STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: May 25, 2022]

BRITTANY DIORIO, STEPHANIE HINES, and KERRI THURBER	:	
VS.	:	**C.A. No. PC-2021-7234**
GINA BAE; AMANDA REGINO BASSE; PATRICK MCCRANN; MEGAN P. DOUGLAS; and ERIKA SEVETSON, individually and in their capacity as members of the Barrington School Committee; and the BARRINGTON SCHOOL COMMITTEE	:	

DECISION

LANPHEAR, J. This matter came on for hearing on motions for a preliminary and permanent injunction against Defendant, the Barrington School Committee. Plaintiffs, former teachers, sought an injunction to prevent the enforcement of a vaccine mandate for staff in the school system. After trial and at briefing, the Plaintiffs have narrowed their focus: Plaintiffs only question whether the Defendants violated the Open Meetings Act in their agenda postings for August and September 2021.

Findings of Fact

The Court makes the following findings of facts:

Michael Messore, III is the superintendent of the Barrington Public Schools. Gina Bae is the chairperson of the Barrington School Committee.

In March 2020, public schools in Rhode Island were abruptly closed following the spread of the SARS-CoV-2 virus (COVID-19). Local school departments, working in cooperation with

the Rhode Island Department of Education, gradually converted to at-home learning and various hybrids of distance learning via videoconferences. In the summer of 2020, the state commissioner of education directed the public schools to move toward more in-person education requiring local school districts to establish appropriate reentry plans. The Barrington School Department developed a detailed policy and plan. In December 2020, the U.S. Food and Drug Administration began to approve vaccines for emergency use to prevent the effects of COVID-19. The vaccines were mass produced, and vaccination programs extended across the country.

In summer of 2021, the Rhode Island Commissioner of Education required the public schools to develop plans for in-person learning for the 2021-2022 school year. "By mid-summer 2021, BPS began developing its Back-to School Plan, for submission to RIDE, for return to school for the 2021-2022 school year." Messore Aff. Ex. A, at 3 (Dec. 16, 2021). Policies for transitioning were discussed by the Policy Subcommittee Meeting. The group is a subcommittee of the Barrington School Committee consisting of several committeepersons, administrators and union representatives.

On August 19, 2021, the policy subcommittee met. Exhibit F is the Agenda. Mr. Messore testified that he requested policies to mandate vaccinations for teachers and to mandate masking of students and teachers. The agenda does not mention vaccinations and says only "B. Discuss and revise General and Interim Emergency Policy on COVID-19 Related Issues." The concepts were approved and sent to legal counsel for formal drafting and later review. Exhibit G is the minutes, but they do not reference either masking or vaccination. The minutes are scant concerning the COVID-19 policy discussion, indicating only "[t]he committee reviewed and discussed the General and Interim Emergency Policy on COVID-19. Edits were made related to changes in the current status of the pandemic." (Ex. G.) The agenda was posted on the Secretary

of State's website. Neither the agenda nor the minutes refer to mandatory masking or mandatory vaccinations.

After the policy subcommittee meeting, Mr. Messore and Ms. Bae, the school committee chairperson, met and agreed that legal counsel would be asked to include a mask mandate and a vaccine mandate in the draft. Tr. 20-25, Feb. 8, 2022.[1] The revised policy was forwarded to the school committee. By August 24, 2021, the draft policy which was being pressed by the administration now included a requirement of masking for all students and staff, and mandatory vaccinations for staff. Exhibits A, H and I.

On August 24, 2021, the Barrington School committee met. Mr. Messore's affidavit, Exhibit 1, describes the meeting and the agenda. The agenda is attached to Exhibit 1 as Subexhibit 10. It describes the item only as "G. First Read: Amended General and Interim Emergency Policy on COVID-19 Related Issues." The agenda speaks for itself but does not reference either mandatory masking of students and teachers or mandatory vaccinations of staff. The School Committee approved the amendments to the policy[2] including, for the first time, mandatory masking and mandatory vaccination of all school staff, including teachers. The agenda was publicly posted but the policy was not. The minutes reflect that the policy was read, "Discussion ensued," but there is no other detail—not even the policy. See Exhibit A, Subexhibit 11 at unnumbered page 7. Specifically, there was no reference to mandatory masking or mandatory vaccinations.

[1] Mr. Messore testified that at the Policy Subcommittee Meeting the group asked that legal counsel prepare a mask mandate and a vaccine mandate, but there is no mention of this topic in the minutes or agenda, and no draft policy is attached. Tr. 9, Jan. 19, 2021.

