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| RONALD DONNERSTAG, KRISTIN LANKO, LISA SNIDER, WENDY VACANTE, MATTHEW DELPRETE, PATRICIA FORTUS, JAIME CESTARE, SCOTT ALFANO, AND LYNNE SWEEZO, | : | SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION DOCKET NO. A-000367-23T4 |
| Complainants-Appellants, | : | CIVIL ACTION |
| v. | : | ON APPEAL FROM THE FINAL DECISION OF THE SCHOOL ETHICS COMMISSION AGENCY DKT. NO. C20-22 |
| MERISSA BORAWSKI, CENTRAL REGIONAL BOARD OF EDUCATION, OCEAN COUNTY, | : | FILED APRIL 16, 2024 |
| Respondent-Respondent. | : | |

# COMPLAINANTS-APPELLANTS' BRIEF IN SUPPORT OF THEIR APPEAL FROM DECISIONS OF THE SCHOOL ETHICS COMMISSION

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## PRELIMINARY STATEMENT

The New Jersey School Ethics Commission's (Commission) Final Decision in this matter is contrary to a robust body of the Commission's own caselaw, does not comport with the evidence in the record, and is repugnant to the statutory mandate set out for the Commission in the School Ethics Act (Act). As a result, the Commission's August 22, 2023 Final Decision in this matter must be reversed as being arbitrary, capricious, and unreasonable.

The New Jersey Legislature tasked the Commission with enforcing a Code of Ethics for local school board members who engage in "conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22. The Legislature further mandated that the Commission must "ensure the uniform maintenance of those standards." Id.

To that end, the Commission developed a clear and consistent body of decisional law relating to social media use by school board members. In doing so, the Commission carefully weighed the First Amendment rights school board members enjoy as individuals alongside the State's compelling interest in ensuring school boards maintain the public's trust. The Commission has long held that when school board members make social media posts from accounts they used to campaign for their seats, those school board members have a duty to affirmatively disclaim their school board membership to mitigate the risk of compromising the Board. In fact, the Commission reaffirmed this line of cases in an opinion it published only six days before the filing of the underlying Complaint in this matter. However, in deciding the matter below, the Commission abjectly failed to apply this well-established standard.

In the matter now being appealed, Central Regional School Board (Board) member Merissa Borawski (Respondent or Borawski) repeatedly campaigned for her seat on the Board from her Facebook account, announced her successful election from

that account, and made clear from this same Facebook account that she was a member of the Board. From this same Facebook account, Respondent belittled the plight of Jews who suffered at the hands of the Nazis during the Holocaust, she encouraged school community members to flout an Executive Order directly relating to New Jersey schools, she sought aggressively to deny the inclusion of transgender students in New Jersey schools, she shared blatant misinformation as to what is actually taught in New Jersey schools, and she openly told school district teachers to drop out of their union, causing the Board to become ensnared in litigation. Respondent even publicly celebrated the "not guilty" verdict of Kyle Rittenhouse, a vigilante who shot and killed protesters during civil unrest following the police shooting of Jacob Blake. At no time did Respondent's posts or account contain a disclaimer making clear that she was speaking in her individual capacity and not on behalf of the Board.

As a result, members of the school community actively protested Respondent at meetings of the Board in her role as Board member, which was clearly reflected by news articles, Board minutes, and even Respondent's own admissions – all of which were in the record. The Board itself even passed two separate Resolutions condemning Respondent's Facebook posts and had to set aside significant time at Board meetings to address complaints regarding Respondent's social media use.

Consequently, Administrative Law Judge Kim C. Belin (ALJ Belin) found in her Initial Decision that Respondent had violated the Act through her failure to affirmatively disclaim her membership on the Board. ALJ Belin cited to the Commission's robust body of decisional law on the issue and recommended the penalty of "censure" in accordance with those prior Commission decisions.

Inexplicably, however, the Commission then decided to ignore its own precedent entirely, asserting that Respondent's Facebook account "lacked a nexus" to her Board membership based on the erroneous conclusion that "her Facebook page

did not make any reference to the Board nor her membership on the same." This finding was contrary to clear, unambiguous, and abundant evidence in the record. It is obvious from the record that Respondent not only held herself out as a Board member from her Facebook page, but that members of the school community protested her at ***meetings of the Board***, meaning that they not only ***could*** have seen her as speaking in her role as Board member, but that they ***actually did*** see her as speaking in this role, thereby compromising the Board. The ***Board itself*** was also subjected to litigation as a direct result of her social media use.

Further, no party to the matter before the Commission ever sought the relief issued. Respondent neither cross-moved for summary decision in her favor nor filed exceptions from ALJ Belin's Initial Decision. As a result, by "rejecting" the grant of Appellants' Motion for Summary Decision, the Commission effectively denied Appellants' Motion for Summary Decision. The appropriate remedy when summary decision is denied without cross-motion is to proceed to a hearing, not to ***dismiss the Complaint altogether***. By *sua sponte* dismissing the Complaint itself, the Commission erred as a matter of law.

The Commission also erred in its prior August 23, 2022 decision granting Respondent's Motion to Dismiss in Lieu of an Answer in part. In doing so, the Commission improperly weighed the facts in the light most favorable to the party moving for dismissal of Counts 3 and 7, made plain errors in its factual findings, inserted facts not in the record, misconstrued an applicable Executive Order, and directly contradicted its own prior Advisory Opinion. As that matter is now ripe for appeal under N.J.C.R. 2:2-3(a)(2), it is also being appealed herein.

For all the reasons that follow, Appellants now request that the Appellate Division 1) reverse the Commission's Final Agency Decision which dismissed the entire Complaint outright, and 2) reinstate Counts 3 and 7 of the Complaint.

## PROCEDURAL HISTORY

On March 3, 2022, Complainants-Appellants Ronald Donnerstag, Wendy Vacante, Jaime Cestare, Kristin Lanko, Matthew Delprete, Scott Alfano, Lisa Snider, Patricia Fortus, and Lynne Sweezo (collectively, Appellants) filed a Complaint before the Commission, asserting violations of N.J.S.A. 18A:12-24.1(a) and (e) of the Act for Respondent's actions which were set out in the Complaint. (Ca382-396). On April 8, 2022, Respondent filed a Motion to Dismiss in Lieu of an Answer.

On May 2, 2022, Appellants filed their Brief in Opposition to Respondent's Motion to Dismiss (Ca216-239),[1] as well as a Motion to Amend the Complaint to add Counts 8-12, which related to conduct that occurred after the initial Complaint was filed. At its meeting on May 24, 2022, the Commission granted Appellants' Motion to Amend the Complaint and accepted their Amended Complaint as filed. (Ca240-378). On June 3, 2022, Appellants filed a Motion to Supplement the Record with documents which had not been made available to Appellants at the time any prior motion or response had been filed. (Ca096-Ca126). On June 6, 2022, the Commission granted that Motion to Supplement the Record. (Ca014).

On August 23, 2022, the Commission issued its decision on Respondent's Motion to Dismiss. (Ca205-215). In doing so, the Commission denied the motion as to Counts 1, 2, 4, 5, 8, 9, 10, 11, and 12 of the Complaint, but granted the motion as to Counts 3, 6, and 7 of the Complaint. (Ca215).

The Commission dismissed Count 3 of the Complaint, calling Respondent's well-documented and public violations of New Jersey's School Mask Mandate as set

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[1] While Appellants note that briefs are generally prohibited in appendices under N.J.C.R. 2:6-1, the limited attached briefs in the present matter go to what facts and evidence were in the record before the Commission and ALJ Belin when the underlying decisions were made, and are "germane to the appeal" under N.J.C.R. 2:6-1(a)(2).

out in Executive Order 251 (EO 251) a "personal decision" – a fact invented by the Commission and weighed in favor of the moving party. (Ca213). The Commission also stated that Respondent never encouraged anyone else to defy EO 251, though there was abundant evidence in the record showing Respondent did precisely that. (Ca242, Ca244, Ca265, Ca280, Ca282, Ca284, Ca286, Ca292).

In Dismissing Count 7 of the Complaint, the Commission stated that it had no jurisdiction over a transparently racist Facebook post made by Respondent because it was initially posted after Respondent was elected to her seat on the Board, but before she was formally seated. (Ca205-215). This directly contradicted a prior Advisory Opinion issued by the Commission. (Ca236-239). The parties were never allowed a chance to be heard on this jurisdictional issue.

On August 25, 2022, Appellants filed a Motion for Leave to Appeal an Interlocutory Decision with the Commissioner of Education (Commissioner). On September 6, 2022, the Commissioner issued an Order denying Appellants' Request for Leave to File an Interlocutory Appeal. (Ca083). The Commissioner did not address the merits of whether the School Ethics Commission erred in dismissing these counts. Id.

Due to Respondent's failure to file an Answer within the prescribed time period, on September 29, 2022, the Commission directed Respondent to file an Answer or each remaining allegation in the Complaint would be deemed admitted. (Ca021-022). On October, 2022, Respondent filed an Answer which contained a one sentence blanket denial. (Ca203-204). Due to inadequacy of her initial Answer, Respondent filed an Amended Answer on January 3, 2023. (Ca201-202). No defenses were raised in the Amended Answer. Id.; See N.J.A.C. 6A:28-7.2(a) (Answers before the Commission must "fully and completely advise the parties and the Commission as to the nature of respondent's defenses for each allegation.")

This matter was then transferred to the Office of Administrative Law for discovery and a hearing. On February 24, 2023, following the exchange of discovery, Appellants filed a Motion for Summary Decision. (Ca041-Ca070). Appellants attached a number of Exhibits to this Motion. (Ca071-Ca200). Based on the evidence in the record, Respondents asked ALJ Belin to find that Respondent had violated the Act as to Counts 1, 2, 4, 5, 8, 9, 10, 11, and 12 of the Amended Complaint. (Ca041-Ca070). In doing so, Appellants expressly reserved the right to appeal the Commission's prior decision on Respondent's Motion to Dismiss pursuant to N.J.C.R. 2:2-3(a)(2) once a final order issued as to all claims as to all parties pursuant to N.J.C.R. 2:2-3(b). (Ca067-068). Respondent did not file any cross-motion.

On May 30, 2023, ALJ Belin issued her Initial Decision granting Appellants' Motion for Summary Decision and imposing the penalty of "censure." (Ca020-040). Having reviewed the record before her, which clearly showed Respondent had repeatedly used her Facebook page to campaign for her seat on the Board and announced that she had become a member of the Board, ALJ Belin found that Respondent had violated the Act with regard to each Facebook post before her. ALJ Belin specifically found that Respondent violated the Act by failing to affirmatively disclaim her Board membership. In doing so, ALJ Belin held:

- Count 1: "members of the public could interpret this [as a] request from the Central Regional Board of Education to fight the existing union structure. Indeed, the CREA and NJEA filed an unfair practice claim against the Board," which violated the Act because "the [Act] does not support a sitting Board member putting the school Board at risk of litigation." (Ca028-29).
- Count 5: Respondent's comparison of Jews who were "tortured and murdered" during the Holocaust "based upon a racist ideology" to "unvaccinated individuals" was "distasteful and reckless," and "resulted in public outcry from parents and students as evidenced by the board meeting minutes and newspaper articles." (Ca029).
- Counts 2, 4, and 8: "The point of these three postings is that the Governor overstepped his bounds in mandating vaccines and the public including school students should galvanize to take action against being

vaccinated" and to flout "Executive Order 251" – New Jersey's School Mask Mandate in effect at the time. (Ca030-031). ALJ Belin stated "it is disconcerting that Borawski has encouraged adults and students, including her own children, to defy the laws of the State." (Ca031-032).

- Counts 9, 10, and 12: "These social [media] posts relate to Borawski's perspective and disagreement with how gender identity is taught in New Jersey." (Ca033). "What is problematic is not that Borawski disagrees with the proposed health education standards or that she opposes the inclusion of transgender students in New Jersey schools, but ***what is problematic is that she failed to include a clear disclaimer that the contents of the posting were her personal opinions and not expressed as a Board member.*** Without a clearly stated disclaimer, it would not be a stretch to consider that the transgender population and parents of transgender students may feel unwelcome by the Board." (Ca034) (emphasis added). "The public outcry against Borawski's postings demonstrates that the public has lost confidence in the Board." (Ca034).

- "A board of education should not be put in a position of having to distance itself from the speech of its board members. Rather, school board members, like Borawski, are required under the [Act] to be responsible in ensuring their conduct does not have the potential to compromise the Board. Accordingly, I conclude that the complainants have met their burden to demonstrate that Borawski violated N.J.S.A. 18A:12-24.1(e) and this charge is sustained." (Ca035-036).

- "This tribunal cannot ignore that even after the Board adopted the March 17, 2022 resolution in which it condemned Borawski's postings, requested that the posts be taken down, and cautioned all board members to be prudent in their social media posts, Borawski continued to post and repost her personal views ***without including a disclaimer*** that would have avoided the appearance – actual or perceived – that her Facebook postings were made in her personal capacity, and not as a board member. This evidence shows a serious lack of judgment." (Ca037-038) (emphasis added).

ALJ Belin filed her Initial Decision with the School Ethics Commission pursuant to N.J.S.A. 18A:12-29 on May 30, 2023. (Ca038-039).

Then, on August 22, 2023, the School Ethics Commission issued a 4 page "Final Decision," which "rejected" ALJ Belin's Initial Decision on the asserted basis that "her Facebook page did not make any reference to the Board nor her membership on same," and that there was therefore "an insufficient nexus between Respondent's personal Facebook page and her membership on the Board." (Ca014-018). This was factually incorrect, as was reflected by abundant evidence in the record at the time.

Appellants filed their appeal on October 5, 2023 (App. Div. No. A-000367-23T4), and now seek reversal of that decision.

## STATEMENT OF FACTS

All facts as stated in the Amended Complaint before the School Ethics Commission (Ca240-378), as well as all facts and documents encompassed by Appellants' Motion for Summary Decision (Ca041-200), and in the record generally, are hereby relied on and incorporated by reference. The facts most salient to this appeal are as follows:

1. On November 1, 2021, Respondent posted a banner to her Facebook account stating:

   Central Regional School Board
   Merissa Borawski & Heather Koenig
   VOTE VOTE VOTE

   **See Exhibit 3 to Amended Complaint** (Ca265).

   This post lists issues supported and opposed by Respondent and her running mate Heather Koenig (Koenig).

2. On November 1, 2021, Respondent posted a link to a Google Doc entitled "BOE Races – November 2nd – Who to Vote For?" and commented on that post, stating:

   Not sure who to vote for Board of Education ??? Check here...

   **See Exhibit 2 to Amended Complaint** (Ca263).

3. On November 1, 2021, Respondent posted a picture of a girl holding a banner that says:

   MERISSA BORAWSKI
   HEATHER KOENIG
   CENTRAL REGIONAL
   Board of Ed

   Below this picture are the words "V.O.T.E., Merissa and Heather for Central B.O.E." **See Exhibit 4 to Amended Complaint** (Ca267-268).

   Above that picture, Respondent typed the words "VOTE tomorrow"

4. On November 2, 2021, Respondent shared a Facebook post stating:

> Prayers are working, keep them coming for NJ, VA, Central Regional BOE, and all of the BOEs
>
> **See Exhibit 5 to Amended Complaint** (Ca270).

5. On November 2, 2021, Respondent posted a link that said "Merissa Borawski & Heather Koenig - Central Regional BOE (Berkley Twp)" and typed out words above that link, stating:

> Thank you Kristen Canavatchel Sinclair for the Endorsement .... our children will be blessed when we are elected today
>
> **See Exhibit 6 to Amended Complaint** (Ca272).

The link in this post leads to a website called "Chaos and Control Substack."

6. On November 2, 2021, Respondent shared tentative results of her election to the Board, indicating that she was poised to win. **See Exhibit 7 to Amended Complaint** (Ca274)

7. On November 3, 2021, Respondent posted complete results of her election to the Board (40/40 Districts Reporting) from her Facebook account. This post stated:

> We won [two confetti emojis]

Respondent typed words above the results of her successful election to the Board:

> Thank you for all of your support [three confetti emojis]
>
> **See Exhibit 8 to Amended Complaint** (Ca276).

8. On November 4, 2022, two days after announcing her election to the Board, Respondent changed her public profile picture to contain the words:

> UNMASKED, UNVAXXED, UNAFRAID.
>
> **See Exhibit 10 to Amended Complaint** (Ca280).

This remained her profile photo while she was a sitting member of the Board. **See Exhibits 12 and 13 to Amended Complaint** (Ca284; Ca286).

9. On November 19, 2021, Respondent posted a picture of Kyle Rittenhouse, a vigilante who shot and killed protestors during civil

unrest over the police shooting of Jacob Blake, celebrating his "not guilty" verdict with the words: "Thank God for true justice [string of celebratory emojis]." (Ca290).

This post remained public well into Respondent's term as a sitting member of the Board. (Ca097-098) (March 17, 2022 Board Resolution formally requesting that Respondent remove "racist" Facebook post.)

10. Respondent was sworn in as a member of the Board on January 7, 2022. (Ca015).

11. On January 17, 2022, Respondent publicly shared a post from her Facebook account which compared the treatment of unvaccinated individuals to the treatment of Jews during the Holocaust. This post stated:

> DISCRIMINATION OF JEWS WAS ENFORCED BY CONVINCING THE PUBLIC THEY WERE SUPER SPREADERS
>
> **See Exhibit 13 to Amended Complaint** (Ca286; Ca129-131).

