



HARTMAN UNDERHILL
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ATTORNEYS AT LAW

February 19, 2015

Via Hand Delivery

John S. Phillips, Esquire
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101 West Middle Street
Gettysburg, PA 17325

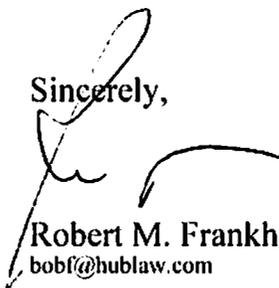
Re: Apryl D. Huster, Sara M. Laird, Rhonda S. Myers, Pamela P. Mikesell,
Marcy A. Van Metre and Lionel R. Whitcomb, Jr. v. Charles P. Hatter,
Richard H. Mathews, Walter M. Barlow, Agatha H. Foscatto and
Bruce A. Lefeber. Docket No. 2015-S-47

Dear Mr. Phillips:

Enclosed please find copies of the following, the originals of which have been filed with the Court:

1. Defendants' Preliminary Objections to Plaintiffs' Petition;
2. Defendants' Brief in Support of Their Preliminary Objections to Plaintiffs' Petition; and
3. Proposed Order.

Sincerely,



Robert M. Frankhouser, Jr.
bobf@hublaw.com

RMF:cla
00754730.DOCX
Enclosures

cc: Mr. Charles P. Hatter
Mr. Richard H. Mathews
Mr. Walter M. Barlow
Ms. Agatha H. Foscatto
Mr. Bruce A. Lefeber
Kevin M. French, Esquire

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Attorneys for Defendants

APRYL D. HUSTER, SARA M. LAIRD,	:	IN THE COURT OF COMMON PLEAS
RHONDA S. MYERS, concerned residents	:	OF ADAMS COUNTY, PENNSYLVANIA
and PAMELA P. MIKESELL, MARCY A.	:	CIVIL ACTION - LAW
VAN METRE, LIONEL R. WHITCOMB,	:	
JR., Directors Fairfield Area School	:	
District,	:	Docket No. 2015-S-47
	:	
Plaintiffs	:	
	:	
v.	:	
	:	
CHARLES P. HATTER, RICHARD H.	:	
MATHEWS, WALTER M. BARLOW,	:	
AGATHA H. FOSCATO and BRUCE A.	:	
LEFEBER, Directors Fairfield Area School	:	
Board,	:	
	:	
Defendants	:	

NOTICE TO PLEAD

TO: Plaintiffs

You are hereby notified to file a written response to the enclosed Preliminary Objections within twenty (20) days from service hereof or a judgment may be entered against you.

HARTMAN UNDERHILL & BRUBAKER, LLC

Date: 2/19/15

By: 

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LEFEBER, Directors Fairfield Area School	:	
Board,	:	
	:	
Defendants	:	

DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFFS' PETITION

Defendants, Charles P. Hatter, Richard H. Mathews, Walter M. Barlow, Agatha H. Foscatto and Bruce A. Lefeber, members of the Board of School Directors of the Fairfield Area School District, preliminarily object to Plaintiffs' Petition pursuant to Pennsylvania Rules of Civil Procedure 1028(a)(1)(lack of jurisdiction), (2)(failure to conform to law), (4)(demurrer) and (5)(nonjoinder of a necessary party), and in support state as follows:

1. Plaintiffs commenced this proceeding by filing a Petition on or about January 16, 2015, in which they seek equitable relief: specifically, that the Court declare that "all actions taken by the Board relevant to Superintendent Chain's contract be

declared null and void" and an injunction ordering the reinstatement of Mr. Chain as Superintendent for the School District.

2. In their Petition, Plaintiffs assert two grounds for the relief they are requesting: first, that the Board allegedly violated the notice requirement contained in Section 10-1073(b) of the Public School Code of 1949, 24 P.S. § 10-1073(b), and second that Defendants allegedly violated Pennsylvania's Sunshine Act, 65 Pa. C.S.A. § 701, *et seq.* Plaintiffs' Petition is procedurally flawed and Plaintiffs' substantive claims are substantially, and fatally, flawed as well.

