KELLY McGRATH,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	CIVIL ACTION – LAW
vs.	:	NO. 20 CV 3698
BOARD OF SCHOOL DIRECTORS OF THE CITY OF SCRANTON and SCHOOL DISTRICT OF THE CITY OF SCRANTON,	:	
Defendants	:	

MAURI B. KELLY
LACKAWANNA COUNTY
2020 OCT -4 P 6: 39
CLERK OF
JUDICIAL RECORDS
CIVIL DIVISION

MEMORANDUM AND ORDER

NEALON J.

The instant request for preliminary injunctive relief involves the novel issue of citizens' rights to observe public meetings, to witness the deliberations and decision-making of their public officials, and to comment during public meetings that are conducted virtually during the pendency of the COVID-19 disaster emergency. In this declaratory judgment action filed by a school district employee whose employment and health care insurance coverage the school board voted to terminate at a public meeting, it is uncontroverted that: (1) the school board scheduled a regular meeting for September 14, 2020, to consider the furlough of and termination of health care insurance for 218 school district employees; (2) the only public notice published for that meeting advised the public that the meeting would be conducted virtually on the Zoom platform, and that public could

"view the meeting" on the school district's YouTube Channel; (3) prior to the start of that meeting, the school board and the school district "learned that the YouTube livestream was inoperable due to technical difficulties"; (4) during the course of their ensuing discussions as to whether the school board and school district would violate the Sunshine Act, 65 Pa.C.S. §§ 701-716, by proceeding forward with the meeting, the school board "acknowledged that members of the public whose only access to the meeting was YouTube would be deprived of the opportunity" to observe the meeting; (5) the school board and school district nevertheless "made the decision to proceed" with the meeting notwithstanding the inability of the public to view the meeting on the school district's YouTube channel, as advertised in the public notice; (6) more than two hours after the meeting had commenced, the school board and school district began to livestream the meeting on the school district's Facebook page, but did not communicate that substitute access to the public at large, nor did it comply with the public access information contained in the public notice for the meeting; and (7) not every citizen, who had registered in advance to offer public comment, was granted access to the school board's Zoom platform to provide remarks during the meeting.

The furloughed employee has satisfied her burden of proving that the school board and the school district violated Sections 702, 704, and 710.1 of the Sunshine Act and Section 5741(c) and (f) of Act 15 of 2020, 35 Pa.C.S., by conducting official action and deliberations at its public meeting on September 14, 2020. The employee has also established the six prerequisites for the issuance of a preliminary injunction, so as to be entitled to an order under 65 Pa.C.S. § 713 temporarily enjoining the school board's action in furloughing those employees and terminating their health care insurance. Consequently,

the employee's request for a preliminary injunction will be granted, subject to her posting of nominal bond or deposit of nominal legal tender, but her request for an award of counsel fees under 65 Pa.C.S. § 1714.1 will be denied.

I. FACTUAL BACKGROUND

Plaintiff, Kelly McGrath ("McGrath"), who is employed as a paraprofessional by defendant, School District of the City of Scranton (the "District"), has instituted this civil action against the District and defendant, Board of School Directors of the City of Scranton (the "Board"), seeking declaratory judgment and injunctive relief relating to a regular meeting of the Board on September 14, 2020. (Docket Entry No. 1). She avers that prior to the onset of the COVID-19 pandemic in March 2020, "all public meetings of the Board were held in-person at the District's Administration Building, or an alternate location, at which all members of the public were permitted to attend, and if so desired, to make public comment on the matters addressed." (Id. at ¶ 9). However, due to the COVID-19 public health crisis, the Board has conducted its regular and special meetings "virtually" since March of this year. (Id. at ¶ 10).

Per the Board's protocol, individuals who wished "to provide public comment" during a virtual meeting "were required to express their interest in advance via e-mail to the Board's Secretary," and "those intended speakers received a confirmation e-mail with login information to the Zoom platform for that particular meeting." (Id. at ¶¶ 11-12, 24). McGrath asserts that "[a]lthough some subscription accounts allow for at least 1,000 participants, starting at $600 per year, the District has subscribed to a less expensive membership that allows a maximum of 100 participants to utilize the service at one time."

(Id. at ¶ 14). In addition, the Board "concurrently livestreams the [Zoom] meeting on YouTube," which enables individuals "to virtually attend the meeting in real time," albeit while being "incapable of interactively participating in the proceeding." (Id. at ¶¶ 16-17). Unlike the District's Zoom subscription which is restricted to 100 participants, "[t]here is no limitation on the number of YouTube viewers." (Id. at ¶ 17).

McGrath avers that on August 31, 2020, the District conducted a special meeting "via the Zoom platform (with a 100 participant limit), while the District simultaneously livestreamed the meeting on YouTube," and "considered a motion to furlough 218 employees, including 140 paraprofessionals." (Id. at ¶¶ 18-20). The motion to approve those furloughs reportedly "was tabled until the next meeting of the Board" which was held on September 14, 2020. (Id. at ¶¶ 21-22). Pursuant to the virtual meetings procedures implemented by the Board and the District, "members of the public who wished to provide comment" at the meeting on September 14, 2020, "were required to notify the Board Secretary in advance of the meeting" and were thereafter furnished with login information to the Zoom platform. (Id. at ¶¶ 11, 24). Two employees of the District, Diane Walsh and Tanya Fox, were among individuals who registered in advance to speak during the public comment portion of the meeting. (Docket Entry No. 1, Exhibit 3 at ¶ 4, Exhibit 4 at ¶ 4).

