

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA  
CIVIL DIVISION

Niehls, et al. :  
 :  
VS. : NO. 2020-19389  
 :  
Montgomery County Board of Commissioners, :  
et al. :

**COVER SHEET OF RESPONDENT**

Date of Filing 11/19/2020 Respondent Defendants

Counsel for Respondent Raymond McGarry I.D. No. \_\_\_\_\_

Document Filed (Specify) Brief in Opposition to Petition for Special and Preliminary Injunction

**RULE RETURN DATE of Related Motion** \_\_\_\_\_

Matter is (Check One)  (Appealable)  (Interlocutory)

Oral Argument  (Yes)  (No)

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Respondent Requires (Specify Reason Only if Interlocutory) :

DISCOVERY \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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**JOHN NIEHLS, ELIZABETH WEIR AND  
KAITLIN DERSTINE**

Plaintiff,

v.

**MONTGOMERY COUNTY BOARD OF  
COMMISSIONERS, VALERIE A.  
ARKOOSH, KENNETH E. LAWRENCE,  
MONTGOMERY COUNTY DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,  
JANET PANNING, RICHARD S.  
LORRAINE, MONTGOMERY COUNTY  
BOARD OF HEALTH, MICHAEL B.  
LAIGIN, FRANCIS JEYARAJ, STEVEN  
KATZ, BARBARA WADSORTH, AND  
MARTIN D. TRICHTINGER**

Defendants.

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COURT OF COMMON PLEAS OF  
MONTGOMERY COUNTY,  
PENNSYLVANIA

No. 2020-19389

**PROPOSED ORDER**

AND NOW, this \_\_\_\_ day of November, 2020, upon consideration of the Petition for Special and Preliminary Injunction filed by Petitioners (the "Petition"), all responses filed in opposition thereto and having heard oral argument thereon, it is hereby ORDERED that the Petition is DENIED.

BY THE COURT:

\_\_\_\_\_  
The Honorable Richard P. Haaz

**BROWN MCGARRY NIMEROFF LLC**  
Raymond McGarry, Esquire  
Mary Kay Brown, Esquire  
Jami Nimeroff, Esquire  
PA Attorney ID Nos. 56520, 54327 and 71696  
Two Penn Center, Suite 610  
1500 John F. Kennedy Boulevard  
Philadelphia, PA 19102  
T: (267) 861-5330

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Defendants.

COURT OF COMMON PLEAS OF  
MONTGOMERY COUNTY,  
PENNSYLVANIA

No. 2020-19389

**DEFENDANTS' BRIEF IN OPPOSITION TO PETITION FOR A SPECIAL AND  
PRELIMINARY INJUNCTION**

Respondents, Montgomery County Board Of Commissioners, Valerie A. Arkoosh,  
Kenneth E. Lawrence, Montgomery County Department Of Health And Human Services  
("Department of Health"), Janet Panning, Richard S. Lorraine, Montgomery County Board Of  
Health (the "Board"), Michael B. Laigin, Francis Jeyaraj, Steven Katz, Barbara Wadsorth, and  
Martin D. Trichtinger (collectively, "Respondents"), by and through their undersigned counsel,

submit this Brief in Opposition to the Plaintiffs' Petition for a Special and Preliminary Injunction and aver as follows:

**I. Matter Before the Court**

This is a case in which Petitioners complain about a public meeting of the Montgomery County Department of Health in which a decision was made by the Board to require all schools in Montgomery County to be virtual during a two-week period around Thanksgiving due to concerns of community spread of Covid-19. The Petitioners' real complaint is about the decision of the Board. And in an attempt to override the Board's decision, Petitioners have cooked up baseless allegations of violations of the Sunshine Act and asked this Court to enjoin the implementation of the decision of the Board. This Court should not entertain such a far-reaching and baseless request.

Accordingly, the Petition should be denied.

**II. Statement of Questions Involved**

- A. Whether the Board of Health complied with the public participation requirements of the Sunshine Act, which was amended in April of 2020 to permit participation through telecommunication devices OR through written comments, when the Board allowed the public to participate in both manners.

