

**BEFORE THE PROFESSIONAL STANDARDS COMMISSION
OF THE STATE OF IDAHO**

In the Matter of the Certificate of:)	Case No. 21632
)	
RYAN KERBY,)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW AND FINAL ORDER OF THE
Respondent.)	HEARING PANEL

The Chief Certification Officer Lisa Colón Durham (CCO) filed an Administrative Complaint against Respondent Ryan Kerby regarding teacher evaluations that were submitted to the State Department of Education while he was Superintendent of the New Plymouth School District. Mr. Kerby asked for a hearing on the Administrative Complaint and later filed an Answer. A Hearing Panel of the Professional Standards Commission was convened and held a hearing as noticed beginning at 9:00 a.m. on Thursday, September 28, 2017, in the City Council Chambers, New Plymouth City Hall, 301 N. Plymouth Avenue, New Plymouth, Idaho. Dennis Cartwright chaired the Hearing Panel. Kristin Beck and Josh Middleton were the other members of the Hearing Panel. Michael S. Gilmore, Deputy Attorney General, advised the Hearing Panel. Robert A. Berry, Deputy Attorney General, represented the CCO. Dan T. Blocksom, Blocksom Law & Policy, PLLC, Boise, Idaho, represented Mr. Kerby. This written decision of the Hearing Panel reviews the proceedings, makes Findings of Fact and Conclusions of Law, and enters a Final Order that Mr. Kerby did not comply with the requirements of Ethics Rule IV.e when New Plymouth School District filed its teacher evaluations for the 2014-2015 school year and that a letter of reprimand should be placed in his State Department of Education file.

I. SUMMARY OF THE PROCEEDINGS

The Administrative Complaint (Complaint) alleged that Mr. Kerby was Superintendent of the New Plymouth School District (NPSD) for the 2013-2014 and 2014-2015 school years, that when NPSD submitted teacher evaluations to the State Department of Education (SDE) for those school years it gave every teacher an identical evaluation, which thus misrepresented or deliberately omitted information regarding evaluation of teachers, and that these identical evaluations

willfully violated Code of Ethics Principle IV, in particular IDAPA 08.02.02.076.05.e, in violation of Idaho Code § 33-1208, subsection 1.j.¹ Complaint, ¶¶ 4-5, 9, 11-12.

Mr. Kerby's Answer to the Administrative Complaint (Answer) did not deny that NPSD uploaded identical teacher evaluations for both school years at issue, but alleged that (1) the requirements for teacher evaluations filed with the SDE for the 2013-2014 school year were at best unclear and that he made a good faith attempt to comply with the reporting requirements, and (2) that he was not involved with the reporting for the 2014-2015 school year and was assured by his staff that it was taken care of. Answer, ¶¶ 7, 9-11, 13-14. The Answer included defenses that the Complaint was vague and ambiguous, that Mr. Kerby had acted in good faith, that the Complaint was not in the public interest, that there was no basis for the requested relief because Mr. Kerby was retired, that the SDE was contributorily responsible for the misreporting, that the SDE and Professional Standards Commission (PSC) had unclean hands, that there were mitigating

¹ Idaho Code § 33-1208, subsection 1.j, provides:

33-1208. Revocation, suspension, denial, or place reasonable conditions on certificate — Grounds. — 1. The professional standards commission may deny, revoke, suspend, or place reasonable conditions on any certificate issued or authorized under the provisions of section 33-1201, Idaho Code, upon any of the following grounds:

...

j. Willful violation of any professional code or standard of ethics or conduct, adopted by the state board of education;

...

State Board of Education Ethics Rule IV.e, part of Rule 76 of the Rules Governing Uniformity, IDAPA 08.02.02.076.05.e, provides:

076. CODE OF ETHICS FOR IDAHO PROFESSIONAL EDUCATORS (SECTIONS 33-1208 AND 33-1209, IDAHO CODE).

...

05. Principle IV — Professional Integrity. A professional educator exemplifies honesty and integrity in the course of professional practice. Unethical conduct includes, but is not limited to:

...

e. Falsifying, deliberately misrepresenting, or deliberately omitting information regarding the evaluation of students or personnel, including improper administration of any standardized tests (changing test answers; copying or teaching identified test items; unauthorized reading of the test to students, etc.);

...

circumstances, that the SDE and PSC had waived their right to bring the Complaint by not providing proper training, that the SDE and PSC had consented to NPSD's teacher reporting, that it was impossible to comply with the deadlines for teacher reporting, and laches.² Answer, Defenses, ¶¶ 1-11, pages 5-15. The Answer also included Counterclaims for Violation of Constitutional Rights and for Libel. Pages 15-23. Among other things, the Defenses and Counterclaims contend that the Complaint was brought against Mr. Kerby in retaliation because he was elected to the Legislature in the 2014 general election and has taken positions inconsistent with the SDE during his time as a legislator. We do not address the Counterclaims because this Hearing Panel has no statutory authority to consider them. If Mr. Kerby believes that he had an obligation to present those counterclaims to this Hearing Panel to preserve those issues for later judicial review, he has done so. As for Mr. Kerby's defenses, if they are relevant, we discuss them below.

