

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

In the Matter of the Certificate of:	)	<b>Case No. 21632</b>
	)	
RYAN KERBY,	)	<b>ORDER OF THE HEARING PANEL</b>
	)	<b>DENYING RESPONDENT’S PETITION</b>
Respondent.	)	<b>FOR PARTIAL RECONSIDERATION</b>

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On October 12, 2017, this Hearing Panel’s Findings of Fact, Conclusions of Law, and Final Order (Final Order) were served upon the parties to this case. The Final Order determined that Respondent Ryan Kerby did not comply with the requirements of State Board of Education Ethics Rule IV.e when New Plymouth School District (NPSD) filed its teacher evaluations with the State Department of Education for the 2014-2015 school year and directed that a letter of reprimand be placed in his file. On October 25, 2017, thirteen days after the service date of the Final Order, Mr. Kerby timely filed Respondent’s Petition for Partial Reconsideration (the Petition). We thus have jurisdiction to consider the Petition. Idaho Code § 67-5246(4). The Petition asked this Hearing Panel to reconsider its decision that Mr. Kerby violated Ethics Rule IV.e when NPSD submitted teacher evaluations for the 2014-2015 school year and to leave intact its decision that he did not violate this Rule when NPSD submitted teacher evaluations for the 2013-2014 school year. For the reasons given below, this Hearing Panel<sup>1</sup> denies the Petition for Partial Reconsideration and affirms its earlier Final Order.

**I. REVIEW OF THE PETITION AND OUR ANALYSIS OF IT**

The Petition was 24 pages long. This decision summaries its central points and our analysis of them as follows:

**A. Part I. The Professional Standards Commission has the burden to prove that Mr. Kerby committed willful ethical violations, pages 1-3.**

Under Idaho Code § 33-1209(2) the Chief Certification Officer (CCO), not the Professional Standards Commission (PSC), signs a complaint and performs the prosecutorial role in an

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<sup>1</sup> The Hearing Panel issuing this decision consists of the same three persons who issued the Final Order: Panel Chairman Dennis Cartwright and Panel Members Kristin Beck and Josh Middleton.

administrative hearing that follows. We thus treat the Petition's references to the PSC's having the burden of proof to mean that the CCO has the burden of proof. That being said, we agree that the CCO must bear the burden of introducing evidence that Mr. Kerby committed an ethical violation and the burden of persuading the Hearing Panel that he did so.

Next, the Petition focuses upon the meaning of the word "willful" in Idaho Code § 33-1208, subsection 1.j, which provides that the PSC may impose discipline for "Willful violation of any professional code or standard of ethics or conduct, adopted by the state board of education." The Petition quotes from the definition of willful in Black's Law Dictionary (2014 ed.), which begins: "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." This definition focuses initially on whether an act is "voluntary and intentional, but not necessarily malicious," then later qualifies those words with aspects of "conscious wrong" or "at least inexcusable carelessness," which is internally consistent.

To help us determine the meaning of "willful" we are guided by a recent case in which another PSC Hearing Panel described the requirement for a "willful" violation as follows:

The evidence is clear and convincing that Ms. Kemery sent a letter to Dr. Tan containing Student's personal information and that [the school] did not have Mother's written consent to provide Student's personal information in that letter. The question before us is whether Ms. Kemery willfully violated the IDEA and its regulations by doing so. The standards of the criminal law do not apply here, but they are instructive because they contain a higher standard for liability than required for civil or regulatory law. In the criminal law an act is willful if it is done with a purpose or willingness to do the act itself without regard to whether there was any intent to violate the law. See Idaho Code § 18-101, subsection 1. Ms. Kemery willfully sent the letter to Dr. Tan. That is enough, whether she was aware or not that there was no written consent to share Student's personally identifiable information. To rule otherwise would allow any supervisor to insulate herself from a violation of IDEA's confidentiality requirements by saying, in effect, "I relied on my subordinate to have acquired the necessary consents." Responsibility for complying with the IDEA's confidentiality requirements should not be delegated; it is personal to the person

sharing a student's private information. Some discipline is required here, if for no other reason than to make it clear that persons disclosing students' personally identifiable information are responsible for knowing whether necessary written consents were obtained.

Findings of Fact, Conclusions of Law, and Final Order of the Hearing Panel in Case No. 21611, Erica Jean Kemery, issued March 7, 2017. The Kemery Hearing Panel also issued a letter of reprimand in that case for a willful violation of a Federal law against releasing a student's personal medical information without written parental consent.