Suggested Answer: Yes.

- B. Did the Board comply with applicable notice requirements for the November 13, 2020 continued meeting by notifying the public at the completion of the November 12, 2020 meeting and posting notice of the November 13, 2020 meeting on social media and the Board's website?

Suggested Answer: Yes.

C. Did the Board act in conformance with the Sunshine Act when it held an information session to gather facts bearing on the Resolution?

Suggested Answer: Yes.

D. Are the Plaintiffs entitled to a preliminary injunction?

Suggested Answer: No.

### III. Statement of Facts

On March 6, 2020, the Commonwealth of Pennsylvania issued a state-wide Declaration of Emergency due to the wide-spread outbreak of the Corona Virus (COVID-19). (Declaration of Lauren Hughes, Esquire filed in support hereof (the “Hughes Declaration”), at ¶2). On March 8, 2020, the Montgomery County Commissioners similarly declared a disaster emergency in Montgomery County because of the wide-spread outbreak of COVID-19 (the “Emergency Declaration”). (Hughes Declaration, at ¶3).

The Emergency Declaration was extended by the Montgomery County Commissioners four times, with the last extension by Resolution dated October 1, 2020 and lasting for a period of sixty days. (Hughes Declaration, at ¶4; Exhibit “A” thereto). That Emergency Declaration currently remains in effect in Montgomery County. (Hughes Declaration, at ¶5).

On April 20, 2020, the General Assembly passed COVID-19 related amendments to a number of statutes, including the Sunshine Act. 35 P.S. §5741. Recognizing that governing during a pandemic such as COVID-19 presents unique challenges, the Assembly passed Section 5741(f) which provides:

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.

(emphasis added). Section 5741(j) defines "authorized telecommunications device" to include any device which permits, at a minimum, audio communication between individuals.

On November 10, 2020, the Montgomery County Board of Health (the "Board") gave notice of a special meeting to be held at noon on November 12, 2020 (the "November 12<sup>th</sup> meeting"). Due to the Emergency Declaration, the meeting was scheduled to be held by Zoom. Notice of the November 12<sup>th</sup> meeting was posted on the Board's website. Members of the public could attend the meeting by emailing the Board to obtain the Zoom link and login information. (Hughes Declaration, at ¶¶ 9-12).

The November 12<sup>th</sup> meeting was commenced at 10:00 am. (Hughes Declaration, at ¶13). At the outset of the meeting, Senior Assistant Solicitor for Montgomery County and solicitor to the Board of Health, Lauren Hughes, gave instructions to all in attendance as to the two ways in which the public could communicate their thoughts to the Board. First, Ms. Hughes advised that members of the public could speak orally at the meeting by entering their name into the "Chat Feature" to be called upon. Each speaker was asked to state their name and his or her township of residence at the outset of their oral comments. Each speaker was limited to two minutes of speaking time. There was, however, no limit to the aggregate time period for public comment. (Hughes Declaration, at ¶14).

Ms. Hughes further advised that, alternatively, members of the public could submit their comments in writing to the Board via the email address: [publichealth@montcopa.org](mailto:publichealth@montcopa.org).

Throughout the meeting, Ms. Hughes was asked via the chat feature to provide that email address, which she did multiple times. (Hughes Declaration, at ¶15). She also acknowledged at

the start of the meeting that members of the public had previously sent letters and emails on the topic at hand, which would not be read out loud at the special meeting, but that had been sent to the Board members for their consideration. (Hughes Declaration, at ¶16).

The Chair then introduced the subject matter of the meeting, which was virtual education only in both public and private schools in Montgomery County for a two-week period due to the rising numbers of COVID cases. (Hughes Declaration, at ¶17). While no motion was made, the proposed resolution was posted on the screen and stated 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 extra-curricular activities.

(Hughes Declaration, at ¶18).