McGrath contends that "[p]rior to the start of the scheduled meeting on September 14th, the District learned that the YouTube livestream was inoperable due to technical difficulties." (Id. at ¶ 25). It is further averred that "the District acknowledged that members of the public whose only access to the meeting was YouTube would be deprived of the opportunity to [virtually] attend," and that "[t]he Board and its counsel deliberated on the issue and publicly discussed whether continuing with the meeting under such

limitations would allow the Board to comply with its obligations under the [Sunshine] Act." (Id. at ¶¶ 27-28). McGrath maintains that "[t]he District nevertheless made the decision to proceed with the Board Meeting despite the limitations." (Id. at ¶ 29).

In her affidavit dated September 24, 2020, Diane Walsh attests that she "attempted to enter the Zoom platform using the information provided" by the Board Secretary, but "was unable to gain access, as the assigned meeting room had reached its maximum capacity." (Docket Entry No. 1, Exhibit 3 at ¶ 6). She "then tried to view the meeting through the YouTube livestream, but was unable to do so as it was inoperable," and, therefore, she "was neither able to view the meeting nor provide comment." (Id. at ¶¶ 7-8). Tanya Fox has attested that although she was capable of entering the Zoom platform to provide public comment as scheduled, "[a]fter speaking, [she] was disconnected from the Zoom platform" and "was unable to observe the remainder of the meeting" since "the YouTube livestream was inoperable." (Docket Entry No. 1, Exhibit 4 at ¶¶ 6-8).

McGrath and another District paraprofessional, Renee Tanner, have submitted affidavits affirming that "[a]cess to the Zoom platform was restricted to members of the public who had signed up beforehand to make public comment," and that they "attempted to view the meeting through the YouTube livestream," but were unsuccessful in doing so "as it was inoperable." (Docket Entry No. 1, Exhibit 1 at ¶¶ 5-6, Exhibit 2 at ¶¶ 5-6). It is alleged in the Complaint that "[a]pproximately two hours and one-half hours after the meeting commenced, the District attempted to stream the audio from the meeting through the cellular phone of somebody using Zoom to its Facebook page." (Docket Entry No. 1 at ¶ 30). However, McGrath avers that "[t]he public was not made aware of this modification

or the availability of the audio stream by any publicly communicated or largely distributed method." (Id. at ¶ 31).

McGrath, Renee Tanner, and Diane Walsh have declared pursuant to 28 U.S.C.§ 1746 and 18 Pa. C.S. § 4904 that approximately three hours after the meeting started on September 14, 2020, they received text messages "from a colleague who informed [them] that the remainder of the meeting was available through the District's Facebook livestream." (Docket Entry No. 1, Exhibit 1 at ¶ 8, Exhibit 2 at ¶ 8, Exhibit 3 at ¶ 9). They submit that they "could barely hear what the meeting participants were saying, as the audio was of such poor quality that [they] could not understand what the meeting participants were saying." (Docket Entry No. 1, Exhibit 1 at ¶ 9, Exhibit 2 at ¶ 9, Exhibit 3 at ¶ 10). Comparable allegations regarding the deficiency of "the sound quality" on the District's Facebook livestream are also set forth in the Complaint. (Docket Entry No. 1 at ¶ 32).

During the meeting on September 14, 2020, the Board approved the furloughs of 218 District employees, including McGrath, by a vote of 6-2. (Id. at ¶ 37). The furloughs were to become effective "at the close of business on September 30, 2020," and would include the termination of "the furloughed employees' health insurance coverage." (Id. at ¶¶ 38-39). McGrath asserts that the "District made the decision to hold the meeting, despite its known technical difficulties, with the knowledge that some individuals who desired to provide public comment would be deprived the opportunity to do so" while others "would have no access to or ability to view" the meeting. (Id. at ¶¶ 49-50). She posits that the District and the Board violated the Sunshine Act by proceeding forward with the meeting, and that any challenged official action taken by the Board at that meeting should be

enjoined pursuant to Section 713 of the Act. (Id. at ¶¶ 44-45). Her complaint also requests injunctive relief barring the District from implementing its furloughs. (Id. at ¶¶ 53-58).

On the same date that McGrath instituted this action on September 25, 2020, she presented a motion "for a special injunction" enjoining the Board and the District "from furloughing employees and terminating their healthcare coverage, effective September 30, 2020." (Docket Entry No. 5 at pp. 2-3). She further requested "a date for a hearing to determine whether this special injunction should be continued." (Id. at p. 2). On September 29, 2020, Judge Thomas J. Munley granted McGrath's motion for a special injunction under Pa.R.C.P. 1531(a), and ordered that the Board and the District were "enjoined from furloughing and terminating the healthcare of the employees identified during their September 14, 2020 regular meeting." (Id. at p. 1). A hearing on McGrath's request for a preliminary injunction was scheduled for October 2, 2020, before the undersigned. (Docket Entry No. 2).

