To be argued by:
JANE L. GORDON

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New York Supreme Court
Appellate Division: First Department

IN THE MATTER OF MICHAEL P. THOMAS,

Petitioner-Respondent,

and

LETITIA JAMES, PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, AND CLASS SIZE MATTERS,

Petitioners-Intervenors-Respondents,

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-Appellants.

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

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PRELIMINARY STATEMENT

Since School Leadership Teams (SLTs) were created 20 years ago, the State Legislature has never required that their monthly meetings be open to the public at large, even as it has mandated that many other education-related meetings must be open to the public. That reflects the Legislature's goal of making SLTs a safe, collaborative advisory committee open to "all members of the school community," defined as "parents, teachers, and other school personnel."

Rather than address that compelling body of evidence head on, petitioners misconstrue or ignore the text of the relevant statutes. Every provision they cite supports our argument and demonstrates that the legislative scheme is carefully considered and reinforces a specific policy decision not to mandate that monthly SLT meetings be open to the general public.

Petitioners also fail to muster support from the general principles of the Open Meetings Law. Their reliance on an SLT's role in developing the Comprehensive Education Plan (CEP) fails because that outline of goals and recommendations is neither final nor executed unilaterally. The requirement that SLTs have a quorum and use the

notice provision of the Open Meetings Law also do not win the day, as those actions simply advance a school's legitimate interest in encouraging the broadest possible involvement by the school community, and not, as petitioners claim, the public at large.

Requiring that monthly SLT meetings be open to the public also creates serious obstacles to the collaborative, inclusive culture the Legislature has created specifically for SLTs. Petitioners dismiss those legitimate concerns as illogical, but SLTs have long enjoyed an expectation of privacy that is threatened by the scrutiny of the press or other strangers to the school community.

Good government depends on the ability to gain candid input and feedback from key stakeholders *before* final governmental action is taken. In recognition of that principle, the Legislature has created multiple opportunities for Thomas and the public at large to observe and comment on education policy but has consistently exempted monthly SLT meetings. Opening up every monthly SLT meeting in the City's 1,800 schools would be contrary to that legislative scheme and represent a dramatic shift in the status quo for two decades. The order of Supreme Court should be reversed.

ARGUMENT

PETITIONERS IDENTIFY NO BASIS FOR COMPELLING MONTHLY MEETINGS OF SCHOOL LEADERSHIP TEAMS TO BE OPEN TO THE GENERAL PUBLIC

A. Petitioners Ignore or Distort the Abundant Evidence that the Legislature Did Not Intend to Mandate that SLT Meetings be Open to the Public at Large.

Though advocates sometimes seem to suggest that unfettered public access is always the best policy, New York courts have recognized that there are a range of reasons to limit access to some kinds of meetings, while requiring others to be open to the public at large. The question is fundamentally the Legislature's to answer: because "neither public nor private meetings of governmental bodies are inherently desirable or undesirable," the "evaluation and balancing of the factors are ultimately . . . for the State Legislature." *Orange County Publications, Div. of Ottaway Newspapers, Inc. v. Council of Newburgh*, 45 N.Y.2d 947, 949 (1978).

Here, a compelling body of evidence—all of it either ignored or misread by petitioners—shows that the Legislature did not intend to mandate that SLT meetings be open to the general public. First, the Legislature specifically required notice of SLT meetings to be given in

accordance with the provisions of the Open Meetings Law, while choosing not to incorporate the other requirements of the Open Meetings Law. Petitioners try to suggest this helps them (Interveners Br. at 30-31), but it points strongly away from their position. If SLT meetings were already subject to the Open Meetings Law under general principles, then the provision referring to the notice requirements would have been unnecessary. And under common principles of statutory construction, the Legislature's decision to incorporate one aspect of the Open Meetings Law, but not others, is strong evidence that the Legislature did not intend the other requirements to apply. *See generally*, *Cruz v. TD Bank, N.A.*, 22 N.Y.3d 61, 72 (2013) (doctrine of *expressio unius est exclusio* is an "interpretive maxim that the inclusion of a particular thing in a statute implies an intent to exclude other things not included").

Nor is there merit to the intervenors' contention that, if our position were correct, the Legislature would have "defined the 'school community' that it wanted to allow into [monthly SLT] meetings" (Intervenors Br., at 21, 26). This is exactly what Education Law § 2590-h (15), in substance, does: the subdivision directs the Chancellor to

promote the involvement of "all members of the school community . . . including parents, teachers, and other school personnel," and requires a plan for SLTs that "balances participation by parents with participation by school personnel." There is no reference to the public at large. Here, too, the intervenors ignore specific evidence of the Legislature's intent.

