IDAHO PROFESSIONAL STANDARDS COMMISSION

In the matter of the certificates of: Ryan Kerby, Respondent	Case No. 21632 **RESPONDENT'S PETITION FOR PARTIAL RECONSIDERATION**

COMES NOW, the Respondent, by and through Dan Blocksom with Blocksom Law and Policy, PLLC, his attorney of record, and hereby petitions this hearing panel to reconsider only the portion of its *Findings of Fact, Conclusions of Law, and Final Order of the Hearing Panel* (hereinafter "Decision") in this case regarding Mr. Kerby's actions in the 2014-15 school year. The Respondent acknowledges and genuinely appreciates the panel's thoughtful consideration of the evidence to the extent that the panel found that he committed no ethical violation in the 2013-14 school year. The Respondent does not take this lightly, knowing that the amount of evidence – both written and spoken – that the panel had to examine was considerable. Nevertheless, this Petition respectfully requests that the panel modify its decision so as to find no ethical violation in the 2014-15 school year as well. This Petition compiles additional legal guidance for the panel's consideration, and demonstrates that the Professional Standards Commission (hereinafter "PSC") did not provide evidence that would support a finding of an ethical violation in the 2014-15 school year.

I. THE PROFESSIONAL STANDARDS COMMISSION HAS THE BURDEN TO PROVE THAT MR. KERBY COMMITTED WILLFUL ETHICAL VIOLATIONS.

Although the statutes and regulations specific to PSC matters do not explicitly mention one way or the other, it is a generally accepted principle that a government agency filing a complaint bears the burden of proving the allegations in the complaint. When a party "bears the burden of proof" in the legal context, that party has the responsibility to provide sufficient evidence to show that its allegations are indeed true. In the criminal context, the prosecutor bears the burden of proof, and accordingly, it is extraordinarily common in criminal jury trials for the accused to not testify and to present no evidence at all.

In this case, the PSC had the burden of proving that Mr. Kerby "willfully … violated Code of Ethics Principle IV." Principle IV forbids "falsifying, deliberately misrepresenting, or deliberately omitting information regarding the evaluation of … personnel…"[1] Based on the allegations in the complaint, the PSC had to prove that Mr. Kerby violated this ethics principle in the 2013-14 and 2014-15 school years. As Mr. Kerby's attorney argued without objection from the PSC at closing argument at the hearing, the PSC had to prove to the hearing panel that (1) Mr. Kerby acted willfully, (2) Mr. Kerby acted deliberately, and (3) Mr. Kerby misrepresented and/or omitted information. Furthermore, the PSC had to prove each of those three elements separately for each of the two school years – proof of a violation in one year does not equate proof of a violation in another year. In paragraph 11 of the PSC's complaint, the PSC further specified how it believed that Mr. Kerby committed this ethical violation: "By intentionally submitting identical evaluation scores for all of his teachers, Mr. Kerby misrepresented or deliberately omitted information regarding the evaluation of personnel within the New Plymouth School District." The panel's duty was then to evaluate whether the evidence showed that *at the time* of this alleged conduct, without the benefit of hindsight, Mr. Kerby took willful acts to commit an ethical violation in each separate school year.

In Mr. Kerby's case, the panel determined that Mr. Kerby did not commit an ethical violation in the 2013-14 school year, meaning that the evidence did not prove that Mr. Kerby (1) willfully (2) deliberately (3) misrepresented and/or omitted information in that school year. As such the panel has dismissed the allegations against Mr. Kerby for the 2013-14 school year. The panel did, however, find that Mr. Kerby did commit an *ethical* violation in the 2014-15 school year. In making that determination, the panel apparently believed that the PSC proved that Mr. Kerby (1) willfully (2) deliberately (3) misrepresented and/or omitted information in the 2014-15 school year. This Petition is requesting that the panel reconsider this finding regarding his actions in the 2014-15 school year.

The definition of the key term "willful" is critical because it shows what the PSC had to prove. Unfortunately, neither Title 33 of Idaho Code (which contains education-specific laws), IDAPA 08 (which contains education-specific regulations), the Code of Ethics for Idaho

[1] IDAPA 08.02.02.076.05.e.

professional educators, nor the Idaho Administrative Procedures Act defines the term "willful." Although Idaho case law contains plenty of definitions of the term "willful" for various contexts (e.g. worker's compensation, product liability), very few if any[2] provide a definition of "willful" in the context of alleged ethical violations. Idaho courts frequently consult Black's Law Dictionary, one of the most widely used law dictionaries in the United States, and it defines "willful" is as follows:

> Willful, adj. (13c) Voluntary and intentional, but not necessarily malicious. ● **A voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong**. The term *willful* is stronger than *voluntary* or *intentional;* it is traditionally the equivalent of *malicious, evil,* or *corrupt.* – Sometimes spelled willful. Cf. WANTON. – willfulness, n.

(italics original, underline and bold added).[3] As indicated in the definition, the act must be "voluntary and intentional" to be "willful." The definition describes "willful" as being more than "voluntary" or "intentional." According to this definition, a "voluntary" action approaches a tipping point and becomes a "willful" action when sort some ill intent is involved.

The definition of the next key term "deliberate" adds yet another term indicating intentionality to the PSC's burden of proof. "Deliberate" is defined in Black's Law Dictionary as "[i]ntentional; premediated; fully considered."[4] The description of the term is far beyond "accidental" or "negligent" – it describes a conscious decision, much like the term "willful" discussed above.

Putting the definitions of these terms together more readily portrays what the PSC was required to prove to the panel. Specifically, the PSC had to prove that in each school year, Mr. Kerby "voluntarily and intentionally, with a conscious wrong or evil purpose" (i.e. willfully), "acted intentionally or in a premediated manner" (i.e. deliberately) to misrepresent or omit information. The panel has already found that the PSC did not satisfy its burden of proof regarding proving

[2] Mr. Kerby's attorney was unable to find any Idaho appellate court cases which defined the term "willful" or "wilful" in the context of an alleged ethical violation.
[3] *Willful*, Black's Law Dictionary (10th ed. 2014).
[4] *Deliberate*, Black's Law Dictionary (10th ed. 2014).

this ethical violation in the 2013-14 school year. This Petition demonstrates that, as a matter of law, the PSC failed to prove an ethical violation in the 2014-15 school year as well.

