

Justice Wilk

CRAIN v. REYNOLDS QDS:22301907 — Plaintiffs, William Crain, a tenured faculty member in the Department of Psychology of the City College of New York; David Suker, a full-time graduate student at the School of Education of City College; James Perstein, an Assistant Professor of History in the Department of Social Science at the Borough of Manhattan Community College; Vernon Ballard, who attended City College full-time in 1995 and is now employed at CCNY as a College Assistant to the Director of Computing; and Joanna Sharf, a full-time doctoral student in the Department of English at the CUNY Graduate Center from September 1987 until the spring of 1997, move for an order preliminarily enjoining defendant Board of Trustees of the City University of New York from acting in furtherance of the May 26, 1998 resolution that abolished remedial education programs at the four-year colleges in the CUNY system.

Plaintiffs contend that the meeting at which the resolution was adopted was held in violation of the Open Meetings Law (Public Officers Law § 87(2)(b)), because misleading information was given to the press; the meeting room was too small to accommodate the number of people known to have an interest in the issue and likely to attend the meeting; preferential access to the meeting was given to CUNY administrative staff and the press; and all of the members of the public who were admitted to the meeting room were required to leave before the Trustees voted on the resolution.

On July 20, 21 and 23, 1998, a hearing was conducted in response to plaintiffs' request for preliminary injunctive relief. My findings of fact and conclusions of law are as follows.

Facts

On June 8, 1995, the CUNY Board of Trustees held a meeting of its Committee on Long-Range Planning at the Board's headquarters at 535 East 80th Street. The meeting, which took place in room 310, concerned the merger of academic departments, curtailment of remedial courses, changes in degree requirements and tuition increases. Room 310 accommodates between 30 and 40 people. Professor Crain attempted to attend the meeting but was not admitted because the room was filled to capacity.

On June 19, 1995, the Trustees conducted a public hearing on long-range plans for CUNY. It was held in room 104 which is known as the board room. A posted fire warning states that the maximum capacity of the board room is 125 people. Professor Crain waited for an hour or two in 100-degree heat outside the building and for two hours inside the building lobby before he was permitted to speak. He suggested that the meeting be moved to a larger room as had been done in 1993, when a public meeting of significant interest was held at the Hunter College School of Social Work. Trustee Murphy stated that the room would become more accessible if people left after they completed their remarks. A request that meetings of general interest be held in a larger room was also made by Sandi Cooper, a member of the University Faculty Senate and an ex-officio member of the Board of Trustees.

This action, commenced in June 1995, constitutes plaintiffs' effort to compel the Trustees to conduct their public meetings in the manner required by the Open Meetings Law.

In March, April and May 1998, the Board of Trustees held public meetings which revealed that the issue of remedial education is one of great interest and importance to the CUNY community and to members of the general public. During these meetings, scores of people requested to speak or to submit written statements. Opinion was overwhelmingly opposed to the total elimination of remedial education in the senior colleges.

On May 8, 1998, the Trustees issued a written notice stating that they would meet on May 26, 1998. This event was scheduled to take place at 4:30 p.m. in the board room. Among the items to be considered were proposals concerning remedial programs at the four-year colleges.

On May 18, 1998, the Board of Trustees held a public hearing on the issues to be considered at the May 26, 1998 meeting. Trustee John Morning advocated a plan to curtail remedial courses at CUNY's four-year colleges. Trustee Herman Badillo proposed that remedial education be eliminated from the senior colleges. The hearing drew an overflow crowd, with members of the public waiting for hours outside the building before being permitted to speak. Prior to the May 18 meeting, 157 people, including students, educators, politicians and writers, had formally requested permission to be heard. Seventy-five people commented on the remediation issue; only three supported the plan to end remedial courses.

As the May 26, 1998 meeting approached, the proponents of the Badillo resolution were uncertain of their ability to muster a majority of the Trustees. It was their intent to postpone a vote on the issue if they did not believe that they could prevail.

On the morning of May 26, 1998, The New York Times quoted Anne Paolucci, Chairperson of the Board, as having said, "I don't think there will be a vote [on the remedial education issue]. We don't seem to be ready for it." In her deposition testimony, Ms. Paolucci confirmed that the quote was accurate.

It is impossible to calculate how many people were dissuaded from attending the meeting by the Times article. Henry Lesnick, a member of the Hostos Community College English Department, did not attend because of Ms. Paolucci's statement to the Times. Other witnesses testified that they were inclined not to attend but changed their minds after information received by them later in the day suggested that a vote might be taken.

