

Before the School Ethics Commission
Docket No.: C40-20
Decision on Motion to Dismiss

Eliza Schleifstein and Layne Varga Broyles,
Complainants

v.

Tammy MacKay,
Randolph Township Board of Education, Morris County,
Respondent

I. Procedural History

This matter arises from a Complaint that was filed on July 23, 2020, by Eliza Schleifstein (Complainant Schleifstein) and Layne Varga Broyles (Complainant Broyles) (collectively referred to as Complainants), alleging that Tammy Mackay (Respondent), a member and Vice President of the Randolph Township Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.* More specifically, the Complaint alleges that Respondent violated *N.J.S.A.* 18A:12-24(b) in Count 1, violated *N.J.S.A.* 18A:12-24(i) in Count 2, violated *N.J.S.A.* 18A:12-24.1(b) of the Code of Ethics for School Board Members (Code) in Count 1, violated *N.J.S.A.* 18A:12-24.1(d) of the Code in Count 2, violated *N.J.S.A.* 18A:12-24.1(e) of the Code in Count 1 and Count 2, and violated *N.J.S.A.* 18A:12-24.1(g) of the Code in Count 1.

On July 24, 2020, the Complaint was served on Respondent, via electronic mail, notifying her that charges were filed against her with the School Ethics Commission (Commission), and advising that she had twenty (20) days to file a responsive pleading.¹ On August 31, 2020, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On September 11, 2020, Complainants filed a response to the Motion to Dismiss and allegation of frivolous filing.

The parties were notified by correspondence dated October 19, 2020, that this matter would be placed on the Commission's agenda for its meeting on October 27, 2020, in order to make a determination regarding the Motion to Dismiss and allegation of frivolous filing. At its meeting on October 27, 2020, the Commission considered the filings in this matter and, at its meeting on November 24, 2020, the Commission voted to grant the Motion to Dismiss in its entirety because Complainants failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24(b) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24(i) as argued in Count 2, violated *N.J.S.A.* 18A:12-24.1(b) as contended in Count 1, violated

¹ Due to the ongoing Coronavirus (COVID-19) pandemic, service of process was effectuated by the Commission through electronic transmission only.

N.J.S.A. 18A:12-24.1(d) as asserted Count 2, violated *N.J.S.A.* 18A:12-24.1(e) as suggested in Count 1 and Count 2, and/or violated *N.J.S.A.* 18A:12-24.1(g) as stated in Count 1. The Commission also voted to find the Complaint not frivolous, and to deny Respondent's request for sanctions.

II. Summary of the Pleadings

A. *The Complaint*

In Count 1, Complainants assert that on May 12, 2020, Respondent made a speech “during the portion of the Board meeting reserved solely for Board comments.” In her speech, Respondent “lambasted a number of [D]istrict parents” (advocacy group) who had “been critical” of some of the past actions of the Board. According to Complainants, Respondent “unfairly attacked” the advocacy group and accused them of “threatening her with ‘unlawful acts,’ trying to influence an elected official, and violating [New Jersey (NJ)] law.” During her speech, Respondent named each of the leaders of the advocacy group by name, and because the speech was made during a virtual meeting, the parents who were named could not defend themselves or “rebut” the comments made by Respondent. Complainants maintain that the Board’s virtual meetings only provide a platform for the Board and their “invited guests” to speak, and the public has less than a “five minute window” to post their written comments/questions, not all of which are addressed by the Board. Complainants further maintain that this forum does not provide the opportunity for members of the public “to speak, ask verbal questions, or engage in any type of written or verbal dialogue with anyone present at the meeting.” Complainants contend that although Respondent provided a disclaimer at the start of her speech, “it was ineffective.” Per Complainants, Respondent stated, “I am speaking right now in my individual capacity as a Member of the [Board],” but *never* mentioned that she was speaking as a “private citizen.” Furthermore, Complainants note that if Respondent “wanted to make clear beyond any doubt or question that she was not speaking as a member of the [Board] but only in her individual capacity as a private citizen,” Respondent should have made her statements in the portion of the meeting reserved for public comments, not during the portion of the meeting designated for Board comments.

