

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

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In the Matter of

MICHAEL P. THOMAS,

Petitioner,

**VERIFIED REPLY**

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

Index No. 100538/14  
I.A.S. Part 57  
(Moulton, J.)

-against-

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

Respondents.

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Petitioner Michael P. Thomas, as and for his Verified Reply, respectfully alleges and states the following:

**PRELIMINARY STATEMENT**

1. 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).

2. The Commissioner of Education found that an SLT 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 these goals, and the fiscal and human resources that will be required. 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. An SLT therefore performs a governmental function and should be subject to the Open Meetings Law.

3. Respondents assert that this Court should be guided by a previous Supreme Court decision which found that SLTs are not public bodies. However, the decision did not consider the holding of the Commissioner of Education that an SLT has final authority over the CEP. Therefore, petitioner respectfully requests this Court to find that SLT meetings should be open to the general public.

#### **STATEMENT OF FACTS**

*The School Leadership Team develops the school's Comprehensive Educational Plan that is aligned with the school-based budget.*

4. Pursuant to Chancellor's Regulation A-655, every New York City public school must form an SLT to ensure compliance with State and Federal law and regulations concerning school-based management and shared decision-making. *See* Chancellor's Regulation A-655, Verified Pet., Ex. "B" at 1; *see also* Education Law § 2590-h(15)(b). The SLT is composed of parents, teachers, and administrators who are responsible for developing the school's CEP that is aligned with the school-based budget. *See* Chancellor's Regulation A-655(II)(A)(1) and (III), Verified Pet., Ex. "B" at 1, 2-3. The CEP describes the goals for a school's educational program, the instructional strategies and activities that will be used to achieve these goals, 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."

5. The principal makes the final determination concerning the school-based budget. *See* Chancellor's Regulation A-655(II)(A)(2), Verified Pet., Ex. "B" at 1. The principal must submit the proposed school-based budget to the superintendent for approval, along with a written explanation justifying that the school-based budget is aligned with the CEP. *See* Chancellor's Regulation A-655(II)(A)(5), Verified Pet., Ex. "B" at 1. To become final, the budget must be approved by the superintendent, who must certify that the budget is aligned with the CEP. *See id.*

6. If the SLT members (other than the principal) reach a consensus that that they disagree with the principal's justification that the school-based budget is aligned with the CEP, the SLT may submit a written response to the justification to the superintendent. *See* Chancellor's Regulation A-655(II)(A)(6), Verified Pet., Ex. "B" at 2. The superintendent must then determine whether the school-based budget is aligned with the CEP, and, if not, provide direction as to how alignment can be achieved. *See* Chancellor's Regulation A-655(II)(A)(7), Verified Pet., Ex. "B" at 2.

*Petitioner was not permitted to attend the SLT meeting at I.S.49 on April 1, 2014.*

7. On or about March 17, 2014, petitioner requested permission 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., Ex. "C." In an email dated March 18, 2014, the SLT Chairperson invited petitioner to attend the SLT meeting on April 1, 2014 at 4:00 p.m. *See* Verified Pet., Ex. "D."

8. 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., Ex. "A." 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.*

9. 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.*

10. 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.*

11. 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.

### **ARGUMENT**

#### **I. The Commissioner of Education holds that School Leadership Teams have final authority over the CEP.**

12. On or about August 7, 2007, the Chancellor issued a revised version of Chancellor’s Regulation A-655. A copy of Chancellor’s Regulation A-655 that was issued on or about August 7, 2007 is annexed hereto as Exhibit “2.” The amended regulation provided that “the principal makes the final determination on the CEP and the budget allocation.” Chancellor’s Regulation A-655(II), Verified Reply, Ex. “2” at 1.

13. Prior to June 30, 2009, Education Law § 2590-h provided that SLTs possessed the power and duty to “develop an annual school comprehensive educational plan that is aligned with

the school based budget.” Education Law § 2590-h(15)(b-1)(i).

14. An appeal was brought to the Commissioner of Education (“Commissioner”) alleging that the revised version of Chancellor’s Regulation A-655 gave each principal final decision-making authority over the CEP in violation of Education Law § 2590-h. A copy of *Appeal of Pollicino, et. al.*, 48 Ed Dept Rep 279 (Decision No. 15,858), is annexed hereto as Exhibit “3.”

15. The Commissioner found in *Pollicino* that the revised language, providing the principal with final authority over the CEP, violated Education Law § 2590-h(b-1). *See Pollicino, Verified Reply, Ex. “3”* at 5. The Commissioner held that the revised language stripped the SLT of the basic, statutorily mandated authority to develop the CEP and improperly allowed the principal to make the “final determination on the CEP,” thus allowing the principal to override any judgment of an SLT. *See id.* The Commissioner ordered the DOE and the Chancellor to revise the language of Chancellor’s Regulation A-655. *See Pollicino, Verified Reply, Ex. “3”* at 6.

