

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

PHOENIX-TIMES PUBLISHING
COMPANY, D/B/A/ EAST BAY
NEWSPAPERS, JOSH BICKFORD, RHODE
ISLAND AFFILIATE, AMERICAN CIVIL
LIBERTIES UNION, INC. AND STEVEN
BROWN,

Plaintiffs

v.

BARRINGTON SCHOOL COMMITTEE,
JAMES HASENFUS in his official capacity
as a member of the Barrington School
Committee; ROBERT E. SHEA, JR., in his
official capacity as a member of the
Barrington School Committee; PATRICK
GUIDA, in his official capacity as a member
of the Barrington School Committee;
THOMAS R. FLANAGAN, in his official
capacity as a member of the Barrington
School Committee; and AMY PAGE
OBERG, in her official capacity as a member
of the Barrington School Committee,

Defendants

C.A. No. 09-4665

FIRST AMENDED COMPLAINT

Received 9/30/09
JLB

Introduction

Plaintiffs Phoenix-Times Publishing Company, d/b/a East Bay Newspapers, Scott Pickering, Rhode Island Affiliate, American Civil Liberties Union, Inc. ("RI ACLU"), and Steven Brown file the instant action for declaratory and injunctive relief against the Barrington School Committee (the "Committee") and its members acting in their official capacities. Plaintiffs contend that the Committee, through its members, violated R. I. Gen. Laws § 42-46-1,

et seq., (the “Open Meetings Act”) by unlawfully meeting in executive session on February 26, 2009 to discuss the merits of instituting a mandatory breathalyzer testing policy for all students attending social dances. The Committee contends that convening in executive session was proper pursuant to R. I. Gen. Laws § 42-46-5(a)(2) as the closed meeting concerned “litigation.” At the time of the executive session, however, there was no litigation pending or threatened. There was not even a specific policy in place that could have been challenged through litigation.

Two months before the executive session, the RI ACLU sent the Committee a letter setting forth policy arguments and urging that the mandatory breathalyzer testing policy be rejected. That letter was proffered by the Committee as justification for its decision to debate public policy in executive session. The Open Meetings Act allows narrow exceptions to the general rule that public business be conducted publicly. If the Committee’s rationale for convening in executive session is validated because it received a letter outlining objections to a proposed policy, then the exception has swallowed the rule. Any opposition to a proposed public policy could provide the basis for secret debate by elected officials relying on phantom and wholly hypothetical “litigation.”

Plaintiffs further contend that the Committee, through its members, has repeatedly violated the Open Meetings Act by failing to provide adequate supplemental public notice of school committee meetings. The Committee routinely fails to specify the nature of the business to be discussed on published agendas. The vague boilerplate terminology used by the Committee in meeting agendas fails to provide any indication of what policies will be covered at the meetings. As a result, the public is unable to differentiate one meeting agenda from another in clear contravention of the purpose of the Open Meetings Act.

Parties

1. Plaintiff, Phoenix-Times Publishing Company is a domestic for-profit

corporation doing business as “East Bay Newspapers” and is the publisher of The Barrington Times. Its principal place of business is located at One Bradford Street, Bristol, Rhode Island.

2. Plaintiff, Josh Bickford, is a resident of Barrington, Rhode Island and is the editor of The Barrington Times.

3. Plaintiff, Rhode Island Affiliate, American Civil Liberties Union, Inc. (RI ACLU) is a non-profit corporation existing under the laws of the State of Rhode Island with a principal place of business in Providence, Rhode Island.

4. Plaintiff, Steven Brown, is a resident of Barrington, Rhode Island and is Executive Director of Rhode Island Affiliate, American Civil Liberties Union, Inc.

5. Defendant, Barrington School Committee is a municipal body operating and organized pursuant to R. I. Gen. Laws § 16-2-9.

6. Defendant, James Hasenfus, is sued in his official capacity as a member of the Barrington School Committee, Barrington, Rhode Island.

7. Defendant, Robert E. Shea, Jr., is sued in his official capacity as a member of the Barrington School Committee, Barrington, Rhode Island.

8. Defendant, Patrick Guida, is sued in his official capacity as a member of the Barrington School Committee, Barrington, Rhode Island.

9. Defendant, Thomas R. Flanagan, is sued in his official capacity as a member of the Barrington School Committee, Barrington, Rhode Island.

10. Defendant, Amy Page Oberg, is sued in her official capacity as a member of the Barrington School Committee, Barrington, Rhode Island.

Jurisdiction and Venue

11. This action is brought under R.I. Gen. Laws §§42-46-1, *et seq.*, entitled, “Open Meetings.” Jurisdiction is proper pursuant to R.I. Gen. Laws §§42-46-8(c).

