

**NEW YORK STATE DEPARTMENT OF EDUCATION  
COMMISSIONER OF EDUCATION**

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IN THE MATTER OF  
THE BUFFALO PARENT TEACHER  
ORGANIZATION, NAACP BUFFALO  
BRANCH, LAWRENCE SCOTT,  
REVEREND MARK BLUE, EVE SHIPPENS,  
KATHERINE HAQ, RAHWA  
GHIRMATZION, GRETCHEN CERCONI,  
CHANDA O'DONNELL DE RAMIREZ, and  
RACHEL DOMINGUEZ,

Petitioners,

-against-

CARL PALADINO,

Respondent.

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Appeal No. 20604

**MEMORANDUM OF LAW**  
ORAL ARGUMENT  
REQUESTED

SHERRILYN IFILL  
Director-Counsel  
JANAI NELSON  
CHRISTINA SWARNS  
JIN HEE LEE  
RAYMOND AUDAIN  
MONIQUE LIN-LUSE  
**NAACP LEGAL DEFENSE AND  
EDUCATIONAL FUND, INC.**  
40 Rector Street, 5th Floor  
New York, New York 10006  
212.965.2200

RICHARD ROSS  
JALINA J. HUDSON  
**PERKINS COIE LLP**  
30 Rockefeller Plaza, 22th Floor  
New York, NY 10112-0085  
212.262.6900

*Attorneys for Petitioners*

Petitioners The Buffalo Parent Teacher Organization (“BPTO”), NAACP Buffalo Branch, Lawrence Scott, Reverend Mark Blue, Eve Shippens, Katherine Haq, Rahwa Ghirmatzion, Gretchen Cercone, Chanda O’Donnell de Ramirez, and Rachel Dominguez (collectively, “Petitioners”), by and through their undersigned attorneys, respectfully submit this Petition (“Petition”) for the removal of Respondent Carl Paladino (“Mr. Paladino” or “Respondent”) from the Board of Education of the Buffalo City School District in Erie County, New York (“Board of Education,” “School Board,” or “Board”) for his neglect of duty and willful violation of the law in connection with his racially inflammatory actions and statements and his revelation of executive session confidences.

### **PRELIMINARY STATEMENT**

As a member of the Board of Education, Mr. Paladino’s first and foremost duty is to safeguard the rights of *all students* and promote a safe and healthy environment in which *all students* within the school community are treated respectfully. Mr. Paladino violated this foundational duty when, on or about December 23, 2016, he stated, in a local publication, that, as a member of the Buffalo Board of Education, his wish for the upcoming year was the following:

Obama catches mad cow disease after being caught having relations with a Herford. He dies before his trial and is buried in a cow pasture next to Valerie Jarret, who died weeks prior, after being convicted of sedition and treason, when a jihady cell mate mistook her for being a nice person and decapitated her.

Michelle Obama. I’d like her to return to being a male and let loose in the outback of Zimbabwe where she lives comfortably with Maxie, the gorilla.

Verified Petition (“Pet.”) Ex. A at 2, 13. Mr. Paladino’s statements are unambiguously racist, and they trade on the oldest and most abominable stereotypes about, and racial slurs against, African-Americans by dehumanizing them as animals, most notably monkeys, apes, and gorillas.

Anyone who casually espouses such noxious and blatantly racist views is unfit to oversee the education of any school children in any community, but especially in Buffalo, where the student population is predominately Black, and where the Buffalo City School District (“District” or “BCSD”) has had a long and troubling history of racial inequity in public education.

Mr. Paladino’s efforts to frame this Petition as an attack on his free expression is meritless. This is not about Mr. Paladino’s right to engage in racist invective; it is about the right of Buffalo’s children to learn in an environment that is free of racism and harassment.<sup>1</sup> That right is afforded to them by the Equal Protection Clause of the United States Constitution, state<sup>2</sup> and federal statutes,<sup>3</sup> and the District’s foundational documents—i.e., the *Buffalo City School District Policies and By-Laws* (“Policies and By-Laws”) and *Buffalo Public Schools Standards For Community-Wide Conduct and Intervention Supports* (“Standards”)—all of which codify the moral imperative to eradicate discrimination in education. The Policies and By-Laws also “establish[ ] limits within which freedom of judgment can be exercised” and require that Board