In anticipation of the hearing, the parties filed a "Joint Stipulation of Facts" which essentially incorporate the foregoing factual allegations set forth in McGrath's complaint. (Docket Entry No. 9 at ¶¶ 1-23; Transcript of Proceedings ("T.P.") on 10/2/20 at pp. 2-3). The parties also presented two joint exhibits comprised of the public notice published by the Board for its meeting on September 14, 2020, and the Board Minutes for that meeting. The notice states that the Board "will hold the regularly monthly Board Meeting on Monday, September 14, 2020 at 7:00 PM virtually at: https://zoom.us/j/98606425616?wd=SndXSHVpYTdzZzJJczY3cjdSZF14QT09," and further represents that "[y]ou may view the meeting on the Scranton School District's YouTube Channel." (Joint Exhibit 2).

The notice also advised the public that "[i]f you wish to sign up for public comment[,] you must email Virginia [Orr] orr@ssdedu.org by 2 PM, September 14." (Id.).

The Board minutes indicate that the Board President called the 7:00 meeting to order at 7:40 PM. (Joint Exhibit 1 at p. 1). The minutes reflect that at the very outset of the meeting, and "since there were technical issues livestreaming the meeting," Board Director Sean McAndrew "asked if IT would continue to work on making the meeting available to the public." (Id.). The second speaker during the "public comment" portion of the meeting, Rosemary Boland, President of the Scranton Federation of Teachers, Local 1147, stated "that she is receiving text messages that people are locked out of the meeting and unable to get back in to speak, and also that livestreaming is not working." (Id. at p. 4). The President of 32BJ SEIU, Luann Henehan, opined that "the District should postpone [the] meeting since the public cannot view the livestream," and that the Board "should be mindful of the vote tonight, keep Roberts Rules of Order in mind, and adhere to them." (Id. at p. 5). Roberta Jadick "suggested tabling the furloughs until technical issues are worked out so the public can view the meeting," and Holly Meade remarked that "she feels [the Board and District] are breaking many Sunshine Laws." (Id. at p. 5).

While the meeting continued to remain unviewable on livestreaming, the Board President, Katie Gilmartin, briefly recessed the meeting at 9:49 PM. (Id.). Upon resuming the meeting at 9:51 PM, President Gilmartin and Director Tara Yanni "asked if there ha[d] been any luck livestreaming the meeting," and "IT indicated there has not been any luck." (Id.). Director Michelle Dempsey then "asked if there was anyone who would be able to livestream from the District's Facebook page as she is concerned the public is not able to participate." (Id.).

The Board's solicitor expressed his opinion that the meeting was compliant with "the Sunshine Act because all of those people who wanted to speak signed up" and "they're all on [Zoom] here and will have the opportunity to speak." (Id. at p.). In reply, the Board Secretary "responded that there are three or four speakers she is unable to locate" on the Zoom platform. (Id.). After Director McAndrew voiced concern regarding public access "because this is a big decision and affects a lot of people," the solicitor noted that "they won't have the opportunity to see it live but they will have the opportunity to watch the recording" at a later date. (Id.). In light of the extended period of inoperable livestreaming and the inability of scheduled speakers to enter the Zoom meeting room to offer public comment, Director Dempsey stated that she "[wa]s concerned because the meetings have prior notice that the public can attend, participate, and comment." (Id.).

Later during the public comment period, the IT director indicated that he was "working diligently to get this working, but for some reason Zoom is not cooperating with our streaming to any platform." (Id.). A public commenter, Christina Horne, requested that since the meeting was not "streaming live to any member of the public [who] wants to view it," the Board's "vote to furlough be postponed." (Id. at p. 7). The Board Secretary then stated that she was still attempting "to reach out" to a scheduled public speaker, Diane Walsh, but had not located her. (Id.). Near the end of the public comment period, President Gilmartin announced that an elementary school principal was now "livestreaming the meeting on [the District's] Facebook page." (Id.). However, as noted above, the published notice for the Board Meeting stated that it could be viewed "on the Scranton School District's YouTube Channel," not on its Facebook page.

For purposes of McGrath's request for a preliminary injunction, the salient facts are not in dispute. The District and the Board scheduled a regular meeting for September 14, 2020, to consider the furlough and termination of health care coverage for 218 employees. (Docket Entry No. 9 at ¶¶ 8, 10-12). The only public notice for that meeting advised the public that the meeting would be conducted virtually on the Zoom platform, and could be viewed "on the Scranton School District's YouTube Channel." (Joint Exhibit 2). "***Prior*** to the start of the scheduled meeting on September 14, the District learned that the YouTube livestream was inoperable due to technical difficulties." (Docket Entry No. 9 at ¶ 15 (emphasis added)). The Board deliberated as to whether proceeding forward with the meeting under those circumstances would violate the Sunshine Act, and "[d]uring the course of the discussions, the District ***acknowledged*** that members of the public whose only access to the meeting was YouTube would be deprived of the opportunity to (virtually) attend." (Id. at ¶¶ 16-17 (emphasis added)).