16. On or about March 24, 2010, the Chancellor issued the current version of Chancellor’s Regulation A-655. *See Chancellor’s Regulation A-655, Verified Pet., Ex. “B”* at 1.

17. In compliance with the Commissioner’s order, Chancellor’s Regulation A-655 now provides that, “[p]ursuant to State Education Law section 2590-h, the SLT is responsible for developing an annual school Comprehensive Educational Plan (CEP) that is aligned with the school-based budget for the ensuing school year.” Chancellor’s Regulation A-655(II)(A)(1), *Verified Pet., Ex. “B”* at 1.

18. The language parallels that of Education Law § 2590-h(15)(b-1)(i), and the only

possible interpretation, in accordance with the finding of the Commissioner in *Pollicino*, is that an SLT has final authority over the CEP.

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

19. The Open Meetings Law mandates that, except for executive sessions, “[e]very meeting of a public body shall be open to the general public.” Public Officers Law § 103(a). A “public body” is defined as “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.” Public Officers Law § 102(2).

20. The Court of Appeals has held that an entity performs a governmental function if “[i]t is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or receive merely perfunctory review or approval.” *Matter of Smith v City Univ. of New York*, 92 NY2d 707, 714 (1999).

21. The Commissioner held in *Pollicino* that an SLT has final decision-making authority over the CEP and exercises more than an advisory function in the development of the school’s educational policies and programs. *See Pollicino*, Verified Reply, Ex. “3” at 5. Furthermore, pursuant to Chancellor’s Regulation A-655, the school-based budget must be aligned with the CEP, thereby ensuring that the educational policies and programs of an SLT will be implemented. *See* Chancellor’s Regulation A-655(II)(A), Verified Pet., Ex. “B” at 1-2. Indeed, Chancellor’s Regulation A-655 sets forth that “SLTs are a vehicle for developing school-based educational policies and ensuring that resources are aligned to implement those policies.” Chancellor’s Regulation A-655(I), Verified Pet., Ex. “B” at 1. The principal develops the school-



based budget, but he or she is constrained by the school's CEP when doing so. Hence, an SLT performs a governmental function.

22. An SLT thus performs a governmental function, a quorum is required for an SLT to conduct business (*see* Chancellor's Regulation A-655[XII]), and an SLT consists of more than two members (*see* Chancellor's Regulation A-655[III][A]). Pursuant to Public Officers Law § 102(2), an SLT is a public body which is subject to the Open Meetings Law.

### **III. This Court should not be bound by the decision of the Supreme Court in *Portelos*.**

23. Respondents assert that the court in *Matter of Portelos v Board of Educ. of the City Sch. Dist. of the City of New York*, Index No. 100813/13 (Sup. Ct., NY County 2013), previously held that SLTs are not public bodies subject to the Open Meetings Law and this Court should be guided by that decision. *See* Respondents' Mem of Law in Opp'n to Pet. 8. A copy of the decision and order for *Portelos* is annexed hereto as Exhibit "4."

24. The court in *Portelos* held that "the SLT's primary purpose is an advisory one – it makes recommendations concerning educational policy and establishes education goals for the school, which are consolidated into a Comprehensive Educational Plan." *Portelos*, Verified Reply, Ex. "4" at 5-6.

25. The court's holding in *Portelos* is in direct conflict with the holding of the Commissioner in *Pollicino* that an SLT has final decision-making authority over the CEP.

26. In *Donohue v Copiague Union Free Sch. Dist.*, 47 NY2d 440, 444 (1979), the Court of Appeals noted that "[c]ontrol and management of educational affairs is vested in the Board of Regents and the Commissioner of Education." The Court observed that all matters pertaining to the general school system of the State should be within the authority and control, on

the State level, of the Commissioner of Education and removed so far as possible and practicable from controversies in the courts.<sup>1</sup> *See Donohue*, 47 NY2d at 444. Thus, courts should uphold the construction given the Education Law by the Commissioner of Education, and this Court should not hold that the primary purpose of an SLT is advisory in nature. *See Howard v Wyman*, 28 NY2d 434, 438 (1971) (“the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld”).

27. Moreover, this Court is not bound by *stare decisis* to follow the decision in the *Portelos* case. A decision of a court of equal or inferior jurisdiction is not necessarily controlling, though entitled to respectful consideration. *See McKinney’s Cons Laws of NY*, Book 1, Statutes § 72 at 143-144.

28. The court in *Portelos* was apparently unaware of the Commissioner’s holding in *Pollicino* that an SLT has final authority over the CEP, and this Court is not bound to follow a erroneous new precedent. The Court of Appeals opined the following in *People v Hobson*, 39 NY2d 479, 488 (1976):

“The nub of the matter is that *stare decisis* does not spring full-grown from a ‘precedent’ but from precedents which reflect principle and doctrine rationally evolved. Of course, it would be foolhardy not to recognize that there is potential for jurisprudential scandal in a court which decides one way one day and another way the next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel.”