12. Respondent admitted that, "at the time [she] made the January 17, 2022 post that is the subject of Count 5 of the Complaint" which compared the treatment of Jews during WWII to the treatment of unvaccinated individuals, "some of [her] Facebook friends were members of the Central Regional School District community, including but not limited to parents, teachers, students, and staff." (Ca166 at Requests for Admission [RQA] 4; Ca169 at Response to RQA 4).

Respondent also admitted that, "[a]s a result of [her] campaigning for the Board from [her] personal Facebook account, and announcing that [she] won a seat on the Board from that account, some of [her] Facebook friends became aware that [she is] a member of the Board." (Ca166 at RQA 3; Ca169 at Response to RQA 3).

13. Also on January 17, 2022, Respondent publicly shared a post on Facebook urging school employees to form new labor unions to replace their existing unions:

> Finally, you have good numbers and your numbers will grow if the state or schools try to change the number of shots required. You should really consider forming new unions and organized labor actions, especially if you are in a district where you have real numbers.
>
> **See Exhibit 1 to Amended Complaint** (Ca260-261).

14. On February 10, 2022, Respondent publicly shared a Facebook post which stated:

> Are you a member of a union?
> [...]

> Are you against Gov. Murphy's radical Covid mandates?
> We NEED YOU at a roundtable discussion!
> [...]
> Invite union members to this roundtable to learn more about uniting against mandates.
>
> **See Exhibit 12 to Amended Complaint** (Ca284).

Above this posts, Respondent typed "Join in now."

15. On March 7, 2022, the day the New Jersey School Mask Mandate was lifted, Respondent posted to her public Facebook account an image of a child giving a thumbs up, with the text:

> ME LISTENING TO THE GOV TELL ME I CAN START DOING THINGS I NEVER STOPPED DOING IN THE FIRST PLACE.
>
> **See Exhibit 16 to Amended Complaint** (Ca292).

Above that image, Respondent wrote: "This is my kids today…. Bare faced the whole time."

16. On April 6, 2022, Respondent publicly posted a series of at least 7 posts and comments regarding what she perceives as the manner in which gender identity is taught in New Jersey schools. The main post, from which she made her numerous comments, states:

> "Do you know what you[r] children are being taught in NJ? Educate yourself and make changes in your district."

Beneath that comment, Borawski added a series of screenshots she claimed represented official guidance for New Jersey schools with regard to gender identity. **See Exhibit 17 to Amended Complaint** (Ca294-297). The documents Respondent shared were not reflective of the New Jersey Department of Education's (NJDOE) actual guidelines on the issue. That NJDOE Guidance was attached as Exhibit 21 to the Amended Complaint. (Ca306-371)

17. On April 9, 2022 Respondent posted to her public Facebook account a video which contained the banner "NJ TO TEACH 2ND GRADERS ON GENDER IDENTITY"

Above this video, Borawski wrote:

> There is a sick war on our children! But we have the power to stop it. It is my mission to put expose and end this.
>
> **See Exhibit 18 to Amended Complaint** (Ca299-300).

Below these words, Respondent posted a link to a website (Chaos and Control Substack) and added "visit and share the site below."

18. On April 11, 2022, Respondent publicly shared two Facebook posts which sought to elicit the public to call the Office of Governor Phil Murphy in order to oppose New Jersey Department of Education Learning Standards. **See Exhibit 19 to Amended Complaint** (Ca302-303).

19. On April 14, 2022, Respondent shared a post to her public Facebook account which states:

> Watch New Jersey's Conservative Congressman Jeff Van Drew blast Governor Phil Murphy and the Radical Left on their bizarre and absurd plans to teach children as young as 6 and 7 years old about 'gender ID' and 'gender change.'
>
> **See Exhibit 20 to Amended Complaint** (Ca305).

20. New Jersey's actual standards for the teaching of gender identity in schools were attached to the Amended Complaint at Exhibit 21. (Ca306-371). They contain no provision for the teaching of "gender change" or anything similar to 6 or 7 year olds. The Board's own policy on transgender students was also attached to the Amended Complaint as Exhibit 22. (Ca372-378).

21. With regard to the foregoing posts and comments regarding school standards and gender identity, Respondent gave the following response, which was in the record at the time the Commission's Final Decision was considered and issued:

> Counts 9, 10, 11, and 12 of the Amended Complaint contain your public statements in opposition to the inclusion of transgender students in New Jersey schools.
>
> ADMIT __X__ DENY ____
>
> (Ca168 at RQA 20; Ca171 at Response to RQA 20).

22. The Public Comment portions of the March 17, 2022 and April 28, 2022 Board meetings primarily consisted of students and parents expressing deep concern over Respondent's Facebook posts. (Ca107-109, Ca120-122). Many students and parents spoke about how Respondent's posts impacted their experience in the District. (Ca123-127) (*PATCH* Article: "Students and community members once again gathered Thursday to protest the social media posts of two Central Regional Board of Education Members."). There was even a protest outside the school on March 17, 2022. (Ca108) (Board minutes: "Ms. Miller stated that there was an organized protest outside the school").

23. In response to Respondent's January 17, 2022 Facebook posts which implored teachers to drop out of their unions – with which the Board

negotiates labor contracts – the Board issued a Resolution on March 7, 2022, stating that "the Board disavows any statements posted or attributed by any individual that is contrary to the" Workplace Democracy Enhancement Act. (Ca137).

24. As Respondent refused to take down her November 19, 2022 Kyle Rittenhouse Facebook post well into her membership as a sitting Board member, on March 17, 2022, a majority of the Board adopted a Resolution formally requesting that "Board Member Borawski" remove specific Facebook posts which the Board stated were "racist and/or biased against African-Americans." (Ca097-098).

25. On April 21, 2022, the Central Regional Education Association (CREA) and the New Jersey Education Association (NJEA) filed an Unfair Practice Charge against the Board before the New Jersey Public Employment Relations Commission, based specifically on Respondent's January 10, 2022 Facebook post telling teachers to drop out of the CREA and the NJEA. (Ca133-140). This post is the subject of Count 1 of the Complaint in this matter. (Ca136 at ¶7; Ca240-241Ca260-261, Ca382).

26. On April 28, 2022, members of the Central Regional School District Community again protested Respondent and her social media posts at a meeting of the Board. (Ca120-122). Respondent – and the Board itself – were asked to take accountability for Respondent's posts. (Ca121) ("Ms. Parker stated that it is disgusting and insane for not taking accountability"). Instead of taking accountability, Respondent grinned. (Ca120**)** (Board minutes: "Melissa Lugo stated stop with the grin while defending the posts.").

27. On April 29, 2022, news outlet *PATCH* posted an article by staff member Veronica Flesher, entitled "Central School Board OKs Social Media Policy After Racist Posts." (Ca121-127). This article stated that "Board members Merissa Borawski and Heather Koenig have been under fire since March for racist social media posts, copies of which have been shared throughout the community and sparked complaints at board meetings." (Ca124).

## LEGAL ARGUMENT

### I. STANDARD OF REVIEW

Appeals to the Appellate Division may be taken as of right to review final decisions or actions of any state administrative agency. N.J.C.R. 2:2-3(a)(2). A final agency decision has been described as one in which the agency communicates written notice of the finality of its decision. Silviera-Francisco v. Bd. of Educ. of City of

Elizabeth, 224 N.J. 126, 136 (2016) (citing Bouie v. N.J. Dep't of Cmty. Affairs, 407 N.J.Super. 518, 527, 972 A.2d 401 (App. Div.2009)).

The Court will uphold a final agency decision unless it is arbitrary, capricious, or unreasonable, unsupported by substantial credible evidence in the record as a whole, offensive to the federal or state constitution, or inconsistent with the administrative agency's statutory mission. See In re Stallworth, 208 N.J. 182, 194 (2011); Circus Liquors, Inc. v. Middletown Tp., 109 N.J. 1, 9-10 (2009); Hemsey v. Board of Trustees, PERS, 198 N.J. 215, 223 (2009).

In determining whether agency action is arbitrary, capricious, or unreasonable, a reviewing court will consider:

> (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of the legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Envtl. Prot., 101 N.J. 95, 103 (1985).

The Appellate Division will reverse the final order of an agency that is not supported by substantial credible evidence in the record as a whole. In re Stallworth, *supra*, 208 N.J. at 194. Where the agency has made certain findings of fact, the Appellate Court will consider whether the agency's findings could reasonably be reached, on sufficient credible evidence present in the record, considering the proofs as a whole. Jackson v. Concord Company, 54 N.J. 113, 117 (1969).

Appellate review of legal questions is *de novo*. L.A. Bd. of Educ. of Trenton, 221 N.J. 192, 204 (2015); Univ. Cottage Club of Princeton N.J. Corp. v. N.J. Dept. of Envtl. Prot., 191 N.J. 38, 48 (2007); In re Taylor, 158 N.J. 644, 656-58 (1999). While the Appellate Division will give weight to an agency's interpretation of a

statutory scheme, such interpretations need not be adopted where they are plainly unreasonable. In re Advisory Op. No 01-2008, 201 N.J. 254 (2010).

In passing the School Ethics Act (Act) into law, the Legislature found and declared:

> a. In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
>
> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them.
>
> N.J.S.A. 18A:12-22.

Subsection (e) of the Act's Code of Ethics for school board members states:

> e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.
>
> N.J.S.A. 18A:12-24.1(e)

## II. APPEAL OF FINAL AGENCY DECISION (Ca014-019)

### A. THE COMMISSION'S FINAL DECISION WAS UNSUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD AND MUST BE REVERSED (Ca014-019).

A reviewing Court may reverse the decision of an administrative agency where it is arbitrary, capricious, or unreasonable, or is not supported by substantial credible evidence in the record as a whole. See, e.g., Dennery v. Bd. of Educ. of Passaic Cty. Reg'l High Sch. Dist. No. 1, Passaic Cty., 131 N.J. 626, 641 (1993). In the present matter, the Commission's Final Decision was not supported by substantial credible evidence in the record. On the contrary, all evidence in the record directly contradicts the erroneous factual assumptions the Commission's Final Decision relied on.

Here, the Commission's decision to dismiss the Amended Complaint outright hinged squarely on the proposition that "there is an insufficient nexus between Respondent's personal Facebook page and her membership on the Board," based on the erroneous conclusion that "her Facebook page did not make any reference to the Board nor her membership on the same," and therefore a member of the public could not have interpreted her posts as speaking for the Board. (Ca017). This conclusion is directly contrary to abundant evidence in the record for at least 8 reasons:

- Respondent repeatedly campaigned for her seat on the Board from her Facebook account (Ca263, Ca265, Ca267-268, Ca270, Ca272, Ca274, Ca276);
- Respondent publicly posted from her Facebook account that she won her election and her seat on the Board (Ca274, Ca276);
- Within ten days of swearing in to the Board, Respondent made the posts that are the subject of Counts 1 and 5 of the Complaint (Ca240-241; Ca243);
- The school community protested Respondent and the Board as a direct result of Respondent's Facebook posts at meetings of the Board and in her role as Board member (Ca107-109, Ca120-122, Ca123-127);
- Respondent posted about issues that both dealt with Board matters and actually affected the Board (Ca017) ("the subject matter of the Facebook posts – State lawsuits related to union activity, vaccines and masking in schools, and gender identity standards – may relate to the business of the Board");
- The Board was subjected to litigation as a direct result of Respondent's public Facebook posts (Ca133-140);
- The Board passed two official Resolutions denouncing Respondent's public Facebook posts which contained no disclaimers (Ca097-098; Ca137); and
- Respondent admitted in discovery – as attached to Appellants' Motion for Summary Decision – that she actually compromised the Board by making the Facebook posts which were the subject of the underlying motion (Ca166 – RQAs 2, 3, 4, 6; Ca169 – Responses to RQAs 2, 3, 4, 6).

It was abundantly clear from evidence in the record before the Commission that Respondent had publicly campaigned for her seat on the Board from her Facebook

account, that she posted that she was a Board member, and – as the Commission even admits – that she was speaking on Board issues while a sitting Board member. (Ca263, Ca265, Ca267-268, Ca270, Ca272, Ca274, Ca276); (Ca017) ("the subject matter of the Facebook posts ... may relate to the business of the Board"). As a result, members of the Central Regional School District community protested the Board itself and Respondent in her role as Board member at meetings of the Board, as evidenced in Board minutes and news articles that were in the record at the time the Commission issued its Final Decision. (Ca107-109, Ca120-122, Ca123-127).

First, Respondent repeatedly campaigned for her seat on the Board from her Facebook account. Attached to the Amended Complaint was a series of posts Respondent Borawski made from her account which asked Central Regional School District community members to vote for her and her running mate Heather Koenig.[2] (Ca263, Ca265, Ca267-268, Ca270, Ca272, Ca274, Ca276). The Amended Complaint itself clearly stated that at the time each post was made, "Borawski's page was public as indicated by the earth-shaped symbol in the top left corner of the post, just below Borawski's name," that "Borawski Repeatedly used this Facebook account to campaign for her position on the Board (Exhibit 2, Exhibit 3, and Exhibit 4, Exhibit 5, Exhibit 6, and Exhibit 7) and posted election results when she won her Board position (Exhibit 8)," and that "Borawski held herself out as a member of the Central Regional Board of Education on her Facebook page." (Ca240-258).

Respondent shared a large banner from her Facebook page which contained the heading "Central Regional School Board, Berkeley Twp," and directly below this headline she solicited votes for "MERISSA BORAWSKI & HEATHER KOENIG."

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[2] Appellants filed a substantially similar Complaint against Central Regional Board of Education member Heather Koenig as a result of her social media use. That Complaint was also improperly dismissed by the Commission on August 22, 2023, and was appealed simultaneously (App. Div. No. A-000366-23T4).

(Ca265). She then shared another large banner which stated "MERISSA BORAWSKI HEATHER KOENIG CENTRAL REGIONAL BOARD OF EDUCATION" with the words "V.O.T.E. Merissa and Heather for Central B.O.E." (Ca267-268). She shared an endorsement she received from the website "chaosandcontrol.substack.com." (Ca272) (See fn10 of Appellants' Brief in Support of Summary Decision at Ca059 for details on the contents of this website). Respondent shared a Google Doc containing instructions for voting for candidates for board of education. (Ca263). She shared her election results twice and she announced that she had been elected to the Central Regional Board of Education. (Ca274, Ca276). As the Commission even admits, she then went on to speak from this same Facebook page on Board matters. (Ca017) ("the subject matter of the Facebook posts – State lawsuits related to union activity, vaccines and masking in schools, and gender identity standards – may relate to the business of the Board").

In fact, Respondent even admitted in her discovery admissions which were attached to Appellants' Motion for Summary Decision that she held herself out as a Board member on her Facebook page and that, in doing so, she actually compromised the Board:

- On November 2, 2021, you shared the results of your successful campaign for your seat on the Board from your personal Facebook account, which you controlled at the time.

  ADMIT __X__ DENY _____

- As a result of your campaigning for the Board from your personal Facebook account, and announcing that you won a seat on the Board from that account, some of your Facebook friends became aware that you are a member of the Board.

  ADMIT __X__ DENY _____

- At the time you made the January 17, 2022 post that is the subject of Count 5 of the Complaint, some of your Facebook friends were members of the Central Regional School District community, including but not limited to parents, teachers, students, and staff.

ADMIT __X__ DENY _____

- Your posts on Facebook have been the subject of criticism during the public comment portion of Board meetings during 2022.

  ADMIT __X__ DENY _____

  (Ca166 – RQA 2, 3, 4, 6; Ca169 – Responses to RQAs 2, 3, 4, 6.)

These admissions were specifically raised by Appellants in their Motion for Summary Decision. (Ca045, Ca053, Ca061). It was glaringly apparent from the record that Respondent held herself out as a member of the Board from her page. As a result, ALJ Belin found in her Initial Decision

- Count 1: "members of the public could interpret this [as a] request from the Central Regional Board of Education to fight the existing union structure. Indeed, the CREA and NJEA filed an unfair practice claim against the Board," which violated the Act because "the [Act] does not support a sitting Board member putting the school Board at risk of litigation." (Ca028-029).

- Count 5: Respondent's comparison of Jews who were "tortured and murdered" during the Holocaust "based upon a racist ideology" to "unvaccinated individuals" was "distasteful and reckless," and "resulted in public outcry from parents and students as evidenced by the board meeting minutes and newspaper articles." (Ca029).

- Counts 2, 4, and 8: "The point of these three postings is that the Governor overstepped his bounds in mandating vaccines and the public including school students should galvanize to take action against being vaccinated" and to flout "Executive Order 251" – New Jersey's School Mask Mandate in effect at the time. (Ca030-019). ALJ Belin stated "it is disconcerting that Borawski has encouraged adults and students, including her own children, to defy the laws of the State." (Ca030-032).

- Counts 9, 10, and 12: "These social [media] posts relate to Borawski's perspective and disagreement with how gender identity is taught in New Jersey." (Ca033). "What is problematic is not that Borawski disagrees with the proposed health education standards or that she opposes the inclusion of transgender students in New Jersey schools, but what is problematic is that she failed to include a clear disclaimer that the contents of the posting were her personal opinions and not expressed as a Board member. Without a clearly stated disclaimer, it would not be a stretch to consider that the transgender population and parents of transgender students may feel unwelcome by the Board." (Ca034). "The public outcry against Borawski's postings

> demonstrates that the public has lost confidence in the Board." (Ca034).

