

**STATE OF NEW YORK
STATE EDUCATION DEPARTMENT**

In the Matter of Cory and Sarah McMillan, Alex Dery Snider and David Snider, Sara Diane and Jason Nolan, and Deborah Jaffe and Edwin Schiele on behalf of our children as students of Cambridge Central School: PM, HS, AS, RN, WN, and AS, from the July 8, 2021, action of the Board of Education of the Cambridge Central School District rescinding the June 17, 2021, vote retiring the District's race-based Native mascot and associated imagery AND the resolution to keep the Indians nickname as a mascot and review changes to the imagery.

Appeal No.: 21598

RESPONDENT'S MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted by Respondent, Board of Education of the Cambridge Central School District (*hereinafter* “Board,” “Respondent,” “District,” or “School District”), in opposition to the Verified Petition of Cory and Sarah McMillan, *et al.*, received by the District on August 3, 2021 (*hereinafter* “Petition”). For the reasons that follow, the Commissioner must dismiss this Appeal for procedural violations or, alternatively on the merits.

STATEMENT OF FACTS

During or about October 2020, John Kane, an individual who does not reside within the School District, who is an activist on the issue of the use of Native American mascots and imagery, sought to have the Board consider a petition that he created and circulated concerning the District’s “Indians” nickname and imagery. (Affidavit of Jessica Ziehm, ¶ 8 “Ziehm Aff.”).¹ By or about its meeting held on December 10, 2020, the Board was presented with competing petitions concerning the continued use of the “Indians” nickname and imagery. The petition presented in favor of keeping the “Indians” nickname was presented by Dillon Honyoust, who was ultimately elected at the May 2021 annual District meeting to serve on the Board. (Ziehm Aff. ¶ 11, Ex. “2”). The Board discussed the process it wanted to use to review the matter, and District Superintendent of Schools, Doug Silvernell, shared a draft of a proposed timeline that the Board could follow with respect to how to proceed and how and when it would potentially come to a decision. (Ziehm Aff. Ex. “2”).

¹ Generally, all references to Affidavits in this Memorandum are references to the Affidavits which were provided in support of Respondent’s Verified Answer filed on August 23, 2021 and referred to herein as “Verified Answer,” which included the Affidavits submitted in support of the District’s opposition to the application for a Stay Order in this Appeal. Affidavits submitted in support of the Petition, and the Petitioner’s response to the Verified Answer filed on or about September 13, 2021, may also be referenced herein.

Over the course of the next six months, the Board conducted a comprehensive review into the School District's use of the "Indians" nickname and the imagery associated with that nickname. (*See generally* Ziehm Aff., Affidavit of Dillon Honyoust "Honyoust Aff.", and Affidavit of David Shay Price "Price Aff."). This review largely occurred in full view of the public and included the following:

- Prior to the Board's meeting on December 10, 2020, during November 2020, the Board attended training on the issue of equity, diversity, and inclusion. (Ziehm Aff. ¶ 13b).
- Numerous discussions during the public sessions of numerous Board meetings during which individuals both for and against keeping the nickname had the opportunity to publicly comment. The first such discussion occurred during a Board meeting held on October 8, 2020. (Ziehm Aff. ¶ 13a).
- Hundreds of pages of documents on the topic of Native American-themed mascots were shared with members of the Board of Education. This included 346 pages of resource materials compiled by Dr. Silvernell, provided to the Board, and posted on the School District's website for the general public to access. The documents included, but were not limited to, articles about other school districts, both in New York and nationally, with Native American-themed nicknames and imagery; the use of Native-American-themed nicknames and imagery by professional and collegiate sports teams; academic studies and reviews on the use of Native American-themed mascots and stereotypes and their effects on both Native and non-native individuals; and information concerning the School District's review in 2001 of the "Indians" name and imagery. (Ziehm Aff. ¶ 13c; *see* "Mascot Packets" annexed to the Petition).
- The School District engaged a team of trained mediators/facilitators – Restorative Practices Team: Bridges – for the purpose of gaining and synthesizing the perspectives

of different stakeholders concerning the nickname issue. In addition to conducting individual interviews with stakeholders, they also led special tailored and facilitated public “community circles” intended to ask questions of the community, cultivate important topics and perspectives, and allow community members the opportunity to share their perspectives and experiences. These circles were important to provide a voice to the community as the COVID-19 pandemic prevented individuals from engaging in in-person discourse on the issue. (Ziehm Aff. ¶ 13i). This was also important because the community had grown increasingly divided on the issue, due in part the overly aggressive approach taken by individuals, including some of the Petitioners, who forcefully advocated with an “all or nothing” and pressure-laden approach. (Ziehm Aff. ¶¶ 14a-c). There were also some individuals who supported keeping “Indians” whose approach was off-putting and unhelpful. (Ziehm ¶ 15).

In addition to the public aspect of the review, Board members engaged in a non-public review of hundreds of pages of e-mails and materials provided to the School District by individuals residing both within and outside of the District. This included documentation provided by individuals who supported the continued use of “Indians” and by individuals who sought the end of the nickname’s use. (Ziehm Aff. ¶¶ 13d and 13e). In addition, as discussed in more detail in the Argument herein, Board members conducted their own research and went about the task of educating themselves on the issue as well. (*See generally* Honyoust, Price, and Ziehm Affs.)