3. Plaintiffs' Petition must be dismissed with prejudice for failure to comply with law, failure to state claims upon which relief can be granted, and failure to join a necessary party.

Preliminary Objection Pursuant to Pa. R.C.P. 1028(a)(1) and (2)

4. Paragraphs 1 through 3 above are incorporated by reference as if set forth in full.

5. Pa. R.C.P. 1028(a)(1) and (2) permits preliminary objections on the grounds of lack of jurisdiction over the subject matter of the action or of the person of the defendant and failure of a pleading to conform to law.

6. In the context of this proceeding, Pennsylvania law does not permit the commencement of an action by petition.

7. Pa. R.C.P. 1007 provides that an action may be commenced only by filing a praecipe for a writ of summons or a complaint.

8. With exceptions not applicable here, the Pennsylvania Rules of Civil Procedure do not authorize the commencement of an action by petition and rule.

9. Because the commencement of this action is improper under Pa. R.C.P. 1007, the Court has no power to act, and there is no jurisdiction established over Defendants.

WHEREFORE, for the reasons set forth above, and in Defendants' Brief in Support of Their Preliminary Objections, which is incorporated by reference, Plaintiffs' Petition must be dismissed with prejudice.

Preliminary Objection Pursuant to Pa. R.C.P. 1028(a)(5) - Failure to Join an Indispensable Party

10. Paragraphs 1 through 9 above are incorporated by reference as if set forth in full.

11. Mr. Chain is not a party to Plaintiffs' proceeding.

12. Based upon the relief Plaintiffs are requesting in their Petition, Mr. Chain is undoubtedly an indispensable and necessary party.

13. The general rule is that "a party in an equity action is indispensable when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience. That is to say, his presence as a party is indispensable where his rights are so connected with the claims of the litigants that no decree can be made between them without impairing such rights." *Mechanicsburg Area School District*

v. Kline, 431 A.2d 953, 956 (Pa. 1981), quoting *Hartley v. Langkemp & Elder*, 243 Pa. 550, 555-556, 90 A. 402, 403 (Pa. 1914).

14. Mr. Chain's absence as a party precludes the Court from granting the relief Plaintiffs are requesting because Mr. Chain is clearly an indispensable party to that relief.

WHEREFORE, for the reasons set forth above, and in Defendants' Brief in Support of Their Preliminary Objections, which is incorporated by reference, Plaintiffs' Petition must be dismissed with prejudice.

Preliminary Objection Pursuant to Pa. R.C.P. 1028(a)(4) - Demurrer to Alleged Violation of the Pennsylvania School Code

15. Paragraphs 1 through 14 above are incorporated by reference as if set forth in full.

16. In their Petition, Plaintiffs allege that Defendants violated the notice requirement contained in Section 10-1073(b) of the Public School Code. 24 P.S. § 10-1073(b).

17. Section 10-1073(b) provides, in relevant part:

At a regular meeting of the board of school directors occurring at least one hundred and fifth (150) days prior to the expiration date of the term of office of the district superintendent, the agenda shall include an item requiring affirmative action by five or more members of the board of school directors to notify the district superintendent that the board intends to retain him for a term of three to five years or that another or other candidates will be considered for office.

18. The notice requirement under § 10-1073(b) does not apply because Mr. Chain tendered his voluntary and irrevocable resignation, which was accepted at the open

public meeting of the Fairfield Area Board of School Directors held on December 1, 2014, thus rendering the notice requirement moot.

19. Moreover, in his letter of resignation, Mr. Chain stated, "I acknowledge and agree that the School Board is not required to provide me further public notice under 24 P.S. § 10-1073(b)...".

WHEREFORE, for the reasons set forth above, and in Defendants' Brief in Support of Their Preliminary Objections, which is incorporated by reference, Plaintiffs' Petition must be dismissed with prejudice.

Preliminary Objection Pursuant to Pa. R.C.P. 1028(a)(4) - Count II - Demurrer to Alleged Violation of the Sunshine Act

20. Paragraphs 1 through 19 above are incorporated by reference as if set forth in full.

21. In their Petition, Plaintiffs allege that the Defendants discussed and made a decision outside of a public meeting to accept Mr. Chain's voluntary and irrevocable resignation.