Complainants maintain that because Respondent, as a sitting Board member, made her statements during the “Board Comments” portion of the meeting, and because she did not state that she was speaking as a private citizen, “no matter what she said about her opinions being her own, or her not speaking on behalf of the rest of the Board” the public can conclude that she was speaking in her capacity as a Board member. Complainants further maintain that the statements that Respondent made about the parent advocacy group were false (inaccurate), namely that Complainant Broyles threatened and coerced Respondent. If Respondent truly believes that Complainant Broyles was threatening and coercing her, she should have filed a police report, but she did not. Furthermore, Respondent’s statements included information that was confidential and “needlessly harmed Complainants, the other members of the advocacy group[,] and their families.”

Complainants assert that because five of the nine members of the Board did not have any knowledge that Respondent was going to make a speech, Respondent “took private action by speaking as a Board member and failing to notify her fellow Board members.” In addition, because the Board meeting was held virtually, Respondent’s comments “were being broadcast into people’s homes” and could be heard by children/Randolph Township School District (District) students; therefore, Respondent “did not act in the best interests of the children.” Based on these facts, Complainants assert that Respondent violated *N.J.S.A. 18A:12-24.1(b)*, *N.J.S.A. 18A:12-24.1(e)*, *N.J.S.A. 18A:12-24.1(g)*, and *N.J.S.A. 18A:12-24(b)*.

In Count 2, Complainants note that they obtained Board emails through an Open Public Records Act (OPRA) request which revealed that Respondent (and another Board member) were involved in the “discussions and planning of district communications with parents” regarding COVID-19, without the knowledge of the other seven Board members, and after accusing one Board member of trying to “seek[] a seat at the table” by simply asking questions on behalf of a parent.

In this regard, Complainants maintain that on March 3, 2020, Dr. Soni (Board member) sent an email to the Board President (Faranetta), Respondent (Board Vice President), the Superintendent, and the Director of Communications, noting that he was aware that Respondent was “being provided with guidance ... on structuring communications” (regarding COVID-19 procedures) and if “he could suggest that there should also be some guidance about letting parents know what their children were being told about school.” Later that evening, the Superintendent emailed Respondent and the Board President informing them that “Board members providing input was exactly *why she did not want to send the communication draft on which they were working, because it was ‘overreaching’ for the Board to purport to provide her with advice.*” The Superintendent also noted that she had “many concerns” about Dr. Soni’s email. Shortly after the Superintendent’s email, Respondent responded to Dr. Soni’s original email reminding Dr. Soni that Board members may “ask questions of the administration with respect to communications but we ultimately have no role in the process.” Respondent also stated, “To ask for a seat at the table and to provide guidance is not within our job description.” Complainants maintain that some documents were not provided as part of the OPRA request, and these documents indicate that Respondent and the Board President discussed “protocols and policies to deal with COVID-19” with members of the administration. According to Complainants, Respondent “acted on her own (or with another Board member) to make decisions alongside” the administration and discussed and planned the “communications strategy and statements to the school community, and thus took private action.” Respondent also “participated in the day-to-day decision making and running of the communications function of the school district,” rather than ensuring that the “schools were well run, together with her ‘fellow board members.’” Based on the above, Complainants assert that Respondent violated *N.J.S.A. 18A:12-24.1(d)*, *N.J.S.A. 18A:12-24.1(e)*, and *N.J.S.A. 18A:12-24(i)*.

B. Motion to Dismiss and Allegation of Frivolous Filing

Following receipt of the Complaint, Respondent filed a Motion to Dismiss and allegation of frivolous filing. With regard to Count 1, Respondent maintains that she was “critical” of Complainant’s advocacy group, “who had all signed the correspondence to which she was referring ... with respect to the contents of emails they had sent to the Board on May 3, 2020 and May 9, 2020.” According to Respondent, “neither of the emails were confidential” because they had previously been shared with the public and were public record. Respondent contends the emails contained “numerous criticisms and conspiracy theories against the Board ... concerning its handling of communications with the school district during the COVID-19 pandemic.” Respondent further contends the criticism was partly due to documents received as part of Complainants’ OPRA request. Respondent stated that Complainants’ May 3, 2020, and May 9, 2020, emails, “mischaracterized those records (OPRA)” Respondent also “accurately described one of the emails as demanding that she either” do what the advocacy group wanted or they would file ethics charges against her. Respondent maintains that the advocacy group “attempted blackmail,” and Respondent responded by assuring the public that their threats “would not deter her efforts” as a Board member.