This review culminated on July 8, 2021, when the Board passed a resolution that, in sum, rescinded a prior Board resolution approved on June 17, 2021, that retired the Indians nickname, and reinstated the Indians name, mascot, and associated imagery. The Board also passed a resolution on July 8, 2021, that provided that the Board would “review for potential changes and/or updates

to the current imagery associated with [the Indians nickname].” With it, the Board also resolved unanimously to direct “the Superintendent of Schools to create a plan that will incorporate enhanced instruction in the curriculum of the School District that recognizes and teaches students in an informed and accurate way about the history of Native American culture, includes as such culture has and continues to exist on the region of the School District.” (Honyoust Aff. ¶¶ 6 and 23; Price Aff. ¶¶ 7, 12, and 22; Ziehm Aff. ¶¶ 3, 5, 13a, 26-29; Verified Answer Ex. “1”). In doing so, the Board acted in an informed, rational manner, based upon careful consideration, deliberation, and analysis of numerous factors, to set a course of action the Board deemed most appropriate under the totality of the circumstances. (*See generally* Honyoust, Price, and Ziehm Affs.).

The Board’s official actions that ultimately led up to its vote on July 8, 2021, are noteworthy. On or about January 19, 2021, amidst the Board’s comprehensive review, then Board Vice President, Beth O’Grady, resigned from the Board effective immediately. Notably, prior to her resignation, Ms. O’Grady had been openly advocating for a committee of community members to be created to seek compromise on the nickname issue. (*See* Ziehm Aff. ¶¶ 10 and 13i, Ex. “2”; Petition, Ex. “3,” Sub-Ex. “FF”).

During the District’s annual meeting and election held on May 18, 2021, the voters overwhelming elected Dillon Honyoust and David Shay Price. As the candidate who received the most votes, Mr. Honyoust joined the Board on May 19, 2021, to complete the remainder of the term vacated by Ms. O’Grady. (Ziehm Aff. ¶ 16).

With every seat on the Board filled, during its next regularly scheduled meeting held on June 10, 2021, Board President Neil Gifford introduced a resolution, which was seconded by then outgoing Board Member Jessica Roosevelt, that would “retire the nickname of Cambridge Indians and all Indigenous imagery associated with that nickname effective July 1, 2021.” (Ziehm Aff. ¶

17, Exs. “9” and “10”). However, Board Member Honyoust strongly advocated that a compromise that he had previously presented to the Board in January 2021, prior to his being seated, which would keep the “Indians” name, while reviewing the associated imagery, be acted upon instead. Board Member Ziehm expressed agreement with this approach, finding that based upon all of the information she had been presented, that it represented the most reasonable approach to moving the District forward with respect to the “Indians” nickname and imagery. Board Member Caleb Breault then stated, “[i]f this vote was put to me right this second, I still don’t know how I’d vote,” or words to that effect. (Ziehm Aff. ¶ 18).

The Board then spent a considerable amount of time discussing possible revisions to the resolution at hand. The majority of the Board was ready to vote on a revised resolution that evening, but Member Ziehm expressed concerns that what they had deliberated about may not be accurately captured should a vote on a revised resolution be immediately taken, and she wanted to review the revised resolution written out in its entirety. With that being said, the Board voted unanimously on a resolution proposed by Board President Gifford, and seconded by Member Breault, to table and then ultimately amend the resolution that was previously proposed, which would incorporate all of the revisions that had been discussed by the Board Members during the meeting. Board Counsel Honeywell was present while the Board deliberated on June 10, 2021, and he was asked to help synthesize what had been discussed and draft a coherent revised resolution. The revised resolution would then be considered by the Board at a special meeting to be held on June 17, 2021. (Ziehm Aff. ¶ 19, Ex. “10”).

During the week that followed, the Board consulted with Board Counsel Honeywell to draft a revised resolution, which encapsulated the Board’s discussion about proposed revisions that occurred on June 10, 2021. All five Board members approved the revised resolution drafted

by Board Counsel Honeywell, and that version was included in the agenda for the special meeting scheduled to be held on June 17, 2021. (Ziehm Aff. ¶ 20, Ex. “11”).

On June 16, 2021, at approximately 4:30 p.m., just over 24 hours before the Board was going to vote on the revised resolution, the Washington Post published an online opinion column in which the author mocked the District as a racially insensitive community. (Ziehm Aff. ¶ 23). That night, Petitioner Sarah Diane Nolan e-mailed Board President Gifford to inform him of the opinion column, which she characterized as being “in the headlines,” and specially noted that the source was the Washington Post. The following morning, Petitioner Nolan e-mailed the Board, Dr. Silvernell, High School Principal Caroline Goss, and Peter Arvo, a Bridges facilitator. She specifically noted “that a national news source is reporting and following along.” (Ziehm Aff. ¶ 24, Ex. “13.”

Despite the Board having unanimously agreed to table and then revise the proposed resolution from the June 10, 2021 meeting, and then drafting the revised resolution with the assistance of Board Counsel, as the Board had tasked, and going so far as to include the revised resolution that had been approved by each member of the Board in its agenda for the meeting to be held on June 17, 2021, the Board did not approve the revised resolution. Instead, then Board President Gifford made a motion, which resurrected the same resolution that the Board had unanimously agreed to table and revise the week before. The motion was seconded by outgoing Member Roosevelt, and Member Breault also voted in favor of this resolution, passing the resolution three votes to two. In his comments, Board President Gifford noted that he was aware this vote would likely be reversed once outgoing Member Roosevelt was replaced on the Board by Mr. Price. (Ziehm Aff. ¶ 21, Ex. 11; Verified Answer Ex. “2”). Notably, during the special meeting on June 17, 2021, outgoing Member Roosevelt stated that she was no longer in favor of the revised resolution as a result of the Washington Post column. (Ziehm Aff. ¶ 25).