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<sup>1</sup> It has long been recognized that the First Amendment “does not protect behavior made unlawful by legitimate legislation or regulation, enacted for purposes unrelated to the suppression of free expression.” *Bullock v. Mumford*, 509 F.2d 384, 387 (D.C. Cir. 1974). Courts have also recognized that the First Amendment should not interfere with the special need to maintain a safe, secure and effective learning environment. *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001). That is because “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *cf. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052, 1053 (9th Cir. 2006) (“[I]t is surely not beyond the authority of local school boards to attempt to protect young minority students against verbal persecution . . . .”) (Reinhardt, J., concurring in denial of rehearing *en banc*), *vacated as moot*, 549 U.S. 1262 (2007); *cf. Smith v. Tammany Parish Sch. Bd.*, 316 F. Supp. 1174, 1176 (E.D. La. 1970) (prohibiting display of Confederate flag in school because the court “can and must prohibit racial discrimination in the operation of the school system”), *aff’d*, 448 F.2d 414 (5th Cir. 1971).

<sup>2</sup> *See* N.Y. Exec. Law § 290 *et seq.*; N.Y. Educ. Law §§ 10-18.

<sup>3</sup> *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

members exercise good and sound judgment on behalf of the District and pursue a course of conduct that will maintain public trust and confidence in the District. Pet. Ex. J at 1120, 6110. When Mr. Paladino chose to join the Board of Education, he agreed to abide by those dictates. Indeed, the Commissioner made clear more than fifty years ago that:

while all citizens of the United States have every right to express freely their opinions, nevertheless, upon the assumption of a high office by a person, such as the office of member of a board of education, the person becomes part of an official body which is responsible for leading the youth of that community to informed and responsible citizenship. Because of this duty and high office, all members of boards of education will wish to ensure that at all times their public statements are consonant with the responsibility of their high office.

*Appeal of Rubinstein*, 2 Ed. Dep't Rep. 303, 304, Decision No. 7,100 (N.Y.S. Dep't of Educ. Aug. 28, 1962). As the Supreme Court described in *Brown v. Board of Education*, "education is perhaps the most important function of state and local governments" because "it is the very foundation of good citizenship" and "a principal instrument in awakening the child to cultural values." 347 U.S. 483, 493 (1954). Yet, instead of honoring this solemn obligation, Mr. Paladino used his office to make unambiguously racist statements that harm all of the students within his charge. This conduct disqualifies him from serving on the Board of Education.

Mr. Paladino has also repeatedly, publicly, and unapologetically revealed highly confidential information from Board executive sessions without the Board's authorization. School boards are often required to discuss and debate difficult and sensitive issues, including matters involving personnel, collective bargaining, and litigation strategies. In recognition of the delicate nature of these matters, the law permits school boards to discuss some issues privately so that these public officers can deliberate more freely and speak more frankly than they might in discussions that are held in full public view. But Mr. Paladino took it upon himself to

disseminate and publish to the media extremely sensitive information that the Board, as a collective body, decided to discuss in confidence. In so doing, Mr. Paladino thwarted the will of the Board's majority and unilaterally invalidated its actions as a corporate body. Mr. Paladino's conduct violates the basic principles of school board governance because a single member cannot—and should not—be allowed to unilaterally disclose information deemed confidential by the Board and properly discussed in executive session, including information protected by the attorney-client privilege.

There have been widespread calls for Mr. Paladino to step down from the Board, including but not limited to a resolution passed by the Board calling for his resignation. Hundreds of people have attended numerous demonstrations to protest Mr. Paladino's racially derogatory comments and demand his resignation. A prayer vigil was held in Buffalo on Martin Luther King Day 2017 in support of Mr. Paladino's removal. The group Stronger Together WNY<sup>4</sup> had a billboard placed along one of Buffalo's major highways, demanding his removal. Buffalo Mayor Byron W. Brown, Erie County Executive Mark Polocarz, State Senator Timothy M. Kennedy, Assemblywoman Crystal D. Peoples-Stokes, Assemblyman Sean Ryan, and the Buffalo City Common Council have all called for Mr. Paladino's resignation or removal from the Board. Governor Cuomo rightly called Mr. Paladino's conduct "racist, ugly and reprehensible."<sup>5</sup> Even President Donald Trump's transition team condemned the remarks as

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<sup>4</sup> Stronger Together WNY is an organizing network in western New York dedicated to building more equitable and just communities by embracing diversity.