Respondent asserts that she made her statement during the “Board Comment” portion of the May 12, 2020, meeting, and prefaced her statement to the public by noting, “... I am speaking right now in my individual capacity as a member of the [Board] and that I am not speaking on behalf of the Board. In other words, the following statements are mine and mine alone” Respondent further stated, “... I will not let threats of harm to me improperly influence my exercise of my official duties as a [Board] member. I will not be bullied. I am not resigning.” Respondent concluded by restating, “... my statement tonight was made by me in my individual capacity as a [Board member] and that I was not speaking tonight on behalf of the Board” According to Respondent, the Complaint does not contain any evidence that her statements “could be construed as jeopardizing the educational welfare of children.” Although Complainants’ alleged that Respondent’s comments “were being broadcast into people’s homes” and “could be heard by children,” they did not offer any evidence to prove that Respondent’s statement “obstructed the programs and policies designed to meet the individual needs of all children” Therefore, Respondent asserts “the claim under *N.J.S.A.* 18A:12-24.1(b) fails as a matter of law.”

As to the alleged violation of *N.J.S.A.* 18A:12-24.1(e), Respondent argues that Complainants did not provide any evidence to support that Respondent “made personal promises.” Furthermore, Complainants’ assertion that Respondent’s statement was “action beyond the scope of her duties” “would strip Board members of their First Amendment rights and handcuff them in contributing to open discussion at public meetings ... including defense of themselves” Respondent notes that she was speaking “as a Board [m]ember during the Board Comment portion of a public [m]eeting of the [Board] regarding what she understood to be attempts to improperly influence her decisions as a Board member.” Respondent maintains she “was not speaking as a private citizen regarding a personal matter.” Respondent further maintains that she did not “reveal any Board confidences, as the emails were public records.”

Respondent asserts that she was speaking as a Board member, “while expressing views that she expressly articulated were her own”; therefore, the alleged violation of *N.J.S.A.* 18A:12-24.1(e) should be dismissed.

Regarding the alleged violation of *N.J.S.A.* 18A:12-24.1(g), Respondent reiterates that she did not “reveal any Board confidences,” and she did not “equate[] the term “self-help” with unlawful action,” but rather understood the term to mean, “someone taking matters into their own hand and acting outside of legal channels.” Respondent argues that her statement and the “exercise of her First Amendment rights” did not “disrupt[] or compromise[]” a pending vote regarding District business, and simply because Complainants disagree with Respondent’s statements that she made in her individual capacity does not establish a violation of *N.J.S.A.* 18A:12-24.1(g). As to the alleged violation of *N.J.S.A.* 18A:12-24(b), Respondent argues that Complainants did not provide any facts to support that Respondent’s goal was to “discredit[] or humiliate[]” Complainants or their group nor that her statement “brought her or others any advantage or privilege.” As such, Respondent asserts that Count 1 “fails to set forth factual allegations . . . , which if true, suggest Respondent violated *N.J.S.A.* 18A:12-24.1(b), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(g), or *N.J.S.A.* 18A:12-24(b).”

Regarding Count 2, Respondent argues that contrary to Complainants’ allegation that she (Respondent) “sought to censor” and “admonish” Dr. Soni, Respondent claims she “advised” Dr. Soni that it is the administration’s responsibility to “construct District communications” and she “reminded” him that although Board members may ask questions, they do not have a role in the process. In addition, Respondent directed Dr. Soni to ask the Superintendent “for an update.” Respondent argues that her advice to Dr. Soni, “[i]ronically” “mirrors the duties and responsibilities of board members set forth in *N.J.S.A.* 18A:12-24(i). As to the alleged violation of *N.J.S.A.* 18A:12-24.1(e), Respondent argues that Complainants have not provided any evidence to prove that Respondent “took private action beyond the scope of her duties to influence the communication of the District.” Respondent is entitled to meet with the Board President and the Superintendent to “set a Board agenda regarding District communications.” Complainants did not provide any facts to support that Respondent’s attendance at this meeting “had the potential to compromise the Board” nor that Respondent “made a personal promise with respect to such meeting or to anyone”; therefore, the allegation that Respondent violated *N.J.S.A.* 18A:12-24.1(e) should be dismissed. As to the alleged violation of *N.J.S.A.* 18A:12-24.1(d), Respondent asserts that the “email exchange” does not prove that Respondent “gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility” Respondent contends the “allegations in the Complaint fail to present the Commission with any evidence which, if true would suggest Respondent [] violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), or *N.J.S.A.* 18A:12-24(i) in Count 2.