On July 8, 2021, with newly elected Board member Price now seated, the Board passed a resolution that reinstated the Indians name, mascot, and associated imagery. The actions of Board Members Ziehm and Honyoust on July 8, 2021, were consistent with the Board's actions during the June 10, 2021, meeting and during the time frame interceding those two meetings, as well as with their actions during the June 17, 2021 meeting. (Ziehm Aff. ¶ 26).

On or about August 3, 2021, the above-captioned Appeal was commenced against the School District. This Memorandum of Law is submitted in compliance with Section 276.4 of the Commissioner's Regulations, in support of the School District's Verified Answer and in opposition to the Verified Petition. Additional facts relevant to the disposition of this matter are contained within the argument *infra*.

For the foregoing reasons, it is respectfully requested that the Commissioner dismiss the Appeal as procedurally deficient; dismiss the Appeal on its merits; and find that the School District has not acted in an arbitrary or capricious manner.

ARGUMENT

POINT I

THE APPEAL MUST BE DISMISSED FOR PROCEDURAL REASONS

Petitioners Cory and Sarah McMillian and Sara Diane and Jason Nolan lack standing to bring the instant appeal. Petitioners Alex Dery Snider and David Snider failed to properly verify, without good cause, the Petition. Accordingly, this Appeal must be dismissed for procedural reasons.

- A. Petitioners Cory and Sarah McMillian and Sara Diane and Jason Nolan do not have standing and accordingly, their claims must be dismissed.**

It is well-settled that an individual may not maintain an appeal to the Commissioner unless aggrieved in the sense that he or she has suffered personal damage or injury to his or her civil,

personal or property rights. *Appeal of Curry*, 55 Ed Dept Rep __, Dec. No. 16,795 (2015) *citing Appeal of Waechter*, 48 Ed Dept Rep 261, Dec. No. 15,853 (2008). Importantly, “only persons directly affected by the action being appealed have standing to bring an appeal.” *Id.* In the instant matter, Petitioners Cory and Sarah McMillan and Petitioners Sara Diane and Jason Nolan lack standing to bring the instant Appeal. It is undisputed that the children of the above-named Petitioners, P.M., R.N., and W.N. respectively, are not enrolled in the School District and accordingly, were not or are no longer directly affected by the Board’s actions of July 8, 2021.

P.M., is the daughter of Petitioners Cory and Sarah McMillan (*collectively referred to herein as “Petitioners McMillan” or “McMillans”*). (*See* Affidavit “A” to the Petition). The McMillans have asserted that they are bringing this Appeal on behalf of P.M. However, P.M. has unenrolled from the District and is not currently attending District schools. The McMillans directly referred to this fact in their Affidavit in support of the Petition. Specifically, Petitioners McMillan state, “[P.M.] ... attended CCS from Kindergarten 2018-2019 through the 2020-2021 school year.” (*Emphasis added*). This implies that P.M. is no longer enrolled in the District. (*See* Affidavit “A” to the Petition). This is confirmed by the District’s Mobility Report listing P.M. as a student transferring to Hiland Hall, a private school located outside the District, and P.M. being unenrolled effective July 2, 2021, some six days before the action complained of. (Verified Answer Ex. “4”).

The fact that P.M. may not have been officially enrolled in Hiland Hall until July 15, 2021, or the reasons P.M. transferred outside of the District, as alleged in the Affidavit of the McMillans provided with Petitioners’ “Verified Response in further support of the Original Verified Petition”²

² For ease of reference, without waiving any rights to challenge the content therein as being improperly submitted and thus, not properly before the Commissioner, Respondent will refer to this pleading herein as “Reply.” Respondent further challenges the scope of petitioner’s reply. The purpose of a reply is to respond to new material or affirmative defenses set forth in an answer (8 NYCRR §§275.3 and 275.14). A reply is not meant to buttress allegations in the petition or to belatedly add assertions that should have been in the petition. *Appeal of Nappi*, 57

(*hereinafter* “Reply”), is irrelevant. Petitioners McMillan made a unilateral decision to unenroll P.M. from the School District. They cited several reasons for this decision including that they were concerned, without providing any foundation for such belief, that P.M. “would become a target at school.” The McMillans have not demonstrated any actual harm to P.M. by the Board’s actions on July 8, 2021. Regardless, as P.M. has left the School District, she is not directly affected by the Board’s actions of July 8, 2021. Accordingly, the claims of Petitioners McMillan must be dismissed.

R.N. is the daughter of Petitioners Sarah Diane and Jason Nolan (*collectively referred to herein as* “Petitioners Nolan” or “Nolans”). (*See* Affidavit “C” to the Petition). She graduated from the District at the end of the 2020-2021 school year, and no longer attends school in the District. *Id.* Accordingly, she was not directly affected in any way by the Board’s actions on July 8, 2021. As their daughter is a former student, the Nolans have no standing to bring a claim on her behalf.