22. In their Petition, Plaintiffs fail to refer the Court to the personnel exception contained in Section 708(a)(1) of the Sunshine Act.

23. Section 708(a)(1) provides:

An agency may hold an executive session for one or more of the following reasons:

(1) To discuss any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the agency, or former public

officer or employee, provided, however, that the individual employees or appointees whose rights could be adversely affected may request, in writing, that the matter or matters be discussed at an open meeting.

24. Under Section 708(b) of the Sunshine Act, the Board had every right to discuss Mr. Chain's continued employment as Superintendent for the School District in an executive session.

25. Moreover, hypothetically, if there was a technical violation of the Sunshine Act (which is denied), such a violation was cured by the Board's deliberations and formal action taken on an agenda item during the regularly scheduled public meeting of the Board held on December 1, 2014.

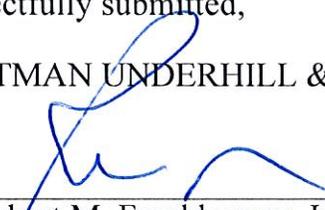
26. Finally, Plaintiffs failed to timely file a legal challenge within the thirty (30) day period mandated under Section 713 of the Sunshine Act. Plaintiffs' claims under the Sunshine act are, therefore, time-barred.

WHEREFORE, for the reasons set forth above, and in Defendants' Brief in Support of Their Preliminary Objections, which is incorporated by reference, Plaintiffs' Petition must be dismissed with prejudice.

Respectfully submitted,

HARTMAN UNDERHILL & BRUBAKER, LLC

Date: 2/19/15

By: 

Robert M. Frankhouser, Jr., Esquire
Attorney I.D. No. 29998
Kevin M. French, Esquire
Attorney I.D. No. 47589
Attorneys for Defendants

CERTIFICATE OF SERVICE

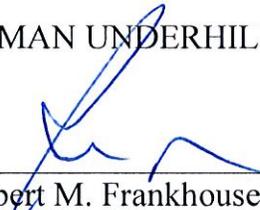
I HEREBY CERTIFY that I am this day serving the foregoing document upon the persons and in manner indicated below.

Service by Hand Delivery and First Class Mail, addressed as follows:

John S. Phillips, Esquire
Phillips & Phillips
101 West Middle Street
Gettysburg, PA 17325

HARTMAN UNDERHILL & BRUBAKER, LLC

Date: 2/19/15

By:  _____

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JR., Directors Fairfield Area School	:	
District,	:	Docket No. 2015-S-47
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Plaintiffs	:	
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MATHEWS, WALTER M. BARLOW,	:	
AGATHA H. FOSCATO and BRUCE A.	:	
LEFEBER, Directors Fairfield Area School	:	
Board,	:	
	:	
Defendants	:	

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR PRELIMINARY
OBJECTIONS TO PLAINTIFFS' PETITION**

I. INTRODUCTION

Unhappy with a decision by a majority of the Board of School Directors of the Fairfield Area School District made at a regularly scheduled public meeting, Plaintiffs have commenced this proceeding seeking injunctive relief to reverse that decision. The decision which precipitated Plaintiffs' extraordinary (and improper) filing was the Board's acceptance of the voluntary and irrevocable resignation of the School District's Superintendent, William Chain. In their Petition, Plaintiffs seek a judicial declaration that "all actions taken by the Board relevant to Superintendent Chain's contract be

considered null and void" and an injunction ordering the reinstatement of Mr. Chain as Superintendent for the School District.

Notably absent from this proceeding before the Court is Mr. Chain himself. If, as Plaintiffs remarkably argue, the Board acted improperly in accepting his resignation, Mr. Chain, and not Plaintiffs, has the legal standing and obligation to either bring an action himself or join Plaintiffs as a material party in interest in their proceeding. Mr. Chain's absence speaks volumes about the lack of merit of Plaintiffs' claims. Moreover, Mr. Chain's absence as a party precludes the Court from granting the relief Plaintiffs are requesting because Mr. Chain is clearly an indispensable party to that relief.