II. A COURT WOULD REVIEW WHETHER THE PANEL'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND WHETHER THE PANEL'S DECISION PREJUDICED MR. KERBY'S SUBSTANTIAL RIGHTS.

If Mr. Kerby were to appeal this panel's decision to a court, the court would look at the factors provided in Idaho Code § 67-5279(3). Specifically, a court is required to affirm the panel's decision unless the court finds that the panel's findings, inferences, conclusions, or decisions failed in at least one of the failing ways:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) not supported by substantial evidence on the record as a whole; or
(e) arbitrary, capricious, or an abuse of discretion.[5]

The courts have provided some guidance as to how to think about the "substantial evidence" factor in Idaho Code § 67-5279(3)(d), the factor most at issue with the panel's decision. A court will not question the panel's findings of fact "unless those findings are clearly erroneous."[6] "To establish whether [the panel's] action is supported by substantial and competent evidence, [the court] must determine whether the [panel's] findings of fact are reasonable."[7] "Evidence is substantial and competent only if a reasonable mind might accept such evidence as adequate to support a conclusion."[8] The courts "must look to the record as a whole, rather than referring to portions of the record in isolation."[9] The term "record" is an important term in the legal realm, and it refers to all the evidence (both written and spoken) that was presented at the hearing. Evidence that was not presented at the hearing is considered

[5] Idaho Code § 67-5279(3).
[6] *Laurino v. Bd. of Prof'l Discipline*, 137 Idaho 596, 601, 51 P.3d 410, 415 (2002), citing *Paul v. Bd. of Prof'l Discipline*, 134 Idaho 838, 11 P.3d 34 (2000).
[7] *Cooper v. Bd. of Prof'l Discipline of the Idaho State Bd. of Med.*, 134 Idaho 449, 456, 4 P.3d 561, 568 (2000); *Industrial Customers of Idaho Power v. Idaho Public Utilities Comm'n*, 1 P.3d 786, 00.9 ISCR 279, 282, 2000 WL 381532, at *8 (2000). *Cf. United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948). s
[8] *Cooper*, 134 Idaho at 456, citing *Reiher v. American Fine Foods,* 126 Idaho 58, 60, 878 P.2d 757, 759 (1994).
[9] *Cooper*, 134 Idaho at 456, citing *Gubler By and Through Gubler v. Brydon,* 125 Idaho 107, 110, 867 P.2d 981, 984 (1994); *Fuller v. State, Dep't of Educ.,* 117 Idaho 126, 127, 785 P.2d 690, 691 (Ct. App. 1990).

"outside the record." "Any findings made by the [panel] based on matters outside the record must be reversed as unsupported by substantial, competent evidence or as arbitrary and capricious."[10]

Even if a court finds that the panel erred in one or more of the ways laid out in Idaho Code § 67-5279(3), the court will still uphold the panel's decision "unless substantial rights of the appellant have been prejudiced."[11] Therefore, if Mr. Kerby were to appeal the panel's decision to a court and succeed, Mr. Kerby would have to prove both (1) at least one error under in Idaho Code § 67-5279(3), and (2) prejudice to his substantial rights.

III. COURTS OVERTURN DECISIONS THAT HAVE NO SUPPORTING EVIDENCE, AND DECISIONS THAT DO NOT RECONCILE CONFLICTING EVIDENCE.

Although Idaho appellate case law provides only two court opinions regarding PSC cases (both of which are not relevant to Mr. Kerby's case), Idaho case law nevertheless provides plenty of examples of courts reviewing government agency decisions to see if the decisions were supported by "substantial evidence." These examples come from cases governed by the Idaho Administrative Procedures Act (as is Mr. Kerby's case), and regularly involve licensing board-type matters similar to Mr. Kerby's case, as well as planning and zoning matters. These cases provide this panel with two overarching takeaway points regarding reversals based on "substantial evidence." As explained below, the panel's decision regarding Mr. Kerby is similar to cases in which courts overturned government agency decisions because the decision was not supported by substantial evidence.

A. Findings not supported by evidence in the record.

The first takeaway from these cases is that, as a matter of law, a court will overturn a finding by the panel that is not supported by evidence in the record.[12] For example, if this panel made a finding about any matter in its decision (e.g. a car ran through a red light), but the record did not contain any evidence that the light was red at that moment in question, then a court would overturn the finding.

[10] *Laurino*, 137 Idaho at 601.
[11] Idaho Code § 67-5279(4).
[12] *See, Sanders*, 137 Idaho at 702; *Laurino*, 137 Idaho at 604; *Ater*, 144 Idaho at 285.

One example of such a court reversal of an agency decision that was unsupported by the evidence is the *Sanders* case.[13] In the *Sanders* case, a board of county commissioners denied a preliminary subdivision plat, and listed seven findings of fact to support its decision of denial. One of those findings of fact was "it is projected that development of central sewer system and water lines will be extended to that area in the reasonably near future."[14] The Court observed that this finding of fact was a key component of one of the board's conclusions of law, but also observed that no evidence was presented to the board on this issue.[15] Accordingly, the Court overturned the board's decision.[16]

This trend –courts reversing decisions when no supporting evidence is offered – is evident in the medical context as well. In the *Laurino* case, the Idaho Board of Medicine filed a complaint against a doctor in Grangeville, alleging provision of substandard care to nine patients.[17] A hearing was held, and the Board determined that the doctor had violated the relevant standard of care. The doctor appealed his case to court. As for the Board's finding that the doctor violated the standard of care by not monitoring a patient's heart condition for six hours, the Court pointed out that no evidence was offered as to the "proper standard of care."[18] As such, the Court found that this specific allegation was not supported by substantial evidence.[19] Similarly, as for the Board's finding the doctor violated the standard of care by failing to do a history and physical on the patient prior to a procedure, the Court again pointed out that no evidence as to the relevant standard of care was provided, and thus found that the Board's findings weren't supported by substantial evidence.[20]