Nevertheless, the District and the Board "made the decision to proceed with the Board Meeting" notwithstanding the inability of the public to "view the meeting on the Scranton School District's YouTube Channel," as advertised in the Board's public notice. (Id. at ¶18; Joint Exhibit 2). The Board's minutes confirm that during the two and one-half hour period that the meeting could not be accessed or viewed on the District's YouTube Channel, several speakers urged the Board to defer its vote on the furloughs to the next meeting which could be observed by the public, and at least one Director, Michelle Dempsey, voiced concerns that the public could not attend and participate in compliance with the public notice. (Joint Exhibit 1 at pp. 5-7). Although the Board subsequently implemented a substitute solution by livestreaming the meeting on the District's Facebook

page, that remedial measure was not communicated to the public at large, nor did it comport with the public access information contained in the published notice for the meeting. (Docket Entry No. 9 at ¶ 19; Joint Exhibit 1 at p. 7). In fact, none of the Board's meeting was ever viewable on the District's YouTube Channel on September 14, 2020. (T.P. 10/2/20 at pp. 10-11). Additionally, not every citizen who had registered in advance to offer public comment during the meeting was able to access the Board's Zoom platform in order to speak. (Joint Exhibit 1 at p. 7; T.P. 10/2/20 at pp. 40-41).

In their brief in opposition to McGrath's motion for a preliminary injunction, the Board and the District concede that "interest in attending the meeting was high [on September 14, 2020] because at that meeting the School Board voted to furlough employees," and that "YouTube was not functioning correctly and the School Board was not able to stream the meeting." (Docket Entry No. 7 at p. 3). They also admit that Diane Walsh was unable to access the Zoom platform to provide her public comments. (Id.). The District and the Board submit that "[a]lthough not every member of the public was able to view the September 14, 2020 meeting in real time," they "posted the full recording of the September 14, 2020, meeting on YouTube early the following morning." (Id. at pp. 4, 7). They also note that if McGrath's motion for a preliminary injunction is granted, the Board will simply vote to approve the furloughs at a regular meeting during the upcoming week when YouTube is "functioning normally." (Id. at p. 8; T.P. 10/2/20 at pp. 45-46).

II. DISCUSSION

(A) STANDARD OF REVIEW

To secure the issuance of a preliminary injunction, McGrath must establish that: (1) the injunction is necessary to prevent immediate and irreparable harm which cannot be

compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it; (3) the injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) her right to relief is clear in that she is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the injunction will not adversely affect the public interest. SEIU Healthcare Pennsylvania v. Com., 628 Pa. 573, 583-584, 104 A.3d 495, 501-502 (2014) (citing Summit Towne Center, Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 646-647, 828 A.2d 995, 1001 (2003)); Scranton Times, LP v. Entercom Wilkes-Barre Scranton, LLC, 23 Pa. D. & C. 5th 517, 524 (Lacka. Co. 2010). If she fails to satisfy any one of the six prerequisites, she has not demonstrated her entitlement to the issuance of a preliminary injunction. Weeks v. Department of Human Services, 222 A.3d 722, 727 (Pa. 2019); Czarkowski v. Jennings, 34 Pa. D. & C. 5th 303, 313 (Lacka. Co. 2013).

"The purpose of preliminary injunctive relief is to maintain the status quo until the case can be investigated and adjudicated." Com. ex rel. Corbett v. Snyder, 977 A.2d 28, 43 (Pa. Cmwlth. 2009), *app. denied*, 606 Pa. 700, 999 A.2d 1247 (2010). "It is a 'temporary remedy granted until that time when the parties' dispute can be completely resolved.'"[1]

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[1]Separate and distinct standards govern a request for a preliminary injunction, as opposed to an application for a permanent injunction. Nether Providence Township v. Coletta, 133 A.3d 86, 95 (Pa. Cmwlth. 2016); Citadel Broadcasting Co. v. Gratz, 52 Pa. D. & C. 4th 534, 543 (Lacka. Co. 2001). To prevail on a claim for a permanent injunction, the petitioner must establish "a clear right to relief," "an urgent necessity to avoid an injury which cannot be compensated" by monetary damages, "and that greater injury will result from refusing rather than granting the relief requested." Richard Allen Preparatory Charter School v. School District of Philadelphia, 123 A.3d 1101, 1107 (Pa. Cmwlth. 2015), *app. denied*, 636 Pa. 668, 145 A.3d 169 (2016); Dunbar v. Rivello, 34 Pa. D.& C. 5th 87, 98 (Lacka. Co. 2013). "The case for a permanent injunction 'must be made by a very strong showing, one stronger than required for a restraining-type injunction.'" City of Philadelphia v. Shih Tai Pien, 224 A.3d 71, 83 (Pa. Cmwlth. 2019) (quoting Big Bass Lake Community Association v. Warren, 23 A.3d 619, 626 (Pa. Cmwlth. 2011)), *app. denied*, 2020 WL 3167903 (Pa. 2020).

Wolk v. School District of Lower Merion, 228 A.3d 595, 609 (Pa. Cmwlth. 2020) (quoting Chipman ex rel. Chipman v. Avon Grove School District, 841 A.2d 1098, 1101 (Pa. Cmwlth. 2004), *app. denied*, 580 Pa. 716, 862 A.2d 1257 (2004)). Therefore, "[i]n the hearing upon a preliminary objection, it is neither necessary nor proper to decide the case as though on final hearing." Brayman Construction Corp. v. Com., Dept. of Transportation, 30 A.3d 560, 562 n.5 (Pa. Cmwlth. 2011); Chipman, 841 A.2d at 1101. "Stated more succinctly: 'the preliminary injunction concludes no rights and is a final adjudication of nothing.'" Philadelphia Fire Fighters' Union, Local 22, Intern. Ass'n of Fire Fighters, AFL-CIO, 901 A.2d 560, 565 (Pa. Cmwlth. 2006) (quoting Romano v. Loeb 326 Pa. 272, 275, 192 A. 100, 102 (1937)), *app. denied*, 588 Pa. 786, 906 A.2d 545 (2006). On appeal from an order granting a preliminary injunction, the appellate courts "'do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below.'" Matenkoski v. Greer, 213 A.3d 1018, 1025 (Pa. Super. 2019) (quoting Summit Towne Center, Inc., 573 Pa. at 645, 828 A.2d at 1000).