Two presenters from the Office of Public Health addressed the proposed resolution and the public health data that supported the need for the resolution. (Hughes Declaration, at ¶19). Following the presentations; there was comment by Board members. Following the comment by Board members; there was comment by members of the public. (Hughes Declaration, at ¶¶ 20-21).

Throughout the meeting, Senior Assistant Solicitor Hughes maintained a list of people who indicated that they wanted to comment publicly on the proposed resolution. (Hughes Declaration, at ¶22; Exhibit “B” thereto). All three Petitioners in this action were in attendance at the Zoom meeting. Two of the three Petitioners spoke. (Hughes Declaration, at ¶23; Exhibit “B” thereto). The third Petitioner provided his comments to the Board via letter. (Hughes Declaration, ¶23; Exhibit “C” thereto).

After hours of public comment, there was a period of 10-15 minutes where no one indicated via the chat feature that they wish to speak publicly. (Hughes Declaration, at ¶24). Hughes read the last public comment out loud because the author did not feel comfortable and asked her to do so. (Hughes Declaration, at ¶25).

After Ms. Hughes read the last comment, the public comment portion of the special meeting closed. Ms. Hughes again stated that if anyone had thoughts they would like to share with the Board on this subject by email, the Board invited them to do so. She reiterated the email address of [publichealth@montcopa.org](mailto:publichealth@montcopa.org). A large number of emails were subsequently received at this address and forwarded to the Board for the members' consideration. (Hughes Declaration, at ¶26).

The Board indicated it would recess without a vote and determined that the meeting would continue the next day at noon. That determination was publicly announced at the November 12, 2020 meeting. (Hughes Declaration, at ¶27). In addition, notice of the resumption of the special meeting was also posted on the Board of Health's website via its Twitter Feed that appears on the website's landing page. (Hughes Declaration, at ¶28; Exhibit "D" thereto).

At approximately 6:00 p.m., the Board convened by Zoom for an information gathering session relative to the proposed resolution. In addition to the Board, in attendance were: Commissioner Val Arkoosh, Solicitor Josh Stein, Senior Assistant Solicitor Lauren Hughes, and from the Health Department, Michelle Masters, Janet Panning and Toyca Williams. (Hughes Declaration, at ¶29).

At that information session, Commissioner Arkoosh and Michelle Masters spoke about the public health reasons for passing the proposed resolution. Members of the Board asked

questions about how other counties in the Commonwealth were handling the issue at hand. There were also questions regarding whether the Commonwealth was considering action that might impact, or even moot, the proposed resolution. No deliberation of the resolution occurred during this information session. No vote was taken; no position expressed by Board members. (Hughes Declaration, at ¶30).

However, because there seemed to be some confusion on the part of the public that the proposed resolution was too open-ended, the Solicitor suggested the removal of the language “with the potential for expansion beyond this date” from the proposed resolution such that, if there was a need to expand virtual education beyond the two-week period, there would be another special meeting and a further opportunity for public comment on that specific issue. (Hughes Declaration, at ¶31).

The special meeting resumed the next day at noon. The public participated by Facebook Live. While this technology did not permit members of the public to speak, it allowed more than 500 people to view the meeting. (Hughes Declaration, at ¶32). At the continuation of the special meeting, the Board passed the following resolution:

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. This requirement includes virtual education only for special education and canceling of school sanctioned extra-curricular activities.

(Hughes Declaration, at ¶33).

#### IV. Legal Argument

##### A. The Board of Health Did Not Limit Public Comment

In 2020, in response to the COVID Pandemic, the Pennsylvania Legislature enacted Section 5741 of Act 15 to address the issue of how to conduct Local Government meetings during the pandemic. As it pertains to public participation in such meetings, subsection (f) states as follows:

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.

Thus, a Local Government Agency complies with the public participation requirements of the Sunshine Act at this time by permitting participation through telecommunication devices OR through written comments. Thus, public participation through telecommunication means is not even required at this time under Pennsylvania law.