Second, the Legislature has repeatedly designated other education meetings to be open to the public, without ever doing the same for SLT meetings, despite amending the SLT provision multiple times since its original enactment. This pattern creates an "irrefutable inference" that monthly SLT meetings, like other purely advisory groups, were intentionally excluded from any mandatory requirement to be opened to the general public. *See Matter of Shannon*, 2 5 N.Y.3d 345, 352 (2015); *Matter of Jae v. Bd. of Educ. of Pelham Union Free Sch. Dist.*, 22 A.D.3d 581 (2d Dep't 2005). The point is only stronger because other provisions requiring other school-related meetings to be open are part of the same statute that creates the SLT structure. *Nguyen v. Holder*, 24 N.Y.3d 1017, 1022 (2014).

Education Law § 414, stressed by the intervenors themselves, only drives home the same point. The intervenors point out that Education

Law § 414 requires a range of "civic meetings," including PTA meetings, to be opened to the public, but even they must concede (at 16) that the provision omits monthly SLT meetings from its list of "civic meetings." Education Law § 414 thus provides still another example where the Legislature mandated other meetings in schools to be open to the general public, but declined to impose the same requirement for SLT meetings.

A similar point is shown by the SLT's participation in joint public hearings on school closings and changes in building utilization pursuant to Education Law § 2590-h (2-a)(d)—which the intervenors also cite (Intervenors Br., at 4). These targeted requirements for public hearings, too, demonstrate that the legislative scheme is carefully considered and reflects a very specific policy decision that monthly SLT meetings not be required to be opened to the public (App. Br., at 32-33).

The statutory text and structure thus yield abundant evidence that the Legislature did not intend to compel monthly SLT meetings to be open to the general public. Petitioners ignore much of this evidence and get the import of the rest backwards. The Legislature's well-

considered policy determinations, regarding which meetings must be open to the public, should be given effect.

B. Under General Principles of the Open Meetings Law, Petitioners Have Failed to Show that SLTs Have Unilateral Decision-Making Powers or Any Power to Implement Their Recommendations.

The specific evidence of the Legislature's intent is sufficient to resolve this case. But even if it were not, petitioners' claim would fail under the general test of the Open Meetings Law. The two points are mutually reinforcing, and together they show decisively why the petition lacks merit.

Petitioners say that SLT meetings should be open to the public because SLTs are part of a school's "governance structure," alongside the Chancellor, superintendents, community and citywide councils, and principals (Intervener Br., at 15-17; Thomas Br., at 6). But they do not explain why that label should be dispositive. "Governance structure" is not a term of art that is used in the Open Meetings Law or the case law applying it.

Relying solely on an SLT's role in developing the CEP, petitioners contend that SLT's have "decision making authority" (Intervenor Br., at

17-19; Thomas Br., at 13-16). That, however, misstates the governing analysis. *Matter of Smith v. City Univ. of New York*, 92 N.Y.2d 707 (1999), instructs that the entity must be "invested" not just with *final* decision-making authority but also *the authority to implement its own recommendations* so that its initiatives are executed unilaterally. SLTs do not have those powers (App. Br., at 11-13, 19).

The CEP is neither final nor executed unilaterally, principally because by statute, an SLT has no decision-making power over the school budget, which is the only way that the CEP's recommendations could possibly be implemented. Educ. Law § 2590-h (15) (b-1) (i) (SLT develops CEP and only *consults* on school budget). *See also*, Educ. Law § 2590-r (b) (i) (the principal "propose[s] a school-based…budget, after consulting with members of the [SLT]"). The CEP, along with the principal's budget justification, must be submitted to the superintendent, who then determines whether the two are in alignment (110). The superintendent also has the ultimate power to make the final determination on the CEP when a consensus by the SLT cannot be reached (110). *Appeal of Pollicino*, NYSED Commissioner's Decision No. 15,858 (Dec. 31, 2008), cited by petitioners (Intervener Br., at 19;

Thomas Br., at 17-18), is both irrelevant and unpersuasive authority. *Pollicino* simply determined that the principal has no unilateral authority over the CEP (173), but that has never been in issue here.

Nor does the Open Meetings Law apply simply because SLTs require a quorum to conduct business (Intervenors' Br., at 19). That requirement is necessary but far from sufficient for the Open Meetings Law to apply. Quorums are required by all kinds of meetings, including shareholder meetings, *see* Robert's Rules Online, http://www.rulesonline.com/rror-11.htm, and yet no one would argue that they are public bodies performing governmental functions. That is because a quorum requirement assures that there is sufficient participation by the various targeted school constituencies—an essential objective of SLTs (App. Br., at 6-8).