[2] Apparently, it is required that the Committee pass the policy at two different meetings, though no reference to the Town Charter or the committees' rules was provided. Therefore, it seems that the "First Passage" has become a mere formality, to bring the matter before the Committee for full debate at the next meeting.

In late August, Mr. Messore met with members of the teachers' union and discussed the policy and its implementation. A Memorandum of Agreement was written on September 9, 2021.

On September 2, 2021, the Barrington School Committee met again. The posted agenda describes the item only as "F. Second Read: Amended General and Interim Emergency Policy on COVID-19 Related Issues." Ex. A, Subexhibit 13. The school committee approved it with some minor changes. Tr. 10, Bae Testimony, Feb. 8, 2022. Oddly, the minutes reflect there were "no further edits" and reference no discussion. Ex. A, Subexhibit 14 at unnumbered page 4. This constituted a second and final passage. The agenda for the meeting indicates only "F. Second Read: Amended General and Interim Emergency Policy on COVID-19 Related Issues." Exhibit A, Subexhibit 13. Specifically, there is no specific mention of mandatory masking or mandatory vaccinations in either the agenda or the minutes.

On September 20, 2021 (after the school year had already started), Mr. Messore sent an electronic mail to teachers and staff informing them of the adoption of the new policy on August 24, and the need to be fully vaccinated by November 1, 2021. (Messore Aff. 6; Subexhibit 17.) Within three days of receiving this notice, the three plaintiffs filed requests for religious exemptions. (Exs. 2-4.) Responses denied the requests as "doing so would place an undue burden on the BPS." In a writing of November 2, 2021, the three plaintiffs were placed on unpaid leave.

Although there were numerous separate postings on the Secretary of State's website, one for each of the Barrington School Committee meetings, the postings never mentioned mandatory vaccinations. The detailed seven-page policy itself, was never posted. (Tr. 8-9, Dec. 17, 2021.) The policy has not changed since the September 2, 2021 meeting. (Tr. 13, Jan. 19, 2022.)

The three plaintiffs were certified teachers employed by the Barrington School Department for the 2021-2022 school year. Each of the three teachers were placed on unpaid suspensions as a

result of the mandatory vaccination policy and their refusals to be vaccinated. *See* Compl. and Answer ¶¶ 20, 21. When they did not provide proof of vaccinations, they were terminated from employment effective January 1, 2022. Pre-deprivation and post-deprivation hearings were provided. The three teachers requested exemptions based on their religious beliefs. The requests were denied.

The policy that was enacted was an important one. It was changing slightly from meeting to meeting, but with the mandatory vaccination provision, it added a new condition of employment for some 427 staff-members: They would each be required to submit proof of vaccinations, or face termination. While the policy itself (Ex. A, Subexhibit 15[3]) does not reference "employment" or "termination" it states in part:

> "1. All employees must be fully vaccinated by no later than November 1, 2021, subject to certain exemptions to be implemented in accordance with federal and state law;
> "2. All employees must obtain and receive a 'booster' vaccine when eligible."

Each plaintiff was terminated because of her failure to follow this policy, that is, their failure to be vaccinated.

The three plaintiffs allege that they were not vaccinated. They object to the mandatory vaccination policy and they were not aware of the mandatory vaccination policy before the school year commenced.

[3] See also Exhibits H and I.

Presentation of Witnesses

The Court need not delve into the credibility of witnesses at length, as there is little controversy concerning the relevant facts. Mr. Messore, the superintendent of schools and Ms. Bae, the chair of the School Committee, were clear and well-spoken. For the most part they were consistent with one another, forthright, educated, prepared and thoughtful. While there were some inconsistencies with whether the policy was amended, the Court finds each of them to be credible and earnest.[4]

Analysis

The complaint herein requests relief pursuant to the Rhode Island Open Meetings Act. It contains three counts:

I. A request for injunctive relief to void the mandatory vaccination policy;
II. A claim for attorneys' fees;
III. A request for imposition of a $5000 statutory fine.

Burden of Proof

Defendants claim that the Plaintiffs carry the burden of proof for defects in notice under the Open Meetings Act. While plaintiff normally carries the burden, the broad wording of G.L. 1956 § 42-46-14 is significant: "In all actions brought under this chapter, the burden shall be on the public body to demonstrate that the meeting in dispute was properly closed pursuant to, or otherwise exempt from the terms of this chapter."