12. Venue is proper in the Superior Court for Providence and Bristol Counties.

The Facts

13. The Barrington School Committee was asked to consider the adoption of a policy requiring mandatory breathalyzer testing of students attending dances in or about December 2008.

14. On or about December 26, 2008, the RI ACLU and Mr. Brown sent a letter to the Principal of Barrington High School urging him to reject any policy that required universal breathalyzer testing at school dances. Exhibit A.

15. The minutes of the January 29, 2009 Committee meeting indicate that Committee member Ms. Oberg suggested the inclusion of a public comment period on a future agenda to address the issue of breathalyzer testing at the high school. Exhibit B.

16. The Barrington School Committee Meeting Agenda for the February 26, 2009 Committee meeting (the "Agenda") includes the topic "Public Comments Re: Breathalyzer Testing." Exhibit C.

17. This same Agenda includes the following vague statement at the end of the enumerated agenda items: "Executive Session pursuant to Sections 42-46-5(a)(1) and 42-46-5(a)(2) for Personnel and Collective Bargaining and Litigation." Exhibit C.

18. The Agenda provides no specific reference to any particular litigation or the subject matter related to any litigation scheduled to be addressed by the School Committee in executive session. Exhibit C.

19. The Agenda failed to adequately provide notice as to the nature of the business to be discussed in executive session in violation of Rhode Island Gen. Laws § 42-46-6(b).

20. The February 26, 2009 Committee meeting (the "Committee Meeting")

minutes reflect that the Committee decided to hear the agenda item concerning the proposed breathalyzer policy near the beginning of the meeting – rather than in the order listed on the agenda – in order to accommodate the public who attended specifically for this item.

21. The official Committee Meeting minutes state as follows:

A lengthy discussion took place regarding whether or not to make breathalyzer testing mandatory at high school dances for all students. Mr. Hasenfus emphasized that there is no formal proposal at this time and that we want to give all due consideration in order to properly handle this issue. Much input was given by members of the audience with regard to the pros and cons of this initiative. More discussion will take place before any decision is made regarding this issue. Mr. Hasenfus urged members of the audience to contact the School Committee or administration with their views.

Exhibit D at page 2.

22. The Committee Meeting minutes make clear that there was no formal proposal for a breathalyzer testing policy. Exhibit D.

23. The Committee Meeting minutes make clear that the Committee wanted to give “all due consideration in order to properly handle this issue.” Exhibit D.

24. The Committee Meeting minutes make clear that the public participated in lengthy public debate about the pros and cons of the policy proposal. Exhibit D.

25. The Committee Meeting minutes make clear that the Committee intended to conduct additional discussion before any decision was made regarding breathalyzer testing. Exhibit D.

26. The Committee Meeting minutes make clear that the Committee urged the public to contact the Committee or school administration with their views. Exhibit D.

27. At the end of the Committee Meeting, the Committee unanimously voted to go into executive session pursuant to Rhode Island Gen. Laws §§ 42-46-5(a)(1) and 42-46-5(a)(2) “specifically for Personnel and Litigation” and further voted to seal the resulting minutes.

Exhibit D.

28. As had the Agenda, the Committee failed to identify at the meeting itself any specific “litigation” that it would be discussing in the closed session. Exhibit D.

29. The Committee Meeting minutes establish that there was no formal proposal to implement mandatory breathalyzer testing, let alone threatened or active litigation over such policy at the time of the February 26, 2009 meeting. Exhibit D.

30. Upon information and belief, the Committee discussed breathalyzer testing in executive session on February 26, 2009.

31. The Committee relied on the litigation exception provided in R. I. Gen. Laws § 42-46-5(a)(2) to remove the Committee’s internal deliberations concerning an important public policy from public scrutiny.

32. The Committee relied upon the so-called litigation exception provided in R. I. Gen. Laws § 42-46-5(a)(2) even though there was no active or threatened litigation, in direct contravention of the purpose of the Open Meetings Act.

33. Any discussion by the Committee members as of February 26, 2009 concerning implementation of a mandatory breathalyzer testing policy is the type of public business that must be conducted in an open and public manner so that citizens are aware of the performance of public officials and the deliberations that go into the making of public policy pursuant to R. I. Gen. Laws § 42-46-1.

34. Upon learning that the breathalyzer testing policy was discussed during executive session at the February 26, 2009 meeting, Plaintiff, Mr. Bickford, editor of The Barrington Times, a publication of Plaintiff East Bay Newspapers, filed a complaint with the Rhode Island Attorney General (“RIAG”) challenging the Committee’s use of the litigation exception to convene in executive session and also the Committee’s vote to seal the minutes

resulting from the executive session. Exhibit E.