Here, the Montgomery County Board of Health did both. The Board of Health opened public comment during the Zoom Meeting on November 12, 2020. At the beginning of the public comment period, Lauren Hughes, Esquire, Senior Assistant Solicitor, and solicitor to the Board of Health provided instructions for public comment to all attending the meeting. She explained that individuals who wished to be heard could do so in two different ways. First, individuals could identify themselves in the Chat Feature on Zoom that they intended to speak. Second, individuals could submit their comments in writing to [publichealth@montcopa.org](mailto:publichealth@montcopa.org). This email address was provided to the public not only prior to public comment being opened by

the Board, but it was also provided numerous times by Ms. Hughes in the Chat feature of Zoom during the public comment part of the meeting, and finally, provided once again orally by Ms. Hughes prior to the recess of the meeting on November 12, 2020.

Every single individual who indicated that they wanted to provide public comment live over Zoom was given that opportunity and did, in fact provide such public comment. Each of the plaintiffs provided public comment either on November 12, 2020 during the Zoom meeting or by letter to the Board. In addition, the Board of Health received hundreds of written public comments. The public comment period of the Zoom Meeting did not end until all participating members of the public were given an opportunity to speak, or in the alternative, provide written comments.

Finally, because the November 13, 2020 meeting was a continuation of the meeting on November 12, 2020, and because public comment had already been permitted on the issues before the Board, both at the Zoom meeting on the 12<sup>th</sup>, and then also in writing both during and after the Zoom meeting, there was no need to re-open public comment. The Board had fulfilled its obligations for public participation.

Based upon the foregoing facts, there is no question that the Board of Health complied with the public participation requirements of the Pennsylvania Sunshine Act. The reality is that plaintiffs, each of whom was fully given an opportunity to speak during the public comment period, and each of whom did speak and/or provide written comment, do not like the decision of the Board, and are using these conjured-up Sunshine Act arguments to undo a lawful action of the Board that they disagree with. They should not be permitted to do so.

**B. The Board Properly Provided Notice of the Reconvened Meeting**

Petitioners contend that the Board violated the Sunshine Act by not providing at least twenty-four hours' advanced notice of the November 13, 2020 reconvened meeting. Petitioners also contend that the Board violated the Sunshine Act by not posting notice of the reconvened meeting at the Board's principal office or the public building where the reconvened meeting was to take place or by advertising notice in a suitable publication or on television or radio, as well as by not publishing notice on the Board's website. Petitioners get their facts wrong, misconstrue the requirements of the Sunshine Act with respect to reconvened meetings, and ignore the impact of Act 15 of 2020 enacted and adopted in April 2020 to govern public meetings conducted during the COVID-19 emergency.

The reconvened meeting on November 13, 2020 did not require at least twenty-hour hours' advanced notice. The "public notice" requirement of a reconvened meeting under the Sunshine Act does not have any associated time element. *See* 65 Pa.C.S.A. §703 (definition of "public notice" of a recessed or reconvened meeting); 65 Pa.C.S.A. §709(a) (recessed and reconvened meeting not mentioned in section requiring 24 hours' advanced notice). Thus, the lack of a full twenty-four hours' advanced notice of the November 13, 2020 reconvened meeting is not problematic.

With respect to the location of the notice, while the definition of "public notice" of a recessed and reconvened meeting contained in section 703 of the Sunshine Act generally requires posting a notice prominently at the principal office of the agency holding the meeting or

at the public building in which the meeting is to be held, such requirement does not apply under the current emergency COVID-19 declaration.<sup>1</sup>

In April 2020, 35 Pa.C.S.A. §5741 was enacted to modify the procedures required for public meetings conducted during the COVID disaster declaration to permit virtual public meetings, such as what occurred here. Section 5741(a) authorizes an agency or board “of a political subdivision included in a declaration of disaster emergency as specified under section 7501(d) (relating to general authority of political subdivisions)” [to] conduct hearings, meetings, proceedings or other business through the use of an authorized telecommunications device until the expiration or termination of the COVID-19 disaster emergency.” 35 Pa.C.S.A. § 5741(a). Montgomery County is included in the Governor’s COVID-19 disaster declaration and has, in fact, issued its own COVID-19 emergency declaration pursuant to 35 Pa.C.S.A. §7501. (Hughes Declaration, ¶¶1-2; Defendants’ Exhibit 1). Thus, agencies of the County are authorized to conduct public meetings through authorized telecommunications devices during the current COVID-19 emergency.