The procedure selected by Plaintiffs to commence this proceeding has no supporting authority in statute, the Rules of Civil Procedure or case law. In fact, the courts have repeatedly held that attempting to commence an action by petition and rule, when there is no authorization for doing so, means that the court has no power to act.

These two procedural defects alone provide ample grounds for this Court to dismiss Plaintiffs' Petition. However, even a cursory review of Plaintiffs' substantive claims reveal that they are substantially, and fatally, flawed as well.

First, the Plaintiffs' claim that by accepting Mr. Chain's resignation, the Board violated the notice requirement set forth in Section 1073(b) of the Public School Code of 1949 ("School Code"), 24 P.S. § 10-1073(b). Plaintiffs' position conveniently ignores the reason for, and the intended beneficiary of, the School Code's notice requirement. Section 1073(b) is intended to give a superintendent notice in sufficient time that his contract either is or is not going to be renewed so he will know whether he has continued

employment or to make alternative plans. In this case, the Board of School Directors had until January 22, 2015 to give Mr. Chain the notice required under § 1073(b). Mr. Chain's voluntary and irrevocable resignation and the Board's acceptance of his resignation on December 1, 2014, rendered the notice requirement of § 1073(b) legally and practically moot. Once Mr. Chain resigned, there simply is no purpose for the notice, and Mr. Chain resigned well before the notice was required.

Second, the Plaintiffs' claim that Defendants violated the Sunshine Act is equally without merit. The Board has the statutory right to meet in executive session to discuss personnel issues, including the performance and retention or non-retention of a superintendent. 65 Pa.C.S.A. § 708(a)(1). The minutes of the Board's public meeting held on December 1, 2014, attached to Plaintiffs' Petition as Exhibit C, demonstrate that there was an executive session prior to the meeting to discuss personnel matters. Curiously, Plaintiffs' Petition pretends that an executive session for personnel issues does not exist under the Sunshine Act.

Hypothetically, even if a technical violation of the Sunshine Act could be shown by Plaintiffs (which is denied), the fact that the Board received comment from members of the public as well as members of the Board and took action by vote in a public meeting cures any alleged violation.

Finally, Plaintiffs' Petition blithely ignores the clear requirement in the Sunshine Act that any legal challenge to the Board's action be taken within thirty days of the alleged violation. Here, Plaintiffs admit that they learned about what they consider to be an alleged violation on December 1, 2014, but did not commence this proceeding until

January 16, 2015. Thus, if as an academic matter Plaintiffs were able to articulate a technical violation of the Sunshine Act, Plaintiffs failed to take any action within the specific time frame mandated by the Act.

In conclusion, Plaintiffs' Petition is so profoundly flawed both procedurally and substantively that Defendants respectfully request that the Court treat it as such by dismissing the Petition with prejudice.

II. STATEMENT OF ALLEGED FACTS¹

Plaintiffs, Apryl D. Huster, Sara M. Laird and Rhonda S. Myers, are registered voters who reside within Fairfield Area School District. (Pet. at ¶¶ 1, 2 and 3). Plaintiffs, Pamela P. Mikesell, Marcy A. Van Metre and Lionel R. Whitcomb, Jr., are members of the Board of School Directors of the Fairfield Area School District. (Pet. at ¶ 4). Defendants, Charles P. Hatter, Richard M. Mathews, Walter M. Barlow, Agatha H. Foscatto and Bruce A. Lefeber, are members of the Board of School Directors of the Fairfield Area School District. (Pet. at ¶ 5).

At the December 1, 2014, open public meeting of the Fairfield Area Board of School Directors, a majority of the Board voted to accept the voluntary and irrevocable resignation of former Superintendent Chain effective December 23, 2014, and to appoint Karen Kugler as Substitute Superintendent through June 30, 2015. (Pet. at ¶ 8). According to Plaintiffs' Petition, Mr. Chain's Irrevocable Letter of Resignation and

¹ Although in many respects the allegations in Plaintiffs' Petition are inaccurate or simply incorrect, in ruling on Preliminary Objections the Court is required to accept Plaintiffs' allegations of fact and inferences therefrom. "A demurrer admits as true all well-pleaded material facts as well as inferences reasonably deducible therefrom." *Bologna v. St. Marys Area School Board*, 699 A.2d 831, 834, fn. 2 (Pa. Cmwlth. 1997).