- "A board of education should not be put in a position of having to distance itself from the speech of its board members. Rather, school board members, like Borawski, are required under the [Act] to be responsible in ensuring their conduct does not have the potential to compromise the Board. Accordingly, I conclude that the complainants have met their burrden to demonstrate that Borawski violated N.J.S.A. 18A:12-24.1(e) and this charge is sustained." (Ca035-036).

ALJ Belin then found that these posts were "clearly example[s] of conduct that would cause Board members to lose the confidence and respect of the public and illustrates conduct that 'creates a justifiable impression among the public that such trust is being violated' within the contemplation of N.J.S.A. 18A:12-22(a)." (Ca034). Citing to the public outcry caused by these posts, and the Resolutions passed by the Board in order to "distance itself" from Respondent's posts (Ca034), ALJ Belin found that Respondent had violated the Act with regard to each and every Facebook post before her. (Ca023, Ca024, Ca033, Ca035). ALJ Belin filed her Initial Decision with the Commission on May 30, 2023.

Despite clear evidence that Respondent campaigned for her seat on the Board from her Facebook page, despite a clear announcement that she had won that election, despite Respondent's own admissions that she held herself out as a Board member on her Facebook page – and that she actually compromised the Board – and despite the Commission's own admission that Respondent was speaking on Board issues from this same page, the Commission still shockingly stated:

> In this matter, the Commission finds that, while the subject matter of the Facebook posts – State lawsuits related to union activity, vaccines and masking in schools, and gender identity standards – may relate to the business of the Board, there is an insufficient nexus between Respondent's personal Facebook page and her membership on the Board, such that a reasonable member of the public would not perceive that respondent is speaking pursuant to her official duties.

> The posts at issue do not mention Respondent's membership on the Board ***nor does she advertise or rely upon her board membership when publishing material on her social media page.*** In short, ***there is no factual evidence*** that the statements/posts on her Facebook account were made as a member of the Board, or had the appearance of being representative of, or attributable to the Board.
>
> [...]
>
> Respondent may have used her Facebook page to reach constituents in her campaign, ***but her Facebook page did not make any reference to the Board nor her membership on the same***

(Ca017) (emphasis added).

This assertion is directly contrary to abundant evidence in the record, it altogether ignores ALJ Belin's factual findings, and it is demonstrably factually incorrect. Respondent made repeated references to the Board and her Board membership. (Ca263, Ca265, Ca267-268, Ca270, Ca272, Ca274, Ca276). She also clearly posted that she won her election and became a member of the Board. (Ca274 276). She then used this same Facebook account to speak on Board issues (Ca017) in a way that caused the public to protest the Board itself (Ca107-109, Ca120-122, Ca123-127) and subjected the Board to litigation (Ca133-140). The Commission plainly got this issue wrong.

It is frankly absurd to say there is "no factual evidence" tying Respondent's Facebook account to her Board membership, and that her page "did not make any reference to the Board of her membership on same." (Ca017). She made repeated references to her Board membership. The Commission's finding to the contrary was, at the least, clear error, and was most certainly not supported by substantial evidence in the record at the time. Dennery, *supra*, 131 N.J. at 641.

Further, if there was truly no nexus between Respondent's Board membership and her Facebook page, as the Commission erroneously held, members of the Central Regional School District community would not have protested Respondent ***at***

***meetings of the Board***. It is unmistakably clear from the Board minutes and news articles that documented these protests against the Board and Respondent in response to her Facebook posts, that the community outcry was a result of the clear connection between her Board membership and her Facebook posts. (Ca107-109, Ca120-122, Ca123-127).

In fact, the news articles in the record clearly identified Respondent in her role as Board member and clearly showed that the public protested Respondent ***in her role as Board member at meetings of the Board as a result of her Facebook posts***. (Ca123-127) ("Students and community members once again gathered Thursday to protest the social media posts of two Central Regional board of Education members, again urging the district to take action"; "On Thursday, the school board was voting on a social media policy for board members that was introduced at the March 17 meeting, in response to the community's uproar over posts by both Koenig and Borawski.") Not only was there a justifiable impression that Respondent engaged in conduct which violated the public trust, the public itself actually stated that such public trust was violated – to the Board and Respondent in her role as Board member – at meetings of the Board.

What is more, in the record before the Commission was an Unfair Practice Charge filed against the Board on behalf of the CREA and the NJEA in direct response to the post that constituted Count 1 of the present matter, which told teachers to drop out of their unions. (Ca133-140). This post was made mere days after Respondent swore in as a member of the Board. (Ca240-241, Ca260-261). That is why ALJ Belin held:

> This filing constitutes litigation which is more than the "potential to compromise the board." To be sure, the Commission found in Persi v. Woska, C03-14 (C25-08 on remand), that a board member compromised the board of education through the board member's self-serving actions that put the board of education at risk of litigation and expending public funds to defend such

> actions. Respondent's discussion distinguishing Persi is unpersuasive. The [Act] does not support a sitting board member putting the school board at risk of litigation. Accordingly, I CONCLUDE that this Facebook posting compromised the Board.
>
> (Ca029).

In fact, in addition to litigation being filed against the Board as a result of the Facebook post that makes up Count 1, the Board passed a Resolution in response to Respondent's anti-union post, which stated in relevant part:

> NOW THEREFORE BE IT RESOLVED by the Central Regional School District Board of Education that the Board disavows any statements posted or attributed by an individual that is contrary to the WDEA.
>
> (Ca137).

At its very next meeting, ten days later, on March 17, 2022, the Board adopted another Resolution addressing Respondent's Facebook posts, stating specifically:

> **WHEREAS**, the Board finds it necessary and appropriate to adopt a social media policy for Board Members to ensure that the District has policy in place addressing the use of social media by individual Board Members; it is
> **NOW, THEREFORE RESOLVED**, that the Central Regional High School District Board of Education hereby adopts District Policy No. 0179 on an emergency basis, to be effective immediately upon adoption, and it is
> **BE IT FURTHER RESOLVED**, that, in accordance with District Policy, the Board formally requests Board Members Borawski and Koenig immediately remove the aforementioned social media posts.
>
> (Ca097-098).

As a result of foregoing, the Commission's contention that "her Facebook page did not make any reference to the Board nor her membership on same," and that, as a result, "there is no factual evidence that the statements/posts on her Facebook account were made as a member of the Board, or had the appearance of being representative of, or attributable to the Board" (Ca017), is directly contrary to abundant evidence in the record for at least the 8 reasons set out above.

As a result of at least these 8 reasons, the Commission's Final Decision and outright dismissal of the Complaint must be reversed as not being supported by substantial evidence in the record. Dennery, *supra*, 131 N.J. at 641 (1993).

### B. THE COMMISSION'S FINAL DECISION WAS CONTRARY TO A ROBUST BODY OF THE COMMISSION'S OWN CASELAW; WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE; AND WAS INCONSISTENT WITH THE COMMISSION'S STATUTORY MISSION (Ca014-019).

An appellate court will reverse an administrative agency decision that is arbitrary, capricious, unreasonable, or not supported by substantial credible evidence in the record as a whole. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). In determining whether agency action is arbitrary, capricious, or unreasonable, a reviewing court will consider:

> (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of the legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors.
>
> Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Envtl. Prot., 101 N.J. 95, 103 (1985).

Here, the Commission's August 22, 2023 Final Decision was arbitrary, capricious, unreasonable, and was directly contrary to a robust body of caselaw the Commission had already developed on this issue pursuant to its statutory mandate.

The School Ethics Commission was created by action of the Two Hundred Fourth Legislature of the State of New Jersey, as approved by the Governor of the State of New Jersey, and enshrined in the School Ethics Act as Public Law 1991, Chapter 393 during its Second Annual Session of the 1991 Legislative Session. In creating the School Ethics Commission, the Legislature found and declared:

> a. In our representative form of government it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
>
> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them.
>
> N.J.S.A. 18A:12-22.

In 2001, the School Ethics Act was amended to include the Code of Ethics that is the subject of this appeal. New Jersey Legislature, Bill A1755, Session 2000-2001, Approved P.L. 2001, c. 178, *available at* https://njleg.gov/bill-search/2000/A1755. The Code of Ethics, including N.J.S.A. 18A:12-24.1(e), which is specifically the subject of this appeal, was added to the School Ethics Act by a New Jersey Assembly vote of 69-0, and a New Jersey Senate vote of 35-0. Id. This bill was then signed into law on July 26, 2001 as Public Law, Chapter 178. Id. N.J.S.A.

As noted above, N.J.S.A. 18A:12-24.1(e) states:

> e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

As a result, the express legislative mission of the School Ethics Commission in this instance is to ensure that board members avoid conduct which creates a justifiable impression among the public that the public trust is being violated. N.J.S.A. 18A:12-22(a). The Legislature specifically tasked the Commission with doing so by mandating that it issue discipline in a "uniform" manner when a school board member takes action that may compromise the board. N.J.S.A. 18A:12-22(b); N.J.S.A. 18A:12-24.1(e).

Here it was unequivocal from the record before the Commission that Respondent engaged in conduct that created a justifiable impression among the public that the public trust was being violated, and that she did so by taking action which may have – and actually did – compromise the Board. This was plainly evidenced by news articles stating that she had compromised the Board, by Board minutes which showed that she had compromised the Board, and by two Board Resolutions which directly found that she had compromised the Board. (Ca097-098, Ca107-109, Ca120-122, Ca123-127).

As a result of this clear evidentiary record, ALJ Belin found in her Initial Decision, as to each Count before her, that Respondent's Facebook posts created a justifiable impression among the public that such trust is being violated within the contemplation of N.J.S.A.12-22(a). ALJ Belin reached this conclusion by reviewing the Commission's prior holdings directly on point with the present matter.

The Commission has clearly and unequivocally addressed school board member social media use in a robust body of caselaw it inexplicably ignored in deciding this matter below. In Melnyk v.Fiel, SEC Docket No. C64-18 ( 2019) (Ca433), cited by the parties and ALJ Belin (Ca031, Ca051-052), the Commission held:

> Although Respondent argues that the statements attributed to her by Complainant were not made in her capacity as a Board member, and do not relate to her Board membership or to Board actions, the Commission finds that the statements on her Facebook page are clearly linked to her Board membership (and candidacy). Respondent's Facebook page is clearly marked with the banner, "Re-Elect Maryann Fiel to the Highlands Elementary Board of Education," but does not appear to have a disclaimer noting that the statements are her own and unrelated to the Board. Thus, it is reasonable for a member of the public, such as Complainant, to perceive the statements as being made by Respondent in her capacity as a Board member.
> Id. at 4.

The School Ethics Commission in Melnyk went on to explain that such a disclaimer would need to be very prominent in order to counteract the presumption

that a school board member who holds themselves out as a board member on their personal social media page – by posting a campaign banner from that page – may be perceived as speaking from their official position:

> A prominent disclaimer (caps/bold), such as, "***THE FOLLOWING STATEMENTS ARE MADE IN MY CAPACITY AS A PRIVATE CITIZEN, AND NOT IN MY CAPACITY AS A BOARD MEMBER. THESE STATEMENTS ARE ALSO NOT REPRESENTATIVE OF THE BOARD OR ITS INDIVIDUAL MEMBERS, AND SOLELY REPRESENT MY OWN PERSONAL OPINIONS***," may have avoided the appearance – actual or perceived – that the statements were made in Respondent's capacity as a Board member. The Commission additionally notes that, even if an appropriate disclaimer is used, the substance of a post/statement can, nevertheless, render the disclaimer meaningless.
>
> Id. at n1 (emphasis in original).

It was undisputed that Respondent repeatedly campaigned for her seat on the Board from her Facebook page, including sharing multiple campaign banners precisely like the one in Melnyk. (Ca265) (banner containing heading "Central Regional School Board, Berkeley Twp,"soliciting votes for "MERISSA BORAWSKI & HEATHER KOENIG"); (Ca267-268) (banner stating "MERISSA BORAWSKI HEATHER KOENIG CENTRAL REGIONAL BOARD OF EDUCATION" and "V.O.T.E. Merissa and Heather for Central B.O.E"). It was also undisputed that Respondent failed to include any sort of disclaimer pursuant to Melnyk. (Ca028).

In fact, ALJ Belin directly addressed Respondent's failure to include a disclaimer no less than 6 times in her Initial Decision. (Ca028) ("It is undisputed that Borawski did not post a disclaimer"); (Ca030) ("failure to post a disclaimer"); (Ca031) ("a prominent disclaimer ... may have avoided the appearance ... that her statements ... were made in her capacity as Board member"); (Ca033) ("This admission underscores the need for a clear disclaimer to ensure that the public does not perceive that statements are being made ... in her capacity as a board member.") ("Failure to include a clear disclaimer"); (Ca034) ("... what is problematic is that she

failed to include a clear disclaimer"). This is because the Commission had already issued clear decisional law on this issue. ALJ Belin directly addressed this caselaw, stating:

> It is uncontested that Borawski is entitled to her personal views on any topic, however, a prominent disclaimer (caps/bold), such as "**THE FOLLOWING STATEMENTS ARE MADE IN MY CAPACITY AS A PRIVATE CITIZEN, AND NOT IN MY CAPACITY AS A BOARD MEMBER. THESE STATEMENTS ARE ALSO NOT REPRESENTATIVE OF THE BOARD OR ITS INDIVIDUAL MEMBERS, AND SOLELY REPRESENT MY OWN PERSONAL OPINIONS**," may avoid the appearance – actual or perceived– that the statements contained in respondent's social media posts were made in her capacity as a Board member. Donald G. Melnyk v. Maryann Fiel, Highlands Borough BOE, C64-18 (March 2019).
>
> (Ca031) (emphasis in original).

Further, in I/M/O Daniel Leonard, SEC Docket Nos. C56-19 and C57-19 (Consolidated) ( 2021) (Ca414), also cited by ALJ Belin, the Commission held:

> In finding a violation of N.J.S.A. 18A:12-24.1(e), ALJ Pelios appropriately concluded that Respondents action constituted "private action that may compromise the Board." In discussing the legislative intent for the School Ethics Act, ALJ Pelios properly highlighted that Board members "must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22(a). The Commission notes that board members do not surrender the rights that they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in Dunbar Bey v. Brown, Camden Board of Education, Camden County, Commission Docket No. C25-11 (Brown), and in light of the social media posts by Respondent, the Commission echoes its decision in Brown, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen." Brown at 7.
>
> [...]
>
> Further, the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." Id. at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the

> Board and compromised the Board's ability to engage with the public.
>
> I/M/O Leonard at 6.

The Legislature's mandate that the Commission uniformly uphold these standards for school board member social media use was also cited prior by the Commission itself in Advisory Opinion A03-07 (2007), as cited by ALJ Belin in her Initial Decision:

> the Legislature has established specific standards to guide the conduct of board members to ensure and preserve public confidence. See, N.J.S.A. 18A:12-22. These Standards, set forth at N.J.S.A. 18A:12-24 and N.J.S.A. 18A:12-24.1, must be applied by the Commission in determining whether a board member's conduct is allowable under the Act. As [relevant case law] demonstrate[s], there are times when a board member's expression of opinion is permissible under the Act and there are times when such conduct is not permissible. The Commission believes that the standards established by the Legislature do not sharply curtail a board member's First Amendment rights. Rather, the standards provide the commission with guidance in balancing a board member's rights as a private citizen with the interest of the Legislature in ensuring that a board member preserves public confidence and avoids conduct that would violate the public trust or create a justifiable impression among the public that such trust is being violated. See, N.J.S.A. 18A:12-22(a). Therefore, in exercising their rights as private citizens, board members must ensure that such activity does not violate these standards.
>
> (Ca032).

In fact, on February 25, 2022 – a mere ***six days*** before Appellants filed their Complaint with the Commission that is the subject of this appeal – the Commission issued Advisory Opinion A02-22 (2022) (Ca397). A02-22 unequivocally reiterates and reaffirms the Commission's guidance on social media use by school board members, stating clearly and directly:

> Since the advent of social media, the Commission has received numerous complaints about whether a Board member's speech, including posts on social media, violates the Act because the Board member either failed to disclaim, or insufficiently disclaimed, their speech. In a recent decision, which is informative here, the Commission stated:

> ... Now, more than a decade later, when the use of social media and online publications has become commonplace, prolific, pervasive, and often times divisive, and given that there has been a significant influx in the number of complaints filed with the Commission regarding use (or nonuse) of disclaimers in electronic publications (not just social media), ***it is now more crucial than ever to underscore and emphasize that when Board members want to speak as private citizens, they must include an appropriate disclaimer that makes the capacity in which they are speaking clear and unambiguous.*** In addition, even if an appropriate disclaimer is used, a school official must never negate the import of the disclaimer by proceeding, under the purported protection of the disclaimer, to discuss or comment on Board business or matters in a way that leads a member of the public to believe that the individual is speaking on behalf of, and as a representative of, the Board[...]
>
> People in your community are aware of your status as a Board member and would likely attribute any statements from you in your capacity as a Board member, and/or on behalf of the Board.
>
> Advisory Opinion A02-22 (2022) (Ca398-399) (citing I/M/O Treston, Randolph Board of Education, Commission Docket No. C71-18, at 12 [2021]) (emphasis added).

Published only six days prior to the filing of Appellants' Complaint before the Commission, this should have been the standard applied to the matter below.