<sup>5</sup> See also Verified Pet. of Joseph R. Montante, et al., *In re Buffalo Parent Teacher Org.*, Appeal No. 20596, Ex. B (N.Y.S. Dep't of Educ. Jan. 18, 2017) ("Sample of Media Coverage").

“absolutely reprehensible.”<sup>6</sup> Nevertheless, Mr. Paladino not only refuses to resign, he remains unapologetic—and, in fact, indignant—about his explicitly racist behavior. It is therefore incumbent upon the Commissioner to immediately remove Mr. Paladino from the Board pursuant to her authority under N.Y. Educ. Law §§ 306 and 2559.

### **STATEMENT OF FACTS**

#### **Mr. Paladino’s History of Racism**

Mr. Paladino has a lurid history in New York politics. In 2010, he was the Republican candidate for governor of New York, but his candidacy was derailed by a series of racist and misogynistic emails disseminated by Mr. Paladino to his friends and colleagues.

See Nicholas Confessore, *Racist E-Mail Tied to Candidate for Governor*, N.Y. Times, Apr. 12, 2010, <http://www.nytimes.com/2010/04/13/nyregion/13paladino.html>; see also Pet. Ex. K.

Specifically, in December 2008, Mr. Paladino distributed an email entitled “Obama Inauguration Rehearsal,” which included a video of African tribesmen performing a traditional dance.

Pet. ¶ 48. In July 2009, Mr. Paladino distributed an email with a violent image captioned, “run,

ni[\*\*]ers, run!” Pet. ¶ 49. In September 2009, Mr. Paladino distributed an email entitled, “Easy Steady Big Fella . . . XXXX,” with a photograph that graphically depicted a woman having sex

with a horse. Pet. ¶ 50. In October 2009, Mr. Paladino distributed an email depicting President

Obama as a pimp and Mrs. Obama as a prostitute. Pet. ¶ 51. In January 2010, Mr. Paladino

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<sup>6</sup> Emma Stefansky, *Not Even Trump’s Transition Team Wants to Deal With Carl Paladino’s Racist Comments About the Obamas*, Vanity Fair (December 2016), <http://www.vanityfair.com/news/2016/12/carl-paladino-trump-team-racist-comments>.

distributed an email containing a pornographic video entitled “Miss France 2008 F[\*\*\*]ing.”  
Pet. ¶ 52.<sup>7</sup>

Despite this appalling behavior, Mr. Paladino became a member of the School Board in 2013, representing the Park District. Pet. ¶ 20; Verified Answer (“Answer”) ¶ 20.<sup>8</sup> African-Americans comprise approximately 30% of the Park District and students of color comprise approximately 50% of the Park District. Pet. ¶ 33. The entire BCSD serves nearly 34,000 students in 60 facilities. African-Americans comprise approximately 50% of the BCSD, and students of color, including Latinos and Asians, comprise more than 70% of the BCSD. Pet. ¶ 23. Although Mr. Paladino chose to serve on the school board of a very diverse district, he did not moderate his penchant for racially charged language. In June 2015, Mr. Paladino complained about “damn Asians” and other “foreigners” attending the University at Buffalo. Pet. ¶ 53; Pet. Ex. L. In April 2016, Mr. Paladino described Donald Trump as an “exterminator” and supporters of Mr. Trump—among whom he counts himself—as people who want “the raccoons out of the basement.”<sup>9</sup> Pet. ¶ 61; Pet. Ex. S. Mr. Paladino has also focused his animus on the African-American President of the Board of Education, Dr. Barbara A. Nevergold. Pet. ¶ 57. In a December 22, 2016 email, he derided Dr. Nevergold as “diabolical” and “an

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<sup>7</sup> Petitioners refer to these events to establish that Mr. Paladino has a long history of making racially prejudiced comments that demean a significant percentage of the students under the supervision of the School Board; that he has long harbored negative views of people of color and women; and that his December 23, 2016, remarks are not accidental, isolated, or uncharacteristic.

<sup>8</sup> He was reelected in 2016, to a term that will expire in 2019. Pet. ¶ 20; Answer ¶ 20.