35. The RIAG investigated the complaint filed by The Barrington Times and issued decision OM 09-10 / PR 09-13 on May 18, 2009, denying Mr. Bickford's request for relief.

36. The RIAG decision states that the Committee considered the RI ACLU's December 26, 2008 letter urging the Principal of Barrington High School to resist implementing a mandatory breathalyzer testing policy to be an express threat of litigation.

37. Several other citizens objected during the Committee Meeting to the implementation of a mandatory breathalyzer testing policy but their objections were not similarly considered to be a threat of litigation. Exhibit D.

38. Nothing in the letter sent by the RI ACLU and Mr. Brown to the Principal of Barrington High School mentions litigation or threatens a lawsuit. Exhibit A.

39. At the time of the Committee Meeting, no litigation was threatened or possible.

40. All that existed at the time the Committee convened in executive session was a public policy debate during an open meeting concerning breathalyzer testing and an invitation by the Committee for the public to communicate their views.

41. This is confirmed by the minutes of the June 18, 2009 Barrington School Committee meeting ("June Minutes"). Exhibit F.

42. The June Minutes state that a draft of the proposed breathalyzer policy was provided to the Committee. Exhibit F.

43. The June Minutes also state that the Committee voted to support the *"updated procedure for breathalyzer testing proposal submitted this evening ... contingent upon feedback and approval from legal counsel."* Exhibit F.

The School Committee's Pattern of Insufficient Meeting Agendas

44. The agendas for the school committee meetings held on June 4 and July 15, 2009, were not posted on the electronic town crier website maintained by secretary of state.

45. The agendas published by the school committee in advance of its meetings routinely fail to provide adequate notice of the matters to be discussed.

46. For example, each meeting agenda typically includes an item generally labeled "Discussion School Department Policies" without any information to inform the public about what particular policies are scheduled to be addressed.

47. The minutes of school committee meetings reveal that the committee frequently identifies, during the course of its meetings, specific department policies that are to be discussed at subsequent meetings.

48. Despite the fact that the minutes reflect specific policies to be discussed at the following school committee meeting, these policies are not identified on the agenda for the subsequent meeting. A sample of school committee agendas and the corresponding meeting minutes is attached as Exhibit G.

49. As a result of this pattern and practice, any particular agenda is often indistinguishable from the next with regard to the discussion of school department policies.

50. Other school department agendas provide specific information that comports with the letter and spirit of the notice requirement contained in the Open Meetings Act. A sample of agendas published by other school committees is attached as Exhibit H.

COUNT I
(Improper Executive Session, February 26, 2009)

51. Plaintiffs incorporate the averments contained in paragraphs 1 through 50 as if fully set forth herein.

52. The purpose of the Open Meetings Act is to ensure that public business is

performed in an open and public manner and that the citizenry is aware of the deliberations and decisions that go into the making of public policy. R. I. Gen. Laws § 42-46-1.

53. Rhode Island Gen. Laws §§ 42-46-4, 42-46-5 and 42-46-6 set forth the procedures by which and the purposes for which a public meeting may be closed. Section 42-46-5 specifically provides, in relevant part, that:

(a) A public body may hold a meeting closed to the public pursuant to § 42-46-4 for one or more of the following purposes:

(2) Sessions pertaining to collective bargaining or litigation, or work sessions pertaining to ... litigation.

...

54. The Committee asserted the exception provided in R. I. Gen. Laws § 42-46-5(a)(2) to justify going into executive session to discuss the proposed breathalyzer policy.

55. There was no litigation at the time of the Committee Meeting.

56. There was no threatened litigation at the time of the Committee Meeting.

57. In fact, there was not even a formal proposal to adopt a mandatory breathalyzer policy at the time of the Committee Meeting.

58. The actions of the Committee in discussing possible breathalyzer testing policies in executive session on February 26, 2009 were in willful contravention of the public policy set forth in the Open Meetings Act, R. I. Gen. Laws § 42-46-1, et seq.

COUNT II
(Deficient Public Notice, February 26, 2009)

59. Plaintiffs incorporate the averments contained in paragraphs 1 through 58 as if fully set forth herein.

60. Rhode Island Gen. Laws § 42-46-6 sets forth the requirements for providing adequate notice of public meetings. It states, in relevant part, that:

(b) Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed.

61. The Agenda included an item relating to public comment about the breathalyzer policy proposal.

62. The Agenda failed to state that the Committee would also meet in executive session to discuss the same policy proposal.

