

COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL ACTION

JOHN NIEHLS, ELIZABETH WEIR, and	:	
KAITLIN DERSTINE	:	NO. 2020-19389
<i>Petitioners</i>	:	
	:	
v.	:	
	:	
MONTGOMERY COUNTY BOARD OF	:	
COMMISSIONERS, VALERIE A. ARKOOSH,	:	
KENNETH E. LAWRENCE, MONTGOMERY	:	
COUNTY DEPARTMENT OF HEALTH AND	:	
HUMAN SERVICES, MONTGOMERY	:	
COUNTY BOARD OF HEALTH, JANET	:	
PANNING, RICHARD S. LORRAINE,	:	
MICHAEL B. LAIGIN, FRANCIS JEYARAJ,	:	
STEVEN KATZ, BARBARA WADSORTH,	:	
MARTIN D. TRICHTINGER	:	
<i>Respondents/ Defendants</i>	:	

MEMORANDUM OF FINDINGS AND LEGAL CONCLUSIONS

Petitioners, John Niehls, Elizabeth Weir, and Kaitlin Derstine, filed a Complaint and Petition for Special and Preliminary Injunction on November 18, 2020 to enjoin official action taken by Respondent, Montgomery County Board of Health (“Board of Health”), at the special meeting held on November 13, 2020 for alleged violations of the Sunshine Act, 65 Pa.C.S.A. § 701, et. seq. The official action taken by the Board of Health required all schools in Montgomery County to support virtual education only for the period of November 23, 2020 through December 6, 2020 and canceled all school sanctioned extra-curricular activities due to the widespread outbreak of COVID-19. Petitioners allege that the Board of Health violated the Sunshine Act by failing to provide proper public notice of the November 13, 2020 meeting, by limiting public comment and by deliberating in private. Respondents filed their brief in opposition to the petition on November 19, 2020. An evidentiary hearing was held on November 20, 2020 which established the following:

- a) Plaintiffs are residents of Montgomery County, Pennsylvania.
- b) The Board of Health consists of five members appointed by the Montgomery County Board of Commissioners.
- c) The five members of the Board of Health are Michael B. Laign, Francis Jeyaraj, Steven Katz, Barabara Wadsworth, and Martin D. Trichtinger, and are sued here in their official capacity.
- d) The Board gave notice through the Montgomery County website of a special meeting to be held via Zoom on November 12, 2020 at 10 a.m.
- e) The Montgomery County Office of Public Health tweeted the following on November 10, 2020 at 12:43 p.m.:

There will be a Special Montgomery County Board of Health Meeting held virtually on Thursday, November 12, 2020 at 10am.

To get the Zoom link, please confirm your participation by sending your name, phone number and e-mail address to Toyca Williams, twilliams@montcopa.org.

- f) Attendance for the November 12th Zoom meeting was capped at 500 participants.
- g) The November 12th meeting commenced at 10:00 am.
- h) The proposed order presented for consideration was as follows:

All schools, both public and private in Montgomery County are required to support virtual education only, for the period of November 23 through December 6, 2020 with the potential for expansion beyond this date. This requirement includes virtual education only for special education and canceling of school sanctioned extracurricular activities.

- i) Lauren Hughes, Esquire is a Senior Assistant Solicitor for Montgomery County.
- j) During the November 12th meeting, Ms. Hughes testified that she gave instructions regarding the two ways in which the public could provide comments to the Board.
- k) Participants could speak orally at the meeting by entering their name in the “Chat Feature” to be called upon. Each speaker was asked to state their name and township where they reside at the outset of their oral comments.

- l) Alternatively, members of the public could submit comments in writing to the Board via email to publichealth@montcopa.org.
- m) Ms. Hughes testified that she was asked via the chat feature on Zoom to provide the email address to submit comments in writing to the Board of Health and Ms. Hughes did so.
- n) Ms. Hughes testified that at the beginning of the meeting, she stated that the letters and emails that were previously sent to the Board of Health regarding the issue at hand would not be read out loud at the meeting, but had been sent to the Board of Health members for their consideration.
- o) Public comments at the meeting were limited to two minutes per person.
- p) Ms. Hughes maintained a list of people who indicated they wanted to publicly comment on the proposed order. Exhibit B, Declaration of Lauren Hughes, Esquire.
- q) All three Petitioners were in Zoom attendance at the November 12th meeting.
- r) All three Petitioners spoke orally at the Zoom meeting.
- s) The Board heard between fifty (50) and seventy-five (75) public comments. *See* Memorandum of Law in Support of Petition for a Special and Preliminary Injunction, at 5.
- t) After more than two hours of public comment, a 10-15 minute period elapsed where no one indicated via the chat feature they wished to speak publicly.
- u) Ms. Hughes stated that comments could still be submitted via email for the Board's consideration. Ms. Hughes testified that a large number of emails were subsequently received and forwarded to the Board of Health for their consideration.
- v) The Board of Health determined that it would recess without a vote and would reconvene the next day, November 13, 2020 at noon.
- w) The November 12th meeting ended at approximately 12:40 p.m.
- x) The Montgomery County Office of Public Health tweeted the following on November 12, 2020 at 5:11 p.m.:

Thank you to those who spoke at today's Board of Health meeting.
The meeting was recessed and will reconvene Fri. 11/13 at noon.
Public comment received by 4pm today will be reflected in the final
Board of Health minutes. Watch tomorrow's meeting here –
facebook.com/MontcoHealthpa/

- y) At 6 p.m. on November 12th, the Board of Health held a zoom meeting with Commissioner Val Arkoosh, Montgomery County Solicitor Josh Stein, Senior Assistant Solicitor Lauren

Hughes, all five members of the Board of Health, Michelle Masters, Janet Panning and Toyca Williams from the Health Department. This meeting was not open to the public.

- z) At the 6 p.m. meeting, Solicitor Josh Stein was asked if removing the clause “with the potential for expansion beyond this date” would be possible. Solicitor Stein suggested removal of that language from the proposed order.
- aa) None of the five members of the Board of Health indicated that discussions were held during that meeting for the purpose of making a decision. They referenced the 6 p.m. meeting as being informational.
- bb) At that meeting, Commissioner Arkoosh and Michelle Masters informed those present about the public health reasons for passing the proposed resolution, how other counties in the Commonwealth were handling the issue, and whether the Commonwealth was considering action that might impact school closings.
- cc) The meeting resumed on November 13th at noon via Facebook live.
- dd) The public was able to observe the meeting on Facebook live, but no public comments were permitted.
- ee) The Board voted to pass the following order excluding language of a potential expansion beyond the period specified:

All schools, both public and private in Montgomery County are required to support virtual education only, for the period of November 23 through December 6, 2020 with the potential for expansion beyond this date. This requirement includes virtual education only for special education and canceling of school sanctioned extracurricular activities.

Conclusions of Law

1. On March 6, 2020, the Commonwealth of Pennsylvania issued a Declaration of Emergency due to the outbreak of COVID-19.
2. On March 8, 2020, the Montgomery County Commissioners declared a disaster emergency in Montgomery County which was extended by subsequent declarations to October 6, 2020.
3. On October 1, 2020, the Montgomery County Commissioners continued the declaration of emergency which took effect October 7, 2020 for a period of sixty days.
4. On April 20, 2020, the General Assembly passed COVID-19 related amendments to a number of statutes, including the Sunshine Act. 35 Pa.C.S. § 5741 - response to COVID-19 disaster emergency regarding local government meetings states as follows:

(c) Advance notice.--To the extent practicable, an agency, department, authority, commission, board, council, governing body or other entity of a political subdivision shall post advance notice of each meeting conducted under subsection (a) on the entity's publicly accessible Internet website, if any, or in an advertisement in a newspaper of general circulation, or both. Public notice shall include the date, time, technology to be used and public participation information as provided under subsection (f).

(f) Public participation.--To the extent practicable, an agency, department, authority, commission, board, council, governing body or other entity of a political subdivision shall allow for public participation in a meeting, hearing or proceeding through an authorized telecommunication device or written comments. Written comments may be submitted to the entity's physical address through United States mail or to an e-mail account designated by the entity to receive the comments.

5. Deliberation is defined as “the discussion of agency business held for the purpose of making a decision.” 65 Pa.C.S.A. § 703.
6. 65 Pa.C.S.A. § 713 states, in relevant part, as follows:

Should the court determine that the meeting did not meet the requirements of this chapter, it may in its discretion find that any or all official action taken at the meeting shall be invalid. Should the court determine that the meeting met the requirements of this chapter, all official action taken at the meeting shall be fully effective.

7. Respondents satisfied the advanced notice and public participation requirements set forth in 35 Pa.C.S. § 5741(c) and (f).

8. Petitioners failed to satisfy their burden of proof that the Board of Health engaged in “deliberations” on November 12, 2020 in violation of the Sunshine Act.
9. Petitioners failed to satisfy their burden of proof that Respondents violated the Sunshine Act.
10. Petitioners failed to meet their burden of proof to satisfy the prerequisites to obtain a preliminary injunction. *See Lee Publications, Inc. v. Dickinson School of Law*, 848 A.2d 178, 189 (Pa. Cmwlth. 2004).
11. The evidence in the record does not support issuance of a preliminary injunction under Pa.R.C.P. 1531.
12. The petition for special and preliminary injunction is **DENIED** and a separate order will be entered.

BY THE COURT:



Richard P. Haaz,

J.

This Memorandum has been e-filed on 11/20/20.

Service via e-filing by the Prothonotary to the parties of record.

Emailed to:

Michael Jorgensen, Court Administration, Civil Division



Secretary