<sup>9</sup> The term “coon” or “raccoon” is an historically racist term used to refer to African-Americans. For example, “Zip Coon” was a song frequently sung in nineteenth century blackface minstrel shows. Pet. ¶ 61; *see also* Debra L. Merskin, *Media, Minorities, and Meaning: A Critical Introduction*, at 263-65 (Peter Lang Publ’g 2011) (describing “coon” caricature as developing into the “most blatantly degrading of all black stereotypes”).

anachronism of failed black leadership.” Pet. ¶ 60. Most recently on March 13, 2017—well after this Petition and others calling for his removal were filed—Mr. Paladino stirred outrage with an email blast that included a meme declaring it to be “Stop Blaming White People Month.” Petitioners’ Verified Reply (“Reply”) Ex. 11.

Mr. Paladino’s racist invectives culminated in the disgraceful December 23 *Artvoice* article, in which he wished death by mad cow disease upon President Obama and stated that he would like the former First Lady “to return to being a male and let loose in the outback of Zimbabwe,” among other incendiary comments. Pet. ¶¶ 2, 62; Answer ¶¶ 62-64; Pet. Ex. A. Mr. Paladino’s statements were posted on the *Artvoice* website on December 23, 2016. Pet. ¶ 63; Answer ¶¶ 62-64; Pet. Ex. A.<sup>10</sup> Later on December 23, 2016, Mr. Paladino issued a statement to the media confirming that he made the *Artvoice* comments. Pet. ¶ 64; Pet. Ex. T. On December 27, 2016, he issued another statement confirming that he made the *Artvoice* comments.

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<sup>10</sup> Although Mr. Paladino argues that he emailed his comments to *Artvoice* on December 20, 2016, the statute of limitations began to run on December 23, 2016, when they became known to the public and to Petitioners. See *In re Appeal Against the Actions of the Bd. of Coop. Educ. Servs.*, 32 Ed. Dep’t Rep., Decision No. 12905, 1993 WL 13713049, at \*5 (N.Y.S. Dep’t of Educ. Apr. 8, 1993) (allowing claims to proceed seven years after objectionable conduct because “they were not known to the public” beforehand; the proceeding was brought immediately after the conduct was discovered; and “the Commissioner of Education has found § 306 appeals to be timely when commenced within 30 days after the petitioner’s good faith discovery of the alleged misconduct”) (citing cases); *Nett*, 45 Ed. Dep’t Rep., Decision No. 15315, 2005 WL 6742549, at \*2 (N.Y.S. Dep’t of Educ. Oct. 24, 2005) (“Because petitioners commenced this proceeding . . . within 30 days of their discovery, I find the proceeding to be timely.”). Moreover, the cause of action accrued when *Artvoice* published Mr. Paladino’s statements because that is when the nexus emerged between Mr. Paladino’s bigoted comments and the students of the City of Buffalo. Mr. Paladino’s argument that he did not know that his responses could be made public is preposterous, as he was responding on the record to an interview request from a person he knew to be a reporter. See Resp’t’s Mem. of Law in Opp’n to Application, *In re Buffalo Parent Teacher Org.*, Appeal No. 20604, App’x A (N.Y.S. Dep’t of Educ. Mar. 1, 2017) (“Mem. of Law in Opp’n”). Indeed, Mr. Paladino admits that he has a long relationship with, and has published numerous quotes in, *Artvoice*. *Id.* at 12-13. Even if Mr. Paladino intended to make the comments in private, his conduct is now public.

Pet. ¶ 67; Pet. Ex. U. He also admits making these comments in his Verified Answer, and appends to his memorandum of law a copy of the original email he sent to *Artvoice*.

Mr. Paladino was unrepentant about the racist *Artvoice* comments. In an interview that aired on Time Warner Cable News Buffalo on December 23, 2016, he declared that “it’s time that these things are said.” Pet. ¶ 65. According to *The Hill*, Mr. Paladino’s message for his critics is, “Tell them all to go f[\*]ck themselves.” Pet. ¶ 65; Pet. Ex. T. On December 23, 2016, Mr. Paladino told the *Buffalo News*, “Tell that Rod Watson I made that comment just for him.” Pet. ¶ 66; Pet. Ex. U. Rod Watson is an African-American editor at the *Buffalo News*. Pet. ¶ 66.