As noted above, two criteria for the issuance of a preliminary injunction are that the injunction is necessary to prevent immediate and irreparable harm, and that the party seeking a preliminary injunction has a clear right to relief. Earlier this year, the Commonwealth Court of Pennsylvania concluded that "[f]or purposes of injunctive relief, statutory violations constitute irreparable harm *per se*." Wolk, 228 A.3d at 610 (citing Pennsylvania Public Utility Commission v. Israel, 356 Pa. 400, 52 A.2d 317 (1947)). "For a right to relief to be clear, it must be 'more than merely viable or plausible.'" Wolk, 228 A.3d at 611 (quoting Ambrogi v. Reber, 932 A.2d 969, 980 (Pa. Super. 2007), *app. denied*,

597 Pa. 725, 952 A.2d 673 (2008)); Czarkowski, 34 Pa. D. & C. 5th at 313 (same). However, "[t]he party seeking a preliminary injunction 'need not prove the merits of the underlying claim, but need only show that substantial legal questions must be resolved to determine the rights of the parties.'" Wolk, supra (quoting Snyder, 977 A.2d at 43).

(B) SUNSHINE ACT REQUIREMENTS

McGrath's request for injunctive relief is predicated upon the provisions of the Pennsylvania Sunshine Act. That Act contains an express Legislative finding "that the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process . . . ." 65 Pa. C.S. § 702(a). It also sets forth specific "declarations" by the General Assembly that it is "the public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon as provided in this chapter."[2] 65 Pa.C.S. § 702(b).

"The purpose of the Sunshine Act is to provide citizens with an opportunity to observe the deliberation, policy formulation, and decision-making processes of public agencies." Lee Publications, Inc. v. Dickinson School of Law, 848 A.2d 178, 180 n.2 (Pa. Cmwlth. 2004), *app. dismissed*, 579 Pa. 545, 857 A.2d 675 (2004). "This clear and specific right is not diminished by general policies and trends favoring negotiation, settlement, and alternative dispute resolution." Trib Total Media, Inc. v. Highlands School District, 3 A.3d

[2]A public "agency" is defined by the Act as "[t]he body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of . . . any board . . . of any . . . school authority, school board, [or] school governing body . . . ." 65 Pa.C.S. § 703.

695, 703 (Pa. Cmwlth. 2010), *app. denied*, 611 Pa. 648, 24 A.3d 865 (2011). To that end, Section 704 of the Act provides that any "[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public," unless one of the statutory exceptions applies. 65 Pa.C.S. § 704.

In addition to establishing the public's right to attend and observe all agency meetings involving official action and deliberations, the Sunshine Act also prescribes "public participation" requirements for those meetings. Section 710.1(a) of the Act requires the board of any political subdivision to "provide a reasonable opportunity at each advertised regular meeting" for the "residents of the political subdivision . . . or for taxpayers of the political subdivision . . . to comment on matters of concern, official action or deliberation which are or may be before the board . . . prior to taking official action." 65 Pa.C.S. § 710.1(a). It vests the board with the discretion "to accept all public comment at the beginning of the meeting," or to "defer the comment period to the next regular meeting" of the board if it "determines that there is not sufficient time at a meeting for residents . . . or for taxpayers . . . to comment."[3] Id. *See also*, Alekseev v. City Council of City of Philadelphia, 607 Pa. 481, 482, 8 A.3d 311, 312 (2010) ("Such commentary also may be

[3]An agency or political subdivision may enforce reasonable "time, place, and manner" restrictions on public comment during a meeting only if those limitations are content-neutral, narrowly tailored to serve a significant government interest, and provide ample alternative channels of communication. Frisby v. Schultz, 487 U.S. 474, 481 (1998); Galena v. Leone, 638 F.3d 186, 199 (3d Cir. 2011). Such a reasonable limitation may properly declare a boisterous speaker out of order and terminate disruptive speech in order to maintain order and preserve decorum at a public meeting. *See, e.g.*, Com. v. Bolus, 104 Lacka. Jur. 1, 17-21 (2002) (disruptive speaker who refused to conclude his remarks after exceeding the prescribed time limit and became disorderly with an enforcement officer was properly charged with disrupting a lawful meeting, 18 Pa.C.S. § 5508). However, a policy which limits the total public comment period to 60 minutes in length, regardless of the number of citizens who wish to address the governing body, is violative of Section 710.1 and arbitrarily stifles public debate. Morrow v. Scott Township Board of Supervisors, 103 Lacka. Jur. 153, 165-167 (2002).

deferred to a later meeting in light of time constraints."). Section 710.1(c) states that "[a]ny person has the right to raise an objection at any time to a perceived violation of this chapter at any meeting of a board . . . of a political subdivision." 65 Pa.C.S. § 710.1(c).