We conclude, based upon the Kemery decision, Black's Law Dictionary, and the plain wording of the statute that a "willful" violation of a State Board Rule means a violation done with knowledge that the act in question was being done, not knowledge whether the act in question violated the Rule. That is, the act must be "Voluntary and intentional, but not necessarily malicious." As the Kemery Panel explained, to rule otherwise would allow any supervisor to delegate responsibility for complying with the Rules and absolve himself of personal responsibility for a violation of the Rule by blaming others. We have a different factual situation here than in Kemery because this case deals with omissions and inactions regarding reporting of teacher evaluations, but the underlying principle is the same.

Thus, we determine that willful violation of a State Board of Education Ethics Rule can include failing to perform one's legal obligations when that failure is "voluntary" and "intentional" as it was in this case. Additionally, the failures to act described below, if not a "conscious wrong," were "at least inexcusable carelessness." As for the meaning of "deliberate", we accept the Petition's proposed meaning of "intentional; premeditated; fully considered."

**B. Part 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, pages 4-5.**

This section of the Petition reviews the standards that a District Court would apply to review this Hearing Panel's decision on appeal. There is nothing for us to address here.

**C. Part III. Courts overturn decisions that have no supporting evidence, and decisions that do not reconcile conflicting evidence, pages 5-11, and Part IV. The Panel’s finding of an ethical violation in the 2014-15 school year was not supported by substantial evidence, pages 11-18.**

We analyze these two sections of the Petition together because they overlap and they are closely related. The central theme of these Parts of the Petition is that there was no evidence that Mr. Kerby was actively involved in evaluating teachers for NPSD or reporting teacher evaluations to the State Department of Education for the 2014-2015 school year. We agree with that assessment of the evidence; it is that lack of involvement and the facts that the 2014-2015 teacher evaluations were all the same and did not “tak[e] growth in student achievement as measured by Idaho’s statewide assessment into account in teacher evaluations for the 2014-2015 school year” that constituted the ethical violation.

First, with regard to Mr. Kerby’s legal responsibilities, in the 2014-2015 school year Mr. Kerby was the New Plymouth School District Superintendent and had a legal obligation to make teacher evaluations and to report teacher evaluations that took into account student achievement as measured by Idaho’s statewide assessment. This is shown by the following:

- (1) The 2013 amendments to Idaho Code section 33-513, subsection 4, provided, “The superintendent, the superintendent’s designee, or in a school district that does not employ a superintendent, the board of trustees shall conduct an annual, written evaluation of each such employee’s [teacher’s] performance.” Exhibit 3. This shows the NPSD Superintendent to make teacher evaluations unless someone else was designated to do so.
- (2) State Board of Education Policy 300 regarding superintendents of schools says: “The superintendent is directly responsible to the board for the execution of its policies, for the faithful and efficient observance of its rules by all employees throughout the system, and for the enforcement of all provisions of the law relating to the operation of schools.” Exhibit 4. Policy 300 thus further imposes obligations to make teacher evaluations on Superintendents.
- (3) Ryan Kerby’s signed Designation of Representative for the SDE data system provides: “The superintendent . . . making a delegation, however, shall be responsible for the acts, or failure to act, of the Designated Representative,” in the submission of data to the SDE. Exhibit 16. This shows that responsibility for proper reporting of teacher evaluations to the SDE was not delegated to another NPSD officer, but stayed with Mr. Kerby.
- (4) New Plymouth School District Regular Meeting Board Minutes for April, May, and June

of 2015 show that Mr. Kerby continued to be the Superintendent for the District. Exhibits 22-24. April, May, and June of 2015 are the relevant times for determining who had responsibility for teacher evaluations for the NPSD and reporting those evaluations to the SDE, and Mr. Kerby was superintendent during those times.

- (5) The version of Uniformity Rule 120 then in effect, IDAPA 08.02.02.120 (2014 version), required the use of student achievement data as measured by Idaho's statewide assessment for the 2014-2015 school year. Exhibits 1 and 2.

These five points underlie the Final Order's Conclusion of Law 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," and its Finding of Fact 3, "Mr. Kerby was an NPSD officer responsible for reporting teacher evaluations to the State Department of Education. CCO Exhibits 4 and 16." We supplement both Conclusion 3 and Finding 3 with reference to these five points.

Mr. Kerby cannot evade responsibility for proper teacher evaluations and reporting of teacher evaluations for the 2014-2015 school year by washing his hands of the matter and not participating at all in the evaluations or the reporting. The evidence is clear that he was the person responsible for the teacher evaluations and reporting them to the State Department of Education, whether he participated in the evaluation or reporting or not, and that whatever evaluation or reporting took place was a result of his willful or deliberate act to be a part of that evaluation and reporting or not to be a part of it.