ALJ Belin even cited to I/M/O Treston, Randolph Board of Education, Commission Docket No. C71-18 (2021) (Ca400), as affirmed by Advisory Opinion A02-22 (2022) above, in determining the appropriate penalty. (Ca037). As the Commission made clear in I/M/O Treston, "there is a robust body of decisions and advisory opinions which school officials can utilize to determine when, and how, a disclaimer must be used on social media when speaking in their personal/private capacity in order to avoid running afoul of the Act." Id at 9.

It is clear from this well-established body of caselaw that – pursuant to the Legislature's mandate in creating the Commission – there is an affirmative duty to disclaim when school board members make social media posts from an account they campaigned from which might otherwise compromise the board. This is especially

true where – as here – "[p]eople in [Respondent's] community are aware of [her] status as a Board member and would likely attribute any statement from [her] in [her] capacity as a Board member." Advisory Opinion A02-22 (2022) (Ca399). These cases were cited extensively by the parties and ALJ Belin as they are clearly the gold standard on this issue. However, this line of cases was inexplicably nowhere to be found in the Commission's analysis in the present matter.

Instead, the Commission relied on a case in which a school board member claimed that his Facebook account had been hacked and that he had not made the Facebook posts at all. (Ca017) (citing to Hodrinksky v. Faussette, SEC Docket No. C11-21 (2021)) (p.5 "... Respondent again maintains that his social media account was compromised/hacked, and denies that he ever made the comments or posted the information ...."). Notably, Hodrinsky was also decided on a motion to dismiss, not on a motion for summary decision, and is procedurally inapplicable to the present matter which was before the Commission. I/M/O Leonard, Melnyk, Brown, and Treston, *supra* – which actually address the precise issues that were before the Commission in this matter – were entirely ignored by the Commission as if they had never happened.

Though the Commission itself clearly and publicly reaffirmed this line of cases in Advisory Opinion A02-22 – ***a mere six days before the filing of the present Complaint*** – it arbitrarily applied an entirely different standard altogether in deciding this case. This was highly improper. Mary Carter Paint Co. v. Federal Trade Commission, 333 F.2d 654, 660 (1964) ("But the law does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another rule for Tuesday, a rule for general application, but denied outright in a specific case."); I/M/O Treston, Randolph Board of Education, Commission Docket No. C71-18 (2021) (Ca400) (p. 9 "there is a robust

body of decisions and advisory opinions which school officials can utilize to determine when, and how, a disclaimer must be used on social media when speaking in their personal/private capacity in order to avoid running afoul of the Act.")

Abandoning its carefully-developed and well-established caselaw on social media posts by school board members in this instance clearly violates the Legislature's mandate as set out in the Act:

> To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism ***to ensure uniform maintenance of those standards*** among them.
>
> N.J.S.A. 18A:12-22(b) (emphasis added).

The Commission was created with an express legislative purpose – to uniformly and consistently apply the Act to school board members. It failed to do so here.

As a result, it is clear that the Commission issued its August 22, 2023 Final Decision in this matter in an arbitrary, capricious, and unreasonable manner, and that it did so contrary to sufficient credible evidence in the record. That being the case, the Appellate Division must now reverse that decision.

### C. THE COMMISSION'S OUTRIGHT DISMISSAL OF APPELLANTS' AMENDED COMPLAINT IN ITS FINAL AGENCY DECISION WAS SO PROCEDURALLY FLAWED AS TO REQUIRE REVERSAL (Ca014-019).

No one sought the relief issued by the Commission in this matter. The legal issue before the Commission was whether to adopt, modify, or reject the Initial Decision of ALJ Belin. N.J.A.C. 1:1-18.6. ALJ Belin's Initial Decision had granted Appellants' Motion for Summary Decision. (Ca038).

Respondent did not cross-move for summary decision in her favor. As a result, "rejecting" the Initial Decision which granted summary decision in favor of

Appellants effectively denied Appellants' Motion for Summary Decision. If Appellants' Motion for Summary Decision was denied, the matter should have properly been sent back to the OAL for a hearing.[3] The Complaint should not have been dismissed outright. Doing so was procedurally improper. For that reason, this procedurally flawed decision should be reversed.

By both denying Appellants' Motion for Summary Decision and also denying an opportunity for an evidentiary hearing, the Commission has deprived Appellants of due process. See, e.g. Angus v. Board of Educ. of Borough of Metuchen, 475 N.J.Super. 362, 367 (App. Div. 2023) ("The standard governing agency determinations for summary decision under N.J.A.C. 1:1-12.5 is substantially the same as that governing motion under Rule 4:46-2 for summary judgment in civil litigation."); N.J.C.R. 4:46-2(c) ("The judgment or order ***sought*** shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that ***the moving party*** is entitled to judgment or order as a matter of law.") (emphasis added).

Put simply, there was no cross-motion for the Commission to rely on to dispose of this matter in favor of Respondent at the summary decision stage. Respondent failed to cross-move altogether, and never requested that the matter be dismissed or that summary decision be granted in her favor. No party to this matter sought the relief granted. This outright dismissal of the Amended Complaint was therefore

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[3] Appellants specifically stated in their Brief in Support of their Motion for Summary Decision that "in the event that this motion is denied or denied in part, [Appellants] request a full hearing as to any and all factual issues that require determination, or that Your Honor determines have not yet been sufficiently factually established." (Ca070).

procedurally improper at the summary decision state pursuant to Angus, *supra*, 45 N.J.Super. at 367 and N.J.C.R. 4:46-2(c).

Further, the Commission had already heard Respondent's Motion to Dismiss at an earlier stage in litigation. On August 23, 2022, based on Respondent's Motion to Dismiss in Lieu of an Answer, the Commission specifically determined that "Counts 1-2, Counts 4-5, and Counts 8-12 should not be dismissed" under its standard for complaint dismissal. (Ca213). In its decision on that Motion to Dismiss, the Commission specifically "denied" the motion as to Counts 1-2, Counts 4-5, and Counts 8-12 . (Ca214). Now, for reasons it has failed to articulate, the Commission has changed its mind and decided to *sua sponte* "dismiss" the Complaint outright. (Ca018) ("As such, the Commission dismisses the above-captioned matter"). The Commission essentially invented procedural grounds that did not exist to issue relief it was never asked to issue – converting a non-existent cross-motion from Respondent back into a Motion to Dismiss it had already heard and decided – and improperly dismissed the entire Amended Complaint in doing so.

Further, not only was there no cross-motion for summary decision filed by Respondent – meaning that no party to this matter ever sought the relief the Commission issued – but Respondent ***did not even file exceptions*** to ALJ Belin's Initial Decision, as is noted in the Commission's own decision. (Ca015) ("The parties did not file exceptions to the Initial Decision"). Respondent never even took issue with ALJ Belin's Initial Decision or the penalty of "censure" she applied. Quite frankly, it appears Respondent would have been happy to walk away from this litigation with a "censure" if the Commission had not gone rogue.

The Commission also improperly avoided statutorily required review by the Commissioner of Education by "dismissing" the Complaint and stating that this matter "is appealable only to the Superior Court-Appellate Division." (Ca018).

Despite "rejecting" ALJ Belin's Initial Decision, the Commission largely agreed with ALJ Belin's characterization of Respondent's social media posts. The Commission stated in its Final Decision:

> [The Commission] would be remiss if it did not address the divisive, inflammatory, and hostile nature of Respondent's public postings. Comparing the treatment of unvaccinated people to Jewish people, encouraging lawsuits against the State, and referring to the "sick war on our children" regarding gender identity teachings runs counter to the level of decorum expected from a publicly elected school official who is charged with serving New Jersey's student population.
>
> (Ca018).

The Commission further stated that "board members should recognize and refrain from inappropriate communications that have no place in the educational setting." (Ca018). As the body with the exclusive statutory mandate to issue uniform discipline when school board members engage in "divisive, inflammatory, and hostile" "communications that have no place in the educational setting," the Commission was required to issue a penalty and to refer that penalty to the Commissioner of Education for review. N.J.S.A. 18A:12-22.

The Commissioner of Education is the body with the statutory authority to review penalties under the Act. N.J.A.C. 6A:28-10.12 ("The Commissioner shall act upon the Commission's recommendation regarding the sanction pursuant to N.J.S.A. 18A:12-29(c)."); N.J.A.C. 6A:28-11.1 ("Any appeal of the Commission's determination regarding a violation of the Act shall be to the Commissioner in accordance with N.J.S.A. 6A:4."). By simultaneously rebuking Respondent for her Facebook posts and dismissing the Complaint altogether, and by stating that this matter "is appealable only to the Superior Court-Appellate Division" (Ca018), the Commission has improperly circumvented this statutorily required review.

As a result of the procedurally improper *sua sponte* dismissal of the Complaint without a cross-motion for summary decision having been filed by Respondent,

because Respondent did not even file exceptions to the Initial Decision, because the Commission had already clearly held that Counts 1-2, Counts 4-5, and Counts 8-12 should not be dismissed, and because the Commission improperly circumvented the Commissioner of Education's statutory review of penalty, the Commission's Final Decision must be reversed.

## III. APPEAL OF THE COMMISSION'S AUGUST 23, 2022 DECISION ON RESPONDENT'S MOTION TO DISMISS (Ca205-215)

In addition to appealing the Commission's August 22, 2023 Final Decision in this matter, Appellants now also appeal the Commission's August 23, 2022 Decision granting in part and denying in part Respondent's Motion to Dismiss. (Ca205-215). Pursuant to N.J.C.R. 2:2-3(b), final judgments, appealable as of right, "are judgments that finally resolve all issues as to all parties." As a result, the Commission's August 23, 2022 was not appealable as of right pursuant to N.J.C.R. 2:2-3(a)(2) until a Final Decision issued from the Commission as to all issues as to all parties. Accordingly, in filing their Motion for Summary Decision, Appellants expressly reserved the right to appeal the Commission's August 23, 2022 decision on Respondent's Motion to Dismiss pursuant to N.J.C.R. 2:2-3(a)(2) once a final order issued as to all claims as to all parties pursuant to N.J.C.R. 2:2-3(b). (Ca067-068). They do so now.

As noted above, a reviewing court may typically make three inquiries regarding decisions of state agencies: "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency bases its action; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Matter of Musick, 143 N.J. at 216 (1996). A reviewing court may reverse the decision of an administrative agency where "it is

arbitrary, capricious, or unreasonable or is not supported by substantial credible evidence in the record as a whole." Dennery v. Bd. of Educ. of Passaic Cty. Reg'l High Sch. Dist. No. 1, Passaic Cty., 131 N.J. 626, 641 (1993).

In determining whether to grant a Motion to Dismiss, "the [School Ethics] Commission shall review the facts in the light most favorable to the complainant and determine whether the allegation(s), if true, could establish a violation of the Act." N.J.A.C. 6A:28-8.3; See also Dolson v. Anastasia, 55 N.J. 2, 5 (1969) (dismissal on motion inappropriate if case supported by a scintilla of evidence).

Appellants pled violations of two provisions of the School Ethics Act in their Complaint: N.J.S.A. 18A:12-24.1(e) and (a).

N.J.S.A. 18A:12-24.1(a) states:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

N.J.S.A. 18A:12-24.1(e) states:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

On August 23, 2022, the School Ethics Commission dismissed Count 3 as to N.J.S.A. 18A:12-24.1(a) and (e) and dismissed Count 7 as to N.J.S.A. 18A:12-24.1 (e). **(**Ca213-214).

### A. THE COMMISSION ERRONEOUSLY DISMISSED COUNT 7, AS APPELLANTS REASONABLY RELIED ON AN ADVISORY OPINION OF THE COMMISSION (Ca067-068).

The Facebook post that is the subject of Count 7 was posted from Respondent's public Facebook account on November 19, 2021 – after she had already announced she won her seat on the Board. (Ca290). This post contained a picture of Kyle Rittenhouse, a vigilante who shot three men with an illegally possessed AR-15-style

rifle during civil unrest in Kenosha, Wisconsin in August of 2020, killing two of them. (A more detailed account of the record on this issue can be found at Ca237-239). The men Rittenhouse shot were protesting the shooting of a Black man – Jacob Blake – at the hands of police. Rittenhouse is closely associated with White Supremacy. (Ca238 at fn3 and fn4). The post that makes up Count 7 of the Amended Complaint celebrated the "not guilty" verdict at Rittenhouse's homicide trial, and contained the words "Thank God for true justice." (Ca290).

This is precisely the type of transparently racist Facebook post that the School Ethics Commission has repeatedly found to violate N.J.S.A. 18A:12-24.1(e) of the School Ethics Act. One of the many examples of this is found in I/M/O Daniel Leonard, SEC Docket Nos. C56-19 and C57-19 (Consolidated) (Nov. 16, 2021), in which the Commission held:

> Complainants alleged that on April 12, 2019, Respondent shared a Facebook post from the "Rant Nation with Graham Allen" site to his personal Facebook page. The shared post appears to link to a video purporting to show United States Representative Ilhan Omar. The post additionally contains a picture of Congresswoman Omar wearing a hijab – a head scarf worn by many Muslim women. In sharing the post, Respondent commented, "Terrorist ... 100%."
>
> [...]
>
> In finding a violation of N.J.S.A. 18A:12-24.1(e), ALJ Pelios appropriately concluded that Respondents action constituted "private action that may compromise the Board." In discussing the legislative intent for the School Ethics Act, ALJ Pelios properly highlighted that Board members "must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated." N.J.S.A. 18A:12-22(a). The Commission notes that board members do not surrender the rights that they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in Dunbar Bey v. Brown, Camden Board of Education, Camden County, Commission Docket No. C25-11 (Brown), and in light of the social media posts by Respondent, the Commission echoes its decision in Brown, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen."

> Brown at 7. In Brown, the Commission found that the respondent, a board of education member, violated the Code when he posted a message on his Facebook page ("Now if we could only do something about our local terrorists that destroy dreams and burn futures"), the Superintendent's photo came up as a result of the post, and he did not remove it. Further, the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." Id. at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the Board and compromised the Board's ability to engage with the public. As ALJ Pelios discussed, Respondent's post had the potential to discourage members of the public, namely members of the Muslim community, to engage with the Board "given what may seem to be an apparent bias." As such, ALJ Pelios' determination is entirely appropriate.
>
> Id. at 1, 6.

Nonetheless, the Commission broke with this precedent and dismissed the transparently racist post that constitutes Count 7 in the present matter, claiming it lacked jurisdiction over this post. (Ca213-214). In doing so, the Commission directly contradicted an Advisory Opinion it publicly issued in 2018 which clearly stated that it has jurisdiction over newly elected school board members who have not yet been seated. Advisory Opinion 36-17 (2018)[4] states in relevant part:

> Similar to all other newly elected, as well as currently seated, Board members, this Board member is bound by and charged with understanding and complying with the ethical standards set forth in the Act.
>
> (Ca213).

In its August 23, 2022 decision, the Commission attempted to claim that its earlier Advisory Opinion, which specifically stated that newly elected board members are bound by the Act, only stood for the proposition that school board members are bound by the Act once they swear in. (Ca214). That is not what Advisory Opinion 36-17 (2018) says. It says that "***newly elected, as well as currently seated Board***

[4] https://www.nj.gov/education/legal/ethics/advisory/cat1/A36-17.pdf

***members*** ... [are] bound by and charged with understanding and complying with the ethical standards set forth in the Act." (Ca236-239). In fact, a review of that Advisory Opinion reveals that the school board member at issue had not yet been seated, but was still told by the Commission that he was subject to the Act. ("You inform the Commission that [the board member at issue is] a newly elected Board member (November 2017)"). The Commission never allowed Appellants in the present matter to be heard on this abandonment of its prior jurisdiction, on which Appellants expressly relied.

By abandoning its own jurisdictional holding, which was reasonably relied on by Appellants, the Commission has denied Appellants due process and the right to be heard on this issue. The minimum requirements of due process are notice and the opportunity to be heard. Cleveland Bd. of Educ. v. Loudermill 470 U.S. 532, 533 (1985); Nicoletta v. N. Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 165 (1978). In fact, the New Jersey Supreme Court explicitly held in Silviera-Francisco v. Bd. of Educ. Of City of Elizabeth, 224 N.J. 126 (2016), that:

> Notice and an opportunity to respond to an issue raised by a party or a court are fundamental elements of due process and a fair hearing. Mettinger v. Globe Slicing Mach. Co., 153 N.J. 371, 389, 709 A.2d 779 (1998). ***Therefore, a court that recognizes a jurisdictional defect should notify the parties and permit them to address the issue of the court's jurisdiction***. N.J. Office of Emp. Relations v. Commc'n Workers of Am., 154 N.J. 98, 108, 711 A.2d 300 (1998).
>
> Id. at 141 (emphasis added).

Here, Appellants had no notice of the Commission's abandonment of its prior holding as to what point in time jurisdiction over school board members is triggered under the School Ethics Act. As a result, Appellants had no opportunity to be heard on the matter. By the Court's holding in Silviera-Francisco, this violated their right to due process.

As Appellants argued in their Opposition to Respondent's Motion to Dismiss:

> Importantly, the Commission has already addressed the issue of "newly elected" Board members and whether they are subject to the School Ethics Act, specifically defining "newly elected" Board members in N.J.A.C. 6A:28-1.2, and stating in Advisory Opinion 36-17 (Jan. 3, 2018) that:
>
> > Similar to all other newly elected, as well as currently seated, Board members, this Board member is bound by and charged with understanding and complying with the ethical standards set forth in the Act.
> >
> > https://www.nj.gov/education/legal/ethics/advisory/cat1/A36-17.pdf

(Ca236).