Finally, Respondent asserts the Complaint is frivolous because Respondent provided an adequate disclaimer before and after making her statement, which was “unequivocally clear that she was speaking in her individual capacity as a Board member, and not on behalf of the entire Board.” Respondent expressed her opinion as her First Amendment rights permit and Complainants’ disagreement with her opinions does not establish a violation of the Act.

Respondent did not reveal any confidential Board information. Furthermore, Complainants “withheld unfavorable evidence from the Commission that is directly relevant to the assertions against Respondent.” According to Respondent, Complainants “attempt to distract the Commission by airing irrelevant and divisive personal conversations between Complainants and others,” and to attack Respondent’s character. “This gratuitous inclusion of this obviously immaterial information” shows that the Complaint was filed in bad faith to attack a public servant. Respondent maintains that Complainants filed the Complaint out of “anger” because Respondent brought their “outrageous demands and intimidation tactics” out into the open. Complainants’ “harassing conduct” should be sanctioned. Respondent claims the Complaint “unjustifiably demonizes” Respondent, whose public comments “made in her individual capacity as a Board member sought only to preserve the public’s trust in her commitment to the [District] in the face of vicious, disruptive bullying by a select few.” For these reasons, the Complaint is “devoid of any facts” sufficient to maintain a violation of *N.J.S.A. 18A:12-24.1(b)*, *N.J.S.A. 18A:12-24.1(d)*, *N.J.S.A. 18A:12-24.1(e)*, *N.J.S.A. 18A:12-24.1(g)*, *N.J.S.A. 18A:12-24(b)* and/or *N.J.S.A. 18A:12-24(i)*. In addition, because it was filed in bad faith and with the purpose of harassing, intimidating and bullying” Respondent, the Commission should sanction Complainants.

C. Response to Motion to Dismiss and Allegation of Frivolous Filing

In response to the Motion to Dismiss and frivolous allegation, Complainants reaffirm that Respondent “committed numerous violations of the [Act],” and the Complaint “is supported by solid and irrefutable evidence that those violations were, in fact, committed.” Complainants assert that Respondent “mischaracterizes the evidence, makes arguments without any evidentiary support or ignores allegations of the Complaint altogether, all in an effort to paint a false picture of the underlying facts.”

Again, Complainants note that on May 12, 2020, while sitting “in their living rooms in the middle of a global pandemic listening to a virtual [Board] meeting, [Respondent] launched into a tirade against a group of parents, who because of the virtual meeting format, had no way of defending themselves or responding in any meaningful manner.” Respondent admitted that she was “speaking as a Board member” when she delivered her statement, and “takes the position in her brief that she was speaking at the time about Board business, rather than a ‘personal matter.’” Complainants argue that the timing of her statement, during Board Comment as opposed to during “New Business” or “Old Business,” was not an accident because that was the only time the public was not permitted to comment, and she “spoke without the knowledge of the Board and authority from the Board as a whole, who did not universally agree with her views.” Complainants note that the Complaint does not “tell a story” of a Board member who addressed the public with the full authority of the Board; instead, the Complaint describes a Board member who “was angry enough that a group of parents had written a number of aggressive and challenging emails to the Board expressing frustrations ... to speak out against those parents in a public meeting, yet arrogant enough to think that she is entitled to do so by sheer virtue of her position.” Complainants assert Respondent hides behind the First Amendment while ignoring the

Commission’s advisement that the First Amendment rights of Board members “are always subject to the restrictions set forth in the [Act].”

Complainants argue that Respondent’s claim that “she is simply doing her job as a good public servant” is false. According to Complainants, Respondent “misrepresents the record and misstates the law”; “falsely accuses parents of serious criminal acts and of undertaking vigilante tactics under the guise of ‘self-help’”; disregards parts of the Act and Code that are “unhelpful to her”; “ignores entire bodies of evidence and events”; and “fails to advise the Commission” the reason for the parents anger and concerns. Furthermore, Respondent’s speech “misquoted parents” and she did not inform the Board of her intentions. Complainants argue they have provided “a clear argument, backed by solid facts and evidence which shows that Respondent exceeded the scope of her role, took private action, compromised the Board, divulged confidential information, manipulated quotes and facts, which needlessly injured individuals “with the malicious and premeditated use of inaccurate information”; prevented a Board member from asking questions, and then threatened him; made a speech with “no regard” for the children who heard Respondent verbally attack parents; and “used the schools and her position for her personal advantage to protect her perceived legacy and reputation” Complainants assert the “merits of the claims are supported by the evidence” and there are sufficient facts to establish violations of *N.J.S.A. 18A:12-24.1(b)*, *N.J.S.A. 18A:12-24.1(d)*, *N.J.S.A. 18A:12-24.1(e)*, *N.J.S.A. 18A:12-24.1(g)*, *N.J.S.A. 18A:12-24(b)*, and *N.J.S.A. 18A:12-24(i)*.”