It is clear that the Trustees anticipated a public response to the notice of the May 26 meeting far beyond the capacity of the board room. To control the crowd, police barricades were erected on the sidewalk in front of the Trustees' headquarters and approximately 350 New York City police officers were stationed in the area.

The board room contains a rectangular table, which seats forty-eight people. These seats are assigned to various university officials. On one side of the table, in an area that permits some people to stand, there are seats for fifty-one people. Because the room has a capacity of 125, there is standing room available for only twenty-six people. Some of the University officials were accompanied by members of their staff. Both staff and the press were admitted to the room before the general public, with whom they shared the space at the side of the table. Also present were Jose Elique, the CUNY Director of Public Safety, and several members of his security force.

Professor Crain arrived at the meeting site at 2:15 p.m. and took a place behind the barricades. Because participants, staff and press had already been admitted to the board room, Professor Crain, the tenth member of the public to enter, was unable to find an unoccupied seat.

Assemblyperson Edward Sullivan, a member of the New York State Assembly Committee on Higher Education, arrived shortly after 4:00 p.m. He observed a crowd outside the building behind police barricades. He identified himself and was escorted into the building. The board room was filled to capacity and he was required to stand.

Renate Bridenthal, Professor of History at Brooklyn College, arrived at 4:00 p.m. She joined the line but was never admitted to the building.

When the meeting was called to order, the room was filled well beyond capacity. The audience listened as Trustee John Morning spoke in favor of a plan more moderate than that offered by the Badillo resolution. His paraphrased reference to an admonition by Edmund Burke that "all that is necessary for the forces of evil to prevail is for enough good people to do nothing," was interrupted by spontaneous audience chanting to "keep admissions open, stop the war on CUNY." After Chairperson Paolucci called for order and threatened to clear the room, the chanting stopped. A handful of people continued to interrupt, in response to which the Chair ordered the room cleared. The audience became silent and Trustee Morning concluded his remarks.

Trustee Badillo spoke next in support of his resolution to discontinue remediation at the four-year colleges. A few people from the audience began to heckle him. The Chair again called for the room to be cleared. Members of the audience challenged her right to clear the room and she responded that she was authorized to do so. Trustee Badillo continued to deliver his remarks. He stopped speaking when a few people resumed heckling. Trustee James Murphy began to calm the audience but was interrupted by the Chair, who asked that the room be cleared. Four or five people were then ejected by CUNY security officers. Professor Crain, who had been heckling, left voluntarily when two students who were standing next to him were ejected. Outside, he saw between twenty-five and thirty people waiting on line to enter the meeting room.

Trustee Badillo continued to deliver his statement, but was interrupted by ten to twenty hecklers when he said that "remediation is nothing other than high school work." By order of Chairperson Paolucci, the room was cleared by CUNY security and New York City police officers. The Chair stated that members of the press could remain because they had not been disruptive.

Assemblyperson Sullivan refused to leave, asserting that he had not been un-ruled and enjoyed the right to remain at a public meeting. He was arrested and charged with trespass. Also arrested were five other members of the audience, including Sister Elizabeth Kelliher, a Franciscan Sister of the Atonement from Greystone, who had been leaning against a window sill. Sister Kelliher had not been disruptive and was straining to hear what was being said at the Trustee table when she was approached by a CUNY security officer. He placed his hand on her arm and asked that she accompany him. She assumed that she was only being escorted out of the building. She reassessed this view when she found herself in a police van charged with trespass.

Shortly after the arrests, the Trustees went into executive session, and all others were asked to leave the room. When the meeting was resumed, only those seated at the table and the press were admitted.

Gary Benenson, an Associate Professor of Engineering at CCNY, arrived at the meeting site at 3:45 p.m. He was not admitted to the meeting room. He was still there at 7:30, when Sandi Cooper announced to the people outside that the executive session was about to end. Those standing in line asked to be admitted but the guard refused to do so without a directive from the administration. The directive never came.

In a May 27, 1998 report to Deputy Chancellor Patricia Hassett, Jose Elique observed that

"[t]he Board Room capacity for the public was more than 60% filled by the time the general public was allowed for press, political representatives and staff representatives. In addition, personnel from several Central Office Departments were also seated prior to the general public entering the room. This procedure has a negative effect on crowd control and affects the ability of public safety officers to adequately secure the area."

This has been a constant concern to Mr. Elique, which he has discussed many times with CUNY officials, to no avail. His ability to maintain order on May 26 was further compromised by the overcrowding of the public section of the room.