The phrase “authorized telecommunications device” is defined as including “any device which permits, at a minimum, audio communication between individuals.” 35 Pa.C.S.A. §5741(j). There is no question that meetings conducted via Zoom fall within this definition. Moreover, hearings conducted in this fashion need not comply with other provisions of law

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<sup>1</sup> The definition of “public notice” in section 703 also discusses giving notice under section 709(c), although it does not state whether compliance with section 709(c) is mandatory. However, that interpretation would be illogical because section 709(c) requires public notice to be supplied to a newspaper of general circulation or to any radio or television station or other interested party only if certain conditions are met, namely “*upon request*” and “*if the newspaper, station or party provides the agency with a stamped, self-addressed envelope prior to the meeting.*” 65 Pa.C.S.A. §709. There is no allegation that any such request was made here.

requiring the presence of a quorum at a physical location. 35 Pa.C.S.A. § 5741(b).

With respect to the advanced notice of virtual meetings that is required, section 5741(c) provides:

**(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).

35 Pa.C.S.A. §5741(c).

Here, the Board provided ample and lawful notice of the reconvened meeting. Since the reconvened meeting was set to and did occur virtually at no physical location or address, under section 5741 there was no need to post a notice at a physical location. Instead, the Board publicly announced that it would recess without a vote and continue the meeting the next day at noon. (Hughes Declaration, ¶27). The Board also provided advanced notice of the reconvened meeting on Facebook and Twitter, which announcements included the date, time and means of virtual attendance at the reconvened meeting. (Defendants' Exhibits 5 and 6). Moreover, since the Board has a link to its Twitter feed posted on its website, the Board complied with section 5741(c) by posting notice of the reconvened meeting on its publicly-available website.<sup>2</sup> (Defendants' Exhibit 6).<sup>3</sup>

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<sup>2</sup> In fact, despite arguing otherwise in its Petition, Petitioners admit in their Verified Complaint that the Board published notice of the reconvened meeting on its website. Verified Complaint, ¶57 ("Rather, the only notice [of the reconvened meeting] was via the Board's website and twitter feed").

<sup>3</sup> Under section 5741(c), the Board had no obligation to advertise the date and time of the reconvened meeting in a newspaper of general circulation since such action would have been highly impracticable given the short time between the November 12, 2020 meeting and the reconvened meeting.

For all of these reasons, the Board did not violate the Sunshine Act with respect to the November 13, 2020 reconvened meeting.

**C. The Board Acted in Conformance with the Sunshine Act When it Held Information Session**

Petitioners' allegation that the Board deliberated the proposed resolution in secret is based on sheer speculation and nothing more. Petitioners urge that "discussion of agency business ... for the purpose of making a decision," took place, which violates the Sunshine Act. 65 P.S. §703. However, Courts do not read the definition of "deliberation" as narrowly as Petitioners. As the Commonwealth Court has noted, "[a] narrow and literal reading of "deliberation," *i.e.*, discussion of agency business, would proscribe public officials from collaborative fact finding. However, this Court has never read "deliberations" so strictly. Fact-finding does not have to take place in the presence of the public." *Smith v. Township of Richmond et. al*, 54 A.3d 404, 409 (Pa. Cmwlth. Ct. 2012), *citing*, *Sovich v. Shaughnessy*, 705 A.2d 942, 945–946 (Pa.Cmwlth.1998) (noting the Sunshine Act does not require a public official to inquire and learn about issues only at open meetings). It has also been established that public officials have a duty to be fully informed. *Belle Vernon Area Concerned Citizens v. Board of Commissioners of Rostraver Township*, 87 Pa.Cmwlth. 474, 487 A.2d 490, 494 (1985). "In short, public officials may 'study, investigate, discuss, and argue problems and issues' outside the confines of public meetings, even with interested parties." *Smith v. Township of Richmond*, 54 A.3d at 409, *citing Belle Vernon*, 487 A.2d at 494.