As the legislature has shifted the burden to establish the appropriateness of meetings to the governing body, the courts may find the governmental body carries a burden in disproving all

[4]The Court found Chairperson Bae to be well-spoken, conscientious of her work, poised and thoughtful, but has concerns concerning the credibility of her answers concerning why more explicit notice was not provided.

violations under the chapter. However, this Court does not reach this issue here, as Plaintiffs have met their burden of proof by a preponderance of evidence on all relevant facts and issues.

The Statutory Framework

The Rhode Island Open Meetings Act G.L. ch. 42-46 requires notice of most public meetings, pronouncing "It is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy."

The act provides definitions, requires that public meetings be held in public except for limited purposes, and then requires notice of meetings:

> **"§ 42-46-6. Notice.**
>
> "(a) All public bodies shall give written notice of their regularly scheduled meetings at the beginning of each calendar year. The notice shall include the dates, times, and places of the meetings and shall be provided to members of the public upon request and to the secretary of state at the beginning of each calendar year in accordance with subsection (f).
> "(b) Public bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours, excluding weekends and state holidays in the count of 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).

Section 42-46-6(e) specifically allows school committees to add agenda items for items which were unexpected.

The Detail required

While the statutes are quite clear, our Supreme Court has discussed the extent of specificity required in notices.

In *Tanner v Town Council of Town of East Greenwich*, 880 A.2d 784 (R.I. 2005), the high court declared:

> The [Open Meetings Act] Legislature did not explicitly specify or delineate the exact requirements of this 'statement.' In our opinion, the Legislature intended to establish a flexible standard aimed at providing fair notice to the public under the circumstances, or such notice, based on the totality of the circumstances, as would fairly inform the public of the nature of the business to be discussed or acted upon. *Tanner*, 880 A.2d at 796.

In *Anolik v Zoning Board of Review of City of Newport*, 64 A.3d 1171 (R.I. 2013), the zoning board provided notice, but did not specify that it would also be acting on a request for additional time to complete certain work at a site. The notice did not mention that the board would consider the item at all, nor was there any reference to the address of the property. There was no agenda item listed. The board granted a two-year extension for the work. The Supreme Court voided the Zoning Board's action as the agenda clearly gave no notice of the zoning board's plan to act.

Three years later, the high court decided *Pontarelli v Rhode Island Board Council on Elementary and Secondary Education*, 151 A.3d 301, 306 (R.I. 2016). Mr. Pontarelli, an employee of the board, complained that a compensation review committee and the board had not given notice of a meeting as required by the Open Meetings Act. Specifically, the posted agenda said the board would consider the "executive pay plans" and noted "enclosure 7b." The enclosure was not on the Secretary of State's website. Although it was elsewhere on the web and the plaintiff admitted to having reviewed it, the Court said the notice "falls short of satisfying the statutory requirements of notice." The Court found that there was no notice that more than one pay plan would be considered. For these reasons the Court found that notice was insufficient per the Open Meetings Act.[5]

[5] The Court determined at a later point that the Open Meetings Act did not apply to the board, but this Court finds the high court's reasoning very instructive.

"In applying the language of § 42-46-6(a), this Court has stated that the content of a notice providing 'the nature of the business to be discussed' is a flexible standard based on the totality of the circumstances. *Anolik*, 64 A.3d at 1175. We have explicitly declined to set 'specific guidelines, or 'magic words,"' necessary to meet the notice requirement set forth in § 42-46-6(a). *Anolik*, 64 A.3d at 1175 (quoting *Tanner v. Town Council of East Greenwich*, 880 A.2d 784, 797 (R.I. 2005)). Instead, we have held that the public body, here the council, must provide 'fair notice' of what will be discussed at a meeting. *Anoli*k, 64 A.3d at 1175. Accordingly, this Court's 'task is to determine whether the notice provided by the … council fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted' at the September 8, 2014 council meeting. *See Tanner*, 880 A.2d at 797.

After a careful review of the record and consideration of the undisputed facts before us, it is this Court's opinion that the agenda provided by defendants, as it relates to the September 8, 2014 meeting, falls short of satisfying the statutory requirements of notice set forth in § 42-46-6(a). Although the notice placed on the Secretary of State's website undeniably informed the public that '[a]pproval of RIDE's Executive Pay Plan' was on the agenda for the council meeting, there was no indication that more than one pay plan would be considered. Moreover, there was also no indication that the additional pay plans (ultimately considered and decided by the council at the meeting) would relate to retrospective fiscal years dating back to 2012. Additionally, while the 7b enclosure that should have been attached would have informed the public that the meeting would involve pay plans from fiscal year 2012 and forward, it is undisputed that the enclosure was not available on the Secretary of State's website as required by § 42-46-6.