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<sup>1</sup> The instant proceeding is properly brought before the Supreme Court. “Public Officers Law § 107 vests exclusive jurisdiction over complaints alleging violations of the Open Meetings Law in the Supreme Court of the State of New York, and alleged violations thereof may not be adjudicated in an appeal to the Commissioner.” *Appeal of Instone-Noonan*, 39 Ed Dept Rep 413 (Decision No. 14,275).



29. This Court should not follow, and thereby further establish, a precedent which does not have a sound basis in law.

**IV. Respondents' determination that SLT meetings were not subject to the Open Meetings Law is arbitrary and capricious and not in accordance with DOE regulations and policies.**

30. 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).

31. 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.

32. Respondents assert that "[i]t was not arbitrary or capricious for the DOE to construe School Leadership Teams created by Chancellor's Regulation A-655 as not being public bodies subject to the Open Meetings Law." Respondents' Mem. of Law in Opp'n to Pet. 15. Notwithstanding Respondents' reliance on an improper standard of review, Respondents' assertion is without merit.

33. Respondents rightfully assert that the SLT, *at times*, serves in an advisory capacity. The principal is responsible for the day to day operation of the school and carries out these duties in consultation with the SLT. *See* Education Law § 2590-i(1). The principal is responsible for proposing the school-based budget after soliciting input on budget priorities from the SLT. *See*

Education Law § 2590-r(b). The SLT must be consulted prior to the appointment of a principal or assistant principal candidate to the school. *See* Chancellor’s Regulation A-655(II)(C)(1).

34. Nevertheless, Chancellor’s Regulation A-655(II)(A)(1) provides that, “[p]ursuant to State Education Law 2590-h, the SLT is responsible for developing an annual school Comprehensive Educational Plan” and, in accordance with the finding of the Commissioner in *Pollicino*, the SLT has final decision-making authority over the CEP.<sup>2</sup> The CEP, which describes the educational policies and programs of a school, imposes significant constraints on the school-based budget, which must be aligned with the CEP. An SLT thus performs a governmental function, and Respondents’ determination that an SLT is not a public body is arbitrary and capricious.

35. Finally, Respondents claim, in a conclusory manner, that many of the topics discussed in SLT meetings are confidential or sensitive. *See* Respondents’ Mem. of Law in Opp’n to Pet. 15. Issues cited by Respondents as being confidential or sensitive in nature include school safety measures, student academic or disciplinary histories, and SLT review of personnel records of principal or assistant principal candidates. *See id.*

36. The only safety issue considered confidential by the DOE is the emergency response information of the School Safety Plan which should not be disclosed in any fashion (*see* Chancellor’s Regulation A-414[II][I], Verified Answer, Ex. “T” at 3), and consequently should

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<sup>2</sup> Since June 30, 2009, Education Law § 2590-h(15) has not included the provision that school based management teams possess the power and duty to develop an annual school comprehensive educational plan. However, the provision is included in the current version of Chancellor’s Regulation A-655, and “an agency’s rules and regulations promulgated pursuant to statutory authority are binding upon it.” *Lehman v Board of Educ. of the City Sch. Dist. of the City of New York*, 82 AD2d 832, 834 (2d Dept 1981).

not be discussed in SLT meetings. The academic or disciplinary histories of students are not properly discussed in SLT meetings and implicate privacy considerations beyond those related to the Open Meetings Law. *See* 34 CFR § 99.30 of the Family Educational Rights and Privacy Act. Pursuant to Chancellor's Regulations A-655 and C-30, the SLT must be consulted prior to the appointment of a principal or assistant principal candidate. *See* Chancellor's Regulation A-655(II)(B)(1), Verified Pet., Ex. "B" at 2; Chancellor's Regulation C-30(XI)(D) and (C), Verified Answer, Ex. "H" at 6, 7. While all matters concerning the selection process are of a highly confidential nature (*see* Chancellor's Regulation C-30[XI][H], Verified Answer, Ex. "H" at 8), the consultation could be conducted in executive session if SLTs were subject to the Open Meetings Law (*see* Public Officers Law § 105[1]).

37. Therefore, Respondents' determination that SLTs are not subject to the Open Meetings Law is arbitrary and capricious in addition to being an error of 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  
August 26, 2014

By: Michael P. Thomas

Michael P. Thomas  
Petitioner, *pro se*  
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VERIFICATION

STATE OF NEW YORK :  
: SS.  
COUNTY OF NEW YORK :

**MICHAEL P. THOMAS** being duly sworn, deposes and says that he is the petitioner in this proceeding; that he has read the annexed foregoing **VERIFIED REPLY, In the Matter of Michael P. Thomas against New York City Department of Education, et al.,** Index No. 100538/14, and supporting papers, and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Michael P. Thomas  
Michael P. Thomas  
Petitioner, *pro se*

Subscribed and sworn to before  
me this 26th day of  
August 2014

Nicholas D. Petronio  
Notary Public