Settlement and Release Agreement ("Agreement") were executed by Mr. Chain and the Board prior to the December 1, 2014 Board meeting. (Pet. at ¶ 10). Although the Agreement clearly and unequivocally establishes that the "District has notified Chain that it will not retain Chain as Superintendent following June 30, 2015, and will be considering other candidates for the position of Superintendent," Plaintiffs allege there was no action item at any prior public Board meeting at which the Superintendent and the public were notified by the Board of its intent. (Pet. at ¶ 11).

According to Plaintiffs' Petition, on December 1, 2014, at approximately 5:00 p.m., two new action items were added to the meeting agenda that had been published earlier on the School District website. The new items appear under Section XVI Other Action Items: A. The Board of School Directors hereby accepts the irrevocable resignation of Mr. Bill Chain, effective June 30, 2015. In addition, as of December 23, 2014, Mr. Chain shall be on paid administrative leave of absence for the remainder of his contract term. B. Pursuant to § 1079 of the Public School Code, 24 P.S. § 10-1079, the Board of School Directors appointed Ms. Karen Kugler as Substitute Superintendent during the time of Mr. Chain's paid administrative leave of absence. (Pet. at ¶ 14).

According to Plaintiffs, the time and purpose of the executive session held just prior to the regular public board meeting on December 1, 2014, was not announced at a prior public meeting nor to the members of the Board twenty-four hours in advance of the executive session. (Pet. at ¶ 22). Plaintiffs allege that notification of the executive session for the purpose of informing them of the resignation and Agreement, and the appointment of a substitute superintendent, was given to the three Plaintiff Board

members at about 5:00 p.m. on December 1, 2014, at that same time they were informed that the action items had been added to the agenda. (Pet. at ¶ 23).

The three Plaintiff Board members saw the signed resignation and were told highlights of the Settlement and Release Agreement by the Board Solicitor in executive session prior to the December 1, 2014 regular meeting. (Pet. at ¶ 24). In their Petition, contrary to what is reflected in the Minutes attached to Plaintiffs' Petition as Exhibit "C", the three Plaintiff Board members allege that they did not have time to read and digest and ask questions prior to the vote on the resignation being called for at the December 1, 2014 public meeting. (Pet. at ¶ 24).

III. PROCEDURAL HISTORY

Plaintiffs commenced this action by Petition on January 16, 2015. Thereafter, the Court ex parte issued a Rule to Show Cause on January 21, 2015. Plaintiffs served the Petition and the Court's ex parte Order on January 30, 2015. Defendants have filed Preliminary Objections to Plaintiffs' Petition. This Brief is filed in support of Defendants' Preliminary Objections.

IV. QUESTIONS INVOLVED

- A. WHETHER THE COMMENCEMENT OF THIS ACTION BY PETITION AND RULE IS IMPROPER UNDER THE PENNSYLVANIA RULES OF CIVIL PROCEDURE?**
- B. WHETHER PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN AN INDISPENSABLE PARTY?**
- C. WHETHER PLAINTIFFS' CLAIM THAT DEFENDANTS VIOLATED THE NOTICE REQUIREMENT UNDER THE SCHOOL CODE IS WITHOUT MERIT?**

D. WHETHER PLAINTIFFS' CLAIM THAT DEFENDANTS VIOLATED THE SUNSHINE ACT IS WITHOUT MERIT?

(Suggested responses: in the affirmative).

V. ARGUMENT

A. The Commencement of this Action by Petition and Rule is Improper Under the Pennsylvania Rules of Civil Procedure

In *Hartmann v. Peterson*, 265 A.2d 127 (Pa. 1970), the plaintiff attempted to bring an action in equity by petition to enjoin the defendant from taking elected office as the commissioner for the selection of jurors for Delaware County. In response to the petition and rule to show cause, the defendant filed preliminary objections and a motion to dismiss challenging the jurisdiction of the trial court on two grounds: (1) that the action was not properly commenced, and (2) that the Election Code provided the exclusive remedy for the wrongs of which plaintiff complained. The trial court dismissed the defendant's preliminary objections and denied the motion to dismiss.