It is our opinion that based on the totality of the circumstances of this case—including that the term 'plan' was in the singular and that the stated 'Enclosure 7b' was not actually available on the Secretary of State's website—adequate public notice was lacking. The public had the statutory right to receive a more complete notice of what would be discussed and decided at the council meeting; this is especially true where the matters relate to expenditures of taxpayer monies. The agenda did not provide the public with fair notice 'of the nature of the business to be discussed' where it "completely omitted any information that one could construe to mean that more than one pay plan would be discussed." *See Anolik*, 64 A.3d at 1175; *Pontarelli*, 151 A.3d at 306.

The Court clearly studied the exact language of the notice, and exact actions of the governmental agency meticulously. Even though the agency's actions applied to few employees, and the notice simply failed to reference one schedule, it found the notice to be lacking.

Needless to say, the public's response to the current COVID-19 health care crisis has been surprising. While the Centers for Disease Control and Prevention and other nationally recognized health care authorities have, from time to time, encouraged the wearing of masks and injections of vaccines in the face of a national pandemic, a substantial portion of the population has refused these suggestions. Just days before this vaccine mandate was considered by the Barrington School Committee, a "few hundred protesters lined the sidewalk Monday outside Rady Children's Hospital in San Diego to rally against California's impending vaccination mandates for health care workers." *As vaccine mandates spread, protests follow – some spurred by nurses*, NBC News, https://www.nbcnews.com/tech/social-media/vaccine-mandates-spread-protests-follow-spurred-nurses-rcna1654 (Aug. 11, 2021). The controversy also existed in Rhode Island. The Providence Journal, August 30, 2021, "Anti-vaccine mandate protesters confront police at R.I. State House." These debates spread worldwide. The New York Times, The Coronavirus Pandemic website, "Vaccine Mandates Rekindle Fierce Debate Over Civil Liberties," https://www.nytimes.com/2021/12/10/world/europe/vaccine-mandates-civil-liberties.html (Dec. 10, 2021). Regardless of who was right or wrong, there can be no question that whether to be required to take a vaccination was controversial in August 2021. It was followed in the press and by the public at large.

It is not just the controversy that make the Barrington actions so important. The proposals make changes to school sports, home learning, school visitations and other facets of school life. It does so in the midst of a pandemic and differs from how other communities are meeting the crisis,

and its changes through time. A new protocol setting policy during a pandemic is not only important to the teacher-plaintiffs, but it is reasonable to conclude that it would be important to the district's 3366 students, their parents, administrators, other teachers, visitors to the schools and to the public at large.

With minimal and vague notice, it is reasonable to conclude that few knew of the actions being taken. There is no evidence to prove otherwise. The teachers who would be required to be vaccinated were not advised of the proposed change directly, or through the required public notice. Students and parents were not advised. The School Committee agendas indicated that there would be changes to how COVID-19 would be handled as schools were being required to reopen by the state, but the notices were not clear or specific that mask mandates or vaccine mandates were being imposed. Barrington's requirement of vaccinations (right or wrong) would have been particularly controversial as no other community required vaccinations for teachers.[6]

For the three plaintiffs, who claimed religious exemptions to the mandate, the vaccine mandate was not just controversial, it cost them their jobs. Moreover, they were the ones who would be subject to the nonvoluntary and controversial vaccination injections. The Plaintiffs refused to take the vaccines, were suspended and then terminated, with little recourse.

Indeed, Chairperson Bae acknowledged that passage of the vaccine policy was an important decision for the school department. Tr. 27, Feb. 8, 2022. She also testified that there were other "comparable important aspects" to the policy such as the distance learning and face

[6] In argument it was mentioned that Barrington is the only school district with a mandatory vaccine requirement for its employees. Little Compton may also have enacted a mandate, but that district has only one elementary school as its high school students travel to school in another town. This provision appears to be quite unique to Barrington, *but see* Defs.' Closing Mem. 12 n.14, Feb. 28, 2022 which states that two other communities have imposed a vaccine mandate.

mask mandate "which I know is [of] great interest [to] members of the public." Tr. 12, 13, Feb. 8, 2022. She recognized the public interest in the issues decided.

Following the dictates of the case law may have left the school committee with protracted and heated public comment, but it also would have resolved the notice issue. Here, the Court finds that "The public had the statutory right to receive a more complete notice of what would be discussed and decided …" *Pontarelli,* 151 A.3d at 306. This Court finds "The agenda(s) did not provide the public with fair notice 'of the nature of the business to be discussed."' *Id.* A far more complete notice could have easily been achieved simply by attaching a copy of the proposed policy. Under the circumstances here, the Open Meetings Act demanded much more.