W.N. is the son of Petitioners Nolan. *Id.* As set forth in the Petition, W.N. has unenrolled from the District and will be attending Burr & Burton Academy, a private school in the fall. *Id.*; Exhibit “4.” Notably, Petitioners Nolan have maintained that the basis for this decision was allegedly, “[d]ue to direct hostility towards their family and having expressed and not received any feedback that was felt would alleviate the anxiety being caused to their son.” (*See* Nolan Affidavit – Reply). The Nolans also allege that W.N. began exploring transferring “in June of 2021.” While the Nolans do not specify an exact date in June 2021, during that month the Board had either not taken any official action or had acted to retire the “Indians” nickname and imagery. (*Id.*) This supports that W.N. sought to transfer not because of the Board’s actions on July 8, 2021, but

Ed Dept Rep Dec. No. 17,300 (2018). Respondent respectfully requests that the Commissioner closely review the reply and refrain from considering those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in the Verified Answer.

because of the “negativity” they experienced during the school year, while the “Indians” nickname was under review. (*Id.*) The District has not disputed that W.N. was enrolled at the time the Petition was filed, but that is irrelevant. He is no longer enrolled in the District (*see* Verified Answer Ex. “4”) and thus, W.N. cannot be directly harmed by the Board’s actions on July 8, 2021.

As P.M., R.N., and W.N., are no longer enrolled in the District’s schools, their parents do not have standing to bring the instant Appeal, as their children cannot be directly affected by the Board’s actions on July 8, 2021. Accordingly, any claims brought by Petitioners McMillan or Petitioners Nolan must be dismissed.

B. Petitioners Alex Dery Snider and David Snider did not properly verify the Petition and accordingly, their claims must be dismissed.

Petitioners Alex Dery Snider and David Snider (*hereinafter collectively referred to as* “Petitioners Snider” or “Sniders”) failed to properly verify the Petition in this matter. Commissioner’s Regulation Section 275.5 states that the petition shall be verified by the oath of a least one of the petitioners. Section 275.7 further provides that “all oaths required by these rules may be taken before any person authorized to administer oaths within the State of New York.” (Emphasis added). 8 NYCRR 275.7.

The oaths provided by Petitioners Snider were administered in the State of Maine, by an individual authorized to administer such oaths in the State of Maine. There is no evidence that the individual who administered the oaths is authorized to do so in the State of New York. Petitioners have offered no acceptable reason why the Petition was not properly verified by the Sniders, other than that they were “out-of-state on a preplanned trip.” (Reply ¶ 25). They must have been aware of the relevant Commissioner’s Regulation concerning verification of the Petition by oath of at least one petitioner, yet inexplicably ignored the mandate that such oath be administered by a person authorized to do so in New York. They could have sought out an individual in Maine who

was authorized to administer oaths within New York, or even could have had the Petition notarized remotely. Petitioners Snider have not claimed ignorance of this requirement, though ignorance would not be a valid reason to excuse the mandate of Section 275.7. *See Application of S.D.* 60 Ed Dept Rep, Dec. No. 18,009 (2021).

In sum, all pleadings in an appeal to the Commissioner must be properly verified. When a petition is not properly verified, the appeal must be dismissed. *See e.g., Appeal of Nappi*, 57 Ed Dept Rep, Dec. No. 17,300 (2018). Accordingly, any claims brought by Petitioners Alex Dery Snider and David Snider must be dismissed.

C. Petitioners failed to state a sufficient claim upon which relief must be granted.

The Petitioners have failed to state a claim upon which relief may be granted. Commissioner's Regulation 8 NYCRR §275.10 requires a petition to contain a clear and concise statement of the petitioner's claim showing that the petitioner is entitled to relief. "Such statement must be sufficiently clear to advise the respondent of the nature of petitioner's claim and of the specific act(s) complained of." Despite bearing this burden, the Petitioners are unable to show that the Board acted on July 8, 2021 in a manner that is contrary to law, in manner beyond the scope of its legal authority, or in a way that caused harm to the Petitioners, their children, or any children enrolled in the District.

There is no statute or regulation that has been violated by the Board in taking action on July 8, 2021 to rescind the June 17, 2021 resolution of the board. No law exists that prohibits the use Native American-themed nicknames or imagery, nor is a member of a board of education prohibited from acting on a resolution before her or him during their first official meeting once sworn into office. (Honeywell Aff. ¶¶ 8-10; *see also e.g.,* Petition Ex. "BB-5" at p. 46). From a purely procedural standpoint, Petitioners have not taken issue with any of the

numerous other actions taken by Board Members Honyoust or Price on July 8, 2021, or in the case of Member Honyoust, during the meetings between his taking a seat on the Board on May 19, 2021, and the Board meeting held on July 8, 2021. It would follow that if it was arbitrary or capricious for Board Members Honyoust and Shay to vote on July 8, 2021, in favor of the resolution rescinding the June 17, 2021 resolution, all of their other votes on other actions would also be improper. Of course, Petitioners have not made such claims as such claims would be baseless.