On April 20, 2020, Section 5741 of the Act of April 20, 2020, P.L. 82, No. 15, § 1.1 ("Act 15 of 2020"), was adopted and became effective immediately for public meetings conducted during the COVID-19 disaster emergency declared by the Governor.[4] Section 5741(a) authorizes an agency or board "of a political subdivision included in a declaration of disaster emergency" to conduct its "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."[5] 35 Pa.C.S. § 5741(a). The phrase "authorized telecommunications device" is defined as including "any device which permits, at a minimum, audio communication between individuals." 35 Pa.C.S. § 5741(j). Section 5741(c) requires the public notice for any such meeting to "include the date, time, technology to be used and public participation information as provided under subsection

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[4]In response to the COVID-19 pandemic, Governor Tom Wolf issued a "Proclamation of Disaster Emergency" on March 6, 2020, pursuant to Section 7301(c) of the Emergency Management Services Code, 35 Pa.C.S. § 7301(c). Wolf v. Scarnati, 233 A.3d 679, 684 (Pa. 2020). On April 13, 2020, the Supreme Court of Pennsylvania held that the Governor had the statutory authority to issue that disaster emergency proclamation, and that his exercise of that authority complied with the United States and Pennsylvania Constitutions. Friends of Danny DeVito v. Wolf, 227 A.3d 872, 903 (Pa. 2020). On June 30, 2020, the Governor renewed the disaster emergency proclamation for an additional 90 days by issuing an "Amendment to Proclamation of Disaster Emergency (1st Amendment)." Wolf, 233 A.3d at 685. On July 1, 2020, the Supreme Court declared the General Assembly's attempt to overturn the Governor's disaster emergency proclamations to be null and void under the Declaratory Judgments Act. Wolf, 233 A.3d at 707. On August 31, 2020, the Governor issued a 2nd Amendment to the Proclamation of Disaster Emergency which renewed the disaster emergency proclamation for an additional 90 days. *See* http://www.pema.pa.gov/Governor-Proclamations/Documents/Amendment-COVID19-Emergency-083120.pdf. Thus, a "Proclamation of Disaster Emergency" remained in effect at the time of the Board's meeting on September 14, 2020.

[5]Although Act 15 of 2020 is contained in Subchapter E, "Local Government Meetings," of Chapter 57 entitled "COVID-19 Disaster Emergency," Section 5741 broadly references any "agency, department, authority, commission, ***board***, council, governing body or other entity of ***a political subdivision*** included in a declaration of disaster emergency . . . ." 35 Pa.C.S. § 5741(a)(emphasis added). When used in any statute in Pennsylvania, the phrase "political subdivision" is defined to include any "school district." 1 Pa.C.S. § 1991. During oral argument, the parties did not dispute the application of 35 Pa.C.S. § 5741 in the case *sub judice*.

(f)." 35 Pa.C.S. § 5741(c). Subsection (f) of Section 5741 addresses "[p]ublic participation" at meetings conducted via authorized telecommunication devices, and provides:

> 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 State mail or to an e-mail account designated by the entity to receive the comments."

35 Pa.C.S. § 5741(f).

Pursuant to Section 702(a) and (b) of the Sunshine Act and Section 5741(a) and (c) of Act 15 of 2020, the public had the right to observe the Board's virtual meeting on September 14, 2020, and to be furnished with advance public notice of the technology to be used to witness that meeting. It is undisputed that the only public notice advised citizens that the meeting could be viewed on the District's YouTube Channel, and that the Board and the District knew "[p]rior to the start of the scheduled meeting" on September 24, 2020, "that the YouTube livestream was inoperable due to technical difficulties." Indeed, the District's YouTube Channel remained inoperable for the entire duration of the Board Meeting, and no member of the public was able to observe the meeting in real time by way of the technology identified for public viewing in the only public notice. The fact that the Board or District belatedly created virtual access via the District's Facebook page more than two hours after the meeting began did not remedy the Sunshine Act violation since Facebook was not identified as the "technology to be used" in the public notice, as required by 35 Pa.C.S. § 5741(c).

The Board and District argue that "[w]hat we have here is a technical glitch that prohibited some people from listening or visually watching the Board Meeting." (T.P. 10/2/20 at p. 43). That so-called "technical glitch" prevented any member of the public from observing the Board's meeting by way of the public access technology identified by the Board in the public notice of the meeting. Upon discovering that the YouTube technology that it advertised for public access was disabled and remained inoperable throughout the Board Meeting, the Board was required to table or defer any action on the motion to furlough employees and discontinue their health care insurance until the next scheduled meeting at which it could address that issue in compliance with 65 Pa.C.S. § 702 and 35 Pa.C.S. §5741(c).

A Commonwealth court ruling under an earlier version of the Sunshine Act is instructive in this regard. In Sovich v. Shaughnessy, 705 A.2d 942 (Pa. Cmwlth 1998), the governmental council believed that its chambers with an occupancy capacity of 45 people would be sufficient for its meeting "because only about a half dozen people generally attended council meetings" and "the provided seating could accommodate more than six times the usual number of people at Council meetings." Id. at 945. However, "when even this number of seats proved insufficient and members of the public were excluded from the meeting, Council immediately entertained a motion to adjoin, prior to conducting ***any*** business, in order to avoid holding a meeting in violation of the Sunshine Act." Id. (emphasis in original). At its next meeting, it accommodated excess members of the public by seating them in an adjacent room equipped with a speaker system and chairs so that they could observe the meeting. Id. at 946. In finding that the Sunshine Act had not been violated in the process, Sovich reasoned that residents "were given an opportunity to

participate in the meeting; they could hear the proceedings in the adjacent room via the speaker system, they could see the Council members through the doorway, and they could directly address Council by approaching the microphone at the podium." Id.