As the Advisory Opinion on this issue was unquestionably clear, and as Appellants had every reason to rely on the Commission's outlining of its own jurisdiction, it was unnecessary to point out what is obvious from the record: that the post that is the subject of Count 7 ***was still public and available well into Respondent's term as a Board member***. (Ca290; Ca097-098). Respondent had been sworn in for weeks while this transparently racist post was still up and public. Leaving this post up while she was a sitting Board member is a reason members of the public protested the Board. Hence the Board itself passed a Resolution in March – months after she was sworn in – requesting that she remove it. (Ca097-098) This Resolution was attached to Appellants' Opposition Brief and was in the record when the School Ethics Commission decided the Motion to Dismiss. Id.

As stated in the Board's Resolution from March 17, 2022:

> **WHEREAS**, the Board has been recently made aware of certain social media postings which have been made by and/or attributed to certain individual Board members which are viewed by many – including the Board – to convey sentiments and/or messages which are racist and/or biased against African Americans.
>
> [...]
>
> **BE IT FURTHER RESOLVED**, that, in accordance with District Policy, the Board formally requests Board Members Borawski and

Koenig immediately remove the aforementioned social media posts. (Ca097-098).

This Resolution was a direct reaction to the public outcry that ensued once Respondent took her seat and did not delete this reprehensible post, among others. The record is replete with the community outrage directed at the Board which was caused by Respondent's racist Facebook posts. (Ca097-098) (March 17, 2022 Board Resolution: "the Board has been recently made aware of certain social media postings which have been made by and/or attributed to certain individual Board members which are viewed by many – including the Board – to convey sentiments and/or messages which are racist and/or biased against African Americans"); (Ca107-109) (Minutes of March 17, 2022 Board Meeting: public comment section filled with school community members addressing Respondent's racist posts); (Ca120-121) (Minutes of April 28, 2022 Board meeting: public comment section filled with school community members addressing Respondent's racist posts); (Ca122-127) (*PATCH* Article: "Central Regional Board OKs Social Media Policy After Racist Posts").

By this holding, the Commission implies, for example, that if an elected school board member holds up a sign that says "Black Lives Don't Matter," is then sworn in while holding that sign, and then continues to hold that sign up while a seated board member at a meeting of the board, the Commission would have no jurisdiction to hear the matter because the conduct began prior to that board member swearing in. This is an absurd result that is contrary to public policy.

Appellants relied on Advisory Opinion 36-17 (2018) which clearly states "***newly elected, as well as currently seated Board members*** ... [are] bound by and charged with understanding and complying with the ethical standards set forth in the Act." (Ca236-239). The Commission failed to abide its prior jurisdictional holding without giving Appellants notice or an opportunity to be heard on this issue. The

Commission also ignored clear evidence in the record that plainly cured this jurisdictional issue by showing that this noxious post ***was still public and available well into Respondent's term as a Board member***, and actually compromised the Board. (Ca290; Ca097-098).

That being the case, Appellants respectfully request that the Appellate Division reverse the Commission's dismissal of Count 7 as to N.J.S.A. 18A:12-24.1(e).

### B. THE COMMISSION ERRONEOUSLY DISMISSED COUNT 3 BASED ON FACTS NOT IN THE RECORD AND OTHER PURPORTED FACTS CONTRADICTED BY THE UNCONTESTED RECORD (Ca206-215).

In determining whether to grant a Motion to Dismiss, "the [School Ethics] Commission shall review the facts in the light most favorable to the complainant and determine whether the allegation(s), if true, could establish a violation of the Act." N.J.A.C. 6A:28-8.3; See also Dolson v. Anastasia, 55 N.J. 2, 5 (1969) (dismissal on motion inappropriate if case supported by a scintilla of evidence). The Commission erred by doing precisely the opposite with regard to dismissing Count 3, by not only viewing facts in the light most favorable to the party moving for dismissal, but also by inserting facts into its Decision that were not in the record at all, and which are actually contradicted by the record. Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974) (factual findings inconsistent with the evidentiary record not to be relied upon).

At the time Respondent refused to wear a mask at multiple meetings of the Board, New Jersey Executive Order 251 (2021) (EO 251) was in place, which stated:

> 1. All public, private, and parochial preschool programs and elementary and secondary schools, including charter and renaissance schools (collectively "school districts"), must maintain a policy regarding mandatory use of face masks by staff, students, and visitors in the indoor portion of the school district premises
> [...]

> 4. It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Order, and to cooperate fully with any Administrative Orders issued pursuant to this Order.
>
> https://nj.gov/infobank/eo/056murphy/pdf/EO-251.pdf

As was clearly pled, "Executive Order 251 was in effect as of that date and therefore Merissa Borawski should have been masked when she attended and performed her duties as a board of education member in a Central Regional school building." (Ca242).

In fact, it is impossible to refute the claim that the Commission's decision to dismiss Counts 3 was premature in light of Respondent's own admissions in discovery. She admitted she broke the law and made clear her reason why:

- You have refused to wear a mask at meetings of the Board, including but not limited to the January 6, 2022 meeting of the Board.

  ADMIT __X__ DENY _____

- You have refused to wear a mask at meetings of the Board, including but not limited to the January 20, 2022 meeting of the Board.

  ADMIT __X__ DENY _____

  (Ca167 – RQAs 8, 9; Ca169-170 – Responses to RQAs 8, 9)

The Complaint was also specifically amended to incorporate Exhibit 16, a meme of a child giving a sarcastic thumbs up on the day EO 251 lifted, with the words "ME LISTENING TO THE GOV TELL ME I CAN START DOING THINGS I NEVER STOPPED DOING IN THE FIRST PLACE." (Ca292). Attached to the Amended Complaint was also Exhibit 12, in which Respondent posted that "teachers"

who are "against Gov. Murphy's radical covid mandates" should rise up together to flout those mandates. (Ca284). During the times she made the relevant posts her profile picture contained the words "UNMASKED UNVAXED UNAFRAID." (Ca280). Her campaign poster – attached to the Amended Complaint – indicated that she is opposed to "mask mandates." (Ca285). She had even attended prior meetings of the Board, such as the August 20, 2021 meeting of the Board, stating "that she has the right to refuse the masks and her children will not be coming to school with masks," and "she stated again that her children will not be coming to school with a mask," while threatening the Board itself with a lawsuit. (Ca187). Her conspiracy theory laden reasoning also shook out in discovery, a sure sign dismissal was premature, with Respondent typing out the words "there is endless medical literature that discusses ... the side effects of masking. Far too many to list." (Ca156 at Response to ROG 12). This is obviously untrue.

Respondent very publicly broke the law and encouraged others to do the same based on false information that she repeatedly propagated. ALJ Belin even held, in her later decision on the Motion for Summary Decision, that:

> Executive Order 251 directed all schools to develop policies requiring mandatory use of masks by staff, students, and visitors in the indoor portion of the school premises during the pandemic. The Executive Order, issued under the powers of the Governor, hold the weight of law. School board members qualify as "visitors" under the Executive Order 251. There was no need to specifically enumerate them as a separate category and thus, contrary to respondent's belief, the mask requirement applied to her. It is disconcerting that Borawski has encouraged adults and students, including her own children, to defy the laws of the state. This conduct does not conform with "faithfully, impartially, and justly" performing all the duties of a school board member.
>
> (Ca031-032).

Yet, the Commission did not even take into account the fact that Respondent clearly and purposefully broke the law as pled. Instead, the Commission invented a fact not in the record with regard to Count 3 – that "Respondent made a ***personal***

***decision*** not to wear a mask during a public Board meeting (and during an ongoing health emergency)" (Ca213). There is nothing "personal" about publicly and vocally breaking the law while dressed in the trappings of public office and urging others to do the same.

It is abundantly clear from the record and the facts as alleged by Appellants – which are to be viewed most favorably to Appellants on a Motion to Dismiss – that Respondent's decision to flout Executive Order 251was not simply personal. Nor did Respondent assert anywhere in the record that her decision to knowingly and publicly break the law while dressed in the trappings of public office was a "personal decision." This assertion appears nowhere but the Commission's August 23, 2022 Decision itself, and therefore Appellants had no opportunity to address it. By adding this fact to its decision, the Commission found a fact not in the record and heavily weighed it in favor of the party moving for dismissal. This is precisely the opposite role the Commission is tasked with in deciding a Motion to Dismiss. Brill v. Guardian Life Ins., *supra* 142 N.J. at 540 (1995).

Respondent made conscious decisions to break the law while a sitting Board member at meetings of the Board. Enforcing uniform disciplinary action when Board members purposely and consciously break laws relating to schools while sitting in their official position at a Board meeting is precisely what the Legislature created the Commission to do. N.J.S.A. 18A:12-22; N.J.S.A. 18A:12-24.1(a), (e). Again, on a motion to dismiss, all facts are to be viewed in the light most favorable to the non-moving party. N.J.A.C. 6A:28-8.3. That was clearly not the standard applied here. This decision was clearly arbitrary, capricious, and unreasonable.

That being the case, Appellants respectfully request that the Appellate Division reverse the Commission's dismissal of Count 3 as to N.J.S.A. 18A:12-24.1(a) and (e).

## CONCLUSION

For all the reasons above, Appellants respectfully request that the Appellate Division issue an order:

1. School Ethics Commission's August 22, 2023 Final Decision
   a. Reversing the School Ethics Commission's August 22, 2023 Final Agency Decision;
   b. Finding that Respondent violated N.J.S.A. 18A:12-24.1(e) with regard to Counts 1, 2, 4, 5, 8, 9, 10, 11, and 12 of the Amended Complaint; and
   c. Reinstating the penalty of "censure."
2. School Ethics Commission's August 23, 2022 Decision on Respondent's Motion to Dismiss in Lieu of an Answer
   a. Reversing the School Ethics Commission's August 23, 2022 dismissal of Count 7 as to N.J.S.A. 18A:12-24.1(e);
   b. Reversing the School Ethics Commission's August 23, 2022 dismissal of Count 3 as to N.J.S.A. 18A:12-24.1 (a) and (e); and
   c. Reinstating Counts 3 and 7 of the Amended Complaint for further proceeding before the Office of Administrative Law.

Respectfully submitted,
SELIKOFF & COHEN, P.A.
*Attorney for Appellants*

DATED: April 16, 2024

BY: Daniel R. Dowdy

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**We are a paperless office. Send documents to appropriate email.**

REPLY TO MORRISTOWN

June 21, 2024

Joseph H. Orlando, Esq.
Clerk, Superior Court of New Jersey,
Appellate Division
P.O. Box 006
Hughes Justice Complex
Trenton, NJ 08625-006

Re: **RONALD DONNERSTAG, KRISTI LANKO, LISA SNIDER, WENDY VACANTE, MATHEW DELPRETE, PATRICA FORTUS, JAIME CESTARE, SCOTT ALFANO, and LYNNE SWEEZO, Complaints-Appellants v. MERISSA BORAWSKI and CENTRAL REGIONAL BOARD OF EDUCATION, OCEAN COUNTY, Respondents-Respondents**
Superior Court of New Jersey, Appellate Division
Docket No. A-000367-23T4

**CIVIL ACTION**

On Appeal From:
THE FINAL JUDGMENT OF
THE SCHOOL ETHICS COMMISSION
Docket No. C20-22

**LETTER-BRIEF AND APPENDIX ON BEHALF OF RESPONDENT-RESPONDENT, MERISSA BORAWSKI**

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Dear Mr. Orlando:

Please accept this letter brief on behalf of Respondent-Respondent Merissa Borawski ("Respondent").

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## PROCEDURAL HISTORY

This action was initiated March 3, 2022 with the filing of complaint ("the complaint") on behalf of Complainants/Appellants Ronald Donnerstag, Wendy Vacante, Jaime Cestare, Krisin Lanko, Matthew Delprete, Scott Alfano, Lisa Snider, Patricia Fortus and Lynne Sweezo (collectively "Complainants") against Respondent Merissa Borawski ("Respondent") with the School Ethics Commission ("Commission"). Ca370-Ca396.[1] Complainants subsequently filed an amended complaint. (Ca240-Ca378).

On April 11, 2020, Respondent filed a Motion to Dismiss the Complaint in Lieu of an Answer. Ra14-Ra15. Complainants opposed the motion. Ra5. The Commission issued on Decision on Motion to Dismiss ("the Decision") dated August 23, 2022. Da205-Da215. In the Decision, the Commission partially granted Respondent's motion by dismissing Complainant's allegation in Counts 1-4 and 8-12 that Respondent violated *N.J.S.A.* 18A:12-24(a) and dismissed Counts 3, 6 and 7 in their entirety. Ca214-Ca215. The Decision also directed Respondent to file an answer to Counts 1-2, 4-5 and 8-12 of the complaint and referred the matter to the Office of Administrative Law (OAL) Ca214.

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[1] The following references to Complainants' appellate brief the appendices of the parties will be used in this brief:

"Cb" to designate Complainants' brief;
"Ca" to designate Complainants' appendix;
"Ra" to designated Respondents appendix.

Complainants moved for leave to appeal from the Decision to the Commissioner of Education and Respondent cross-moved for leave to appeal (Ra9). The Acting Commissioner denied the motions. Ca83.

On October 9, 2022, Respondent filed an answer to the complaint and filed an amended answer to the complaint on January 3, 2023. Ca203-204; 201-201.

On February 24, 2023 Complainants filed a Motion for Summary Decision with the OAL. (Ca71-Ca200). Respondent opposed the motion. Ra12. On June 9, 2023, the Hon. Kim C. Belin, A.L.J. issued an Initial Decision . Ca20-Ca39. Judge Belin granted Complainants Motion For Summary Decision and found that censure is the appropriate sanction, subject to review by the Commission. Ca38.

On August 22, 2023, the Commission issued its Final Decision. Ca14-Ca19. It rejected Judge Balin's Initial Decision and dismissed this matter. (Ca18, Ca19). The Final Decision stated that it was a final agency decision appealable to the Appellate Division. Ca18.

Complainants have filed an appeal of the Commission's decisions to the Court. Ca1-Ca13.

## STATEMENT OF FACTS

Respondent was sworn in as a member of the Central Region Board of Education, Ocean County ("the Board") on January 7, 2022. Ca2. Approximately two months later, on March 2, 2022, Complainants filed a complaint with the

Commission alleging that Respondent violated the School Ethics Act. Ca379-Ca396. Complainants subsequently amended their complaint. Ca240-Ca378.

Count 1 of the amended complaint relates to January 17, 2022 Facebook post in Respondent shared and agreed with another post that Complainants describe being "anti-union, anti-vaccination and anti-testing." Ca240-241. Complainants allege that the post "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public" and that Respondent "held herself out as a member of" the Board on her Facebook page. Ca241.

Count 2 of the amended complaint relates to what Complainants describe as "anti-vaccine" Facebook posts by Respondent which Complainants allege that the posts "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public." Ca241-Ca242 . They also allege that Respondent "held herself out as a member of" the Board on her Facebook page. Ca241.

Count 3 of the amended complaint relates to Respondent's attendance at a January 22, 2022 meeting of the Board without wearing a mask while performing her duties as a member of Board. Ca242. Complainants allege that Respondent's actions "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public." Ca242. They also state that Respondent

swore to uphold and enforce all laws, rules and regulations of the State Board of Education relating to schools. Ca242.

Count 4 of the amended complaint relates to what Complainants describe as "anti-school masking, anti-vaccination, and anti-testing requirements" Facebook post. Ca242. Complainants allege that the post "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public" and that Respondent "held herself out as a member of" the Board on her Facebook page. Ca242.

Count 5 of the amended complaint relates to what Complainants describe as a Facebook page that "compares the treatment of unvaccinated individuals to the treatment of the Jewish people during the Holocaust." Ca243. Complainants allege that the post "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public" and that Respondent "held herself out as a member of" the Board on her Facebook page. Ca243.

Count 6 of the amended complaint relates to what Complainants describe as "anti-vaccination" Facebook post. Ca243. Complainants allege that the post "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public" and that Respondent "held herself out as a member of" the Board on her Facebook page. Ca243.

Count 7 of the amended complaint relates to what Complainants describe as "politically charged post" by Respondent which "praises" the acquittal of Kyle

Rittenhouse. Ca244. Complainants allege that the post "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public" and that Respondent "held herself out as a member of" the Board on her Facebook page. Ca244.

Count 8 of the amended complaint relates to what Complainants describe as "anti-mask mandate post" featuring the image of a child who is not wearing a mask. Ca244-Ca245. Complainants allege that the post "admits that she [i.e. Respondent] influenced her kids to flout New Jersey school mask mandate the entire time the mask mandate was in place. . . " Ca245. Complainants allege that the post "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public" and that Respondent "held herself out as a member of" the Board on her Facebook page. Ca245.

Count 9 through 12 of the amended complaint relates to Respondent's posts regarding sex education including criticism what "she perceives to be as the way gender identity is taught in New Jersey schools." Ca245-Ca249. Complainants allege that Respondent's actions "could be reasonably be seen as compromising the Board and as speaking for the Board as a member of the public" and that Respondent "held herself out as a member of" the Board on her Facebook page. Ca246, Ca247, Ca248.