63. The vague statement at the end of the enumerated agenda items generically reciting “Executive Session pursuant to ... 42-46-5(a)(2) for ... Litigation” fails to adequately provide public notice regarding the nature of the business to be discussed, particularly where no litigation was pending or threatened.

64. Plaintiffs are entitled to relief as provided by R.I. Gen. Laws §42-46-8, as the Defendant has willfully violated R.I. Gen. Laws § 42-46-1, et seq., by failing to adequately provide public notice of the business to be discussed during an executive session.

COUNT III
(Deficient Supplemental Written Notice of Open Meetings)

65. Plaintiffs incorporate the averments contained in paragraphs 1 through 64 as if fully set forth herein.

66. Rhode Island Gen. Laws § 42-46-6 sets forth the requirements for providing adequate notice of public meetings. It states, in relevant part, that:

(b) Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. This notice shall include the date the notice was posted, the date, time and place of the meeting, and **a statement specifying the nature of the business to be discussed.** (emphasis added).

67. The published agendas for the school committee meetings routinely fail to

provide “a statement specifying the nature of the business to be discussed” – for example, any description at all of particular school department policies.

68. The Committee’s failure to include a statement specifying the nature of the business to be discussed at the meetings referenced above in its supplemental written notice fails to provide the public with any meaningful notice of the public business to be conducted, and is in violation of the Open Meetings Act.

COUNT IV
(Deficient Supplemental Written Notice of Open Meeting, June 4 and July 15, 2009)

69. Plaintiffs incorporate the averments contained in paragraphs 1 through 68 as if fully set forth herein.

70. Rhode Island Gen. Laws § 42-46-6 sets forth the requirements for providing adequate notice of public meetings. It states, in relevant part, that:

(b) Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date. This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed.

71. Rhode Island Gen. Laws § 42-46-6 sets forth additional requirements of the written public notice of meetings referenced in subpart (b). It states, in relevant part, that:

(c) Written public notice shall include, but need not be limited to, posting a copy of the notice at the principal office of the public body holding the meeting, ..., and electronic filing of the notice with the secretary of state pursuant to subsection (f);

72. Rhode Island Gen. Laws § 42-46-6(f) states, in relevant part:

(f) All notices required by this section to be filed with the secretary of state shall be electronically transmitted to the secretary of state in accordance with rules and regulations which shall be promulgated by the secretary of state.

73. The agendas for the school committee meetings held on June 4 and July

15, 2009, were not posted on the eTown crier website maintained by secretary of state.

74. The Committee's failure to provide supplemental written notice is a violation of the Open Meetings Act.

WHEREFORE, Plaintiffs Phoenix-Times Publishing Company, d/b/a East Bay Newspapers, Josh Bickford, Rhode Island Affiliate, American Civil Liberties Union, Inc. and Steven Brown seek an Order that provides as follows:

a. A declaration by this Court, pursuant to R. I. Gen Laws § 9-30-1, et seq., and in accordance with R. I. Gen Laws § 42-46-1, et seq., that the executive session convened by the Barrington School Committee on February 26, 2009 to discuss the breathalyzer policy proposal was a violation of the Open Meetings Act, R. I. Gen Laws § 42-46-1, et seq.;

b. A declaration by this Court, pursuant to R. I. Gen Laws § 9-30-1, et seq., and in accordance with R. I. Gen Laws § 42-46-1, et seq., that the failure to give written notice on the February 26, 2009 agenda of the executive session by the Barrington School Committee to discuss the breathalyzer policy proposal was a violation of the Open Meetings Act, R. I. Gen Laws § 42-46-1, et seq.;

c. An Order directing the Barrington School Committee to unseal and publish the minutes resulting from the February 26, 2009 executive session to the extent they relate to the breathalyzer policy proposal;

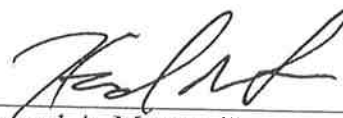
d. An Order directing the Barrington School Committee prospectively to include a statement specifying the nature of the business to be discussed at each open meeting in its supplemental written notice;

e. An Order directing the Barrington School Committee prospectively to ensure that school committee agendas are electronically transmitted to the Rhode Island Secretary of State in accordance with the Open Meetings Act;

- f. An award of attorneys fees and costs to Plaintiffs;
- g. Imposition of a civil fine against the Barrington School Committee pursuant to in accordance with R. I. Gen Laws § 42-46-8(d); and
- h. An award to the Plaintiffs of such other relief as the Court deems just and proper.

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