Here, the Board held an information session to get a further understanding as to the necessity of the proposed resolution. This included questions presented to the members of the Health Department about how other counties were handling this issue, what steps the

Commonwealth was taking on the issue of all-virtual education and basic information about transmission rates and means. This type of fact-finding does not require public observation.

Moreover, even in the cases cited by Petitioners, *Moore v. Township of Raccoon*, 625 A.2d 737 (Pa. Cmwlth. Ct. 1993) and *Ackerman v. Upper Mt. Bethel Township*, 567 A.2d 1116 (Pa. Comwlth. Ct. 1985), the Court, in the exercise of its discretion, did not set aside the agency actions for Sunshine Act violation. Rather, because the agencies held open meetings after the alleged closed meetings where public opinions were voiced, no invalidation was warranted. In this case, the public was given the opportunity to speak orally during the public comment period and to provide written comments, which the public did from before the meeting started on November 12<sup>th</sup> up to and after it concluded on November 13<sup>th</sup>. Under the COVID-19 related amendments to the Sunshine Act, an agency is only required to provide the public participation through telecommunications OR through written comment. The Board of Health did s in this case.

Finally, Petitioners' outrage over the revision to the proposed resolution is more than puzzling. There was no "significant" revision to the proposed resolution requiring all virtual education for all schools in Montgomery County. There was a clarification. While the original resolution contemplated a possible further extension, the revised resolution made it clear that, if the need to extend all-virtual learning arose beyond a two-week period, another public meeting and opportunity to comment would occur. It provided for more transparency, not less. It provided for more public participation, not less.

**D. Plaintiffs Are Not Entitled to Injunctive Relief**

Lastly, even if the Court determines that the meeting did not meet the requirements of Section 713 of the Sunshine Act, which Defendants deny, the Court has discretion on what action to take, if any. Under section 713:

[s]hould 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.

65 Pa.C.S.A. §713. In their Memorandum of Law, Petitioners themselves acknowledge that in order to prevail, their right to a preliminary injunction must be clear. (Petitioners' Mem. at p. 11). No such clarity exists here.

Petitioners cannot satisfy the standards for the granting of a preliminary injunction. They claim that the injunction is necessary to prevent the irreparable harm to the public for not being able to publicly comment on the Resolution in question. However, that is not the question at hand. Petitioners are only three members of the general public. All three attended the Zoom meeting, two of whom are documented to have spoken at the meeting during the public comment period on November 12, 2020 and the third provided his comments by letter. (Hughes Declaration, ¶23). Petitioners have not made any argument or provided any evidence of the irreparable harm that purportedly will befall them if the injunction is not granted. The Court should deny the requested relief on this basis alone.

Even if the Court were to permit Petitioners to argue harm to the general public, it is simply untrue that the public was not provided the right to comment on the Resolution at issue, as demonstrated by the Declaration of Senior Assistant Solicitor Hughes. Prior to the meeting even occurring, many members of the public had sent letters and emails to the Board about the

topic of virtual schooling, which writings had been sent to the Board members for their consideration. (Hughes Declaration, ¶16). Members of the public were then able to attend the November 12<sup>th</sup> meeting by emailing the Board to obtain the Zoom link and login information. (Hughes Declaration, ¶12). At the outset of the meeting, members of the public were advised that they could speak orally at the meeting or provide written comments to the Board via email. (Hughes Declaration, ¶¶14, 15). Dozens of members of the public spoke publicly at the meeting which went on for hours. While it is true that each member was limited to two minutes each for comment, there were no limitations placed on the aggregate time period allotted to public comments. (Hughes Declaration, ¶14). After hours of public comment there was a period of 10-15 minutes where no member of the public indicated via the Zoom chat feature that he or she wished to speak publicly. (Hughes Declaration, ¶24). Even so, members of the public were further advised that they could provide additional comments to the Board in writing and given the email address to direct such comments, which prompted a large number of additional emails to be sent by the public after the meeting which were also forwarded to the Board for consideration. (Hughes Declaration, ¶26). There simply is no evidence that the public was denied the right to provide public comment on the Resolution at issue.