In the absence of law expressly prohibiting an action, a school district's action may only be set aside if it is arbitrary or capricious or in a manner that lacked a rational basis. The Commissioner has held that local school boards have the authority and discretion to establish the name of its athletic programs – in this matter the Cambridge Indians. Absent proof the board abused its discretion in declining to “change the team name,” Petitioners are not entitled to the relief request. *Appeal of Tobin*, 25 Ed Dept Rep, Dec. No. 11,591 (1986). Though we are some 35 years removed from that Decision and despite Petitioners' insistence, there is no decision or legal precedent to the contrary. This legacy cements that such a decision is within the local control of a board of education to make. Moreover, in his April 5, 2001, memorandum, former Commissioner Mills asked “superintendents and presidents of school board to lead their communities to a new understanding of [the use of Native American symbols or depictions],” and to “resolve it locally.” (See Petition Ex. “BB-3” pp. 1-5). Despite facing a school year rife with the challenges created in response to the COVID-19 pandemic, and despite the initial inquiry in 2020 coming from an individual who does not reside locally, this is precisely what the Board of Education did throughout the 2020-2021 school year, culminating in the Board of Education's legally sound and rational actions on July 8, 2021. The Board's actions on July 8, 2021, were well within the Board's authority and discretion, were logical, rational, and appropriate, and Petitioners

have not met their burden of establishing otherwise.

Petitioners' have not demonstrated that any of P.M., H.S., A.S., R.N., W.N., and A.S. will be harmed by the Board's actions on July 8, 2021. As discussed above, P.M. is no longer enrolled in the School District, and thus cannot be harmed by the Board's July 8, 2021 resolution. The alleged past negative impact described in the Affidavit of Petitioners McMillan is circumstantial at best and lacking any concrete or direct evidence that P.M. has been harmed by the "Indians" nickname or imagery. There is no allegation that anyone in the District ever used the term "savage" in conjunction with the nickname or imagery. (*See* Aff. A to Petition).

Moreover, to the extent it is alleged that the District had previously utilized some stereotypical imagery in the past, the Board is prepared to review and remedy any such concerns by virtue of their resolution on July 8, 2021, requiring "a review for potential changes and/or updates to the current imagery associated with [the "Indians" nickname]." (*See* Verified Answer Ex. "1"). This was also addressed by the Board in directing Dr. Silvernell "to create a plan that will incorporate enhanced instruction in the curriculum ... that recognizes and teaches students in an informed and accurate way about the history of Native American culture, including as such culture has and continues to exist in the region of the School District." In other words, the District plans to review the imagery deemed to be problematic, while simultaneously offering enhanced instruction to appropriately educate its students on Native American culture.

These actions would also remedy the concerns set forth by Petitioners Snider concerning the use of stereotyping imagery and creating a supportive learning culture in the School District. In addition, the Equity, Inclusivity, and Diversity in Education Plan ("Plan") unanimously adopted by Respondent Board on February 11, 2021, coupled with the Board's focus on developing and implementing "enhanced instruction in the curriculum," directly counteracts any of the presumed reinforcement of "stereotyping" inappropriate treatment of another's symbols or sacred objects,

and generally any negative viewpoint concerning Native Americans or any other underrepresented populations. It will also counteract any unsubstantiated presumption that the use of the “Indian” nickname or associated imagery will create “implicit bias” in Petitioners’ children. (Honeywell Aff. ¶ 19). Beyond that, Petitioners Snider have failed to present even a scintilla of evidence that their children, H.S. and A.S., have been directly harmed by the District’s use of the “Indians” nickname or the Board’s actions on July 8, 2021. Mere speculation is insufficient to establish that the Board has acted in arbitrary or capricious manner. (Honeywell Aff. ¶¶ 18-19).

Petitioners Nolan have set forth similar claims to Petitioners Snider. With respect to R.N., as discussed above, it is undisputed that she graduated from the School District in June 2021, and accordingly, the Board’s actions on July 8, 2021 have no further bearing on her. With respect to W.N., the bulk of the Nolan’s claims relate to concerns they have about “anxiety” caused by the review of the nickname, not the nickname itself, claims related to a Facebook page that Petitioners Nolan know is not affiliated with the School District (*see* Affidavit “C” to Petition, Ex. 3 [“I now understand that this page is not affiliated with the school]), and are otherwise speculative and were remedied by the Board as discussed above. Moreover, as also discussed above, W.N. is no longer enrolled in the School District, and thus the Board’s actions on July 8, 2021 have no affect on him.

Regarding the second AS, though she is a rising senior at Cambridge Junior-Senior High School, the incidents alleged by Petitioners Deborah Jaffe and Edwin Schiele (*hereinafter collectively referred to as* “Petitioners Jaffe and Schiele”) occurred while she was in kindergarten, at a time when she and her classmates had only limited exposure to the “Indians” nickname and imagery, and during “junior high school,” which upon information and belief is during either seventh or eighth grade. Petitioners Jaffe and Schiele do not allege any direct correlation to the “Indians” nickname or imagery. No allegations of more recent direct harm were made, and the

remaining allegations and inferences are speculative and conclusory in nature. There is no specific allegation that there is current likelihood of harm to A.S. (*See* Affidavit “D” to Petition; Honeywell Aff. ¶ 20). Moreover, as discussed above, the concerns raised by Petitioners Jaffe and Schiele were addressed by the Board in its resolution approved on July 8, 2021.

In sum, Petitioners claims of any direct harm to P.M., H.S., A.S., R.N., W.N., and A.S. by the Board’s actions on July 8, 2021, are specious or speculative. In some instances, by virtue of the student no longer being enrolled, the student cannot be affected by the July 8, 2021 resolution. To the extent it is alleged they could be harmed, it follows that the imagery review and enhanced curriculum and instruction ordered by the Board on July 8, 2021, combined with the District’s Equity, Inclusivity, and Diversity Plan, will remedy any speculative harm.