The counseling realm has its own example of how the courts will overturn agency decisions when the record lacks supporting evidence for the agency's decision. In the *Ater* case, the Board of Professional Counselors and Marriage and Family Therapists brought disciplinary

[13] *Sanders Orchard v. Gem Cty.*, 137 Idaho 695, 52 P.3d 840 (2002)
[14] *Sanders*, 137 Idaho at 702.
[15] *Sanders*, 137 Idaho at 702.
[16] *Sanders*, 137 Idaho at 702.
[17] *Laurino*, 137 Idaho at 600.
[18] *Laurino*, 137 Idaho at 604.
[19] *Laurino*, 137 Idaho at 604.
[20] *Laurino*, 137 Idaho at 605.

proceedings against a counselor in Twin Falls County for alleged violations of a code of ethics.[21] In this case, the hearing was held before a hearing officer, who then forwarded her factual determinations, legal conclusions, and recommendation to the Board. Contrary to the hearing officer's findings, the Board found that the counselor had violated the code by following the counselee out of his office and verbally confronting the counselee in the counselee's extremely agitated state.[22] The Board chose to "rely[] solely on its specialized knowledge and experience," and disregarded what the hearing officer had determined regarding the facts and witness credibility.[23] The Court overturned the Board's decision, explaining that even though the Board could "use its knowledge and expertise to judge [the counselor's] conduct against an articulated and recognized standard, … *it may not use its expertise as a substitute for the evidence in the record*…" [emphasis added].[24]

Similar to these cases, no evidence existed in Mr. Kerby's case that would suggest that he acted willfully and deliberately regarding the May 2015 scores and uploads. As described further below, the only evidence in the record was that Mr. Kerby was not available and was not involved with the May 2015 scores and uploads. By definition, someone who is not available and is not involved cannot take a willful or deliberate act. In that way, the panel's decision is similar to all of these cases – *Sanders*, *Laurino*, and *Ater* – because the panel made a finding for which no evidence was in the record. The commissioners in *Sanders* made a finding about expected future development of sewer lines when no evidence was presented to that effect. The Board in *Laurino* determined that the doctor violated the standard of care when no evidence was presented as to what the applicable standard of care was. The Board in *Ater* decided to rely on its "specialized knowledge and experience" instead of the hearing officer's finding of fact, based on the credibility of the witnesses. The panel in Mr. Kerby's case made a finding that Mr. Kerby willfully, deliberately misrepresented and/or omitted information in the May 2015 uploads and scores, even though all evidence indicated that Mr. Kerby made no

[21] *Ater v. Idaho Bureau of Occupational Licenses*, 144 Idaho 281, 160 P.3d 438 (2007), overruled on other grounds by *City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012).
[22] *Ater*, 144 Idaho at 284.
[23] *Ater*, 144 Idaho at 285.
[24] *Ater*, 144 Idaho at 285.

decision and took no action at all. As such, the panel is committing the same error found in the *Sanders*, *Laurino*, and *Ater* cases.

B. Unreconciled conflicting evidence in the record.

The second takeaway from these cases is that, again as a matter of law, a court will overturn a finding by the panel if the panel does not reconcile conflicting evidence in the record.[25] Reconciling conflicting evidence is much simpler than it sounds, and is done by every parent who asks a young child whether he ate the forbidden cookie. The child denies the accusation but the crumbs around his mouth tell another tale. The conflicting evidence are (1) the child's denial; and (2) the crumbs on the child's face. A parent instinctually reconciles this conflicting evidence by making findings that (a) the child has no credibility, and (b) the crumbs demonstrate the child's guilt, thus justifying her conclusion that the child did in fact eat the forbidden cookie.

The clearest example of this judicial trend is the *Cooper* case. In the *Cooper* case, the Idaho Board of Medicine filed a complaint against a psychiatrist in Boise, alleging that he had unethical sexual contact or conduct with his patient.[26] At the hearing, the testimony of the patient alleging the sexual encounter and other inappropriate events did not match the exhibits and testimony from the other witnesses. For example, the patient could not provide an accurate or consistent description of the bedroom in which the sexual conduct allegedly occurred, even though the patient could provide a very accurate description of the downstairs living room. Furthermore, the psychiatrist's ex-wife and daughter both stated that at the time of the alleged event, the psychiatrist was having his traditional post-Thanksgiving dinner with his ex-wife's family.[27] To further complicate matters, later in the hearing, the patient changed her testimony regarding the time of the alleged incident so as to coincide with the end of the dinner, which was three hours later than her initial testimony. The hearing officer determined that the sexual encounter occurred, and the Board accepted those findings.[28] Although there were findings regarding the credibility of the patient and the psychiatrist, there were no findings that the psychiatrist's family members were not credible, and no discussion about the discrepancies between the patient's

[25] *See, Cooper*, 134 Idaho at 457; *Laurino*, 137 Idaho at 604, 609;
[26] *Cooper*, 134 Idaho at 450.
[27] *Cooper*, 134 Idaho at 453.
[28] *Cooper*, 134 Idaho at 451-452.

testimony and the exhibits.[29] As such, the Board never explained why it reached the decision that it did in light of the directly conflicting evidence. Accordingly, the Court overturned the Board's findings regarding the sexual encounter because the findings were not supported by substantial evidence on the record as a whole.[30] The outcome in this case is particularly fascinating because although differences and contradictions in evidence at a hearing should be expected to some degree, the Court overturned the Board's findings because "the Board did not make findings that reconciled [the patient's] account with the testimony of other witnesses …"[31]

Although not as obvious as in the *Cooper* case, the *Laurino* case also contained numerous examples of court reversals based on unreconciled conflicting evidence. In *Laurino*, the Board of Medicine accused the doctor of violating the standard of care by not conducting serial EKGs and serial enzymes, and not doing a cardiac consult.[32] A doctor who testified for the Board, however, did not factor in the fact that the patient refused further tests when initial tests were negative.[33] Furthermore, the doctor-witness also stated that he did not always obtain a cardiac consult. As such, even though the complaint alleged that the doctor should have taken certain actions, the evidence at the hearing showed that those certain actions were not always warranted or realistic. The Board found a violation of the standard of care anyway. The Court overturned the Board's decision regarding this patient, reasoning that there was a lack of substantial evidence to support the allegation.[34]