That same laudable yet limited objective is achieved by borrowing the notice provisions of the Open Meetings Law for use in holding monthly SLT meetings (App. Br., at 30-31). Neither point establishes that monthly SLT meetings must be held open to the public at large, such as members of the press or strangers to the school community.

Nor is there merit to the intervenors' argument that SLTs make "policy proposals" that subject them to the Open Meetings Law (Intervenors' Br., at 22). *Matter of Perez v. City Univ. of New York*, 5 N.Y.3d 522 (2005), far from supporting this point, refutes it. As we explained in our main brief (App. Br., at 19-20, 23), the Hostos Community College Senate in *Perez* executed powers that had been delegated by the Legislature to the CUNY Board, implemented its own policy recommendations, decided disciplinary matters and made scholarship awards, approved changes to the school's Governance Charter, and implemented the school's admission policy, among other powers (App. Br., at 23-24). That final decision-making authority far exceeds, by any measure, an SLT's responsibility to create a CEP.[1]

C. Supreme Court's Decision Creates Serious Obstacles to the Collaborative Advisory Culture of SLTs.

Mandating open meetings would also obstruct the basic function, and change the essential nature, of SLTs. In recognition of the unique

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[1] Petitioners separately rely on advisory opinions of the Committee on Open Government (Intervener Br., at 23-24), which are also neither binding nor entitled to any particular deference. *Buffalo News v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 493 (1994). They are also contrary to the legislative analysis and unpersuasive.

advisory role SLTs play in consensus building in individual schools, the Legislature has created a safe, confidential environment to foster genuine input, feedback, and advice from parents, staff and students that has never been opened to the general public and press (App. Br., at 30-35). These team members volunteer with the understanding that their meetings will not be open to the public and press. Petitioners nonetheless claim that it is "illogical" to conclude that volunteers will be reluctant to continue to serve if their opinions suddenly were subject to scrutiny by the public, the press, and other strangers who would be able to attend SLT meetings if they prevailed (Intervenors' Br., at 24-25; Thomas Br., at 25). But the settled understandings of SLT members cannot be so easily dismissed.

SLT members have long had an expectation of privacy in their deliberations. That legislatively created right to comment on school policy would certainly be chilled if SLT meetings were open to the public. *Cf. Mitchell v. Board of Educ. of Garden City Union Free School Dist*, 113 A.D.2d 924, 925 (2d Dep't 1985) (those who attend public meetings and decide to express their opinions "fully realize that their comments and remarks are being made in a public forum"). DOE policy

has never considered monthly SLT meetings to open to the public and press, and petitioners' reference to an erroneous Power Point Presentation to show otherwise (Intervener Br., at 21) is misleading. That material contained an incorrect statement and has been replaced; the correct material does not open SLT meetings to the public.[2] School districts in other cities and towns have followed the same practice as DOE, as has a leading resource for New York City charter schools.[3]

While the intervenors contend, without support, that SLTs are "inappropriate venues for discussing confidential information" (Intervenors' Br., at 25), they ignore that minors are required members of high school SLTs (106), and their presence poses unique and sensitive concerns if the meetings are opened to the public at large. The proposed

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[2] A copy of the new Power Point presentation was submitted to the Court, as Exhibit A, to the affirmation of Robin Singer, dated August 20, 2015, in further support of DOE's cross-motion for a stay pending appeal.

[3] *See* Rochester School Based Planning Team Manual 2014-2014, at 16 http://www.rcsdk12.org/cms/lib04/NY01001156/Centricity/Domain/4/SBPT%20Manual%202014-2015.pdf. The same policy is applied by the Great Neck, New York public school system. *See* Great Neck Public Schools District Plan for Shared Decision Making, https://www.greatneck.k12.ny.us/GNPS/Pages/SDMPlan.pdf. The New York City Charter School Center also advises that the Open Meetings Law does not apply to the SLT meetings of charter schools, either. www.nyccharterschools.org/sites/default/files/resources/operations_memo_ii_oml_faq.pdf, at 2.

brief by amicus Council for Supervisors and Administrators demonstrates that sensitive personnel issues are also sometimes discussed (CSA Brief, at 8-9).

SLT members must be able to exchange ideas, opinions, advice and criticism freely in order for their collaborative process to work, as it has for the past two decades, without public disclosure of their deliberations. Notwithstanding ample opportunities to change the way SLTs do their work, the Legislature has consistently refused to make their monthly meetings public, while also providing many separate opportunities for the public to observe the decision-making process involved in running the City's public schools. Supreme Court's decision is contrary to that intention and threatens the essential nature of SLTs, and its order should be reversed.

CONCLUSION

For the foregoing reasons, the order of the Supreme Court should be reversed.

Dated: New York, NY
December 18, 2015

Respectfully submitted,

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