III. Analysis

A. Standard for Motion to Dismiss

In determining whether to grant a Motion to Dismiss, the Commission shall review the facts in the light most favorable to the non-moving party (Complainants), and determine whether the allegation(s), if true, could establish a violation of the Act. Unless the parties are otherwise notified, a Motion to Dismiss and any response is reviewed by the Commission on a summary basis. *N.J.A.C. 6A:28-8.1 et seq.* Thus, the question before the Commission is whether Complainants have alleged sufficient facts which, if true, could support a finding that Respondent violated *N.J.S.A. 18A:12-24(b)* in Count 1, violated *N.J.S.A. 18A:12-24(i)* in Count 2, violated *N.J.S.A. 18A:12-24.1(b)* in Count 1, violated *N.J.S.A. 18A:12-24.1(d)* in Count 2, violated *N.J.S.A. 18A:12-24.1(e)* in Count 1 and Count 2, and/or violated *N.J.S.A. 18A:12-24.1(g)* in Count 1.

B. Alleged Prohibited Acts

In their Complaint, Complainants allege that Respondent violated *N.J.S.A. 18A:12-24(b)* in Count 1, and violated *N.J.S.A. 18A:12-24(i)* in Count 2. These provisions of the Act provide:

- b. No school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others;

- i. No elected member shall be prohibited from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to, or accepted by the member or a member of his immediate family, whether directly or indirectly in return therefore;

Alleged Violation of N.J.S.A. 18A:12-24(b)

In order to credit an alleged violation of *N.J.S.A. 18A:12-24(b)*, the Commission must find evidence that Respondent used or attempted to use her official position to secure an unwarranted privilege, advantage or employment for herself, members of her immediate family, or “others.”

In **Count 1**, Complainants argue that because Respondent, as a sitting Board member, made negative statements about the parent advocacy group during the “Board Comments” portion of the meeting (a time when the public did not have an opportunity to reply), and because she did not state that she was speaking as a private citizen, she violated *N.J.S.A. 18A:12-24(b)*. Respondent counters that Complainants did not provide any facts to support that Respondent’s goal was to “discredit[] or humiliate[]” Complainants or their group nor that her statement “brought her or others any advantage or privilege.”

After review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A. 18A:12-24(b)*. Regardless of whether Respondent’s statements were made in a personal/private capacity or in her capacity as a member of the Board, it is clear that Complainants have not articulated facts sufficient to show that her remarks, *if* made in her capacity as a Board member, resulted in Respondent, a member of her immediate family, or an “other” securing an *unwarranted* privilege, advantage, or employment. At worst, Respondent’s remarks resulted in what Complainants perceive as an unfair portrayal of the parent advocacy group to which Complainants belong. However, how Respondent (or a member of her immediate family or an “other”) *personally* secured a specific and identifiable unwarranted privilege, advantage, or employment from expressing negative remarks about the parent advocacy group is not sufficiently pled in the Complaint. Therefore, the Commission finds that the alleged violation of *N.J.S.A. 18A:12-24(b)* in Count 1 should be dismissed.

Alleged Violation of N.J.S.A. 18A:12-24(i)

To credit an alleged violation of *N.J.S.A. 18A:12-24(i)*, the Commission must find evidence that Respondent made an inquiry for information on behalf of a constituent, and a fee, reward, or other thing of value was promised to, given to, or accepted by Respondent or a member of her immediate family (whether directly or indirectly) in return for her inquiry.

In **Count 2**, Complainants contend that Respondent violated *N.J.S.A. 18A:12-24(i)* after she accused a Board member (Dr. Soni) of trying to “seek[] a seat at the table” by simply asking questions on behalf of a parent. Respondent counters that she “advised” Dr. Soni that it is the administration’s responsibility to “construct District communications,” and reminded” him that although Board members may ask questions, they do not have a role in the process. In addition,

Respondent directed Dr. Soni to ask the Superintendent “for an update” should he require one. As such, it is Respondent’s position that she acted consistent with, and not contrary to, her ethical duties and obligations.