In response to Respondent's Motion to Dismiss in Lieu of an Answer (Ra14-Ra15), the Commission found:

1. No legal authority supported Complainant's claim that Respondent's conduct alleged in Counts 1-4 and 8-12 of the complaint violated *N.J.S.A.* 18A:12-24.1(a). Ca171;
2. As of Count 3, Respondent's decision not to wear a mask at a board meeting was a "personal decision" which was unrelated to her duties as a board member and could not have compromised the Board. Ca213;
3. As to Counts 6 and 7, the Facebook post in question was posted prior to the time that Respondent was sworn in as a member of the Board and thus the COMMISSION was bound to dismiss these counts. Ca213-Ca214.

Accordingly, the COMMISSION dismissed the allegation in Count 1-4 and 8-12 that Respondent violated *N.J.S.A.* 18A:12-24(a) and dismissed Counts 3, 6 and in their entirety. Ca214.

In her May 30, 2023 Initial Decision, the Hon. Kim C. Belin, A.L.J. granted Complainants Motion For Summary Decision, that censure was the appropriate sanction Ca38.

In its Final decision, the Commission ruled that Respondent's Facebook posts regarding opting out of the union and masking in school "may relate to the business of the Board" but there is an insufficient nexus between Respondent's personal Facebook page and her membership on the Board such that a reasonable member of

the public would not perceive that respondent is speaking pursuant to her official duties. Ca17. It noted that the Facebook posts do no mention Respondent's membership on the Board and there is no evidence that the posts were made in her capacity as a member of the Board or "had the appearance of being representative, attributive to the Board. Ca17. The Commission rejected the notion that, the fact that Respondent used her Facebook page in her campaign, does not render her posts as being made in official capacity. Ca17.

Finally, while the Commission acknowledged that Respondents posts were divisive, inflammatory and hostile" it state that:

> . . . [H]ow school officials conduct themselves outside of the scope of their duties as school officials is best address at the time of election. It is the public, not the Commission, who ultimately decides which individuals in their community are best suited to serve their students.

Ca18.

## LEGAL ARGUMENT

### POINT I

### APPELLANTS'INITIATION OF AND CONTINUED PROCOMMISSIONUTION OF THESE PROCEEDINGS ARE, AS THE COMMISSION SUGGESTED, APPELLANTS' ATTEMPT TO OBTAIN THROUGH LITIGATION SUPPORT APPELLANTS COULD NOT OBTAIN AT THE BALLOT BOX AND TO CURTAIL RESPONDENT'S FIRST AMENDMENT RIGHTS.

At the outset, it is respectfully submitted that the Court must view this action in context. It is obvious that Appellants have initiated and continued these proceedings because they disagree with Respondent's views. If Respondent's views make her unsuitable to serve as a member of the Board, the remedy lies in the election process, not in proceedings before the Commission. In its Final Decision, the Commission correctly grasped this reality.

Moreover, in attempting to punish Respondent for expressing her views, Complainants seek to infringe on her First Amendment rights. As the United States Supreme Court has recently reiterated, school personnel do not ""shed their constitutional rights to freedom of speech or expression at the schoolhouse

### POINT II

### THE COMMISION'S FINAL DECISION WAS SUPPORTED BY SUBSTANTAL CREDIBLE EVIDENCE.

The decision of an administrative agency will be reversed by a reviewing court only when the agency's decision is arbitrary, capricious, unreasonable or not

supported by substantial credible evidence in the record as a whole. *Dennery v. Bd. of Educ. of Passaic Cty. Regional High Sch.,* 131 N.J. 626, 641 (1993), *Henry v. Rahway State Prison,* 81 N.J. 571,580 (1980). Appellants have acknowledged this narrow scope of judicial review of decisions of administrative agencies. Complainants argue that the Commission's Final Decision was not supported by substantial credible evidence. They take issue with the Commission's finding that there was "an insufficient nexus" between Respondent's Facebooks posts and her membership on the Board, focusing on what they argue is the "erroneous conclusion "that Respondent's Facebook posts make no reference to her membership on the Board. This proposition must be rejected because there is simply no evidence, anywhere in the record, that Respondent held herself out or even held her Facebook account out as something speaking for the Board. In fact, other than a photo of her being sworn in and the posting of the election results, there are no posts that in any way suggest that the poster is a Board member. Respondent does not lose her right to speak as a member of the public merely because she was elected to the Board. Complainants stress that Respondent held herself as a member of the Board in all her Facebook posts based on the fact that she campaigned for the Board and she posted pictures of her swearing in as Board member. These contentions must be rejected. As to the campaigning, it defies logic that Respondent held herself out as a member of the Board based on postings that predate her election to the Board.

Next, Complainants contend that, by responses to requests for admissions,

Respondent admits that she held herself out as a member of the Board, yet none of the responses cited by Complainants contain such an admission. Complainants also emphasize what they describe as the "community's uproar" over Respondent's Facebook's posts but public dissatisfaction with the posts does not establish that Respondent held herself out in a member of the Board. In facts, it is questionable whether the evidence that the evidence presented by Complainants actually establish that there was such an "uproar." The minutes of meetings of the Board presented by Complainants include only sporadic complaints about the Facebook posts and the accounts in news articles are simply the perspective of the author of that article. In sum, since there is no evidence that Respondent held herself out as a member of the Board in her Facebook posts, the Commission's finding that there was not a substantial nexus between the posts and her membership on the Board was supported by credible evidence.

## POINT III

## THE COMMISSION'S FINAL DECISION WAS NOT INCONSISTANT WITH ITS STATUTORY MISSION.

Appellants quote *N.JS.A.* 18A:12-22 for the proposition that the Commission was created to ensure public confidence and trust in school board members and school officials. They argue that Respondent's conduct created an impression that the public trust was being violated and compromised the Board. As discussed in POINT II above, however, Respondent did not hold herself out as a member of the

Board in her controversial Facebook posts. Therefore, her posts did not undermine public confidence in the Board or compromise it.

Appellants further contend that a violation of public trust is evidenced by minutes of meetings of the Board, news articles and two resolutions of the Board. As discussed above, however, the meeting minutes include only sporadic complaints about the Facebook posts and the mere fact that the media posted an article does not just mean it speaks for the entire electorate when it does so.

Appellants make much ado about how the public "could" have interpreted the posts at issue. (Cb16). The Commission rightfully found it is not about what "could be" perceived, it is about what the reasonable reader would perceive, and the Commission rightfully found an insufficient nexus in Appellant's claims.

## POINT IV

## THE COMMISSION DID NOT ERR IN DISMISSING THE COMPLAINT BASED ON THE FACT THAT RESPONDENT'S FACEBOOK POSTS CONTAINED NO DISCLAIMERS.

Appellants make much ado about the fact that Respondent's Facebook posts do not contain disclaimers that makes clear that the contents of the posts represent her own personal opinions and are not representative of the Board. However, the lack of a disclaimer in Respondent's posts do not render the Commission's Final Decision wrong and subject to reversal.

Appellants claim that "such a disclaimer would need to be very prominent in order to counteract the presumption that the school board member [who posts on

social media] holds themselves out as a board member, *citing Melnyk v. Fief,* COMMISSION Docket No. C64-18 (2019) (Ca269-CA273). *Melneyk* contains no such holding. The Commission's opinion in that matter merely notes that the Facebook post in question does not contain and disclaimer, *id.* at 4, followed by footnote that says that a disclaimer ***"may*** have avoided the appearance-actual or perceived-that the statements were made in Respondent's capacity as a Board member." *Id.* at 4 n. 1. (emphasis added), The footnote went on to say that "even if an appropriate disclaimer is used, the substance of a post/statement can, nevertheless, render the disclaimer meaningless." *Ibid.* This is a far cry from a holding that disclaimers are mandatory and that the absence of a disclaimer creates a "presumption" that the school board member who posts holds themselves out as a member of the board.

Complainants discuss I/M/O *Treston, Randolph Board of Education,* COMMISSION Docket No. C7 l-18 (2021) (Ca236-Ca249) in support of their argument that school board members must always include a disclaimer in their social media posts. Cb29-Cb30. The Commission's opinion in *Teston* merely quoted the footnote in *Melnyk* and states the following:

> ... [T]here is a robust body of decisions and advisory opinions which school officials can utilize to determine ***when,*** and how a disclaimer must be used on social media (and other online/electronic publications) when speaking in their personal/private capacity in order to avoid running afoul of the Act.

*Treston* at 9 (emphasis added). Thus, *Teston,* like *Melnyk,* does not reflect an across-the-board requirement that school board members include a disclaimer in all their social media posts. The *Teston* opinion went on to say that:

> These decisions and advisory opinions also make clear the use of a disclaimer does not give a school board official carte blanche to *then* discuss Board business and/or matters in a way that is, or appears to be, on behalf of the Board.

*Ibid.* Here, Respondent's Facebook posts did nothing of the kind they did not discuss business of the Board and do not appear to be posted on behalf of the Board. By contrast, the Respondent Board of Education member in *Teston* wrote an op-ed article that endorsed four candidates for election to the Board while criticizing complainant, another candidate for election to the board, and contending that she should not be elected. *Id.* at 1, 2-3. The Commission observed that "the power of Board-backed non-endorsement of a candidate cannot be denied." *Id.* at 11. No such evidence exists in this matter.

Appellants also rely on Public Advisory Opinion-A202-22 dated February 25, 2022 and emphasize that the Opinion was issued six days before the Complaint in this matter was filed. *Ibid.* That fact supports that decision not being applicable here as the conduct at issue took place before that Opinion was issued. Thus, even if the Opinion could be construed to require disclaimer on all social media posts by school board members, such a mandate could not be fairly applied to support sanctions for conduct that took place before the Opinion was issued. Such a result would be akin

to the enforcement of an ex post facto law which is prohibited by both the United States Constitution and the New Jersey Constitution. *U.S. Const.* art. I, § 10, c1. 1; *N.J. Const.* art. IV,§ 7, ir3; *State v. Hester,* 233 N.J. 381, 391 (2018).

Appellants cite *Mary Carter Paint Co. v. Federal Trade Commission,* 333 F.2d 654 (5°•Cir. I 964), *rev'd. sub nom Federal Trade Commission v. Mary Carter Paint Co.,* 382 U.S. 46, 86 S.Ct. 219, 15 L.Ed.2d 128 (1965). Cb31. Federal court decisions, however, are not binding on New Jersey state courts. *See e.g. Manahawkin Convalescent v. O'Neill,* 426 N.J. Super. 143, 156 (App. Div. 2012), *citing Ryan v. American Honda Motor Co., Inc.,* I 86 N.J. 431,436 (2006).

Moreover, Complainants fail to indicate that the language that they quote from in *Mary Carter* appears in a concurring opinion, rather than the majority opinion of the court, 333 F.2d at 660 (Brown, J ., concurring) and that the o inion which they cite was reversed by the United States Supreme Court.

In sum, Complainants' argument that the Commission's Final Decision should be reversed because Respondent's Facebook posts did not disclaimers must be rejected.

## POINT V

## THE COMMISSION DID NOT ERR IN DISMISSING THE COMPLAINT IN RESPONSE TO COMPLAINANTS' MOTION FOR A SUMMARY DECISION

Appellants that they were denied due process because the Commission dismissed their complaint in the absence of a cross-motion for a summary decision

on behalf of Respondent. This contention must be rejected *because N.J.A.C.* 6:28-9.l(a) reads in applicable part as follows:

> Upon return of a matter from the OAL to the Commission, a hearing before the Commission pursuant to *N.J.A.C.* 6A:28-9.8, or the Commission's summary review of a complaint pursuant to this chapter, the Commission shall determine by majority vote whether the conduct complained of constitutes a violation of the Act or ***whether the complaint should be dismissed.***

(emphasis added). Thus, the Commission acted within its authority to dismiss the Complaint after the matters return from the Administrative Law Judge.

The only authority that Appellants cite in support of their argument is *Angus v. Bd. of Educ. of Boro. of Metuchen,* 475 N.J. Super. 362 (App. Div. 2023). *Angus* holds that" [t]he standard governing agency determinations for a summary decision under *N.J.A.*C. 1:1-12.5 is 'substantially the same as that governing a motion under *Rule 4:46-2* for summary judgment in civil litigation'", 475 N.J. Super at 367. The language was followed by a brief discussion regarding how evidence should be considered under the summary judgment standard. *Ibid. Angus* has nothing do with the issuer of whether an agency can dismiss a complaint upon a motion for a summary decision when the respondent does not file such a motion; in *Angus,* both parties move for a summary decision. *Id.* at 366.

Thus, Appellants' contention that the Commission cannot dismiss a Complaint in the absence of a motion or cross motion for a summary decision must be rejected.

## POINT VI

## THE COMMISSION DID NOT ERR IN STATING THAT ITS FINAL DECISION WAS APPEALABLE TO THE APPELLATE DIVISION RATHER THAN THE COMMISSIONER OF EDUCATION.

The Commission stated that its Final Decision "is a final agency and is appealable to the Superior Court-Appellate Division. *See N.J.A.*C. 6A:28-10.11 and *New Jersey Court Rule* 2:2-3(a). Despite Appellants' argument that appeal of the Final Decision should be to the Commissioner of Education ("Commissioner"), the Commission's statement is correct.

*N.J.A.*C. 6A:28-10.11 has been recodified as *N.J.A.C.* 6A:28:9.10. *N.J.A.C.* 6A:28:9.I0(b) reads as fo11ows:

> A determination to dismiss a complaint shall constitute final agency action, and shall be appealable directly to the Appellate Division or the Superior Court.

Complainants cite *N.J.A.C.* 6A:28-10.12 and N.J.A.C.6A:28-11.1. These regulations have been recodified as *N.J.A.C.* 6A:28-9.1 l. *N.J.A.C.* 6A:28-9.1 l(c) provides for review by the Commissioner only if the Commission recommends a sanction. The same is true as to *N.J.S.A.* 18A: I 2-29-29c.

Thus, the Commission correctly stated that its Final Decision was appealable this Court rather than to the Commissioner.

## POINT VII

## THE COMMISSION DID NOT ERR IN DISMISSING COUNTS 3 AND 7 OF THE COMPLAINT.

The Commissions decisions on these allegations were cogent and well-reasoned. There is no evidence of the same being arbitrary, capricious, or not supported by substantial credible evidence in the record as a whole such as would call for reversal. *See Dennery v. Bd. of Educ. of Passaic Cty. Regional High Sch.*, supra, 131 N.J. at 641; *Henry v. Rahway State Prison, supra,* 81 NJ. at 580.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the Final Decision of the School Ethics Commission be affirmed in its entirety.

Respectfully submitted,
Gold, Albanese & Barletti, LLC
Attorneys for Respondent
Merrissa Borawski

By:_____
JAMES N. BARLETTI, ESQ.

cc: Daniel R. Dowdy, Esq. (via e-Courts)
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|---|---|
| RONALD DONNERSTAG, ET AL.<br><br>Appellants,<br><br>v.<br><br>MERISSA BORAWSKI, CENTRAL REGIONAL BOARD OF EDUCATION, OCEAN COUNTY,<br><br>Appellee. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br><br>CIVIL ACTION<br><br>DOCKET NUMBER A-000367-23<br><br>STATEMENT OF ITEMS COMPRISING THE RECORD ON APPEAL |

To: Joseph H. Orlando
Clerk of the Appellate Division
Superior Court of New Jersey
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 006
Trenton, New Jersey 08625-0006

Daniel R. Dowdy, Esq.
Selikoff & Cohen, P.A.
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Mt. Laurel, NJ 08054

**PLEASE TAKE NOTICE** that Respondent, New Jersey Department of Education, School Ethics Commission ("Commission"), hereby certifies and files, pursuant to Rule 2:5-4(b), the statement of items comprising the record on appeal in this matter:

1. Ethic Commission of New Jersey School Ethics Act Complaint Form filed by Ronald Donnerstag, Wendy Vacante, Jaime Cestare, Kristin Lanko, Matthew Delprete, Scott Alfano, Lisa Snider, Patricia Fortus, and Lynne Sweezo ("Appellants") against Heather Koenig ("Appellee") on March 3, 2022, attaching
    a. Exhibit 1: Facebook Post from Missy Merissa Fern-Bora, reposting a post from Dana Wefer (date unknown);
    b. Exhibit 2: Facebook Post from Missy Merissa Fern-Bora, dated November 1, 2021;
    c. Exhibit 3: Facebook Post from Missy Merissa Fern-Bora, dated November 1, 2021;
    d. Exhibit 4: Facebook Post from Missy Merissa Fern-Bora, dated November 1, 2021;
    e. Exhibit 5: Facebook Post from Missy Merissa Fern-Bora, dated November 2, 2021;

f. Exhibit 6: Facebook Post from Missy Merissa Fern-Bora, dated November 2, 2021;

g. Exhibit 7: Facebook Post from Missy Merissa Fern-Bora, dated November 2, 2021;

h. Exhibit 8: Facebook Post from Missy Merissa Fern-Bora, dated November 3, 2021;

i. Exhibit 9: Facebook Post from Missy Merissa Fern-Bora, reposting a post from Brittany Faith;

j. Exhibit 10: Facebook Post from Missy Merissa Fern-Bora, dated November 4, 2021;

k. Exhibit 11: Facebook Post from Missy Merissa Fern-Bora, dated November 6, 2021;

l. Exhibit 12: Facebook Post from Missy Merissa Fern-Bora, dated February 10 (year unknown);

m. Exhibit 13: Facebook Post from Missy Merissa Fern-Bora, date unknown;

n. Exhibit 14: Facebook Post from Missy Merissa Fern-Bora, dated November 16, 2021;

o. Exhibit 15: Facebook Post from Missy Merissa Fern-Bora, dated November 19, 2021.