On appeal, the Supreme Court held that the petition must be dismissed because a petition is not an authorized procedure to properly commence a legal proceeding. The Supreme Court observed that the plaintiff had not filed a complaint or summons to begin the action. The Court cited Pennsylvania Rule of Civil Procedure No. 1007, which at that time was incorporated into the Rules for Equity by virtue of Pennsylvania Rule of Civil Procedure No. 1501.² Since the Supreme Court's decision in *Hartmann*, present Rule 1007, entitled "Commencement of Action", provides:

² Since the Supreme Court's decision in *Hartmann*, the Pennsylvania Rules of Civil Procedure have been amended and the former action in equity abolished. See former Rule 1501 of the Pennsylvania Rules of Civil Procedure, rescinded effective July 1, 2004. Pa. R.C.P. 1001(b) provides that there shall be a "civil action" in which shall be brought all claims for relief heretofore asserted in "the action in equity".

An action may be commenced by filing with the prothonotary

(1) a praecipe for writ of summons, or

(2) a complaint.

In *Hartmann*, the Supreme Court observed, "Nowhere do the rules provide for commencing an action by petition." *Hartmann*, 265 A.2d at 128. In reversing the trial court's order permitting the proceeding to proceed upon a petition, the Supreme Court stated:

With no complaint, summons or amicable agreement to bring this action within the power to act of the court below, it has no power to make any order whatsoever, including an order allowing the filing of a complaint *nunc pro tunc*.

Moreover there was no service of such a "complaint" upon appellant as required by Pennsylvania Rule of Civil Procedure 1009. Therefore, the jurisdiction over the person of the appellant was not established.

Hartmann, 265 A.2d at 128. See also, *Zimmerman v. Auto Mart, Inc.*, 910 A.2d 171, 175 (Pa. Cmwlth. 2006)(rule to show cause may not substitute for original process); *In re: Montgomery*, 445 A.2d 873, 874 (Pa. Cmwlth. 1982)(a petition for an order is not a praecipe, complaint or agreement; a petition must be dismissed).

Here, Plaintiffs did not commence their proceeding by praecipe for writ of summons or complaint. Rather, they commenced this proceeding by filing a petition, an act that has no authorization in the Pennsylvania Rules of Civil Procedure. As the Supreme Court held in *Hartmann*, absent a summons or complaint to bring this proceeding, the Court has no power or authority to act. Accordingly, Defendants'

Preliminary Objection for failing to conform to law should be granted and this proceeding dismissed.

B. Plaintiffs' Complaint Must be Dismissed for Failure to Join an Indispensable Party

Mr. Chain, the individual who executed and submitted an irrevocable and voluntary resignation, is not a party to the action in any capacity. Curiously, Plaintiffs expect that this Court will reinstate Mr. Chain notwithstanding his irrevocable resignation. "It is fundamental that persons whose interest will necessarily be immediately affected by any decree that can be rendered are so necessary and indispensable as parties that the court will not proceed to a decree without them." *Paterra v. Charleroi Area School District*, 349 A.2d 813, 815 (Pa. Cmwlth. 1975). "The general rule is that 'a party in an equity action is indispensable when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience. That is to say, his presence as a party is indispensable when his rights are so connected with the claims of the litigants that no decree can be made between them without impairing such rights.'" *Mechanicsburg Area School District v. Kline*, 431 A.2d 953, 956 (Pa. Cmwlth. 1981).

It is impossible to imagine a circumstance where it is more necessary that Mr. Chain be a party to the proceeding given the specific relief sought by Plaintiffs. Plaintiffs are seeking an Order from this Court invalidating the Board's acceptance of Mr. Chain's resignation and requiring him to return to his prior employment as Superintendent for the

School District, notwithstanding his irrevocable resignation. There is simply no authority for the Court to entertain such a request without Mr. Chain being a party to the action. The absurdity of Plaintiffs' position is that they are requesting that Mr. Chain be required to resume his former position as Superintendent, notwithstanding the fact that he (a) irrevocably resigned from the position, and (b) is receiving the benefits of his resignation under the Agreement. See Exhibit A to Plaintiffs' Petition.