The *Laurino* case provided a second example of court reversal based on unreconciled conflicting evidence. Both the patient and the nurse testified that an x-ray and EKG had been taken, and the x-ray itself was produced at the hearing.[35] Office records had no reference to any x-ray or billing for it, and a doctor-witness testified that the x-ray wasn't produced at earlier peer review proceedings. The Board concluded that the doctor was being untruthful and had

[29] *Cooper*, 134 Idaho at 456-457.
[30] *Cooper*, 134 Idaho at 457.
[31] *Cooper*, 134 Idaho at 457.
[32] *Laurino*, 137 Idaho at 604.
[33] *Laurino*, 137 Idaho at 604.
[34] *Laurino*, 137 Idaho at 604.
[35] *Laurino*, 137 Idaho at 603.

fabricated the x-ray. The Court overturned this finding, stated that there was "insufficient evidence to support the Board's conclusion that [the doctor] fabricated the x-ray."[36]

The third example of court reversal based on unreconciled conflicting evidence in the *Laurino* case was because the Board simply ignored the conflicting evidence. The Board found that the doctor should have performed a physical exam and x-ray, that the doctor misdiagnosed the malady, and that the doctor breached the standard of care in delaying treatment.[37] The Court overturned the Board's decision, pointing out that the Board completely "ignored the patient's testimony that he had refused a consult, a hip culture, and an x-ray and that this condition improved under [the doctor's] care. The Board also ignored the patient's testimony that [the doctor] had examined him on every visit, even though there is nothing so indicated by the records."[38] Because the Board simply didn't consider this information in its decision, the Court ruled that the evidence for this allegation was also insufficient.

In Mr. Kerby's case, the evidence as to Mr. Kerby's involvement in the May 2015 uploads and scores was undisputed. If the panel believes, however, that the record contained conflicting evidence, then the panel needs to identify and reconcile those conflicts. For example, the evidence showed that Mr. Kerby simply was not involved in the May 2015 uploads or scores. Suppose that the panel believed that other evidence showed that Mr. Kerby indeed was involved (as opposed to "should have been involved," which is not relevant in this case as to whether Mr. Kerby committed this willful *ethical* violation). The panel's decision needed to cite the evidence supporting a finding of a willful and deliberate act regarding the May 2015 uploads and scores, and then explain why all of the evidence that Mr. Kerby had no willful or deliberate intentions was not credible. Given that the evidence regarding Mr. Kerby's lack of involvement came from at least two witnesses (including a PSC witness), and evidence regarding Mr. Kerby's good intentions came from at least five witnesses (again including a PSC witness), the panel had a great deal of evidence to reconcile with its finding to the contrary. In Mr. Kerby's case, there was no discernable split in the evidence as in the *Cooper* case, in which the record contained two diametrically opposed explanations. If anything (which Mr. Kerby does not concede), Mr. Kerby's

[36] *Laurino*, 137 Idaho at 603.
[37] *Laurino*, 137 Idaho at 609.
[38] *Laurino*, 137 Idaho at 609.

case could be somewhat similar to the *Laurino* decision in which the Board ignored the evidence that the patient refused a consult, a hip culture, and an x-ray. His case could be somewhat similar to another instance in the *Laurino* case, in which the Board was presented with evidence about an x-ray which was not available for earlier peer review and had no billing documentation, and the Board concluded on its own that the x-ray was fabricated. The panel's decision simply did not reconcile the evidence that ran directly contrary to its conclusion.

IV. THE PANEL'S FINDING OF AN ETHICAL VIOLATION IN THE 2014-15 SCHOOL YEAR WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The panel's finding of an ethical violation in the 2014-15 school year was "not supported by substantial evidence on the record as a whole."[39] As will be demonstrated in detail below, the record contained no evidence that Mr. Kerby took any willful or deliberate action whatsoever in the 2014-15 school year.

A. Evidence showing lack of guidance regarding how to incorporate student achievement data into teacher evaluation scores for 2013-14 school year.

First, although *not* the direct subject of this petition for reconsideration here, the evidence was entirely undisputed – even from the PSC's witnesses – as to the lack of guidance provided in the 2013-14 school year. Mr. Kerby himself received absolutely no guidance on how to incorporate student achievement data into teacher evaluation scores before the ISEE upload deadline in May 2014 or on whether to reupload finalized teacher evaluation scores. The evidence presented through Todd King and Roger Sargent, employees of the Idaho Department of Education and witnesses for the PSC, showed without dispute that the few emails sent out regarding ISEE uploads did not go to Mr. Kerby, or most superintendents for that matter – those emails went to the ISEE personnel at the school districts. Furthermore, the ISEE manual for the 2013-14 school indisputably did not provide guidance as to how to reconcile the May ISEE upload date with the fact that the student achievement data would not be available until later in May. A single paragraph addressing how to deal with this conflict in deadlines would have alleviated the need for this entire administrative complaint. The evidence was also undisputed from both Lisa Colon-Durham's testimony and Mr. Campbell's subpoena response letter that other than the ISEE

[39] Idaho Code § 67-5279(3)(d).

manual (which did not address this specific issue), the Idaho Department of Education provided no guidance or trainings regarding the conflict in deadlines or re-uploading and modifying teacher evaluation data.[40] Superintendents from other school districts, such as Wendy Johnson from the Kuna School District, Pat Charlton from the Vallivue School District, Wil Overgaard from the Weiser School District, and Pete Koehler who was formerly the superintendent with the Nampa School District, all corroborated each other in remembering general statewide confusion and little or no guidance from the state on how to deal with the quandary.