2. Letter from Kathryn A. Whalen, Esq. ("Whalen"), former Director of School Ethics Commission, to Appellants and Appellee, dated March 8, 2022.
3. Notice of Motion to Dismiss in Lieu of Answer, filed by Appellee on April 7, 2022, attaching
    a. Brief in Support of Motion to Dismiss, dated April 7, 2022.
4. Letter from Whalen to Appellants and Appellee, dated April 12, 2022.
5. Letter from Appellants to Whalen, dated May 2, 2022, attaching
    a. Brief in Opposition to Motion to Dismiss, dated May 2, 2022;
    b. Unfair Practice Charge, filed with the Public Employment Relations Commission, dated April 21, 2022;
    c. Addendum to Unfair Practice Charge;
    d. Facebook Post from Heather Koenig, dated January 12 (year unknown);
    e. Facebook Post from Missy Merissa Ferb-Bora (date unknown);
    f. Letter from Keith Waldman, Esq., and Daniel R. Dowdy, Esq. to Mark G. Toscano, Esq., dated January 27, 2022;
    g. Addendum - March 7, 2022 – Motions;
    h. Resolution No. 2022- ;
    i. Letter from Keith Waldman, Esq., and Daniel R. Dowdy, Esq. to Mark G. Toscano, Esq., dated March 10, 2022;
    j. Certification of Service, dated May 2, 2022.
6. Letter from Whalen to Appellants and Appellee, dated May 3, 2022.

7. Letter from Appellants to Whalen and Appellee, Requesting Leave to Amend Complaint, dated May 2, 2022, attaching

    a. First Amended Complaint;

    b. Exhibit 1: Facebook Post from Missy Merissa Fern-Bora, reposting a post from Dana Wefer (date unknown);

    c. Exhibit 2: Facebook Post from Missy Merissa Fern-Bora, dated November 1, 2021;

    d. Exhibit 3: Facebook Post from Missy Merissa Fern-Bora, dated November 1, 2021;

    e. Exhibit 4: Facebook Post from Missy Merissa Fern-Bora, dated November 1, 2021;

    f. Exhibit 5: Facebook Post from Missy Merissa Fern-Bora, dated November 2, 2021;

    g. Exhibit 6: Facebook Post from Missy Merissa Fern-Bora, dated November 2, 2021;

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l. Exhibit 11: Facebook Post from Missy Merissa Fern-Bora, dated November 6, 2021;

m. Exhibit 12: Facebook Post from Missy Merissa Fern-Bora, dated February 10 (year unknown);

n. Exhibit 13: Facebook Post from Missy Merissa Fern-Bora, date unknown;

o. Exhibit 14: Facebook Post from Missy Merissa Fern-Bora, dated November 16, 2021;

p. Exhibit 15: Facebook Post from Missy Merissa Fern-Bora, dated November 19, 2021;

q. Exhibit 16: Facebook Post from Missy Fern, dated March 7 (year unknown);

r. Exhibit 17: Facebook Post from Missy Fern, dated April 6 (year unknown);

s. Exhibit 18: Facebook Post from Missy Fern, dated April 9 (year unknown);

t. Exhibit 19: Facebook Post from Missy Fern, dated April 11 (year unknown);

u. Exhibit 20: Facebook Post from Missy Fern (date unknown), attaching

i. 2020 New Jersey Student Learning Standards - Comprehensive Health and Physical Education;

ii. District Policy 5756: Transgender Students.

8. Email from Whalen to Appellants and Appellee, Granting Request to Amend Complaint, dated May 24, 2022.

9. Letter Requesting to Supplement the Record, filed by Appellants on June 3, 2022, attaching

   a. Central Regional School District Resolution, dated March 17, 2022;

   b. Board Policy No. 0179: Board Social Media Policy for Board Members;

   c. Meeting Minutes of the Central Regional Board of Education for the March 17, 2022 meeting;

   d. Meeting Minutes of the Central Regional Board of Education for the April 28, 2022 meeting;

   e. "Central School Board OKs Social Media Policy After Racist Posts," Patch.com, April 29, 2022;

   f. Certification of Service, dated June 3, 2022.

10. Letter from Appellee to the Commission and Appellants, dated June 27, 2022, attaching

    a. Letter-Brief in Support of Motion to Dismiss New Allegations in the Amended Complaint.

11. Letter from Whalen to Appellants and Appellee, dated June 28, 2022.
12. Letter from Appellants to the Commission and Appellee Opposing Motion to Dismiss, dated June 30, 2022.
13. Letter from Whalen to Appellants and Appellee, dated July 1, 2022.
14. Decision on Motion to Dismiss adopted by the Commission at its meeting on August 23, 2022.
15. Motion for Leave to Appeal an Interlocutory Decision, filed by Appellants on August 25, 2022.
16. Opposition to Motion/or Leave to Appeal an Interlocutory Decision, filed by Appellee on August 28, 2022.
17. Cross-Motion for Leave to Appeal an Interlocutory Decision, filed by Appellee on August 28, 2022.
18. Response to Appellee's Cross-Motion for Leave to Appeal an Interlocutory Decision, filed by Appellants on August 30, 2022.
19. Decision on Interlocutory Review, decided by the Commissioner of Education on September 6, 2022.
20. Letter from Appellants to Commission and Appellee, Requesting that Appellee's Failure to Answer be Deemed an Admission, dated September 27, 2022.

21. Letter from Appellants to Commission and Appellee, Renewing Request that Appellee's Failure to Answer be Deemed an Admission, dated October 4, 2022.

22. Letter from Appellants to Commission and Appellee, Renewing Request that Appellee's Failure to Answer be Deemed an Admission, dated October 10, 2022.

23. Answer to School Ethics Complaint, filed by Appellee on October 9, 2022.

24. Letter from Whalen to Appellants and Appellee, dated October 11, 2022.

25. Letter from Whalen, transmitting the above-captioned matter to the Office of Administrative Law ("OAL"), October 17, 2022.

26. Letter from Appellee to the Honorable Kimberly Belin, A.L.J. ("ALJ Belin"), dated December 12, 20222, attaching

    a. Notice of Motion for a Protective Order filed by Appellee on December 12, 2022;

    b. Certification in Support of a Notice of Motion for a Protective Order;

    c. Exhibit A: Appellants' Interrogatories, Requests for the Production of Documents, and Requests for Admission to Appellee.

27. Letter from Appellants to Appellee and ALJ Belin, Requesting to Hold Appellee's Discovery Motion in Abeyance for Lack of Ripeness, dated December 13, 2022.

28. Letter from Appellee to ALJ Belin and Appellants, Withdrawing Motion for a Protective Order, dated December 28, 2022.

29. Letter from Appellants to ALJ Belin and Appellee, Withdrawing Motion to Deem Admitted Allegations in the Complaint, dated January 13, 2023.

30. Letter from Appellants to Judge Hughes, dated February 24, 2023, attaching

    a. Brief in Support of Summary Decision, filed by Appellants on February 24, 2023,

    b. Exhibit A: Commission's Decision on Motion to Dismiss a School Ethics Act Complaint Against Heather Koenig, C-19-22, dated July 26, 2022;

    c. Exhibit B: Decision on Interlocutory Review, decided by the Commissioner of Education on September 6, 2022;

    d. Exhibit C: District Policy 1648.14;

    e. Exhibit D: Facebook Posts from Missy Fern, dated January 14 (year unknown); November 15, 2022; December 7, 2021; and several undated posts;

    f. Exhibit E: Central Regional School District Resolution, dated March 17, 2022; Board Policy No. 0179: Board Social Media Policy for Board Members; Meeting Minutes of the Central Regional Board of Education for the March 17, 2022 meeting; Meeting Minutes of the Central Regional Board of Education for the April 28, 2022 meeting;

"Central School Board OKs Social Media Policy After Racist Posts," Patch.com, April 29, 2022;

g. Exhibit F: Instagram Post by "the_freedom_chronicles" (undated);

h. Exhibit G: Unfair Practice Charge, filed with the Public Employment Relations Commission, dated April 21, 2022; Addendum to Unfair Practice Charge; Facebook Post from Missy Merissa Fern-Bora (undated); Letter from Keith Waldman, Esq., and Daniel R. Dowdy, Esq. to Mark G. Toscano, Esq., dated January 27, 2022;

i. Exhibit H: Appellants' Interrogatories, Requests for the Production of Documents, and Requests for Admission to Appellee; Appellee's Responses to Appellants' Interrogatories, Requests for the Production of Documents, and Requests for Admission to Appellee, dated December 12, 2022 and January 10 and 19, 2023;

j. Exhibit I: Meeting Minutes of the Central Regional Board of Education for the August 20, 2021 meeting; Meeting Minutes of the Central Regional Board of Education for the September 16, 2021 meeting;

k. Certification of Service, dated February 24, 2023.

31. Letter from Appellee to ALJ Hughes, dated March 16, 2023, attaching

a. Brief Opposing Appellants' Motion for Summary Decision;

b. Certification of James N. Barletti, Esq., dated March 16, 2023, attaching:

i. Exhibit A: Facebook Homepage of Merissa Borawski.

32. Letter from Appellants to Judge Hughes, dated March 27, 2023, attaching

a. Brief in Reply to Appellee's Opposition to Summary Decision, filed by Appellants on March 27, 2023;

b. Certification of Service, dated March 27, 2023.

33. Initial Decision, dated May 30, 2023.

34. Order of Extension to issue a Final Decision (until August 28, 2023), executed on June 2, 2023, by School Ethics Commission Acting Director Brigid C. Martens.

35. Final Decision adopted by the School Ethics Commission at its meeting on August 22, 2023.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/Sadia Ahsanuddin
Sadia Ahsanuddin
Deputy Attorney General

Dated: February 27, 2024

| | | |
|---|---|---|
| RONALD DONNERSTAG, KRISTIN LANKO, LISA SNIDER, WENDY VACANTE, MATTHEW DELPRETE, PATRICIA FORTUS, JAIME CESTARE, SCOTT ALFANO, AND LYNNE SWEEZO, | : | SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION DOCKET NO. A-000367-23T4 |
| Complainants-Appellants, | : | CIVIL ACTION |
| v. | : | ON APPEAL FROM THE FINAL DECISION OF THE SCHOOL ETHICS COMMISSION DKT. NO. C20-22 |
| MERISSA BORAWSKI, CENTRAL REGIONAL BOARD OF EDUCATION, OCEAN COUNTY, | : | FILED AUGUST 16, 2024 |
| Respondent-Respondent. | : | |

# COMPLAINANTS-APPELLANTS' REPLY BRIEF IN SUPPORT OF THEIR APPEAL FROM DECISIONS OF THE SCHOOL ETHICS COMMISSION

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## PRELIMINARY STATEMENT

Respondent Merissa Borawski (Respondent) repeatedly campaigned for her seat on the Central Regional Board of Education (Board) from her public Facebook account, shared endorsements of her candidacy from her public Facebook account, shared campaign banners containing her name next to the words "CENTRAL REGIONAL BOARD OF ED," shared successful election results, and clearly announced she had become a member of the Board from this same public account. It is abundantly clear she held herself out as a member of the Board on this platform.

While clearly holding herself out as a member of the Board, and without providing any sort of disclaimer as required by the Commission's well-established caselaw, Respondent engaged in conduct which caused the public to protest the Board, sparked public outcry at meetings of the Board, and caused the Board itself to issue two official Resolutions specifically condemning those statements. Respondent's conduct also directly subjected the Board to litigation. In doing so, Respondent clearly engaged in activity which not only had the potential to compromise the Board, but ***actually did*** compromise the Board.

These are the only two elements required. The Appellate Division need go further in its analysis of the Commission's August 22, 2023 Decision.

However, Respondent now attempts to raise a generic First Amendment argument it waived below by failing to raise it in her Answer and her Amended Answer. What is more, the Commission's own decisional law – as exhaustively cited by Appellants and 2 separate Administrative Law Judges (ALJs) – has repeatedly addressed the First Amendment issue. Since Respondent has chosen to raise this waived defense on appeal, Appellants will briefly address it below.

Respondent also appears to call into question the validity of the School Ethics Act (Act) as a whole, making a simultaneously broad-sweeping yet ill-defined

argument that the Legislature should have left all school board member discipline to the electoral process. The Legislature voted unanimously to pass a Code of Ethics for New Jersey school board members into law. Whether Respondent disagrees with this Legislative decision as a matter of policy is of no relevance here. The law is what the law is.

The Legislature tasked the Commission with issuing discipline pursuant to that Code of Ethics in a uniform manner. In accordance with the Legislature's mandate, the Commission issued a robust body of caselaw addressing school board member social media use and disclaimers. In issuing its August 22, 2023 Decision, however, the Commission sharply departed from that line of cases without explanation, and issued a ruling that made no analytical sense in light of its prior decisions or the evidence in the record. As a result, the Commission's August 22, 2023 Decision must be reversed as arbitrary, capricious, unreasonable, and unsupported by the evidence in the record.

## PROCEDURAL HISTORY

Appellants hereby repeat and incorporate their Procedural History as set out in their Brief in Support of Their Appeal filed on April 16, 2024.

## STATEMENT OF FACTS

Appellants hereby repeat and incorporate their Statement of Facts as set out in their Brief in Support of Their Appeal filed on April 16, 2024.

## LEGAL ARGUMENT

### I. RESPONDENT CLEARLY HELD HERSELF OUT AS A MEMBER OF THE BOARD (Ca014-019)

Respondent repeatedly used her public Facebook account to post campaign banners and garner support for her Board campaign. (Ca263, Ca265, Ca267-268, Ca270). She specifically shared campaign banners which contained the words:

MERISSA BORAWSKI
HEATHER KOENIG
CENTRAL REGIONAL
BOARD OF ED

(Ca265, Ca267-268).

Respondent shared campaign endorsements from her public Facebook account. (Ca272, Ca299-300). She shared election results which made clear she had won her seat on the Board. (Ca276) (election results showing 40/40 districts reporting with the words "we won [celebratory emojis]"). Respondent admitted that, "'at the time [she] made the January 17, 2022 post that is the subject of Count 5 of the Complaint' which compared the treatment of Jews during WWII to the treatment of unvaccinated individuals, 'some of [her] Facebook friends were members of the Central Regional School District community, including but not limited to parents, teachers, students, and staff.'" (Ca166 at Requests for Admission [RQA] 4; Ca169 at Response to RQA 4). Respondent also admitted that, "[a]s a result of [her] campaigning for the Board from [her] personal Facebook account, and announcing that [she] won a seat on the Board from that account, some of [her] Facebook friends became aware that [she is] a member of the Board." (Ca166 at RQA 3; Ca169 at Response to RQA 3). It was common knowledge to those viewing her posts from this account that Respondent was a member of the Board. This was undisputed below.

ALJ Kim Belin (ALJ Belin), in issuing her Initial Decision, repeatedly held that, since Respondent had held herself out as a member of the Board, and because she has failed to post any sort of disclaimer which might have clarified in what capacity she was speaking when she told teachers to drop out of their unions, stated that transgender students have no place in New Jersey schools, encouraged others to flout Executive Order 251 (EO 251), and made light of the Holocaust, she compromised the Board.

> What is problematic is not that Borawski disagrees with the proposed health education standards or that she opposes the inclusion of transgender students in New Jersey schools, but ***what is problematic is that she failed to include a clear disclaimer that the contents of the posting were her personal opinions and not expressed as a Board member.*** Without a clearly stated disclaimer, it would not be a stretch to consider that the transgender population and parents of transgender students may feel unwelcome by the Board.
>
> (Ca034) (emphasis added).
>
> This tribunal cannot ignore that even after the Board adopted the March 17, 2022 resolution in which it condemned Borawski's postings, requested that the posts be taken down, and cautioned all board members to be prudent in their social media posts, Borawski continued to post and repost her personal views ***without including a disclaimer*** that would have avoided the appearance – actual or perceived – that her Facebook postings were made in her personal capacity, and not as a board member. This evidence shows a serious lack of judgment.
>
> (Ca037-038) (emphasis added).

Respondent campaigned for her seat from this account. She announced that she took her seat. She stated clearly that she was a member of the Board. She then went on to speak on Board issues without providing any sort of disclaimer. That is why it is all the more inexplicable that the Commission erred so grievously in stating in its Final Decision that her account did not "make any reference to the Board nor her membership on the same." (Ca017). This was simply not true. The Commission's outcome determinative finding that "there is no factual evidence" tying Respondent's Facebook account to her Board membership was demonstrably false. Id. There was abundant evidence tying her Board membership and candidacy to her account.

The Commission's well-established caselaw states clearly that school board members who use their Facebook account to campaign for their seat on a school board must make clear in which capacity they are speaking, and explains why:

> The Commission notes that board members do not surrender the rights they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in Dunbar Bey v.

Brown, Camden Board of Education, Camden County, Commission Docket No. C25-11 (Brown), and in light of the social media posts by Respondent, the Commission echoes its decision in Brown, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen." [...]

Further the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." Id. at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the Board and compromised the Board's ability to engage with the public.

I/M/O Daniel Leonard, Commission Docket Nos. C56-19 and C57-19 (2021) (Ca255), reaffirmed, e.g., by I/M/O Christopher T. Treston, Commission Docket No. C71-18 (2021) (236) and Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233).