Based on its review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A.* 18A:12-24(i). There are absolutely no facts set forth in the Complaint, which could establish that *Respondent* made an inquiry for information on behalf of a constituent which was predicated on receipt of a fee, reward, or other thing of value. Instead, it is Complainants’ position that Respondent chastised Dr. Soni for engaging in behavior which is permitted by this subsection of the Act, i.e., because he asked a question on behalf of a constituent that was not conditioned on receipt of a fee, reward, or other thing of value. However, even if Respondent may have rebuked Dr. Soni for permissible conduct does not mean that *Respondent* engaged in the unethical behavior prohibited by *N.J.S.A.* 18A:12-24(i). As such, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24(i) in Count 2 should be dismissed.

C. *Alleged Code Violations*

Complainants further allege that Respondent violated *N.J.S.A.* 18A:12-24.1(b) in Count 1, violated *N.J.S.A.* 18A:12-24.1(d) in Count 2, violated *N.J.S.A.* 18A:12-24.1(e) in Count 1 and Count 2, and violated *N.J.S.A.* 18A:12-24.1(g) in Count 1. These provisions of the Code provide:

- b. I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.
- d. I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.
- e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.
- g. I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

Alleged Violation of N.J.S.A. 18A:12-24.1(b)

Pursuant to *N.J.A.C.* 6A:28-6.4(a)(2), factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(b) shall include evidence that Respondent willfully made a decision contrary to the educational welfare of children, or evidence that Respondent took deliberate action to obstruct

the programs and policies designed to meet the individual needs of all children, regardless of their ability, race, color, creed or social standing.

In **Count 1**, Complainants assert that because the Board meeting was held virtually, and Respondent's comments "were being broadcast into people's homes" and could be heard by children and District students, Respondent "did not act in the best interests of the children" in violation of *N.J.S.A.* 18A:12-24.1(b). Respondent counters that the Complaint does not contain any evidence that her statements "could be construed as jeopardizing the educational welfare of children." Although Complainants' alleged that Respondent's comments "were being broadcast into people's homes" and "could be heard by children," they did not offer any evidence to prove that Respondent's statements "obstructed the programs and policies designed to meet the individual needs of all children"

After review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(b). Even if Respondent's statements were made in her capacity as a Board member, the Complaint is devoid of factual evidence indicating that Respondent willfully made a decision contrary to the educational welfare of children, or took deliberate action to obstruct programs and policies. The fact that the Board's meeting may have been broadcasted to the community, which necessarily includes children and students, does not mean that Respondent made a *decision* or took *action* prohibited by this subsection of the Code. Therefore, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(b) in Count 1 should be dismissed.

Alleged Violation of N.J.S.A. 18A:12-24.1(d)

As set forth in *N.J.A.C.* 6A:28-6.4(a)(4), factual evidence of a violation of *N.J.S.A.* 18A:12-24.1(d) shall include, but not be limited to, evidence that Respondent gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district or charter school.

In **Count 2**, Complainants allege Respondent violated *N.J.S.A.* 18A:12-24.1(d) because, based on the substance of emails that were provided in response to an OPRA request, Respondent, without the knowledge of at least seven other members of the Board, "participated in the day-to-day decision making and running of the communications function of the school district" instead of ensuring that the "schools were well run, together with her 'fellow board members.'" Respondent counters that the "email exchange" does not prove that Respondent "gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility"

Based on its review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(d). There are no facts in the Complaint indicating that

Respondent gave a direct order to any member(s) of the administration, and no facts that Respondent became impermissibly involved in the activities or functions of designated school personnel or the administration of the District. The emails provided in response to the OPRA request merely confirm that Respondent met with members of the administration and another Board officer, not that she – whether alone or in concert with another member of the Board – unilaterally made decisions that should have been made by others. As such, the Commission finds that the alleged violation of *N.J.S.A. 18A:12-24.1(d)* in Count 2 should be dismissed.

Alleged Violations of N.J.S.A. 18A:12-24.1(e)

Pursuant to *N.J.A.C. 6A:28-6.4(a)(5)*, factual evidence of a violation of *N.J.S.A. 18A:12-24.1(e)* shall include evidence that Respondent made personal promises or took action beyond the scope of her duties such that, by its nature, had the potential to compromise the board.