B. Evidence showing lack of guidance regarding re-uploading finalized scores for 2013-14 school year.

Second, the panel was presented with no evidence whatsoever indicating that Mr. Kerby or Ms. Trunnell[41] were told by anyone to re-upload finalized teacher evaluation scores for the May 2014 ISEE upload, or that the scores uploaded were not acceptable. In fact, the only evidence that the panel did receive was that there was statewide confusion on what scores to upload, and that Mr. Tom Luna, the Idaho Superintendent of Education at the time, stated at a meeting of superintendents – at which Mr. Kerby was present – that the Idaho Department of Education would not be using the scores. The panel also heard undisputed testimony from both Mr. Kerby and Ms. Trunnell – a witness in the PSC's case-in-chief – that they would have happily re-uploaded finalized teacher evaluation scores had they been told to do so. As such, the panel rightfully determined that there was no ethical violation in the 2013-14 school year.

C. Evidence showing lack of guidance regarding how to incorporate student achievement data into teacher evaluation scores for 2014-15 school year.

Third, the evidence was entirely undisputed – again even from the PSC's own witnesses – as to the lack of guidance for the 2014-15 school year. Mr. Kerby received absolutely no guidance on how to incorporate student achievement data into teacher evaluation scores before the ISEE upload deadline in May 2015 or whether to re-upload finalized teacher evaluation scores. The undisputed evidence from both Lisa Colon-Durham's testimony and Mr. Campbell's subpoena response letter demonstrated that other than the ISEE manual, which did not address this specific

[40] See PSC Exhibit 7.

[41] Irene Trunnell was the network administrator and ISEE coordinator, among many other things, for the New Plymouth School District in the 2013-14 and 2014-15 school years.

issue, and the emails that did not go to Mr. Kerby, the Idaho Department of Education again provided no guidance or trainings regarding the conflict in deadlines or re-uploading and modifying teacher evaluation data.[42] If the panel would look through the eyes of a superintendent who was faced with a confusing problem in May 2014, who received no guidance from the state as to how to deal with the problem, who jointly came up with a solution with his principals, who received no feedback that the solution was unacceptable, and who received no new guidance as to how to deal with the problem when it arose again in May 2015, it is unclear why the PSC or the panel would expect a superintendent to act any differently. It is even more unclear why this conduct would rise to the level of an ethical violation.

D. Evidence regarding Mr. Kerby's belief that failure to upload placeholder data would result in withholding of payment from the state.

Fourth, the evidence was again undisputed that Mr. Kerby and Ms. Trunnell believed that failure to upload some sort of teacher evaluation score would result in withholding of payment from the state. The PSC's witnesses testified that failure to upload scores would not result in withholding of funding from the districts, but none of them provided any evidence that Mr. Kerby or Ms. Trunnell were advised to that effect – again, no guidance in either school year. The undisputed testimony from Ms. Wendy Johnson, the Kuna School Superintendent for both of the years in question, demonstrated that she too was under the impression that failure to submit by the May ISEE deadlines would result in the withholding of school district funding in both school years. The panel's decision more or less suggests that Mr. Kerby should have doubted and verified Ms. Trunnell's concern about the withholding of funds. Interestingly, the undisputed evidence regarding Ms. Trunnell demonstrated that she was a knowledgeable, well-experienced, and trusted member of the New Plymouth School District's administrative team for decades, and the New Plymouth Education Association president to boot. The evidence showed that Mr. Kerby and the principals jointly came up with a solution for the problematic situation in the 2013-14 school year, and then Mr. Kerby received *no indication* from the state whatsoever that what they had done was not acceptable. It is therefore unclear why the panel believes that Mr. Kerby should have then doubted Ms. Trunnell for the 2014-15 school year.

[42] See PSC Exhibit 10.

E. Evidence regarding Mr. Kerby's complete lack of involvement in the 2014-15 school year teacher revaluation scores and ISEE score uploads.

Fifth, and most pertinent to the "willful" element of this case, the evidence was undisputed that Mr. Kerby was not involved with the May 2015 teacher evaluation scores or the May 2015 ISEE upload. Not a single witness – including the PSC's witnesses – said anything about Mr. Kerby being involved at all. Ms. Trunnell, a witness in the PSC's case-in-chief, confirmed that Mr. Kerby was not present when she looked for direction as to how to handle the May 2015 ISEE uploads. Mr. Kerby's involvement in the teacher evaluation scores and ISEE score uploads was limited to the 2013-14 school year uploads, as well as the redesign of the evaluation forms to ensure that the student achievement scores could be calculated directly on the teacher evaluation form itself. The undisputed testimony by Wil Overgaard, the Weiser School Superintendent, indicated that superintendents may not necessarily even be involved in the teacher evaluation score or ISEE upload processes. Instead, Mr. Overgaard testified that he does not even see the teacher evaluation scores until the scores are already uploaded and submitted in the ISEE system.

The evidence that was disputed over involvement in the scores was whether Mr. Kevin Barker, the incoming superintendent, gave instructions to Ms. Trunnell to report scores in May 2015 as the District chose to do in May 2014. Ms. Trunnell testified that Mr. Barker instructed her to do in May 2015 what Mr. Kerby told her to do in May 2014. Mr. Barker denied having this conversation with Ms. Trunnell. Based on the totality of the evidence, and the fact that Mr. Barker's testimony on other matters (such as the content of administrative meetings and the applicable state law at the time) was in direct contradiction to that of three other witnesses plus Mr. Kerby, the validity of Mr. Barker's testimony and his memory was questionable at best. And yet even Mr. Barker himself, another witness in the PSC's case-in-chief, did not provide any evidence that Mr. Kerby had any involvement in the May 2015 teacher evaluation scores or the May 2015 ISEE upload.

This undisputed nature of the evidence regarding Mr. Kerby's involvement in the May 2015 scores and uploads cannot be emphasized enough. As indicated by the definitions of both "willful" and "deliberate," not only did the PSC have to prove that Mr. Kerby acted "voluntarily"

and "intentionally," the PSC had to prove that Mr. Kerby acted with some sort of evil intent. The evidence in the record did not come close to proving that Mr. Kerby acted willfully or deliberately. Not only did no evidence show any misrepresentation or omission, the evidence showed that Mr. Kerby in fact did not do anything at all. He had delegated many functions to his staff and incoming superintendent, he had received no guidance from the state, he hadn't been told that his previous year's actions were unacceptable, and he was busy working on budgets and new building construction. When he remembered to ask about the ISEE upload at some point after the May upload deadline, he was told by his staff that it had been "taken care of." This is not a situation in which the panel has to conflicting evidence – this is a situation in which the undisputed evidence in the record shows no willful or deliberate unethical act whatsoever.