Plaintiffs seek declaratory relief in the form of a declaration by the Court that the Board's acceptance of Mr. Chain's resignation "be considered null and void." The Declaratory Judgments Act, 42 Pa. C.S. § 7531, *et seq.*, permits the Court to issue declaratory judgments. Section 7540(a) of the Declaratory Judgments Act, however, provides:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

Accordingly, under the Declaratory Judgments Act, Mr. Chain is required to be a party because he has an interest "which would be affected by the declaration" specifically sought by Plaintiffs.

Defendants' Preliminary Objection for failing to join a necessary party must be granted and this proceeding dismissed.

C. Plaintiffs' Claim that Defendants Violated the Notice Requirement Under the School Code is Without Merit

Section 10-1073(b) of the School Code, 24 P.S. § 10-1073(b), provides:

At a regular meeting of the board of school directors occurring at least one hundred and fifty (150) days prior to the expiration date of the term of office of the district superintendent, the agenda shall include an item requiring affirmative action by five or more members of the board of school directors to notify the district superintendent that the board intends to retain him for a further term of three (3) to five (5) years or that another or other candidates will be considered for the office. In the event that the board fails to take such action at a regular meeting of the board of school directors occurring at least one hundred and fifty (150) days prior to the expiration date of the term of office of the district superintendent, he shall continue in office for a further term of similar length to that which he is serving.

As the Commonwealth Court observed in *Bologna v. St. Marys Area School Board*, 699 A.2d 831, 834 (Pa. Cmwlth. 1997), § 1073(b) of the School Code "serves to protect the superintendent so that he will know prior to the end of his term whether or not he has continued employment...".

Mr. Chain's contract as Superintendent was to expire on June 30, 2015.

Accordingly, the Board had until January 31, 2015, to include an agenda item to notify Mr. Chain that it either intended to retain him or that another or other candidates would be considered for the office of superintendent. Mr. Chain, however, tendered his voluntary resignation to the Board on December 1, 2014, well prior to January 31, 2015. In his Irrevocable Letter of Resignation, Mr. Chain expressly stated, "I acknowledge and agree that the School Board is not required to provide me further public notice under 24 P.S. § 10-1073(b) that the Board will be considering other candidates for the superintendent position and does not intend to renew my contract, term or commission." As a result of Mr. Chain's tender of his resignation and the Board's acceptance of that

resignation, the notice requirement in § 1073 of the Public School Code was rendered legally and practically moot.

Defendants' Preliminary Objection for failure to state a claim for an alleged violation of § 10-1073(b) must be granted and this proceeding dismissed.

D. Plaintiffs' Claim that Defendants Violated the Sunshine Act is Without Merit

Pennsylvania's Sunshine Act, 65 Pa. C.S. § 701, *et seq.*, provides generally that official action and deliberations by a quorum of the members of an agency [which includes the board of directors of a school district] shall take place at a meeting open to the public unless closed under Sections 707, 708 or 712. Section 708, entitled "Executive Sessions", provides that an agency may hold an executive session for one or more of the following reasons:

- (1) to discuss any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the agency, or former public officer or employee, provided, however, that the individual employees or appointees whose rights could be adversely affected may request, in writing, that the matter or matters be discussed at an open meeting.

Under Section 708, the Board had every right to discuss Mr. Chain's continued employment as Superintendent for the School District in executive session. Under Section 708(b) such an executive session may be held during an open meeting or at the conclusion of an open meeting or may be announced for a future time. The reason for holding the executive session must be announced at the open meeting occurring

immediately prior or subsequent to the executive session. In this case, the Minutes of the Board's public meeting held on December 1, 2014, attached as Exhibit "C" to Plaintiffs' Petition, reflect that the Board met in executive session to discuss personnel matters, as it is expressly permitted to do under the Sunshine Act.