The following witnesses testified at the hearing: Todd King, Information Technology Resource Manager for the SDE; Roger Sargent, Wireless Program Manager for the SDE and former Idaho System for Educational Excellence (ISEE) Region 3 Technical Coordinator (NPSD is in Region 3); Irene Trunnell, retired NPSD ISEE Coordinator who actually uploaded the NPSD teacher evaluations to the SDE in May of 2014 and May of 2015; Kevin Barker, current Superintendent of NPSD and former principal for New Plymouth High School; Wendy Johnson, Superintendent of Kuna School District; Christine Collins-Otto, former principal of New Plymouth Middle School; Lisa Colón Durham, the Chief Certification Officer; Wil Overgaard, Superintendent of Weiser School District; Respondent Ryan Kerby, former Superintendent of NPSD and current member of the Idaho Legislature; Carrie Aguas, former NPSD elementary principal and current staff member for Federal programs; Patrick Charlton, Superintendent of Vallivue School District; and Peter Koehler, Chief Deputy Superintendent of Public Instruction. In addition, many exhibits were identified during the hearing. This decision does not individually review each witness's testimony, in part because many testimonies returned to the same themes and

² *Black's Law Dictionary* (10th ed. 2014) defines laches as: "1. Unreasonable delay in pursuing a right or claim — almost always an equitable one — in a way that prejudices the party against whom relief is sought. — Also termed *sleeping on rights*."

were repetitive; neither does it review each exhibit used at hearing. Instead, this decision focuses on the uncontested facts and the legal significance of them in light of the explanations offered by the witnesses.

First, all witnesses who addressed the issue agreed that in 2013 the State Board of Education adopted a rule that required, among other things, an annual evaluation of all teachers. That rule also required consideration of student achievement as part of the evaluation process and that these annual evaluations be reported to the SDE.³ All witnesses who addressed the issue also agreed that school districts had a two-week window at the start of May to report their teacher evaluations to the SDE and that the results of Idaho's statewide student testing data were not yet available during the first two weeks of May.

Mr. Kerby and Ms. Trunnell were the NPSD officers who were responsible for reporting teacher evaluations to the SDE. CCO Exhibit 16. Their testimonies (and at times the testimonies of others) were to the effect that the NPSD Superintendent and Principals agreed that all NPSD teachers were at least proficient based upon their observations of the teachers through the end of April/start of May of the 2013-2014 school year; the same was true through the end of April/start of May of the 2014-2015 school year;⁴ thus, in May of both years they reported to the SDE that all of their teachers were proficient and did not report any of them as less than proficient (unsatisfactory or basic) or more than proficient (distinguished). They did not modify any of their reports in June as later data became available and stated that they did not know that the May reports could be modified, even though Mr. Kerby had directed Ms. Trunnell to modify another report to the State to correct the description of an NPSD employee for staff allowance purposes.

NPSD's internal teacher performance reviews showed that some NPSD teachers were rated as distinguished or highly effective, CCO Exhibits 18 and 19, but that information was never reported to the SDE. Mr. Kerby and Ms. Trunnell (and others) also stated that they had

³ These amendments were to Rule 120 of the Rules Governing Uniformity, IDAPA 08.02.02.120, in particular subsections 120.02, -.03, and -.07. See Idaho Administrative Bulletin, Vol. 13-10 (October 2, 2013); CCO Exhibit 1. See also Final Rule 120; CCO Exhibit 2.

⁴ Mr. Barker's testimony on these points cannot be squared with Mr. Kerby's and Ms. Trunnell's. We find the latter two testimonies to be more credible.

heard in 2014 that the school districts' May payments from the SDE under the Foundation Program might be withheld if the teacher evaluation reports to the SDE were not completed in May. Mr. Kerby and Ms. Trunnell also testified that they did not intend to falsify, mislead or omit information filed with the SDE when NPSD reported every teacher as proficient.