The panel's own decision implicitly recognizes the lack of ill intent by Mr. Kerby. Specifically, the decision does not cite to any evidence that Mr. Kerby took any willful or deliberate action at all regarding the evaluation scores or ISEE uploads in the 2014-15 school year. If this case were to be reviewed by a court, this would not even be a situation in which a court would decide whether conflicting evidence was reconciled, as in the *Cooper* case.[43] The evidence was undisputed that Mr. Kerby simply was not involved in the May 2015 scores and uploads. This undisputed evidence ran directly contrary to the panel's decision; as such, the panel cannot conclude that he committed an ethical violation – he simply did not commit any willful or deliberate act.

F. Evidence regarding lack of intent by Mr. Kerby to mislead, misrepresent, or omit information.

Sixth, the evidence showed that Mr. Kerby had no intent to mislead, misrepresent, or omit any information. The undisputed testimony from Ms. Trunnell was that (a) Mr. Kerby stressed to her that "truth, truth, truth" was important; (b) Mr. Kerby is a highly respected man in the community; and (c) she could not imagine Mr. Kerby intending to misrepresent or omit information. Mr. Kerby explained at length that his intent in the 2013-14 school year was solely focused on being as accurate as possible given the circumstances. For the 2014-15 school year,

[43] "This Court will not reweigh the evidence and substitute our judgment for that of the hearing officer." *Wilkinson v. State*, 151 Idaho 784, 789, 264 P.3d 680, 685 (Ct. App. 2011); *see also, Suits v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397, 399, 64 P.3d 323, 325 (2003)).

he explained that he was not even involved for scores and uploads. The undisputed testimony from Ms. Carrie Aguas, the elementary school principal for both years at issue, was that Mr. Kerby did not try to misrepresent information, and that he was one of the three most honest people she knew, along with her two grandfathers – she stated that they never ever said anything that was not true. Ms. Aguas explained that the principals and Mr. Kerby discussed what to do regarding this quandary in the 2013-14 school year, and that they believed it would be unethical to enter "4"s for the teachers that they expected to be distinguished, even though they were relatively certain who those individuals were. In addition to corroborating that she didn't believe Mr. Kerby was trying to misrepresent information, Ms. Christine Collins, the middle school principal in the 2013-14 school year, explained that the principals and Mr. Kerby discussed how to accurately provide data when the school year was not yet over. Even the questionable testimony from Mr. Barker, the high school principal for both years at issue, alleged no intent by Mr. Kerby to misrepresent, mislead, or omit anything. The panel's decision must somehow reconcile its finding of an ethical violation with all of this evidence to the contrary – its current decision does not.

The only "evidence" regarding Mr. Kerby's intentions regarding the scores and the uploads were statements that were taken out of context by a newspaper article. Mr. Kerby provided an undisputed explanation as to the two related but very distinct topics that the reporter and he were discussing (specifically, evaluation scores and the Career Ladder legislation), and what incorrect attributions the newspaper article made. Furthermore, the panel heard testimony from other superintendents about the underlying bias of the Idaho Education News, the newspaper at issue. This incorrect article was the only piece of information that was remotely relevant to demonstrating whether Mr. Kerby acted willfully and deliberately. And yet the PSC did not call the reporter to testify at the hearing to rebut Mr. Kerby's explanation, even though the PSC knew nearly a month before the hearing[44] that Mr. Kerby believed that the reporter took his statements out of context. As such, the reporter never testified, and Mr. Kerby never cross-examined him. In this day in age where challenges to the accuracy of media reports

[44] Mr. Kerby filed an affidavit with the hearing officer and with the PSC's attorney on August 31, 2017, nearly a month before the hearing on September 28, 2017, explaining what he had discussed with the news reporter and how his statements had been taken out of context.

are rife and where anyone with access to the internet can allege anything, perhaps the PSC implicitly acknowledged that the article carried little to no value by not bringing the reporter. The inaccurate article was the only evidence that contained any information remotely relevant to demonstrating whether Mr. Kerby intended to do anything. As it turned out, Mr. Kerby's explanation at hearing regarding his statements quoted in the article remains undisputed.

G. Evidence showing lack of guidance regarding re-uploading finalized scores for 2014-15 school year.

Seventh, the PSC presented no evidence whatsoever indicating that Mr. Kerby was told by anyone to re-upload finalized teacher evaluation scores for the May 2015 ISEE upload, or that the scores uploaded were not acceptable. Instead, the panel only heard undisputed testimony from both Mr. Kerby and Ms. Trunnell that they would have happily reuploaded finalized teacher evaluation scores had they been told to do so. Furthermore, the panel had the undisputed evidence that Mr. Kerby retired in June 30, 2015, which deprived him of any ability to correct the data beyond that point.

H. Evidence regarding student achievement scores being incorporated into teacher evaluation scores in the 2014-15 school year.

Eighth, the undisputed evidence shows that the finalized evaluation scores for the 2014-15 school year did indeed incorporate student achievement data, contrary to the decision's wording in the first full paragraph on page 7. Exhibit 19 from the PSC shows the teacher evaluation forms for the 2014-15 school year. The last page of those forms included a table on which the student achievement scores were calculated into the teacher's final evaluation score. The panel's decision stated that Mr. Kerby should be reprimanded "for not taking growth in student achievement … into account in teacher evaluations for the 2014-2015 school year." The evaluation forms in the PSC's Exhibit 19 demonstrate that this statement is factually incorrect. What would be correct is that the finalized teacher evaluation scores, which included the student achievement data once it came in, were not re-uploaded into the ISEE system – Mr. Kerby freely admitted this, and wished that he had thought of doing so. Student achievement data was included in the teacher evaluation scores.