In fact, it is documented that two of the three Plaintiffs themselves attended the November 12<sup>th</sup> meeting and spoke publicly about the proposed Resolution and the third provided comments in writing. (Hughes Declaration, ¶23). Thus, their standing to complain about lack of notice under the Sunshine Act is questionable. *See Borough of E. McKeesport v. Special/Temp. Civil Serv. Comm'n of Borough of E. McKeesport*, 942 A.2d 274, 280-81 (Pa. Commw. Ct. 2008) (court need not invalidate agency action under the Sunshine Act due to lack of notice when the complaining party was at the meeting in question).

With respect to the Resolution itself, there was no material change to the resolution requiring all virtual education for schools in the County, only a clarification, which actually benefits the general public in making clear that any extension of the two week virtual learning period will require a further meeting and public comment.

Lastly, even if the Court believes that a minor technical violation of the Sunshine Act may have occurred here, the Court should nevertheless deny the requested preliminary injunction. The adopted Resolution is narrowly tailored and limited in time, intended solely to deal with the anticipated community spread of COVID-19 from family gatherings over the Thanksgiving holiday. The Board carefully considered the information available to it about rising COVID-19 cases and potential community spread and the myriad of public comments about the potential struggles with virtual only learning during this short time period. After balancing the potential harms, the Board determined that the risk of harm to County residents in light of anticipated community spread due to family celebrations over the Thanksgiving holiday was high and warranted virtual only learning for a limited period of time. Respectfully, this Court should not overrule the Board's reasoned balancing of interests here. Plaintiffs have not demonstrated a clear entitlement to injunctive relief.

**V. Conclusion**

Respondents Montgomery County Board Of Commissioners, Valerie A. Arkoosh, Kenneth E. Lawrence, Montgomery County Department Of Health And Human Services, Janet Panning, Richard S. Lorraine, Montgomery County Board Of Health, Michael B. Laigin, Francis Jeyaraj, Steven Katz, Barbara Wadsorth, and Martin D. Trichtinger respectfully request that the Court deny the Petition for Special and Preliminary submitted by Plaintiffs and grant such further relief as the Court deems just and equitable.

Date: November 19, 2020

/s/ Raymond McGarry

**BROWN MCGARRY NIMEROFF LLC**

Raymond McGarry

Mary Kay Brown Jami Nimeroff

Jami B. Nimeroff, Esquire

PA Attorney ID Nos. 56520, 54327 and 71696

Two Penn Center, Suite 610

1500 John F. Kennedy Boulevard

Philadelphia, PA 19102

T: (267) 861-5330

*Attorneys for Defendants, Montgomery County Board Of Commissioners, Valerie A. Arkoosh, Kenneth E. Lawrence, Montgomery County Department Of Health And Human Services, Janet Panning, Richard S. Lorraine, Montgomery County Board Of Health, Michael B. Laigin, Francis Jeyaraj, Steven Katz, Barbara Wadsorth, and Martin D. Trichtinger*

**CERTIFICATE OF SERVICE**

I, Raymond McGarry, hereby certify that on this 19<sup>th</sup> day of November 2020, I caused a true and correct copy of the foregoing to be electronically filed using the Court's electronic filing system, and to be served upon those parties requesting service therefrom. I further certify that I caused a true and correct copy to be served upon all counsel by electronic mail.

*/s/ Raymond McGarry*

\_\_\_\_\_  
Raymond McGarry