The Board was required to act comparably upon discovering that the public was unable to view the meeting on September 14, 2020, via the YouTube technology identified in the public notice. Moreover, the Board and District were also obligated to "provide a reasonable opportunity" for public comment "[t]o the extent practicable." 35 Pa.C.S. § 5741(f); 65 Pa.C.S. § 710.1(a). Relying upon dictionary definitions, the Commonwealth Court has defined the word "practicable" as "possible to practice or perform," "capable of being put into practice, done or accomplished," or "feasible." In re Estate of Ryerss, 987 A.2d 1231, 1241 (Pa. Cmwlth. 2009). The Board initially arranged for such "a reasonable opportunity" which was "capable of being put into practice" or "accomplished" by enabling members of the public to affirmatively reserve the right to speak on the Zoom platform. However, it did not allow every registered speaker to do so by granting each speaker Zoom access in a designated waiting room. Hence, the meeting on September 14, 2020, likewise did not comply with 35 Pa.C.S. § 5741(f) and 65 Pa. C.S. § 710.1(a). [6]

Section 713 of the Sunshine Act addresses official actions that are taken by an agency during a public meeting that does not comply with the Act's requirements, and states that "[t]he court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached." 65 Pa.C.S. § 713.

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[6]The language of subsection (f) vests the District with the authority to "allow for public participation" during the COVID-19 disaster emergency either "through an authorized telecommunication device or written comments." 35 Pa.C.S. § 5741(f). But once the Board chose the former via the Zoom platform, rather than by way of written comments, it became obligated to ensure that its designated technology permitted all scheduled speakers to offer public comment.

It further provides that "[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." Id. Section 713 uses the "may" in that regard, and "a court's decision to invalidate an agency's action for violation of the Sunshine Act is discretionary, not obligatory." Baribault v. Zoning Hearing Board of Haverford Township, 2020 WL 3956262, at *5 (Pa. Cmwlth. 2020) (citing Borough of East McKeesport v. Special/Temporary Civil Service Commission of Borough of East McKeesport, 942 A.2d 274, 280 (Pa. Cmwlth. 2008)). Moreover, in determining whether to continue a special injunction which, as here, is already in effect, the court must appropriately consider the six prerequisites referenced in Section II(A) above when granting or denying preliminary injunctive relief pursuant to 65 Pa.C.S. § 713. Dusman v. Board of Directors of Chambersburg Area School District, 123 A.3d 354, 361 (Pa. Cmwlth. 2015), *app. denied*, 635 Pa. 735, 132 A.3d 460 (2016).

1) Immediate and Irreparable Harm

In her brief and during the injunction hearing, McGrath asserted that the "inevitable harm resulting from being unemployed and uninsured cannot be cured by monetary damages," and that the furloughs and "the immediate termination of health care coverage" constitute immediate and irreparable harm. (Docket Entry No. 5 at p. 10; T.P. 10/2/20 at pp. 24-25). However, as counsel were advised repeatedly, the merits of or necessity for the furloughs and termination of health insurance due to the pandemic is not an issue to be addressed in McGrath's action asserting a Sunshine Act violation. (T.P. 10/2/20 at pp. 25-28). The only relevant harm for purposes of McGrath's request for injunctive relief "is the Sunshine Act harm." (Id. at p. 25).

"For purposes of injunctive relief, statutory violations constitute irreparable harm *per se*." Wolk, 228 A.3d at 610. The evidence presented by the parties established the violation of two statutes, the Sunshine Act and Act 15 of 2020. *See* 35 Pa.C.S. § 5741(c), (f); 65 Pa.C.S. §§ 702, 710.1(a). Hence, McGrath has demonstrated the requisite immediate and irreparable harm to secure preliminary injunctive relief.

(2) Greater Injury From Refusing Than Granting an Injunction

If McGrath's request for a preliminary injunction is denied, the Board will have conducted "official action" at a meeting that did not comply with the requirements of the Sunshine Act or Act 15 of 2020. Such a result would violate Section 704 of the Sunshine Act which requires all official action and deliberations to "take place at a meeting open to the public," as well as Section 713 empowering courts to enjoin any official action taken at a public meeting that did not comply with the Sunshine Act. In contrast, if McGrath's requested injunction is granted, the Board and District may cure their violations of the Sunshine Act by entertaining the motion to furlough and terminate health care insurance "at a subsequent public meeting that conforms to the Act's requirements." Smith v. Township of Richmond, 623 Pa. 209, 225 n.10, 82 A.3d 407, 417 n.10 (2013) (citing ACORN v. SEPTA, 789 A.2d 811, 813 (Pa. Cmwlth. 2002), *app. denied*, 569 Pa. 695, 803 A.2d 736 (2002)). Therefore, greater harm would result from refusing the request for a preliminary injunction than from granting it.