Trustee Badillo's resolution (known as Resolution No. 10) was considered, voted upon and passed. The effect of the resolution is to eliminate remedial course instruction at Baruch, Brooklyn, Queens and Hunter Colleges no later than September 1999; at Lehman, John Jay, Staten Island, New York City Technical and City Colleges no later than September 2000; and at York and Medgar Evers Colleges no later than September 2001.

Last September, CUNY welcomed 20,000 students into its entering class, of whom approximately 14,000 were placed in remedial programs. In a May 19, 1998 memo to interim Chancellor Christoph Kimmich, Deputy Chancellor Hassett projected that because the percentage of students in need of remedial study has been so high, five campuses will experience a fifty percent decline in entering students in the first year of implementation of the Badillo resolution.

In March 1998, some members of the Board of Trustees, CUNY senior college presidents and members of the New York State legislature, including Assemblymember Sullivan, attended a meeting in Albany. At the meeting, Lehman College President Fernandez estimated that a prohibition against remediation would reduce Lehman enrollment by two-thirds.

In his memo of May 20, 1998, Richard Rothbard, Vice Chancellor for Budget, Finance and Information Services, predicted an \$18,000,000 revenue loss during the first year of implementation of the resolution.

Although the earliest date for the elimination of remedial courses in the senior colleges is September 1999, Vice Chancellor Louise Mirrer, her staff of twenty-six and the presidents of each of the eleven senior colleges are already working on plans for the implementation of the resolution. Reports from each of the college presidents are due in September 1998.

Because the CUNY budget for 1999 must be presented to the City Council by October 1998, and because the Badillo resolution cannot go into effect in September 1999 without significant budgetary, staff, curriculum and admissions policy adjustments having been made in advance of that date, the impact of the new program must be assessed immediately.

Currently, students are eligible for admission to CUNY, though not necessarily to the college of their choice, if they have graduated from high school. If they score well enough on CUNY's freshman skills assessment test or on the SAT's, they need not take remedial courses. If they do not score well enough on either of these exams, they must take remedial courses in the basic skill areas in which they are weak. Because the Badillo resolution eliminates remedial courses at the senior colleges, students who do not score high enough on these tests will not be eligible to attend CUNY senior colleges. Only 29.37% of the September 1997 entering class scored high enough to avoid remedial course work.

In response to the resolution, those charged with the duty to plan for its implementation are attempting to expand the Summer Immersion Program. This four week program, created in 1985, provides high school students with intensive instruction in reading, writing and mathematics.

There is also a plan to design programs, in partnership with New York City public high schools, to make remedial courses available during the last two years of high school.

Some of the senior college presidents are considering working more closely with community colleges to ultimately make senior college admission available to students enrolled in remedial courses at the community colleges.

Vice Chancellor Mirrer has recommended that the pass score on the writing portion of the CUNY freshman skills assessment test be lowered from 8 to 6, that the pass mark on the verbal portion of the SAT exam be lowered from 600 to 500, and that results of New York State Regents exams be considered in determining a student's eligibility for admission to a CUNY senior college.

Vice Chancellor Mirrer anticipates that these recommendations, if adopted and properly implemented, will reduce the percentage of those not admitted to a senior college as a consequence of the Badillo resolution to only 5%.

Law

Standing

Defendants contend that plaintiffs lack standing because they were not personally excluded from the meeting. Defendants also argue that plaintiffs cannot bring their claims on behalf of "all others similarly situated," because they have not sought class certification. Defendants are incorrect.

The Open Meetings Law states that "[a]ny aggrieved party shall have standing to enforce the provisions of this article against a public body . . .". Public Officers Law §107. Under the statute, a plaintiff's standing

"derives from her membership in that class aggrieved by the board's unconstitutional lapse in its decision-making process (i.e., the citizenry) . . . [I]n fashioning a remedy for violation of these statutes, the reviewing court must focus solely upon the public injury."

Matter of Sanna v. Lindenhurst Bd. of Educ., 85 AD2d 157, 162 (2d Dept. 1982), aff'd 58 NY2d 626. Plaintiffs' standing does not turn on the issue of whether they were personally excluded from the meeting. Their

"role in the scheme of open meeting and open vote statutes [is] not . . . that of . . . private individual[s] pursuing a personal grievance, but [is] that of . . . private attorney[s]-general seeking vindication of the public's right to observe a vote. . . ."

Id. at 160-161.