If Petitioners’ speculative harm stems from their review of psychological and academic studies cited in the Petition, essentially arguing that the use of Native American-themed nicknames and imagery amounts to *per se* harm of students, this argument is misplaced and does not establish that the Board acted in an arbitrary or capricious manner. As described further below, these same studies were reviewed by the Board prior to acting on July 8, 2021. A comprehensive review of the studies is set forth in Laurel R. Davis-Delano, Joseph P. Gone & Stephanie A. Fryberg (2020) *The psychosocial effects of Native American Mascots: a comprehensive review of empirical research findings*, *Race Ethnicity and Education*, 23:5, 613-633. (Petition Ex. “BB-6” at pp. 0-21). While the Board trusts that the Commissioner will review and analyze these studies, many of which form the basis of the many proclamations and resolutions referenced by Petitioners and reviewed by Respondent Board, it is important, to note the following:

- None of the research studies were conducted in the School District, Upstate New York, New York, or even the Northeastern United States, where there is a different history with Native American populations than other parts of the United States. For

example, at least two of the studies utilized as samples children living on reservations in Arizona while most others were based out of universities in the Midwest.

- All of the studies utilized only small sample sizes and many of these studies used samples that were from one specific location, such as a specific university or reservation.
- Some of the data collection techniques may reveal contextual factors that impact the effect of Native American nicknames and imagery. In other words, the veracity of the studies may have been influenced by external factors and not solely based on Native American-themed exposure.

These “limitations” are set forth on page 628 of L.R. Davis-Delano et. al. (Petition Ex. “BB-6” at pp. 16). In addition to these “limitations” concerning the empirical evidence, the review also concluded that “more scholarship on the subject is needed” and highlighted that one such area to explore is the impact of living in an area where teams use Native mascots versus living in an area without such teams, to determine the impact of level of exposure. (*Id.*)

Petitioners also rely upon the Position Statement of the New York Association of School Psychologists (“NYSAP”) (*See* Affidavit “C” to Petition, Ex. “1”). However, much of what NYASP recommends is in line with the actions taken by the Board. The Board resolved to significantly enhance curriculum and instruction concerning Native American history and culture, as NYASP recommends. NYASP also strongly asserts that school districts should work collaboratively with leaders of Indigenous nations, including those reflected in the school’s demographic, before acting as “[i]t would be irresponsible to make assumptions on behalf of Indigenous populations without engaging them in [the] process.” (*Id.*) As discussed further below, the Board engaged in this process and it was one of the factors most heavily weight by Board

Members Ziehm, Price, and Honyoust (himself a Native American) before acting on July 8, 2021.

In sum, the Petitioners have failed to state a claim and meet its burden that the Board acted in an arbitrary and capricious manner on July 8, 2021.

POINT II

ASSUMING ARGUENDO THAT PETITIONER HAS STATED A CLAIM UPON WHICH RELIEF COULD BE GRANTED THE PETITION FAILS ON THE MERITS AS RESPONDENT BOARD ACTED IN A RATIONAL, WELL-REASONED, LOGIAL MANNER ON JULY 8, 2021

In this case, whether Petitioners, and even the Commissioner, disagree with the action of the Board and the methodology utilized by the Board in taking action on July 8, 2021 to “rescind the retirement of the Indians mascot and to reinstate the Indians name, mascot, and associated imagery,” and then taking additional action to pass a new resolution that provides the Board will “review for potential changes and/or updates to the current imagery associated with the [Indians nickname],” is irrelevant. Whether the actions taken by the Board are the same as those the Petitioners would have taken, or even the Commissioner would have taken, under the same circumstances, is not relevant. *See Appeal of Voss, Jr.* 31 Ed Dept Rep, Dec. No. 12,567 (1991). As set forth in the Affidavits of Board Members Ziehm, Honyoust, and Price, the Board’s action was based upon careful consideration, deliberation, and analyzing numerous factors, to set a course of action the Board deemed most appropriate under the totality of the circumstances. *See generally* Ziehm Aff., Honyoust Aff., and Price Aff. In other words, the Board’s actions were neither arbitrary, nor capricious.

While there is no allegation that Board Member Ziehm was uninformed at the time she voted on the July 8, 2021 resolutions concerning the “Indians” nickname and imagery, the deliberative process she utilized prior to voting is relevant to this proceeding to demonstrate that she acted in a logical and rational manner under the circumstances. As Member Ziehm attests, she

“thoroughly educated [herself] on the issue of the District’s continued use of the “Indians” nickname and associated imagery.” (Ziehm Aff. ¶ 13). She attended every Board meeting from the time the nickname issue was raised through July 8, 2021 when the Board’s resolution maintaining the “Indians” nickname was approved. She attended equity, diversity, and inclusion training, and approved the District’s Plan. Member Ziehm reviewed hundreds of pages of resource materials and other materials and information provided by individuals residing both within and outside of the District. She communicated with many residents of the District to ascertain their viewpoints on the issue of the use of “Indians.” Member Ziehm also spoke with students, with respect to what their preferences might be for a mascot in lieu of using “Indians.” She also communicated with professional educators, including teachers employed by the District, to ascertain how they felt both personally and professionally as the educators of children and also to gain additional insight into the climate and culture that exists within the District’s schools. She participated in the aforementioned activities facilitated by Bridges. Unsurprisingly, Member Ziehm consulted with her own children, rising 4th and 5th graders in the District, to better understand their perspectives on the matter and to better determine whether they were being harmed in some way by the District’s use of the “Indians” nickname and imagery. She had sought to survey the District’s students more broadly since the issue impacted them the most directly and potentially in multiple ways, but that approach was roundly rejected by the individuals advocating for the discontinuation of “Indians,” including some of the Petitioners. Recognizing that Cambridge is not the only school district utilizing a Native American-themed nickname and imagery,³ Member Ziehm also researched how other school districts addressed the issue facing Cambridge and, if they chose to keep the mascot, how they educated their school district about the