Hypothetically, even if there had been some technical violation of the Sunshine Act (which is denied), the Supreme Court has ruled and the Commonwealth Court has consistently held that subsequent public action will "cure" the effect of prior action taken in private. *See Kennedy v. Upper Milford Township Zoning Hearing Board*, 834 A.2d 1104, 1125-26 (Pa. 2003), citing *Association of Community Organizations for Reform Now v. Southeastern Pennsylvania Transportation Authority*, 789 A.2d 811 (Pa. Cmwlth.), appeal denied, 569 Pa. 695, 803 A.2d 736 (2002); *In re: Petition of the Hazelton Area School District*, 527 A.2d 1091 (1987); *In re: Avanzato*, 44 Pa. Cmwlth. 77, 403 A.2d 198 (1979).

Finally, Section 713 of the Sunshine Act provides that a legal challenge to action taken in alleged violation of the Act shall be filed within thirty days from the date of a meeting which is open, or within thirty days from the discovery of any action that occurred at a meeting which was not open at which the Sunshine Act was allegedly violated. According to Plaintiffs' Petition, they became aware of what they believe to be a violation of the Sunshine Act on December 1, 2014 (See Pet. at ¶ 16); however, they did not commence this proceeding until January 16, 2015. Plaintiffs' challenge was filed sixteen days after the thirty day period under Section 713. Thus, under any circumstances, Plaintiffs' action is barred by the Sunshine Act.

Defendants' Preliminary Objection for failure to state a claim for an alleged violation of the Sunshine Act must be granted and this proceeding dismissed.

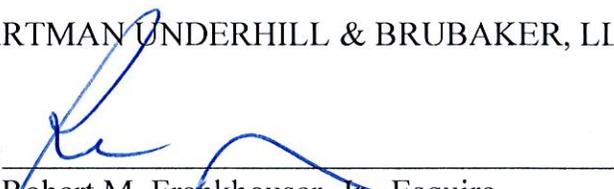
VI. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that Plaintiffs' Petition be dismissed with prejudice, plus such other relief as is permitted by the law and the facts.

Respectfully submitted,

HARTMAN UNDERHILL & BRUBAKER, LLC

Date: 2/19/15

By: 

Robert M. Frankhouser, Jr., Esquire
Attorney I.D. No. 29998
Kevin M. French, Esquire
Attorney I.D. No. 47589
Attorneys for Defendants

CERTIFICATE OF SERVICE

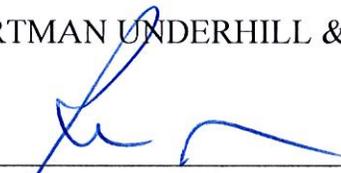
I HEREBY CERTIFY that I am this day serving the foregoing document upon the persons and in manner indicated below.

Service by Hand Delivery and First Class Mail, addressed as follows:

John S. Phillips, Esquire
Phillips & Phillips
101 West Middle Street
Gettysburg, PA 17325

HARTMAN UNDERHILL & BRUBAKER, LLC

Date: 2/19/15

By:  _____

Robert M. Frankhouser, Jr., Esquire
Attorney I.D. No. 29998
Kevin M. French, Esquire
Attorney I.D. No. 47589
Attorneys for Defendants

APRYL D. HUSTER, SARA M. LAIRD,	:	IN THE COURT OF COMMON PLEAS
RHONDA S. MYERS, concerned residents	:	OF ADAMS COUNTY, PENNSYLVANIA
and PAMELA P. MIKESELL, MARCY A.	:	CIVIL ACTION - LAW
VAN METRE, LIONEL R. WHITCOMB,	:	
JR., Directors Fairfield Area School	:	
District,	:	Docket No. 2015-S-47
	:	
Plaintiffs	:	
	:	
v.	:	
	:	
CHARLES P. HATTER, RICHARD H.	:	
MATHEWS, WALTER M. BARLOW,	:	
AGATHA H. FOSCATO and BRUCE A.	:	
LEFEBER, Directors Fairfield Area School	:	
Board,	:	
	:	
Defendants	:	

ORDER

I. AND NOW, this ____ day of _____, 2015, upon consideration of Defendants' Preliminary Objections to Plaintiffs' Petition, Brief in Support and any response thereto, it is hereby **ORDERED** and **DECREED** that Plaintiffs' Petition is dismissed with prejudice.

BY THE COURT:

J.

Distribution List:

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