Ramos Decision

In a prior motion for a preliminary injunction, plaintiffs sought an order compelling defendants to re-hold three meetings in a larger room. In a decision dated October 23, 1995, Justice Charles E. Ramos denied the motion, stating that "[o]n these papers" plaintiffs did not demonstrate that they would succeed on the merits.

Justice Ramos' decision does not, as defendants argue, constitute the law of the case or an adjudication on the merits. Papa Gino's of America, Inc. v. Plaza at Latham Assocs., 135 AD2d 74, 77 (3rd Dept. 1988). In addition, the decision does not address the May 26, 1998 meeting, which is the subject of this motion.

Open Meetings Law

The Open Meetings Law requires that "every meeting of a public body shall be open to the general public." Public Officers Law §103(a). The Committee on Open Government, the agency with primary responsibility for interpreting the statute (Id. at §109), has stated that "the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies." Dept. of State Comm. on Open Govt. Advisory Opinion no. OML-AO-2737, at 2 (June 13, 1997). The policy underpinning the statute is contained in section 100:

"It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it."

The provisions of the law should be construed liberally to give effect to the statute's purposes. Matter of Gordon v. Village of Monticello, Inc., 87 NY2d 124, 127 (1995).

The Open Meetings Law requires that the public be given one week's advance notice of the time and place of a public meeting. Public Officers Law §104(1). Notice must be given to the news media and posted in a public place.

The Board's notice of the May 26, 1998 meeting was adequate. Although the statute does not require that notices state the matters to be considered, the informed community was well aware that the issue of remedial education was expected to be on the agenda. It was this topic that had captured public interest.

Chairperson Pasolunici's statement to The New York Times that no vote would be taken, published on the morning of the meeting, was inconsistent with the purpose embodied in the statute's notice provision. Her statement had the effect, if not the intent, of dissuading interested members of the public from attending the meeting, thereby vitiating the original notice and undermining the Open Meetings Law.

In addition, the Trustees improperly limited public access by holding the meeting in a room which they knew to be too small to accommodate the expected audience.

In Advisory Opinion OML-AO-2236, dated June 23, 1993, the Executive Director of the State of New York Department of State Committee on Open Government, stated that

" . . . the Open Meetings Law should be implemented in a manner that gives reasonable effect to its intent . . . [I]f it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending."

Another Advisory Opinion addressed the issue of whether a university may limit the number of spectators at an open meeting. Dept. of State Comm. on Open Govt. Advisory Opinion no. OML-AO-689 (October 20, 1981). In March 1980, 300 people attended a meeting of the Cornell University Board of Trustees. Many individuals voiced concerns about a proposed tuition increase and were so disruptive that the meeting was adjourned. The Trustees limited attendance at future public meetings to twenty members of the public. The Advisory Opinion stated that this was not a reasonable restriction. It recommended that rules of conduct be established in advance and stated that the ejection of disrupters is reasonable. It noted that the presence of the news media does not justify limitations on the general public. It advised that "[i]f . . . a public body has the option of meeting in a conference room that accommodates twenty persons and an auditorium that accommodates hundreds, and if there is substantial interest in attending . . . it would be unreasonable to hold a meeting in the smaller facility."

The CUNY Trustees knew that the board room was too small to accommodate the people expected to attend the May 26 meeting and that a larger facility was available. They exacerbated the problem by reserving a significant portion of the public area for their staff and for the press, after having been warned against such action by their own Director of Public Safety. This behavior was unreasonable, designed to deny public access to the meeting and inconsistent with the fundamental principles of the Open Meetings Law that "the public business be performed in an open and public manner" (Public Officers Law §100; Comm on Open Govt. Advisory Opinion no. OML-AO-689, id.) and that "every meeting . . . shall be open to the general public" (Public Officers Law §103(a), emphasis added.)

In addition, the CUNY Board improperly excluded the public (Goetschius v. Bd. of Educ. of the Greenburgh Eleven Union Free School Dist., ___AD2d___, 664 NY2d 811, 812 [2d Dept., 1997]) before it voted on the remediation resolution. The decision to require every member of the public to leave the room, as opposed to removing only the unruly individuals in the audience, was unreasonable. The actions of a disruptive few did not justify depriving the public of its right to observe the vote.