The Final Order's Finding of Fact 4 described misrepresentations or omissions in NPSD evaluations and reporting to the SDE — that in 2014-2015 all NPSD teachers were rated as proficient, no better and no worse, and that teacher evaluations were based in part upon student achievement as measured by Idaho's statewide assessment for Federal accountability purposes — that were not true.<sup>2</sup> When NPSD reported to the SDE, it was Mr. Kerby who was willfully or

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<sup>2</sup> Finding of Fact 4 said:

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). 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. [Footnote omitted.]

deliberately misrepresenting or omitting that all NPSD teachers were equally proficient and that their evaluations were based in part on student growth measured in part on statewide assessments because he was the one legally responsible for complying with the law, whether he actively participated or not. To rule otherwise would allow an officer responsible for complying with State law or State Board Rule to willfully and deliberately walk away from his responsibilities without any consequences. Mr. Kerby argues, “By definition, someone who is not available and is not involved cannot take a willful or deliberate act.” Petition, page 7. We disagree. Not doing one’s job as required by law and letting others to do one’s job is willful and deliberate, particularly when the work that is submitted is one’s own responsibility and does not comply with the law.

We next need to tie up a few loose ends in Parts III and IV of the Petition. There is no conflicting evidence to be reconciled; whether Mr. Kerby participated in the evaluations or in their submission to the SDE is beside the point; he was legally obligated to do both and is responsible for whether they were properly done.

Next, lack of SDE guidance on how to submit teacher evaluations is not an excuse for not properly submitting them. Statute imposed the obligation to evaluate teachers, and the State Board of Education required evaluations to take into account statewide testing data in considering student achievement in 2014-2015. The State Department of Education cannot relieve superintendents of their legal duties under statute or rule by not giving them enough “guidance” about the submissions, by not explaining whether funding is contingent upon submissions by a certain date, or by not explaining that school districts had an ability to revise submissions.<sup>3</sup> However, we took “lack of guidance” into account by giving Mr. Kerby the mildest form of discipline, a letter of reprimand.

We did not infer Mr. Kerby’s “intent” not to comply with the teacher evaluation requirements and reporting from the Idaho Education News articles identified as Exhibits 20 and 21. Those Exhibits played no part in our decision. Mr. Kerby’s “intent” is clear from the evidence:

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<sup>3</sup> Mr. Kerby knew how to revise submissions in other areas like misclassifications of employees for salary allocation purposes.

He did not follow through on his responsibilities and allowed others to do them for him.

The evidence did not show that teacher evaluations for the 2014-2015 school year took into account “growth in student achievement as measured by Idaho’s statewide assessment for Federal accountability purposes,” which Uniformity Rule 120.03, 08.02.02.120.03 (2014 version), required for that year. The Petition tries to get around this point by use of an ellipses:

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.

Petition, page 17, quoting Final Order, page 7.

The omitted words in the quotation above are “as measured by Idaho’s statewide assessment.” Nothing in Exhibit 19’s teacher evaluations shows systematic use of Idaho’s statewide assessment to measure student growth; in fact, it is not apparent that the statewide assessments were used at all because the box labeled Student Achievement Data was generally left blank. The Petition has not directed us to particular pages of Exhibit 19 indicating use of statewide assessments to measure student growth. This reinforces the Final Order’s Finding 4 that NPSD’s teacher evaluations did not consider student growth as measured in part by statewide assessments.

**D. Part V. A Court will find that Mr. Kerby’s substantial rights were prejudiced, pages 18-20, and Part VI. The Panel should modify its decision to find no ethical violation in both years, pages 20-22.**

These final two section of the Petition summarize much of what was said before and do not add any additional issues of substance. Any arguments in the Petition that have not been previously discussed are rejected. We affirm the Findings of Fact, Conclusions of Law, and Final Order issued on October 12, 2017, and deny reconsideration of that Final Order. In addition, we explicitly supplement Conclusion of Law 3 with the five points set forth on page 4.

**II. ORDER DENYING PETITION FOR PARTIAL RECONSIDERATION**

IT IS THE ORDER OF THIS HEARING PANEL ON RECONSIDERATION that the Respondent’s Petition for Partial Reconsideration be DENIED.

Dated this 8th day of November, 2017.



Dennis Cartwright  
Hearing Panel Chair

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**Judicial Review**

Pursuant to Idaho Code §§ 33-1209(8), 67-5270, and 67-5272, any party aggrieved by this Order Denying Reconsideration or by another Order previously entered in this Contested Case may obtain Judicial Review of this Order Denying Reconsideration 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 Order Denying Reconsideration. See Idaho Code §§ 67-5246 and 67-5273.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 8th day of November, 2017, I caused to be served a true and correct copy of the preceding ORDER DENYING RECONSIDERATION 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