In **Count 1**, Complainants argue that because five of the nine members of the Board did not have any knowledge that Respondent was going to make a speech during the Board’s meeting about the parent advocacy group, Respondent “took private action by speaking as a Board member and failing to notify her fellow Board members” in violation of *N.J.S.A. 18A:12-24.1(e)*. Respondent counters that Complainants did not provide any evidence to support the position that Respondent “made personal promises.” Furthermore, Complainants’ assertion that Respondent’s statement was “action beyond the scope of her duties” “would strip Board members of their First Amendment rights.” Respondent maintains she “was not speaking as a private citizen regarding a personal matter,” and instead was speaking as a Board member, “while expressing views that she expressly articulated were her own.” Respondent further maintains that she did not “reveal any Board confidences, as the emails were public records.”

After review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A. 18A:12-24.1(e)*. Accepting Complainants’ argument that Respondent’s statements were made in her capacity as a Board member (and not in her personal/private capacity), there is nothing which prohibits a member of the Board from making remarks, even if of a personal nature, about matters related to the business of the Board. The critical fact in this case is that Respondent’s remarks directly touched upon an issue impacting the Board. Individual Board members are certainly permitted to speak about such matters, and to find otherwise would unduly silence the sharing of opinions. Therefore, the Commission finds that the alleged violation of *N.J.S.A. 18A:12-24.1(e)* in Count 1 should be dismissed.

In **Count 2**, Complainants contend Respondent violated *N.J.S.A. 18A:12-24.1(e)* because, based on the substance of emails that were provided in response to an OPRA request, Respondent took impermissible “private action” when she “acted on her own (or with another Board member) to make decisions alongside” the administration, and also discussed and planned the “communications strategy and statements to the school community” without the knowledge of at least seven other members of the Board. Respondent counters that Complainants have not provided any evidence to prove that Respondent “took private action beyond the scope of her

duties to influence the communication of the District.” Respondent is entitled to meet with the Board President and the Superintendent to “set a Board agenda regarding District communications.” Complainants did not provide any facts to support that Respondent’s attendance at this meeting “had the potential to compromise the Board” nor that Respondent “made a personal promise with respect to such meeting or to anyone.”

Based on its review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondent violated *N.J.S.A. 18A:12-24.1(e)*. In this regard, there are no facts in the Complaint evidencing an impermissible personal promise from Respondent to anyone, and no facts indicating that Respondent took action beyond the scope of her duties. Once again, the emails provided in response to the OPRA request merely confirm that Respondent met with members of the administration and another Board officer. When appropriate, meeting with members of the administration and other Board officers is certainly within the scope of one’s duties and responsibilities as an individual member of the Board and/or Board officer. As such, the Commission finds that the alleged violation of *N.J.S.A. 18A:12-24.1(e)* in Count 2 should be dismissed.

Alleged Violation of N.J.S.A. 18A:12-24.1(g)

As set forth in *N.J.A.C. 6A:28-6.4(a)(7)*, factual evidence of a violation of the confidentiality provision of *N.J.S.A. 18A:12-24.1(g)* shall include evidence that Respondent took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that Respondent violated the inaccurate information provision of *N.J.S.A. 18A:12-24.1(g)* shall include evidence that substantiates the inaccuracy of the information provided by Respondent and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances.

In **Count 1**, Complainants assert that because the statements that Respondent made about the parent advocacy group were false (inaccurate), namely that Complainant Broyles threatened and coerced Respondent, and because Respondent’s statements included information that was confidential and “needlessly harmed Complainants, the other members of the advocacy group[,] and their families,” she violated *N.J.S.A. 18A:12-24.1(g)*. Respondent counters that she did not “reveal any Board confidences,” and she did not “equate[] the term “self-help” with unlawful action,” but rather understood the term to mean, “someone taking matters into their own hand and acting outside of legal channels.” Respondent argues that her statement and the “exercise of her First Amendment rights” did not “disrupt[] or compromise[]” a pending vote regarding District business, and simply because Complainants disagree with Respondent’s statements does not mean she (Respondent) violated the Code.