The Chair's reaction, even to minimal disruption, was to order that the room be cleared. Although it was reasonable for her to eject those who were interfering with the orderly process of the meeting, there is no indication that she attempted to do so. Mr. Elique's testimony that it was difficult to identify the people who were disrupting is contradicted by his having done so on his own initiative earlier in the meeting. Members of his staff and New York City police officers were available to determine who was being disruptive. If it was not possible to eject each person who heckled, the responsibility must be shared by the Trustees, who permitted the room to be filled well beyond capacity. The room was cleared, not because the disrupters could not be identified, but because the Chair had ordered it. In any event, the Trustees offered no explanation for their failure, once the room was cleared, to admit the people who had been waiting peacefully outside for several hours.

Preliminary Injunction

To obtain a preliminary injunction, plaintiffs must demonstrate: (1) a probability of success on the merits; (2) the danger of irreparable harm; and (3) a balancing of the equities in their favor. *Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862 (1990).

Plaintiffs have shown that the CUNY Trustees violated the Open Meetings Law and that there is a strong likelihood that the May 26, 1998 resolution will be voided. "Irreparable injury . . . mean[s] any injury for which money damages are insufficient" [citations omitted]. *Matter of Walsh v. Design Concepts, Ltd.*, 221 AD2d 454, 455 (2d Dept. 1995).

Measures that must be taken to implement the Badillo resolution are underway. Budgets will be adopted under the assumption that senior college remediation need not be funded, faculty will be transferred or discharged to reflect the new needs of the University, and the plans of thousands of high school students and their families will be derailed. Absent preliminary injunctive relief at this time, the needs of students who will require remedial course work in September 1999, will not be adequately met because the requisite budgeting and planning for these programs will have been abandoned as a result of the improper adoption of Resolution 10.

Vice Chancellor Mirrer's plan to eliminate the need for remedial education at the senior colleges, by enriching summer programs and developing a high school remediation program in partnership with Chancellor Rudy Crew, is laudable and will not be affected by this decision. The fact that her plan is a response to the May 26 resolution does not render it any less desirable or less workable. I am not persuaded, however, that by September 1999, high school and college administrators will be able to provide remedial courses sufficient in quantity and quality to satisfy the need for remediation formerly available at the senior colleges.

In balancing the equities, "[i]t must be shown that the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to the defendant through the imposition of the injunction [citation omitted]". *McLaughlin, Piven, Vogle, Inc. v. W.J. Nolan & Co., Inc.*, v. 114 AD2d 165, 174 (2d Dept. 1986), appeal denied 67 NY2d 606.

The potential harm of any delays caused by the granting of injunctive relief will be more than offset by the potential benefits to be derived from further study of the effectiveness of Vice Chancellor Mirrer's proposals. If they prove to be less salutary than hoped, CUNY students and faculty will be spared the demonstrable harm of having remediation eliminated pursuant to a resolution passed in violation of the Open Meetings Law.

Accordingly, it is ordered that plaintiffs' motion for an order preliminarily enjoining the Board of Trustees from implementing Resolution No. 10 is granted to the extent that:

1. No CUNY senior college is required or permitted to eliminate remedial education programs from its curriculum, except to the extent possible before the adoption of Resolution No. 10.

2. No CUNY senior college is required or permitted to reduce the availability or scope of remedial programs for current or incoming students, except to the extent possible before the adoption of Resolution No. 10.

3. No CUNY senior college is required or permitted to engage in planning or to submit plans to CUNY Central Administration or the Board of Trustees with respect to the elimination or reduction of remedial programs, except to the extent possible before the adoption of Resolution No. 10.

4. No CUNY senior college is required or permitted to create or submit budgeting proposals which contemplate the elimination or significant reduction of remedial programs.

5. No CUNY senior college is required or permitted to deny admission to students based upon Resolution No. 10.

6. The CUNY Central Administration shall not engage in planning or create or submit budgeting proposals with respect to the elimination or significant reduction of remedial education at any senior college.

At the hearing, an issue was raised that is specific to Baruch College. In accordance with admissions standards adopted by Baruch College prior to May 26, 1998, none of its September 1998 entering class will be required to take remedial courses. Tutorial services will be made available to those who need them. This order does not require that Baruch make any adjustments to the September 1998 class or curriculum.

This order is not intended to prohibit the CUNY Central Administration from pursuing plans to create and enhance remedial education at community colleges, at high schools and in summer immersion programs.

This order does not alter or modify any resolution of the Board adopted prior to the May 26, 1998 Board meeting or abridge any statutory or common law rights of CUNY senior colleges to make governance or curricular decisions.

(1) The meetings were the June 8, 1995 meeting of the Committee on Long-Range Planning, the June 19, 1995 hearing before the Trustees, and the June 26, 1995 Board meeting.

(2) This agency was formerly known as the Department of State Committee on Access to Public Records.