Although Respondent argues that the statements attributed to her by Complainant were not made in her capacity as a Board member, and do not relate to her Board membership or to Board actions, the Commission finds that the statements on her Facebook page are clearly linked to her Board membership (and candidacy). Respondent's Facebook page is clearly marked with the banner, 'Re-Elect Maryann Fiel to the Highlands Elementary Board of Education,' but does not appear to have a disclaimer noting that the statements are her own and unrelated to the Board.

Melnyk v. Fiel, Commission Docket No. C64-18 (2019) (Ca269)), reaffirmed, e.g., Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233); I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca242-243).

There is a robust body of decisions and advisory opinions which school officials can utilize to determine when, and how, a disclaimer must be used on social media when speaking in their personal/private capacity in order to avoid running afoul of the Act.

For example, in Melnyk v. Fiel ... the Commission discussed how failure to include a disclaimer can lead to the belief that the statements made by a school official, even in attempted to be made in their personal/private capacity, can be viewed as those of the Board. Highlands Borough Board of Education, Monmouth County, Commission Docket No. C64-

> 18. More specifically, and although Respondent Fiel argued that the statements attributed to her by Complainant Melnyk "were not made in her capacity as a Board member and [did] not relate to her Board membership or to Board actions," the Commission found that "the statements on her Facebook page [were] clearly linked to her Board membership (and candidacy)," her social media page did not have a disclaimer noting that the statements made were her own and unrelated to the Board, and that, as a result, "it [was] reasonable for a member of the public ... to perceive the statements as being made by Respondent in her capacity as Board member." C64-18 at 4.
>
> I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca242-243) (citing Melnyk v. Fiel, Commission Docket No. C64-18 (2019) (Ca269)), reaffirmed, e.g., Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233).
>
> Since the advent of social media, the Commission has received numerous complaints about whether a Board member's speech, including posts on social media, violates the Act because the Board member either failed to disclaim, or insufficiently disclaimed, their speech. In a recent decision, which is informative here, the Commission stated:
>
> ... Now, more than a decade later, when the use of social media and online publications has become commonplace, prolific, pervasive, and often times divisive, and given that there has been a significant influx in the number of complaints filed with the Commission regarding use (or nonuse) of disclaimers in electronic publications (not just social media), ***it is now more crucial than ever to underscore and emphasize that when Board members want to speak as private citizens, they must include an appropriate disclaimer that makes the capacity in which they are speaking clear and unambiguous.*** In addition, even if an appropriate disclaimer is used, a school official must never negate the import of the disclaimer by proceeding, under the purported protection of the disclaimer, to discuss or comment on Board business or matters in a way that leads a member of the public to believe that the individual is speaking on behalf of, and as a representative of, the Board.
>
> Advisory Opinion A02-22 (2022) (Ca233) (citing I/M/O Treston, Randolph Board of Education, Commission Docket No. C71-18, at 12 (2021)) (emphasis added)).

Despite campaigning for the Board from her public Facebook account, announcing she won her seat, sharing endorsements, and sharing multiple campaign

banners containing her name alongside the words "CENTRAL REGIONAL BOARD OF EDUCATION," Respondent's account contained no disclaimer. She then made every public post that was the subject of the Commission's August 22, 2023 Decision shortly thereafter, and from the very same public account.

Pursuant to the Commission's decisional law for well over a decade, and based on the clear and direct evidence presented, Respondent held herself out as a Board member from this same Facebook account. The Commission's finding in its Final Decision that "there is no factual evidence" tying Respondent's Facebook account to her Board membership was made in error, was contrary to the factual findings of ALJ Belin, and was contrary to all evidence in the record. As a result, the Commission's August 22, 2023 must be reversed as being arbitrary, capricious, unreasonable, and unsupported by the evidence in the record.

## II. RESPONDENT ENGAGED IN CONDUCT WHICH NOT ONLY HAD THE POTENTIAL TO COMPROMISE THE BOARD – BUT WHICH ACTUALLY DID COMPROMISE THE BOARD (Ca014-019)

Respondent asserts that Respondent's "posts did not undermine public confidence in the Board or compromise it." Rb14. They obviously did. The record contains direct evidence – including the Board's own minutes, official Resolutions passed by the Board, actual litigation filed against the Board as a result of Respondent's conduct, and news coverage of Respondent's conduct – which clearly shows that Respondent actually compromised the Board.

The question of whether a member of the school community ***could have*** reasonably perceived Respondent of speaking as a Board member is directly answered by the fact that many members of the public ***did*** perceive her as speaking on behalf of the Board. I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca406-407) (citing Melnyk v. Fiel, Commission Docket No.

C64-18 (2019) (Ca433)). That is why the public protested her at meetings of the Board. (Ca107-109, Ca120-122, Ca123-127). That is why newspapers referred to her as a Board member. (Ca123-127). That is why the Board ***itself*** was compelled to pass two Resolutions clarifying that it did not stand behind her public statements and that her statements should not continue to be seen as having been made on behalf of the Board. (Ca097-098; Ca137). Respondent's statements also led directly to litigation being filed against the Board, which was clearly reflected in the record. (Ca133-140).

Respondent makes an attempt at circular logic, asserting that Respondent could not have possibly comprised the Board because "there is simply no evidence, anywhere in the record, that Respondent held herself out or even held her Facebook account out as something speaking for the Board." Rb12. First, she clearly held herself out as a member of the Board from her Facebook account as addressed above. Treston, Melnyk, and Leonard, supra, all stand for the proposition that when a school board member campaigns from their public Facebook account – and especially where they actually state they have won that election and are a school board member – they hold themselves out as school board members for the purposes of the Act. Their posts are then subject to the Act's Code of Ethics and its prohibition on social media use which may compromise the Board. N.J.S.A. 18A:12-24.1(e). Respondent did so by causing protest in the school community, which was recorded in Board minutes and newspaper articles, as well as by subjecting the Board to litigation. This was all clear from abundant evidence in the record.

Respondent also asserts that Respondent was not speaking on Board issues. This was directly contradicted by the Commission's own Final Decision. (Ca017) ("In this matter, the Commission finds that, while the subject matter of the Facebook posts – State lawsuits related to union activity, vaccines and masking in schools, and gender identity standards – may relate to the business of the Board ...."). While a

review of Leonard or Treston, supra, clearly show that a school board member can compromise a school board in violation of the Act without speaking directly on school board issues, here even the Commission agreed in its Final Decision that Respondent spoke directly to Board issues. The Commission again acknowledges this in its Statement in Lieu of a Brief filed on July 13, 2024 in this appeal. (p. 14. "the Commission correctly concluded that, although Borawski's speech related to board business ....")

Respondent further asserts that "it is questionable whether the evidence that the evidence [sic] presented by Complainants actually establish that there was such an 'uproar'," calling the public's demands that the Board and Respondent be held accountable "sporadic," and asserting that news articles covering the tumultuous Board meetings and ensuing protests are written by people, and are therefore questionable. Rb13. This argument strains credulity. The argument that these documents do not say what they say, or should not be taken at face value, was not raised below, and must be disregarded. It was undisputed below that the Board minutes and news articles reflected actual public outcry from the school district community regarding Respondent's statements.

> The illegal discrimination suffered by Jewish people at the hands of Nazi Germany was based upon a racist ideology. There is no common ground with unvaccinated people. In addition, while the January 17, 2022 posting may not have included the word "Holocaust," the public understood the implication. Indeed, these postings resulted in public outcry from parents and students as evidenced by the board meeting minutes and newspaper articles.
>
> (Ca029).

It was obvious below – as it is obvious now – that these events actually occurred. Respondent asks the Appellate Division to deny what it can see with its own eyes. This argument carries no weight and should be disregarded. Respondent clearly compromised the Board in violation of the Act.

## III. RESPONDENT'S ILL-DEFINED FIRST AMENDMENT ARGUMENT FAILS BECAUSE IT WAS WAIVED BELOW, AND BECAUSE THE LEGISLATURE AND THE COMMISSION HAVE SPOKEN CLEARLY ON THIS ISSUE (Ca014-019)

Respondent essentially asserts that no school board member could ever make any statement which could be subject to the Commission's jurisdiction. Rb11. Respondent provides no First Amendment analysis in support of this proposition, nor does Respondent address the Commission's robust body of caselaw addressing this precise issue. Respondent also waived this affirmative defense below.

First, Respondent waived any such affirmative defense by failing to raise it in both her Answer and her Amended Answer before the Commission. On October, 2022, Respondent filed an Answer which contained a one sentence blanket denial. (Ca203-204). Due to inadequacy of her initial Answer, Respondent filed an Amended Answer on January 3, 2023. (Ca201-202). No defenses were raised in the Amended Answer. Id.; See N.J.A.C. 6A:28-7.2(a) (Answers before the Commission must "fully and completely advise the parties and the Commission as to the nature of respondent's defenses for each allegation."). In failing to raise this affirmative defense, Respondent waived it below.

Next, Respondent cites no law at all in support of her vague First Amendment argument. Pbll. This appears to be the result of a failure to copy and paste the entirety of the First Amendment argument made in the companion case now before the Appellate Division.[1] Pbll ("school personnel do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse" [sentence abruptly cuts off]).

Construing this vaguely raised argument generously, and assuming that Respondent intended to insert the same cases into both briefs – the only cases cited

[1] Ronald Donnerstag, et. al. v. Heather Koenig, App. Div. Docket No. A-000366-23T4.

by Respondent in the companion case are inapplicable, as each of those 2 cases refers to the First Amendment rights of public school teachers being disciplined ***by*** a school board. Kennedy v. Bremerton School District, 597 U.S. 507 (2022) ("neither ***teachers nor students*** shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.") (emphasis added) (citing Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969)). Respondent is neither a teacher nor a student. Nor is she an employee of the Board at all. Rather, Respondent ***is a government official and a representative of the school board itself***. Put another way, Respondent is an agent of the government which the First Amendment protects private citizens ***from***, not the other way around.

The difference between speaking in one's private capacity and – alternatively – being perceived as speaking on behalf of a school board, is precisely the reason the Commission has developed a robust body of caselaw on the First Amendment and social media disclaimers for school board members. The Commission has set out its First Amendment analysis on this issue time and time again:

> The Commission notes that board members do not surrender the rights they have as citizens such as freedom of speech when they become members of a school board. However, as discussed in Dunbar Bey v. Brown, Camden Board of Education, Camden County, Commission Docket No. C25-11 (Brown), and in light of the social media posts by Respondent, the Commission echoes its decision in Brown, specifically that "when a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen." [...]
>
> Further the Commission emphasized "that in using social media, the affirmative duties within the Code of Ethics for School Board Members may not be overlooked." Id. at 8. With the above in mind, Respondent's disparaging posts to social media at issue constituted conduct that undermined the public's trust in the Board and compromised the Board's ability to engage with the public.
>
> I/M/O Daniel Leonard, Commission Docket Nos. C56-19 and C57-19 (2021) (Ca255) (citing Dunbar Bey v. Brown, Commission Docket No.

> C25-11 (2011) (Ca275)), reaffirmed, e.g., by I/M/O Christopher T. Treston, Commission Docket No. C71-18 (2021) (236) and Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233).
>
> Although Respondent argues that the statements attributed to her by Complainant were not made in her capacity as a Board member, and do not relate to her Board membership or to Board actions, the Commission finds that the statements on her Facebook page are clearly linked to her Board membership (and candidacy). Respondent's Facebook page is clearly marked with the banner, 'Re-Elect Maryann Fiel to the Highlands Elementary Board of Education,' but does not appear to have a disclaimer noting that the statements are her own and unrelated to the Board.
>
> Melnyk v. Fiel, Commission Docket No. C64-18 (2019) (Ca269)), reaffirmed, e.g., Commission's Advisory Opinion A02-22 (February 25, 2022) (Ca233); I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca242-243).
>
> For example, in Melnyk v. Fiel ... the Commission discussed how failure to include a disclaimer can lead to the belief that the statements made by a school official, even in attempted to be made in their personal/private capacity, can be viewed as those of the Board. Highlands Borough Board of Education, Monmouth County, Commission Docket No. C64-18. More specifically, and although Respondent Fiel argued that the statements attributed to her by Complainant Melnyk "were not made in her capacity as a Board member and [did] not relate to her Board membership or to Board actions," the Commission found that "the statements on her Facebook page [were] clearly linked to her Board membership (and candidacy)," her social media page did not have a disclaimer noting that the statements made were her own and unrelated to the Board, and that, as a result, "it [was] reasonable for a member of the public ... to perceive the statements as being made by Respondent in her capacity as Board member."
>
> I/M/O Christopher T. Treston, Commission Docket No. C71-18, at pp. 7-8 (2021) (Ca242-243) (citing Melnyk v. Fiel, Commission Docket No. C64-18 (2019) (Ca269)).

It is clear from this body of decisional law that, where a school board member has used their public Facebook account to campaign for their seat on the Board – and certainly where a school board member also shares election results and announces that she is a sitting Board member – members of the public might reasonably believe

she is speaking in her role as Board member. Here, where Respondent posted numerous campaign banners to her page precisely like the respondent in Melnyk, shared successful election results, announced she was taking her seat on the Board, and went on to speak directly to Board issues without any Melnyk disclaimer, it is obvious that members of the public could have reasonably believed she was speaking in her role as Board member. In fact, that is precisely what happened here, as evidenced by Board minutes, news articles, and even official Board Resolutions which were all included in the record before the Commission.

To be perfectly clear – this matter is not about whether Respondent's posts were controversial or whether any particular person or persons disagreed with them. Respondent held herself out as a Board member from the same account she made posts which unquestionably compromised the Board. Appellants are members of the school district community and ***are employees of the Board***. (Ca249). The Act was crafted by the Legislature with just such school board employees and community members in mind. That is why the express Legislative intent set out in the Act states:

> The Legislature finds and declares:
>
> a. In our representative form of government it is essential that the conduct of members of local board of education and local school administration hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
>
> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and some disciplinary mechanism to ensure the uniform maintenance of those standards among them.
>
> N.J.S.A. 18A:12-22.

Here the disciplinary action requested by Appellants is merely a reimposition of the penalty of "Censure." ALJ Belin in the present matter, and ALJ Hughes in the

companion case now before the Appellate Division, each independently reviewed the Commission's caselaw on penalty, including I/M/O Christopher T. Treston, Commission Docket No. C71-18 (2021), and each independently imposed the penalty of censure. (Ca037).

The Commission's long history of applying a censure regarding school board member social media use which tends to compromise the school board obviously passes constitutional muster. While Respondent has failed to make a coherent First Amendment argument or to identify the standard of scrutiny that applies, a mere censure is clearly the least restrictive means of furthering the compelling government interest (the Legislature called it "essential") in upholding the public trust placed in boards of education. As a result, even if Respondent had articulated its First Amendment argument in a manner that comports with constitutional law, it would have failed. See, e.g., Williams-Yulee v. The Florida Bar, 575 U.S. 433 (2015).

The New Jersey Supreme Court and the United States Supreme Court have repeatedly upheld codes of ethics for public officials, including New Jersey's Code of Judicial Conduct, to which Your Honors are subject. The compelling government interest cited in those decisions is the public's trust in those institutions. See, e.g., In re DiLeo, 216 N.J. 449, 471 (2014) ("Consideration of the public's perception of the judiciary is not new to the judicial discipline process. It lies at the core of the Code of Judicial Conduct."). The penalty of censure is regularly applied in those cases. See, e.g., In re Perskie, 207 N.J. 275 (2011).

Lastly, the Appellate Division's decision in this matter will have widespread consequences in school districts across the State of New Jersey. If the Commission is allowed to simply ignore well over a decade of its own well-established caselaw, there will no longer be any mechanism for holding school board members accountable for their actions which compromise the school boards on which they sit.

The record below was bursting with direct evidence that Respondent actually compromised the Board. Appellants ask only that You believe what You can see with Your own eyes.

In light of all the foregoing, Appellants request that the Commission's August 22, 2023 Final Decision be reversed as being arbitrary, capricious, unreasonable, and not supported by the evidence in the record. Dennery v. Bd. of Educ. of Passaic Cty. Reg'l High Sch. Dist. No. 1, Passaic Cty., 131 N.J. 626 (1993).

## CONCLUSION

For all the reasons above, Appellants respectfully request that the Appellate Division issue an order:

1. School Ethics Commission's August 22, 2023 Final Decision

    a. Reversing the School Ethics Commission's August 22, 2023 Final Agency Decision;
    b. Finding that Respondent violated N.J.S.A. 18A:12-24.1(e) with regard to Counts 1, 2, 4, 5, 8, 9, 10, 11, and 12 of the Amended Complaint; and
    c. Reinstating the penalty of "Censure."

2. School Ethics Commission's August 23, 2022 Decision on Respondent's Motion to Dismiss in Lieu of an Answer

    a. Reversing the School Ethics Commission's August 23, 2022 dismissal of Count 7 as to N.J.S.A. 18A:12-24.1(e);
    b. Reversing the School Ethics Commission's August 23, 2022 dismissal of Count 3 as to N.J.S.A. 18A:12-24.1 (a) and (e); and
    c. Reinstating Counts 3 and 7 of the Amended Complaint for further proceeding before the Office of Administrative Law.

Respectfully submitted,
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*Attorney for Appellants*

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DATED: August 16, 2024