³ The Commissioner’s determination in this matter may directly impact over 50 school districts statewide.

issue, including specifically how they planned to educate their students. (Ziehm Aff. ¶ 13).

Most significantly, and in line with the recommendation of NYASP, and consistent with how colleges who had come under scrutiny by the NCAA addressed their mascot issues, Member Ziehm sought insight and collaboration from Native Americans. As the Commissioner will glean from the papers submitted in this matter, Native American opinion and sentiment on this matter is not a monolith. Opinions on the topic diverge from nation to nation, member to member, even family member to family member. Locally, Member Ziehm communicated with individuals who identify as Native American, including the Honyoust family (which includes Board Member Dillon Honyoust) whom she greatly respects and whose opinions she values and trusts. (Ziehm ¶ 15). While acknowledging that other Native Americans may feel differently, they spoke respectfully and warmly about the District’s use of “Indians” and its associated imagery. They also made an interesting point about how indigenous peoples were once the stewards of the land within the District and how the Indians nickname and imagery is a last connection and tribute to those peoples. Member Ziehm noted that the Honyousts are related to John Kane by marriage (who introduced the petition to the District seeking to retire the “Indians” nickname), which demonstrates that Native Americans may have diverging views on the issue. (*Id.*)

Member Ziehm found the insights offered by the Honyousts to be highly informative in that they are part of a unique demographic in the School District,⁴ and thus have a unique perspective. Member Honyoust is Native American. Specifically, he is of the Onondaga Nation, of the Haudenosaunee Confederacy.⁵ (Honyoust Aff. ¶¶ 7-8). Member Ziehm strongly believed that the unique perspective offered by the Honyousts merited heightened consideration. NYASP’s

⁴ It is highly likely that members of the Honyoust family make up the entire population of School District students who identify as Native American. (Honyoust Aff. ¶¶ 7 and 19).

⁵ During the June 17, 2021 special meeting of the Board, then Board President Gifford, gave a Land Acknowledgment, describing the Haudenosaunee as former stewards of the land within the School District.

Position Statement supports this belief. (Ziehm Aff. ¶ 15b).

Outside of the local community, Board Member Ziehm reviewed the materials provided by Dr. Silvernell, which included statements and resolutions from various Native American people and organizations. She also reviewed communications from the Native Americans Guardians Association (NAGA), a non-profit organization that advocates for increased education about Native Americans, especially in public education institutions, and seeks the recognition of Native American Heritage. NAGA supports the District's continued use of "Indians," together with increased education and recognition about Native Americans. The Board also received an e-mail (with a letter attached) from Eunice Davidson, a member of the Spirit Lake Tribe, Spirit Lake, North Dakota, dated March 8, 2021, further highlighting the division on these issues even within their own nations, as tribes' counsels do not always speak for all their members and how this leads some tribal members to feel oppressed amongst their own people. (Ziehm Aff. ¶ 15c, Ex. "6").

Though not on the Board through the entirety of the District's review, Board Members Honyoust and Price adopted similar methods of educating themselves about the issue prior to voting on the resolution on July 8, 2021. Certainly, as noted-above, Board Member Honyoust already had unique insight on the issue. He was also well-aware that the District had already engaged in review of the nickname and imagery in 2001 in response to the Memorandum issued by Commissioner Mills on the subject, the District engaged in a review of the Indian nickname and the correlating imagery employed by the District at that time. (Honyoust Aff. ¶¶ 20-21). Member Honyoust's grandfather, David Honyoust, an Oneida War Chief, advised at the time that the use of the term "Indians" was not offensive but that the imagery then in use should be updated to more closely represent the Native Americans who inhabited the area around the District. This ultimately led to the District updating its logo to depict an Eastern Woodland head (subject to this Appeal), as it was to honor those Native Americans that called the District's geographical area

home. (*Id.*) Thus, the image used by the District does not perpetuate a Native American stereotype, which would be more of a matter of concern.⁶

It is true that both Members Honyoust and Price embraced a platform when running for vacant Board seats of preserving the District's "Indians" nickname. (Honyoust Aff. ¶ 4; Price Aff. ¶ 9). Though, particularly in the case of Member Price, this was not the lone reason he ran for the Board, as alleged by Petitioners. (Price Aff. ¶ 9). Regardless, both Member Honyoust and Member Price prepared extensively prior to voting on July 8, 2021. (Honyoust Aff. ¶ 9; Price Aff. ¶¶ 10 and 12). Both gentlemen are parents of children currently attending District schools. (Honyoust Aff. ¶ 7; Price Aff. ¶ 18). They consulted with their children, as well as other students attending District schools. They did not observe any negative affect on these students. (Honyoust Aff. ¶ 19; Price Aff. ¶¶ 18-19). Both reviewed the materials provided on the District's website concerning the issue, which are prominently appended to the Petition. (Honyoust Aff. ¶ 15; Price Aff. ¶ 13). In addition, they each engaged with Native Americans residing both within and outside of the community. (Honyoust Aff. ¶¶ 13, 14, and 17; Price Aff. ¶ 14). Prior to and after their election, both Member Honyoust and Member Price attended and/or participated in numerous Board meetings during which the issue was discussed. They also sought out community members to discuss the issue aside from these Board meetings. (Honyoust Aff. ¶¶ 10-12, and 16 ; Price Aff. ¶¶ 16-17). In addition, both Member Honyoust and Member Price actively engaged in the process facilitated by Bridges. (Honyoust Aff. ¶ 15; Price Aff. ¶ 15).