I. Lack of support by substantial evidence for the panel's decision.

The panel's finding of an ethical violation in the 2014-15 school year is not supported by substantial evidence on the record as a whole. The panel is obviously entitled to its opinions regarding whether Mr. Kerby was a competent and responsible superintendent. The panel is not, however, entitled to translate those opinions into a finding of an ethical violation that runs contrary to undisputed evidence – the courts will not uphold that. The panel's decision indicates that its opinions regarding Mr. Kerby's competency as a superintendent were the reason for its finding of an ethical violation. Specifically, the decision found an ethical violation in the 2014-15 school year because (a) Mr. Kerby had a "one-year learning curve" under his belt by then; (b) "[Mr. Kerby] *should have known*" that the scores could have been revised; and (c) the school district had a legal obligation to take student achievement into account.[45] While the panel can have its opinion as to what Mr. Kerby should or should not have known and done, at the end of the day, the panel's own decision cites *no evidence* that Mr. Kerby acted in a willful or deliberate way in connection with the May 2015 scores and uploads. To be upheld by a court, the panel's decision needs to reconcile the conflicting evidence, and address the undisputed evidence that runs contrary to the panel's decision – this decision does not. The panel's decision doesn't say that the panel believed that Mr. Kerby and Ms. Trunnell were untruthful in their testimony. The decision merely says that these explanations were "not an acceptable excuse." As such, the panel's decision falls in line with agency findings that were overturned by the courts, such as *Sanders*, *Laurino*, and *Ater* cases described above. Specifically, because there is no evidence that Mr. Kerby took any action regarding scores or uploads in the 2014-15 school year – willful, deliberate, or otherwise – the panel's current decision is unsupported by the record. If the panel believes that there was evidence that Mr. Kerby took a willful and deliberate action in the 2014-15 school year, the panel must reconcile that evidence with the great deal of evidence to the contrary, or else risk being overturned as in the *Cooper* case.

V. A COURT WILL FIND THAT MR. KERBY'S SUBSTANTIAL RIGHTS WERE PREJUDICED.

Idaho case law explains what would constitute prejudice to a "substantial right." As a general matter, "due process rights are substantial rights."[46] Much of the Idaho case law

[45] *Decision*, page 6.
[46] *Eddins v. City of Lewiston*, 150 Idaho 30, 36, 244 P.3d 174, 180 (2010).

regarding what constitutes a "substantial right" in the arena of the Idaho Administrative Procedures Act arises in the planning and zoning context. That said, even court decisions in the planning and zoning context provide some helpful guidance for this panel. The Idaho Supreme Court in the *Hawkins* case articulated some substantial rights as follows:

> Generally, as a procedural matter, all the parties involved in a land-use decision have a substantial right to *a reasonably fair decision-making process*. Governing boards owe procedural fairness not just to applicants but also their interested opponents. Both should expect proceedings that are *free from procedural defects that might reasonably have affected the final outcome*. *See Noble v. Kootenai Cnty.*, 148 Idaho 937, 942-43, 231 P.3d 1034, 1039-40 (2010) (holding that, even though the county board disallowed the public from participating in a site visit, doing so did not likely affect the decision); *Eacret v. Bonner Cnty.*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004) (vacating a county board's decision due to a commissioner's likely bias). This includes the right for all interested parties to have a *meaningful opportunity to present evidence* to the governing board on salient factual issues. *Cnty. Residents Against Pollution from County Residents Against Pollution from Septage Sludge v. Bonner County*, 138 Idaho 585, 588-89, 67 P.3d 64, 67-68 (2003); *Sanders Orchard v. Gem Cnty. ex rel. Bd. of Cnty. Comm'rs*, 137 Idaho 695, 702, 52 P.3d 840, 847 (2002).
>
> …
>
> Of course, assuming that a decision is procedurally fair, applicants for a permit also have a substantial right in *having the governing board properly adjudicate their applications by applying correct legal standards*.

[emphasis added].[47] The same line of reasoning is evident in the *Lane Ranch Partnership* case, another planning and zoning case, in which the Idaho Supreme Court determined that an applicant for permission to construct a private road had "a substantial right to have its application evaluated properly" under the city's ordinances.[48]

Substantial rights also include the right to be presented with the evidence upon which a government agency bases its decision.[49] In yet another planning and zoning case, the *Sanders* case that was mentioned above, a board of county commissioners denied a preliminary subdivision plat application, and listed seven findings of fact to support its decision. One of those findings of fact was "it is projected that development of central sewer system and water lines will

[47] *Hawkins v. Bonneville Cty. Bd. of Comm'rs*, 151 Idaho 228, 232-33, 254 P.3d 1224, 1228-29 (2011).
[48] *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007).
[49] *Sanders*, 137 Idaho at 702.

be extended to that area in the reasonably near future."[50] The Idaho Supreme Court determined that "Because no evidence was presented to the Board on this issue, nor were any findings on this issue made by the Planning and Zoning Commission, Sanders Orchard had no notice that the Board may base its decision upon the issue of when the City of Emmett would extend city water and sewer to the subdivision." [51] The Court therefore overturned the board's decision on grounds that the board prejudiced the applicant's substantial rights by basing its decision on an issue upon which no evidence was presented.[52]

Failure to correct this panel's decision would result in prejudice to Mr. Kerby's substantial rights. The first substantial right being prejudiced would be Mr. Kerby's right to have the panel "properly adjudicate [the PSC's administrative complaint] by applying correct legal standards," as articulated in the *Hawkins* case. Specifically, Mr. Kerby has the substantial right to have this panel apply the correct legal standards to the facts of his case, and to judge it accordingly. This petition for reconsideration has laid out in great deal the correct legal standards applicable to this case, specifically that the courts will overturn decisions that are made contrary to undisputed evidence, and or that fail to reconcile conflicting evidence.

The second substantial right being prejudiced would be Mr. Kerby's right to have notice of the evidence upon which the panel based its decision. This right is along the lines of that articulated in the *Sanders* case, in which the Idaho Supreme Court said that if no evidence is presented that supports the decision, then the decision violates the applicant's rights. As documented extensively above, no evidence at Mr. Kerby's hearing supported factual finding #5 in the panel's decision. The evidence that was relevant to Mr. Kerby's total lack of involvement in the May 2015 scores and uploads was entirely undisputed – even the PSC presented no contrary evidence. Mr. Kerby therefore has no notice of what evidence the panel used to determine that Mr. Kerby committed a willful ethical violation in the 2014-15 school year.

