permitted to attend the SLT meeting. *See* Verified Pet. ¶ 12. According to the SLT Chairperson, the SLT by-laws of I.S. 49 specifically state that only members of the school

community may attend SLT meetings. *See id.* Petitioner – who is not a parent, teacher or administrator of I.S. 49 – is therefore not allowed to attend SLT meetings at the school. *See id.*

On April 1, 2014 at approximately 3:50 p.m., petitioner entered I.S. 49 and informed School Safety Agent (“SSA”) Meyer, SSA Wall, and SSA Villacis that he wanted to observe the SLT meeting. *See Verified Pet.* ¶ 13. Petitioner also informed the school safety agents that he was not a member of the school community, and requested that they obtain authorization before allowing him to attend the meeting. *See id.*

SSA Villacis contacted Linda Hill, Principal of I.S. 49, and she prohibited petitioner from attending the SLT meeting because he was not a member of the school community. *See Verified Pet.* ¶ 14. Petitioner immediately left the school building. *See id.*

Petitioner thereby brought the instant proceeding pursuant to Article 78 of the CPLR to challenge the determination that SLTs are not subject to the Open Meetings Law.

STANDARD OF REVIEW

Generally, in Article 78 proceedings seeking the review of a determination by an administrative agency, “[t]he courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious.” *Pell v Board of Educ.*, 34 NY2d 222, 231 (1974)(internal quotation marks omitted).

However, the correct standard of review in an Article 78 proceeding regarding a violation of the Open Meetings Law is whether the determination was affected by an error in law. Public Officers Law § 107(1) provides that a court shall have the power, upon good cause shown, to declare that the public body violated the Open Meetings Law if the court determines that the public body failed to comply with the law.

ARGUMENT

I. SLTs perform a governmental function and are public bodies under Public Officers Law § 102.

SLTs perform substantially more than a mere advisory function when developing the CEP and therefore exercise a governmental function.

Public Officers Law § 102 provides that a “[p]ublic body” means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, ... or committee or subcommittee ... of such public body.” An SLT consists of ten or more members (*see* Chancellor’s Regulation A-655[III][A]) and a quorum is required for an SLT to conduct business (*see* Chancellor’s Regulation A-655[XII]). Hence, the cardinal question which must be answered is whether an SLT performs a governmental function.

In determining whether an entity performs a governmental function, a court must consider “the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies.” *Matter of Smith v City University of New York*, 92 NY2d 707, 713 (1999).

The Court of Appeals “has noted that the powers and functions of an entity should be derived from State law in order to be deemed a public body for Open Meetings Law purposes.” *Id.* In accordance with State Education Law § 2590-h, Chancellor’s Regulation A-655 requires the formation of an SLT in every New York City public school to ensure the development of an annual school comprehensive educational plan that is aligned with the school-based budget. *See* Chancellor’s Regulation A-655(I) & (II)(A)(1), Verified Pet., Ex. “B” at 1.

The composition of the SLT balances participation by parents with participation by school personnel in compliance with State and Federal law and regulations concerning school-based management and shared decision-making. *See* Education Law § 2590-h(15)(b). Thus, the powers and functions of SLTs are derived from State law.

Pursuant to Chancellor's Regulation A-655, the SLT operates within the fiscal parameters of the school-based budget to develop goals and objectives which will meet the needs of students and define the school's educational policies. *See* Chancellor's Regulation A-655(II)(A)(1), Verified Pet., Ex. "B" at 1. The CEP describes the goals for a school's educational program, the instructional strategies and activities that will be used to achieve each goal, and the fiscal and human resources that will be required. A copy of the DOE template for CEP Goals and Action Plans is annexed hereto as Ex. "1."

The influence exerted by the SLT on a school's budget and structure depends on the instructional strategies and activities identified by the SLT to achieve a particular goal. For example, a goal of a school's CEP may be to increase the pass rate on the English Language Arts Regents Examination by 5%. If the instructional strategies and activities listed in the CEP to achieve this goal only indicate that "English teachers will attend professional development sessions to improve questioning techniques," the impact on the school's fiscal and human resources would be minimal. However, if the instructional strategies and activities indicate that "the maximum class size in English classes will be 25 students and all English teachers will receive thirty hours per session pay for small group tutoring," the school would be required to hire additional English teachers and to set aside funds for after-school tutoring.

Significantly, the SLT has sole, nonreviewable power regarding the development

of the CEP. The principal's input regarding the development of the CEP is limited to his or her role as a member of the SLT, and the superintendent has no authority to review or change the CEP. The superintendent only becomes involved in the development of the CEP as a last resort if the SLT is unable to reach consensus on the CEP. *See* Chancellor's Regulation A-655(II)(A)(4), Verified Pet., Ex. "B" at 1. Therefore, an SLT performs a governmental function because it has final decision-making authority in the development of the school's CEP.

The SLT does not act in a mere advisory role to the principal, and the principal does not make the final determination on the CEP. Indeed, the DOE attempted to amend Chancellor's Regulation A-655 in 2007 to give the principal final decision-making authority over the school CEP. The Commissioner of Education found in *Appeal of Pollicino, et. al.*, 48 Ed Dept Rep 279 (Decision No. 15,858), that the revision violated Education Law § 2590-h(15) by stripping the SLT of its powers and duties to develop an annual school comprehensive plan aligned with the school-based budget. The Commissioner ordered the language changed in Chancellor's Regulation A-655 to restore final authority over the CEP to the SLT.