In sum, despite Petitioners' claims to the contrary, Board Members Ziehm, Honyoust, and Price, engaged in a deliberate and informative process prior to rendering their votes on July 8, 2021. They were extremely well-prepared. It does not matter that Petitioners' or even the

⁶ Documents related to the District's 2001 review of the "Indians" nickname and imagery are appended to the Petition as they were records made publicly available for consideration by the District during the Board's review.

Commissioner may disagree with how they voted. It is clear that they made an informed vote based upon information available to them that had been widely available in the community at large that was reasonable and rational under the circumstances. Accordingly, the Commissioner cannot find that the Board's actions on July 8, 2021 were arbitrary and capricious. To do so, the Commissioner would have to ignore their engagement in the Board's review (essentially rendering the process itself inconsequential), the additional steps taken by Board Members Ziehm, Honyoust, and Price to procure additional information that would ultimately inform their decision, discount the copious amounts of information reviewed by Board Members Ziehm, Honyoust, and Price, and essentially find that their decisions were irrational and/or defied logic. This simply is not the case. Rather, the resolutions passed by the Board on July 8, 2021 were logical, reasonable, rational, and measured to ensure that in addition to the nickname being reinstated, the imagery would be reviewed and curriculum and instruction in Native American culture and history would be enhanced. Ultimately, Board Members Ziehm, Honyoust, and Price, formed a consensus about utilizing the compromise position initially presented by Member Honyoust in January 2021. This was in line with the prevailing sentiment of the entire Board following its regular meeting of June 10, 2021 and shaped the resolution the Board approved on July 8, 2021.⁷

Concerning the timing of the vote itself, it is paradoxical for Petitioners to claim that Honyoust and Price's votes on July 8, 2021 were *per se* unreasonable as they were (relatively) new Board members, when they, without the benefit of serving on the Board, have provided a trove of resources for the Commissioner's consideration, nearly, if not all of which both Members Honyoust and Price had access to before voting on July 8, 2021. To the contrary, as set forth

⁷ The resolution, proposed by Member Honyoust, seconded by Member Price, expressly recognizes the differences of opinion on the issue between the prominent National Council of American Indians, "along with other professional organizations," in contrast to NAGA, and "local Native Americans." In apposite to Petitioners' contention, this underscores that countervailing viewpoints were duly considered by the Board.

above, Members Honyoust and Price were extremely well-informed at the time they voted on July 8, 2021. One would suspect that Petitioners would not have offered such an argument had votes of Members Honyoust and Price aligned with the Petitioners' subjective view on the matter.

Moreover, the timing of the vote was completely appropriate under the circumstances. It would have potentially been far more detrimental to the District and its community, to begin undertaking a process of retiring the "Indians" nickname and imagery, incurring significant expense and human resource depletion in the process, only to potentially reverse course months later. In fact, the Commissioner has previously been critical of such board action where, without explanation, a board reversed a prior board's course of action, despite the school district having actively engaged in implementing the prior board's determination for months. *See Appeal of Kaufman et. al.*, 57 Ed Dept Rep, Dec. No. 17,250 (2017). Moreover, in the instant matter, the Board had conducted an exhaustive review, and nothing further would have been gained by simply waiting until a later date to vote. The Board exercised its collective judgment on July 8, 2021 and had a rational basis to do so. As the Commissioner has held, "a board of education is not prohibited from nullifying or rescinding the actions of a prior board by subsequently duly-adopted resolutions. *Id.*

In conclusion, even if Petitioners have stated a claim upon which relief can be granted, a review of the evidence and record in this matter makes it clear that the Board did not act in an arbitrary and capricious manner on July 8, 2021. Rather, the Board, after a lengthy, comprehensive review, took action that was reasonable, logical, and rational under the circumstances. Accordingly, the Petition should be dismissed on the merits.

CONCLUSION

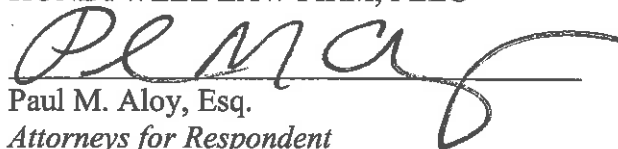
For all of the foregoing reasons, the Respondent-Board respectfully requests that the Commissioner:

- a. Dismiss the Petition on the merits;
- b. Dismiss the Petition for failure to state a claim upon which relief can be granted;
- c. Dismiss the Petition for lack of standing;
- d. Dismiss the Petition for lack of proper verification; and
- e. Order such other and further relief which the Commissioner may seem just and proper.

Dated: October 7, 2021

Respectfully submitted,

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