Plaintiffs Had Sufficient Standing To Bring This Challenge

The statutory scheme casts a broad net of persons who have standing.

> **"§ 42-46-8. Remedies available to aggrieved persons or entities.**
> (a) Any citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general.
> …
> (c) Nothing within this section shall prohibit any individual from retaining counsel for the purpose of filing a complaint in the superior court …"

Hence, the plain language of the statute provides standing to all who are "aggrieved." This term is not defined in the Open Meetings statute, though the statute is obviously intended to be liberally construed to achieve its purpose. Black's defines an "aggrieved party" as

> "A party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." *Aggrieved Party,* Black's Law Dictionary (7th ed. 2019).

There can be no doubt that Plaintiffs were aggrieved. They were given the option of taking a vaccination which they did not want against their will or losing their jobs. The evidence

established that they each lost their jobs. Delaying the actual notice to them until September 21, 2021 prevented them from applying for jobs in other school districts until after the school year had already begun. Their pecuniary and property rights in their employment were adversely affected.

Moreover, plaintiff Brittany DiOrio is a resident of Barrington. (Compl. ¶ 1.) She has children in the Barrington public schools (Ex. 2). As the public policy, set forth in § 42-46-1, is to see "that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy," Ms. DiOrio, and indeed all plaintiffs, have a right to know what is going on in their school district and were aggrieved under the statute.

Defendants allege Plaintiffs were not aggrieved as the only "harm" set forth in the Complaint is the Plaintiffs' loss of employment … and only "harm" suggested at the hearing/trial was the denial of Plaintiffs' requests for exemption from the mandate." Defs.' Closing Mem. 15. Loss of continued employment (and each of plaintiffs was still employed as a staff member for the following school year) is substantial and more than enough to justify standing. *Cleveland Board of Education vs. Loudermill*, 470 U.S. 532, 538 (1985).

Our Supreme Court has consistently been explicit regarding the broad net which the Open Meetings Act casts for standing, summarizing it as follows:

> "When interpreting a statute, a court shall not ignore its plain and unambiguous language and must avoid adopting a construction of a statute that would circumvent the evident purpose of its enactment. On its face, the avowed purpose of the OMA is that 'public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." Section 42-46-1. The plain language of this chapter clearly demonstrates that the purpose of the OMA is to protect the public's right to participate in the political process, and not an individual's property or contract rights. Thus, the statutory requirement that an individual be 'aggrieved' by a violation of the OMA does not require

> that a plaintiff allege some harm to his or her economic or property interests, but rather that his or her right to be 'advised of and aware of' the performance, deliberations, and decisions of government entities was, or may be, violated.
>
> "Moreover, this Court previously has held that the OMA "does not require individuals to possess a personal stake or interest in the substance of the meeting to assert a right to attend a meeting of a public body," *Solas v. Emergency Hiring Council of State*, 774 A.2d 820, 823 (R.I. 2001), and consequently, plaintiff's right to be advised of the business to be conducted at the meeting does not depend on his or her having a personal stake in the substance of the meeting. Clearly, since members of the general public have a right to receive notice of public meetings, a member of the public should have standing to enforce that right. Furthermore, this Court has indicated that even an individual who actually attends a meeting still may establish standing …" *Tanner*, 880 A.2d at 792-93 (footnote omitted).

No doubt, there would be little question that Plaintiffs had standing, had they testified. However, Exhibits 1 through 4 demonstrate their religious beliefs and reluctance to vaccinations. They had a stake in the outcome, and sufficient standing to bring this action.

Conclusion

Defendants' motion to strike is denied; however, the Court relies only on exhibits accepted at hearing.

This case is not about whether mandating vaccinations is appropriate. Regardless of the significant political stance which the public may take for or against that issue, the issue here is whether the Barrington School Committee provided sufficient notice before enacting the Emergency Policy on COVID-19 Related Issues in August and September 2021. This Court finds that violations occurred.

This Court defers its imposition of any remedies, damages or sanctions until after the parties have had an opportunity to be heard. Each of the parties has addressed the issue of remedies. Therefore, further briefing on remedies is allowed but not required and must be submitted on or

before June 16, 2022. The Court schedules a hearing for that purpose on June 21, 2022 at 9:30 a.m.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Brittany DiOrio, et al. v. Gina Bae, et al.**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 25, 2022**
JUSTICE/MAGISTRATE:	**Lanphear, J.**

ATTORNEYS:

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