VI. THE PANEL SHOULD MODIFY ITS DECISION TO FIND NO ETHICAL VIOLATION IN BOTH YEARS.

[50] Sanders, 137 Idaho at 702.
[51] *Sanders*, 137 Idaho at 702.
[52] *Sanders*, 137 Idaho at 702.

Mr. Kerby's case is not the story of someone who was told to do something one way, and who chose not to comply. That would be willful, deliberate – unethical. The evidence shows that this is not what happened.

The panel was presented with a great deal of undisputed testimony – even from the PSC's own witnesses – as to Mr. Kerby's actions, intentions, and the information he had at the time. Mr. Kerby received no guidance from the state in either school year about what to do, whether to re-upload finalized scores, or whether the District's solution in the 2013-14 school year was unacceptable. Mr. Kerby believed that the payment from the state would be withheld if some sort of placeholder data was not uploaded. Furthermore, Mr. Kerby was not at all involved in the 2014-15 school year scores or uploads. The evidence showed that Mr. Kerby had no intention of misrepresenting information. The panel's decision hinges on factual finding #5 of the decision, which runs directly contrary to the thrust of the evidence in the record. As such, the panel's determination of an ethical violation in the 2014-15 school year is in error.

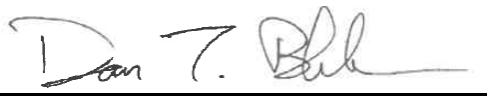
The reasoning in the panel's current decision does not lead to a finding of an ethical violation. The panel obviously believes that Mr. Kerby should have verified the rumor regarding the funding issue. The fact is that he didn't; he trusted his staff. Furthermore, the decision points out that Mr. Kerby "should have known" by the 2014-15 school year that the scores should have been re-uploaded. The fact is that he didn't know. The decision also takes issue with Mr. Kerby's explanations that he was busy with other things and had delegated certain duties to others. The fact is that he was busy, and honestly didn't think about this issue until later. All of the panel's reasons don't support a finding of an ethical violation. None of these reasons cite evidence as to how Mr. Kerby's acts in the 2014-15 school year could be "willful" and "deliberate." Instead, all of these reasons are the panel's opinions as to whether Mr. Kerby was a responsible and competent superintendent – they are not reasons why Mr. Kerby's actions were unethical. The panel is free to hold its opinions as to Mr. Kerby's competency and fulfillment of his responsibilities. The panel cannot, however, translate those opinions into a finding of unethical conduct when Mr. Kerby clearly did not commit any "voluntary" or "intentional" act regarding the scores or uploads in the 2014-15 school year.

The implications of not revising the panel's decision are large. Thankfully, the panel already determined that no ethical violation was committed in the 2013-14 school year, and that the discipline should be the "mildest allowable." Still, even with that determination, Mr. Kerby would still have to live for the rest of his life with a letter of reprimand (see Appendix A),[53] stating that he "did not comply with the requirements of Ethics Rule IV.e." This letter will be available online for all to see on the Idaho Department of Education website, just as the other reprimand letters to other educators are. Based on the tone of the panel's written decision, let alone the evidence to the contrary, it is difficult to believe that a publicly available letter that labels Mr. Kerby actions as "***unethical***" is what the panel believed to be the appropriate outcome in this case.

For these reasons, Mr. Kerby respectfully asks this panel to consider this petition for partial reconsideration, and to issue a decision that completely exonerates Mr. Kerby of any and all ethical violations.

DATED this 25th day of October 2017.

RYAN KERBY

By 

Dan Blocksom
Attorney for Respondent

[53] Appendix A is a copy of the letter of reprimand that PSC's attorney, Robert Berry, provided to Mr. Kerby's attorney on October 20, 2017, stating that this "is what the letter of reprimand would look like."

APPENDIX A: Letter of Reprimand

RE: Ryan Kerby
Professional Standards Commission Case No. 21632

LETTER OF REPRIMAND

The Professional Standards Commission issues a formal reprimand to Ryan Kerby.

A hearing panel concluded 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. Mr. Kerby was the New Plymouth officer responsible for reporting teacher evaluations to the State Department of Education. The New Plymouth School District reported all of its teachers as proficient in 2015, but the teacher evaluations did not consider student achievement as measured by Idaho's statewide assessment for Federal accountability purposes and the teacher evaluations were not amended in light of state statewide assessment data that later became available. 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. The hearing panel has directed the Chief Certification Officer to issue and place this letter of reprimand in Mr. Kerby's certification file.

Dated this _____ day of _____, 2017.

IDAHO STATE DEPARTMENT OF EDUCATION

_____
Lisa Colón Durham
Chief Certification Officer

cc: Ryan Kerby, Respondent
Dan Blocksom, Respondent's Counsel
Robert A. Berry, Attorney for the Chief Certification Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of October, 2017, I caused a true a correct copy of the foregoing document to be served to the following:

Professional Standards Commission 650 W. State St., Rm. 200 Boise, ID 83702	☒ Hand Delivery ☐ U.S. Mail ☐ Telecopy (FAX)
Robert Berry, Deputy Attorney General *Professional Standards Commission* Office of the Attorney General 700 W. Jefferson St. P.O. Box 83720 Boise, ID 83720-0010 robert.berry@ag.idaho.gov	☐ Hand Delivery ☐ U.S. Mail ☐ Telecopy (FAX) ☒ Email at: robert.berry@ag.idaho.gov
Mike Gilmore, Deputy Attorney General *Professional Standards Commission – Panel Attorney Advisor* Office of the Attorney General 700 W. Jefferson St. P.O. Box 83720 Boise, ID 83720-0010 mike.gilmore@ag.idaho.gov	☐ Hand Delivery ☐ U.S. Mail ☐ Telecopy (FAX) ☒ Email at: mike.gilmore@ag.idaho.gov

Dan T. Black

Attorney