(3) Restoring the Status Quo

The stated "purpose of preliminary injunctive relief is to maintain the status quo until the case can be investigated and adjudicated." Snyder, 977 A.2d at 43. By virtue of the official action that was taken by the Board at its meeting on September 14, 2020, the

public were deprived of their rights to observe that meeting and to offer public comment during it in conformity with the Sunshine Act and Act 15 of 2020. Making a video of that meeting available on the District's YouTube channel on the following day did not cure the real-time violations of those statutory rights. By granting McGrath's requested preliminary injunction and compelling the Board to address the furloughs and termination of health care coverage at a subsequent meeting, the public's rights to witness and offer comments will be restored and the parties will maintain the status that they possessed prior to the violations of the Sunshine Act and Act 15 of 2020.

(4) Clear Right to Relief

"To establish a clear right to relief, the party seeking an injunction need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties." SEIU Healthcare Pennsylvania, 628 Pa. at 590-591, 104 A.3d at 506. The parties' dispute raises novel issues involving the application of the Sunshine Act to virtual public meetings that are conducted pursuant to Act 15 of 2020. McGrath's request for injunctive relief clearly implicates "substantial legal questions" that need to be resolved, and based upon the foregoing reasoning, she has demonstrated a reasonable likelihood of prevailing on the merits of her Sunshine Act arguments. Thus, she has satisfied the fourth prerequisite for injunctive relief.

(5) Abating the Offending Activity

The Board and District posit that "a preliminary injunction is not reasonably suited to abate the activity of which [McGrath] complains" since the "furlough was not caused by a YouTube malfunction," but "was caused by factors related to the pandemic, which are

sadly not in the power of any court to eliminate." (Docket Entry No. 7 at p. 8). However, just as McGrath focused upon the incorrect "immediate and irreparable harm," the Board and District fixate upon the wrong "offending activity." The "wrongful conduct" at issue is the violation of the public's rights to observe and participate in public meetings. The wisdom of the furloughs and termination of health insurance is beyond the scope of this matter concerning Sunshine Act violations. Inasmuch as a preliminary injunction will require the Board to address the furloughs and health care coverage matters at a subsequent meeting that complies with the Sunshine Act and Act 15 of 2020, it is reasonably suited to abate the pertinent offending activity.

(6) Public Interest

The Board and District contend that "the public interest does not favor the issuance of a preliminary injunction" since "[i]t is not in the public interest to delay a needed furlough because of a technical glitch." (Docket Entry No. 7 at p. 9). Once again, the issue of whether the furloughs are warranted is not relevant in this matter. By adopting the Sunshine Act, the Legislature specifically declared it to be the public policy of this Commonwealth to ensure the rights of its citizens to observe all public meetings and to witness the deliberations and decisions of all public officials. *See* 65 Pa.C.S. § 702(a)-(b). The grant of McGrath's motion for a preliminary injunction would promote that public policy by enjoining official action that was undertaken at a public meeting that violated the public's right to view the Board's meeting, deliberations, and decisions. For that reason, the grant of a preliminary injunction will not adversely affect the public interest.

(C) ISSUANCE OF INJUNCTIVE RELIEF

Based upon the foregoing, McGrath has satisfied her burden to prove a violation of the Sunshine Act, *see* Smith, 623 Pa. at 223, 82 A.3d at 416, and has demonstrated the six prerequisites for the issuance of a preliminary injunction. She has also requested an award of counsel fees, but the materials submitted for review do not establish that the Board or District "willfully or with wanton disregard violated" the Sunshine Act, and for that reason, her request for "reasonable attorney fees" will be denied. 65 Pa.C.S. § 714.1. Pa.R.C.P. 1531(b) requires the posting of bond or the deposit of legal tender whenever any form of injunction relief is granted, and based upon the circumstances of this case, McGrath "will be directed to post nominal bond or deposit nominal legal tender in the amount of $1.00." Scranton Times, 23 Pa. D. & C. 5th at 540 (citing Christo v. Tuscany, Inc., 368 Pa Super. 9, 12, 533 A.2d 461, 463 (1987) (trial court order required nominal bond of $1.00), *app. discontinued*, 520 Pa. 601, 553 A.2d 964 (1988)). An appropriate Order follows.

KELLY McGRATH, Plaintiff vs. BOARD OF SCHOOL DIRECTORS OF THE CITY OF SCRANTON and SCHOOL DISTRICT OF THE CITY OF SCRANTON, Defendants	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY CIVIL ACTION – LAW NO. 20 CV 3698

ORDER

AND NOW, this 4th day of October, 2020, upon consideration of the "Motion for Injunctive Relief" filed by plaintiff, Kelly McGrath, the exhibits and memoranda of law submitted by the parties, and the oral argument of counsel during the hearing on October 2, 2020, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. Plaintiff's motion for a preliminary injunction enjoining defendants from furloughing 218 employees and terminating their health care coverage based upon official action and deliberations at a public meeting on September 14, 2020, is GRANTED due to defendants' violations of 65 Pa.C.S. §§ 702(a)-(b) and 710.1(a) and 35 Pa.C.S. § 5741(c) and (f) in connection with that public meeting.

2. Plaintiff's request for an award of reasonable attorney fees and costs of litigation pursuant to 65 Pa.C.S. § 714.1 is DENIED; and

3. Plaintiff is directed to post nominal bond in the amount of $1.00 pursuant to Pa.R.C.P. 1531(b)(1), or to deposit with the Clerk of Judicial Records legal tender in the amount of $1.00 in accordance with Pa.R.C.P. 1531(b)(2).

BY THE COURT:

_____________________________J.
Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. C. P. 236 (a)(2) and (d) by transmitting time- stamped copies via electronic mail to:*

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