Be that as it may, CCO Exhibit 8 shows that many school districts revised their initial May 2014 teacher proficiency reports in June 2014 even though NPSD did not. CCO Exhibit 12 shows the same for many school districts in 2015 and shows that NPSD did not report in May, but reported in June. Ms. Trunnell explained that this may have been caused by a computer constraint when the reports were uploaded later in May, but not in June.

II. OUR ANALYSIS OF THE FACTS AND LAW

The evidence shows that the 2014 teacher evaluation reporting was a confusing, stressful task for NPSD and other school districts whose superintendents testified. Part of that confusion and stress was fed by a rumor that Foundation Program payments for May might be withheld if teacher evaluations were not submitted in the first two weeks of May. However, a rumor making the rounds on the grapevine is not a good enough basis for Mr. Kerby's or Ms. Trunnell's actions. Superintendents have a responsibility not to act on the basis of rumor, particularly when a call to the SDE's Public School Finance offices could have dispelled or verified the rumor. Mr. Kerby knew how to call that office when an employee was misreported for staff allowance purposes; he also could have called about the far more significant issue of withholding of Foundation Program payments, but he did not. We cannot excuse failure to properly comply with reporting requirements on the false sense of urgency created by a rumor that was never checked out.

As for the reporting requirements themselves, the student achievement part of the teacher evaluation differed between the 2013-2014 and 2014-2015 school years. Teacher evaluations for the 2013-2014 school year were not required to be based on standardized testing:

03. Student Achievement. For evaluations conducted on or after July 1, 2013, all certified instructional employees ... must receive an evaluation in which at least thirty-three percent

(33%) of the evaluation results are based on multiple objective measures of growth in student achievement as determined by the board of trustees and based upon research. ...

Amendment to Rules Governing Uniformity 120.03, Idaho Administrative Bulletin, Vol. 13-10 (October 2, 2013); CCO Exhibit 1. See also Final Rule 120; CCO Exhibit 2. Teacher evaluations in the 2014-2015 school year, on the other hand, required student achievement to be measured in part by standardized testing: “For evaluations conducted on or after July 1, 2014, growth in student achievement as measured by Idaho’s statewide assessment for Federal accountability purposes must be included.” *Id.* (The 2013-2014 and 2014-2015 requirements have since been amended and are no longer in effect.)

It is a close call, but in the end we find that Mr. Kerby did not violate Rule 120.03’s reporting requirements in May 2014. He was under no legal obligation at that time to include standardized testing data in his teacher evaluations. However, it strains credulity to pre-judge whether standardized test results would never reduce a teacher’s evaluation from what it otherwise would be, or raise it to a higher level, and that is why the call is a close one. Likewise, failure to report distinguished teachers is a close call, but given the confusion in the first year of this kind of reporting, we hesitate to say that it was deliberate.

Reporting in 2015 is another matter. Mr. Kerby and Ms. Trunnell had a one-year learning curve under their belts by then. If they did not know by then that they could revise their reports filed in May in response to information received after the reports were filed, they should have known it. Other districts were doing so, and that was more than a rumor; it was a fact. Further, by then NPSD was under a legal obligation to take into account “growth in student achievement as measured by Idaho’s statewide assessment” in teacher evaluations for that school year and to report distinguished teachers. Thus, we find that Mr. Kerby violated Ethical Rule IV.e. in connection with the May 2015 reporting of teacher evaluations to the SDE. It is not an acceptable excuse that he thought that staff was taking care of it. Nor do we accept any of Mr. Kerby’s other defenses. In particular, the facts that he was serving the Legislature, was not full time, and had turned over certain duties to others during the 2014-2015 school year are not a defense to not

fulfilling his responsibilities as superintendent.

That leaves the question of whether there should be any discipline for Mr. Kerby's violation of this Ethical Rule. There must be some discipline, but it should be the mildest allowable. We therefore direct the Chief Certification Officer to place a letter of reprimand in Mr. Kerby's file. The letter will say: "Mr. Ryan Kerby is hereby reprimanded for not taking growth in student achievement as measured by Idaho's statewide assessment into account in teacher evaluations for the 2014-2015 school year."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Respondent Ryan Kerby holds administrative and secondary certificates in Idaho. Complaint, ¶ 3; Answer, ¶ 5.

2. Mr. Kerby was Superintendent of New Plymouth School District #372 (NPSD) during the 2013-2014 and 2014-2015 school years. He has since retired as an educator.

3. Mr. Kerby was an NPSD officer responsible for reporting teacher evaluations to the State Department of Education. CCO Exhibits 4 and 16.