After review of the Complaint, the Commission finds that even if the facts as alleged are proven true by sufficient credible evidence, they would not support a finding that Respondent

violated *N.J.S.A.* 18A:12-24.1(g). First, to the extent that Complainants assert that Respondent disclosed confidential information, the Complaint does not sufficiently identify which aspect(s)/portion(s) of Respondent's remarks were confidential and/or the basis for the alleged confidentiality of those remarks. Second, to the extent that Complainants assert that Respondent provided inaccurate information, the Complaint does not sufficiently identify the "inaccurate statement" articulated by Respondent or provide evidence, which establishes the inaccuracy was other than reasonable mistake or personal opinion. Complainants' contention that Respondent's failure to file a police report or to contact law enforcement about the threats she received means, in and of itself, that the threats did not occur is, in the Commission's review of the facts, insufficient. Therefore, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(g) in Count 1 should be dismissed.

Accordingly, and granting all inferences in favor of the non-moving party (Complainants), the Commission has determined to **grant** the Motion to Dismiss in its entirety because Complainants failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24(b) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24(i) as argued in Count 2, violated *N.J.S.A.* 18A:12-24.1(b) as contended in Count 1, violated *N.J.S.A.* 18A:12-24.1(d) as asserted Count 2, violated *N.J.S.A.* 18A:12-24.1(e) as suggested in Count 1 and Count 2, and/or violated *N.J.S.A.* 18A:12-24.1(g) as stated in Count 1.

IV. Request for Sanctions

At its meeting on October 27, 2020, the Commission considered Respondent's request that the Commission find the Complaint frivolous, and impose sanctions pursuant to *N.J.S.A.* 18A:12-29(e). Despite Respondent's argument, the Commission cannot find evidence that might show that Complainants filed the Complaint in bad faith or solely for the purpose of harassment, delay, or malicious injury. The Commission also does not have information to suggest that Complainants knew or should have known that the Complaint was without any reasonable basis in law or equity, or that it could not be supported by a good faith argument for an extension, modification or reversal of existing law. *N.J.A.C.* 6A:28-1.2. Therefore, at its meeting on November 24, 2020, the Commission voted to find the Complaint not frivolous, and to deny the request for sanctions.

V. Decision

Based on the foregoing, and in reviewing the facts in the light most favorable to the non-moving party (Complainants), the Commission voted to **grant** the Motion to Dismiss in its entirety because Complainants failed to plead sufficient, credible facts to support a finding that Respondent violated *N.J.S.A.* 18A:12-24(b) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24(i) as argued in Count 2, violated *N.J.S.A.* 18A:12-24.1(b) as contended in Count 1, violated *N.J.S.A.* 18A:12-24.1(d) as asserted Count 2, violated *N.J.S.A.* 18A:12-24.1(e) as suggested in Count 1 and Count 2, and/or violated *N.J.S.A.* 18A:12-24.1(g) as stated in Count 1. The

Commission also voted to find that the Complaint is not frivolous, and to deny Respondent's request for sanctions.

Pursuant to *N.J.S.A.* 18A:12-29(b), the Commission hereby notifies Complainants and Respondent that, for the reasons set forth above, this matter is dismissed. This decision is a final decision of an administrative agency and, therefore, it is appealable only to the Superior Court-Appellate Division. *See, New Jersey Court Rule 2:2-3(a).*

Robert W. Bender, Chairperson

Mailing Date: November 24, 2020

**Resolution Adopting Decision
in Connection with C40-20**

Whereas, at its meeting on October 27, 2020, the School Ethics Commission (Commission) considered the Complaint, the Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and allegation of frivolous filing, and the response to the Motion to Dismiss and allegation of frivolous filing submitted in connection with the above-referenced matter; and

Whereas, at its meeting on October 27, 2020, the Commission discussed granting the Motion to Dismiss in its entirety for failure to plead sufficient, credible facts to support the allegations that Respondent violated *N.J.S.A.* 18A:12-24(b) as alleged in Count 1, violated *N.J.S.A.* 18A:12-24(i) as argued in Count 2, violated *N.J.S.A.* 18A:12-24.1(b) as contended in Count 1, violated *N.J.S.A.* 18A:12-24.1(d) as asserted Count 2, violated *N.J.S.A.* 18A:12-24.1(e) as suggested in Count 1 and Count 2, and/or violated *N.J.S.A.* 18A:12-24.1(g) as stated in Count 1; and

Whereas, at its meeting on October 27, 2020, the Commission discussed finding the Complaint not frivolous, and denying Respondent's request for sanctions; and

Whereas, at its meeting on November 24, 2020, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on October 27, 2020; and

Now Therefore Be It Resolved, that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of its decision herein.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on November 24, 2020.

Kathryn A. Whalen, Director
School Ethics Commission