Chancellor's Regulation A-655 also ensures that the CEP is implemented as intended by the SLT. The school principal must justify that the school-based budget is aligned with the CEP, and the superintendent, prior to approving the budget, must certify that the budget is aligned with the CEP. *See* Chancellor's Regulation A-655(II), Verified Pet., Ex. "B" at 1-2. The duties of the principal and superintendent pertaining to the alignment of the CEP and the budget do not usurp the power of the SLT, but rather enhance its power to perform a governmental function by ensuring that the CEP will be implemented.

A realistic appraisal of an SLT's functional relationship to affected parties and

constituencies must consider that the success of a school's educational program requires the enthusiastic participation of all members of the school community. Members of the SLT must communicate effectively with their constituent groups and share the views of their constituencies with the team. The likelihood of effective communication is increased if SLT meetings are open to the public and members of the school community are allowed to attend. Although the SLT bylaws of I.S. 49 allegedly open SLT meetings to members of the school community (*see* Verified Pet., Ex. "A"), access to SLT meetings by members of a school community should not be dependent on a discretionary provision in the bylaws of the SLT. Furthermore, potential members of a school community – whether parents with children or persons seeking employment – should be able to observe SLT meetings to assess the goals and objectives of the educational program of a particular school and to determine the degree of collaboration within the school. SLT meetings should be subject to the Open Meetings Law to ensure that members of the school community, as well as potential members of the school community, are informed.

Moreover, members of the general public without a specific connection to a particular school also have a significant interest in the development of educational programs. The operating budget of the DOE for the 2013-2014 school year is \$19.8 billion, with approximately \$9 billion allocated to school-based budgets. *See* the DOE Overview of the 2013-2014 budget, *available at* <http://schools.nyc.gov/Aboutus/Funding/overview/default.htm>. Despite these significant expenditures, class size throughout the DOE continues to rise and student achievement is stagnant. In enacting the Open Meetings Law, the Legislature declared that “[i]t is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the

performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.” Public Officers Law § 100. Few causes are more essential to the maintenance of a democratic society than education, and certainly no other cause consumes as much of New York City’s budget. The general public has the right to witness the process by which educational programs are created.

In applying the Open Meetings Law, a court should construe its provisions liberally in accordance with its stated purposes. *See Matter of Perez v City University of New York*, 5 NY3d 522, 528 (2005). Petitioner therefore respectfully submits that this Court should hold that SLTs perform a governmental function and SLT meetings are therefore subject to the Open Meetings Law.

II. If petitioner substantially prevails in this proceeding, he requests the Court to require members of the DOE to participate in a training session concerning the obligations imposed by the Open Meetings Law.

If the Court determines that the DOE has violated the Open Meetings Law, the Court may require members of the DOE to participate in a training session conducted by the Committee on Open Government concerning the obligations imposed by the Open Meetings Law. *See* Public Officers Law § 107(1).

Petitioner notes that the DOE is a massive organization in which substantial confusion exists regarding whether SLTs are subject to the Open Meetings Law. For example, training sessions for SLT members conducted by the DOE assert that SLT meetings must be open to the general public; the Office of Legal Services of the DOE holds that SLTs are not public bodies subject to the Open Meetings Law; and some SLTs explicitly restrict attendance at SLT meetings to certain members of the general public (*see* Verified Pet., Ex. “A”). A copy of the

relevant page from a DOE training manual for SLTs, *available at* <http://www.learndoe.org/face/files/2012/10/School-Leadership-Teams-Foundation-revised.pdf>, is annexed hereto as Exhibit “2,” and a copy of an email from the Office of Legal Services to petitioner dated November 14, 2012 is annexed hereto as Exhibit “3.”

If the Court finds that SLTs are subject to the Open Meetings Law, the DOE will be faced with the herculean task of providing guidance to approximately 1,500 SLTs regarding their obligations under the Open Meetings Law, including making records discussed at meetings available prior to the meeting or at the meeting (*see* Public Officers Law § 103[e]), allowing SLT meetings to be recorded and/or transmitted by audio or visual means (*see* Public Officers Law § 103[d][1]), releasing minutes of meetings pursuant to the Freedom of Information Law (*see* Public Officers Law § 106[3]), etc. The assistance of the Committee on Open Government in such an undertaking would be invaluable.

III. If petitioner substantially prevails in this proceeding, he is entitled to costs, fees, and disbursements.

Public Officers Law § 107(2) provides that costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party in a proceeding brought pursuant to the Open Meetings Law. Petitioner respectfully requests the Court to awards costs, fees and disbursements to petitioner if he substantially prevails in this proceeding.

CONCLUSION

An SLT performs a governmental function because it has final decision-making authority in the development of a school’s CEP. SLT meetings should therefore be open to the general public. Members of the DOE would benefit from training sessions conducted of the Committee on Open Government concerning the obligations of SLTs under the Open Meetings

Law.

WHEREFORE, petitioner respectfully requests the Court to grant an Order and Judgment:

1. declaring that a School Leadership Team meeting is a meeting of a public body which must be open to the general public pursuant to the Open Meetings Law;
2. finding that Respondents violated the Open Meetings Law;
3. ordering Respondents to participate in a training session concerning the obligations imposed by the Open Meetings Law conducted by the staff of the Committee on Open Government pursuant to Public Officers Law § 107(1); and
4. awarding costs, fees, and disbursements, together with such other and further relief as may be just and proper.

Dated: New York, New York
May 17, 2014

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