4. NPSD reported to the State Department of Education (SDE) that all its teachers were proficient in May of 2014 and again in May of 2015 (although SDE software might have forced these evaluations to be shown as done in June of 2015).⁵ Neither of these two sets of teacher evaluations considered student achievement as measured by Idaho's statewide assessment for Federal accountability purposes. Neither set of teacher evaluations was amended in light of statewide assessment data that later became available.

5. The New Plymouth School District teacher evaluations reported to the State Department of Education in May of 2015 deliberately misrepresented or deliberately omitted whether they were based in part upon student achievement as measured by Idaho's statewide assessment for Federal accountability purposes and whether any of those teachers were more

⁵ In the end it makes no difference to our decision whether the teacher evaluations for 2014-2015 were reported to the SDE in May or June of 2015.

than proficient.

B. Conclusions of Law

1. This Hearing Panel has authority under Idaho Code § 33-1208 and § 33-1209 to hear this contested case initiated by the Chief Certification Officer's Administrative Complaint against Mr. Kerby.

2. This Hearing Panel has authority under Idaho Code § 33-1208, subsection 1.j, and § 33-1209 to order the issuance of a letter of reprimand and to impose reasonable conditions upon the certificate of Ms. Kerby if it finds that he willfully violated Ethics Principle IV.e, Uniformity Rule 76.05.e, IDAPA 08.02.02.076.05.e.

3. Mr. Kerby was ultimately responsible for the proper reporting of NPSD teacher evaluations to the SDE for the 2013-2014 and 2014-2015 school years.

4. Findings of Fact 3, 4 and 5 show that Mr. Kerby willfully violated Ethics Principle IV.e, Uniformity Rule 76.05.e, IDAPA 08.02.02.076.05.e. when the NPSD reported its teacher evaluations for the 2014-2015 school year.

5. The issuance of a letter of reprimand described in the text of this decision is a discipline authorized by Idaho Code § 33-1208 and § 13-1209 and is a reasonable condition to place upon Mr. Kerby's certificates as provided by § 33-1208 and § 13-1209.

FINAL ORDER

IT IS THE FINAL ORDER of this Hearing Panel that the files for the certificates of Respondent Ryan Kerby include a letter of reprimand as described in this Final Order.

Dated this 11th of October, 2017.



Dennis Cartwright
Hearing Panel Chair

Review of Final Order

THIS IS A FINAL ORDER OF THE HEARING PANEL. Any party may file a Petition for Reconsideration of this Final Order within fourteen (14) days of its service date. The Hearing Panel is required by law to dispose of a Petition for Reconsideration within twenty-one (21) days of its filing or the Petition for Reconsideration will be considered to be denied by operation of law. See Idaho Code § 67-5243(3).

Petitions for Reconsideration of this Final Order may be filed by mail addressed to the Professional Standards Commission, Department of Education, Statehouse, Boise, ID 83720- 0027, or may be delivered to the Department of Education, Len B. Jordan Building, Room 200, 650 West State Street, Boise, Idaho, and must be received within fourteen (14) days of the service date of this Final Order.

Judicial Review

Pursuant to Idaho Code §§ 33-1209(8), 67-5270, and 67-5272, any party aggrieved by this Final Order or by another Order previously entered in this Contested Case may obtain Judicial Review of this Final Order and of all previously issued Orders in this Contested Case by filing a Petition for Judicial Review in the District Court as provided by those sections.


A Petition for Judicial Review must be filed within twenty-eight (28) days of the service date of this Final Order, or, if a Petition for Reconsideration is timely filed, within twenty-eight (28) days of the service date of a decision on the Petition for Reconsideration or denial of the Petition for Reconsideration by operation of law. See Idaho Code §§ 67-5246 and 67-5283.

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October, 2017, I caused to be served a true and correct copy of the preceding FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER OF THE HEARING PANEL by the method(s) indicated below and addressed to the following:

Dan T. Blocksom Blocksom Law & Policy, PLLC PO Box 170972 Boise, ID 83717	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail, Return Receipt Requested <input checked="" type="checkbox"/> E-mail: dan@danblocksom.com
Robert A Berry, Deputy Attorney General Office of the Attorney General Statehouse Boise, ID 83720-0010	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail, Return Receipt Requested <input checked="" type="checkbox"/> E-mail: robert.berry@ag.idaho.gov
Shannon Reece Clerk of the NPSD Board 103 SE Avenue New Plymouth, Idaho 83655	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail, Return Receipt Requested <input checked="" type="checkbox"/> E-mail: reeces@npschools.us



Michael S. Gilmore
 Attorney Advisor to the Hearing Panel