On December 29, 2016, the Board of Education convened a special meeting in the Buffalo City Hall Common Council Chamber to consider a resolution calling for Mr. Paladino’s resignation. Pet. ¶ 69. The Chamber was filled to capacity with an overflow of people in the hallway outside trying to observe the special meeting. *Id.* The Board voted 6-2 to pass the resolution, to a standing ovation. *Id.*

#### *Effects of Mr. Paladino’s Remarks on Petitioners and the Community*

Mr. Paladino’s remarks have caused concern and outrage among the Petitioners, including the following:

- Petitioner Lawrence Scott is a co-chair of the BPTO, a non-profit organization created to build relationships between parents, educators, and community members that is formally recognized by the Board of Education. Pet. ¶¶ 10, 11, 25; Pet. Ex. F-1. The BPTO’s mission is to initiate, support, advocate for, and recognize positive projects, programs, and accomplishments of Buffalo’s students, families, and schools. Pet. ¶ 26; Pet. Ex. F-1. The BPTO represents families of all racial and cultural backgrounds and values, and celebrates diversity in Buffalo’s public schools. Pet. ¶ 26; Pet. Ex. F-1. Among other things, the purpose of the BPTO is to support the education of Buffalo’s children by fostering relationships among parents, families, administrators, school staff, and community members. Pet. ¶ 27; Pet. Ex. F-1. The BPTO is committed to defending against all acts of harassment and discrimination in the school community. Pet. ¶ 29; Pet. Ex. F-1. Mr. Paladino’s bigoted remarks have subverted the BPTO’s

mission.

- Mr. Paladino’s remarks have also subverted the mission of the Buffalo branch of the NAACP (“Buffalo NAACP”). The Buffalo NAACP was founded in 1915. The head of the Buffalo NAACP—Petitioner Rev. Mark Blue—describes the organization’s work to “ensure that every disadvantaged student and student of color graduates ready for college or a career by ensuring access to great teaching, fair discipline, equitable resources and challenging curriculum. We are dedicated to eliminating the severe racial inequities that continue to plague our education system. Our ultimate goal is that every student of color receives a quality public education that prepares him or her to be a contributing member of a democracy.” Pet. ¶ 13; Pet. Ex. X. Rev. Blue worries that Mr. Paladino “has caused such a disruption that it is impossible for the school board to work effectively.” Pet. Ex. X.
- Petitioner Eve Shippens is a co-chair of the BPTO, teaches 9<sup>th</sup> grade biology at Pathways and Academy 13, and is the parent of Buffalo public school students. Pet. ¶ 14; Pet. Ex. X. Petitioner Shippens comes from a multi-racial family and feels that Mr. Paladino has demonstrated that he “could not possibly show respect for members of my family, my students of color, and the people of Buffalo in general.” Pet. Ex. X. Petitioner Shippens worries that “Buffalo is struggling with a racist past and hate speech from an elected official, especially one who is charged with the care of children, is problematic . . . . [Mr. Paladino’s] words negatively influence children to think it is okay to be hateful and prejudiced.” *Id.* Petitioner Shippens also worries about her 14-year old son, and “how [Mr. Paladino] will affect him as a black male, and his peers, most of whom are people of color.” *Id.* Petitioner Shippens reports that her son’s “school is mostly [B]lack and he is afraid that [Mr. Paladino’s] bias will cause his school not to get the resources it needs.” *Id.*
- Petitioner Katherine S. Haq is a BPTO Secretary and BCSD parent. Pet. ¶ 15. She believes that Mr. Paladino’s comments have harmed the District’s reputation on a local, state, national, and international level. Pet. ¶ 15; Pet. Ex. X. She recounts how “family members from across the state and friends across the country have called to try to understand how this bigoted, misogynistic and racist man could be a member of our school board.” *Id.* Petitioner Haq is concerned about the effect Mr. Paladino’s comments will have on her multi-racial teenage son, who is a Buffalo public school student. *Id.*
- Petitioner Rahwa Ghirmatzion is the Deputy Director of PUSH Buffalo, an organization that serves approximately 2,000 BCSD youths per year—over 75% of whom are children of color. Pet. ¶ 16; Pet. Ex. X. Petitioner Ghirmatzion is also the parent of a 3-year-old African American boy in the District. *Id.* Like other BCSD parents and students, Petitioner Ghirmatzion has serious safety concerns after Mr. Paladino’s “racist, homophobic and xenophobic remarks.” *Id.* Petitioner Ghirmatzion is considering moving out of the District or finding an alternative choice for her son, as she worries not just for his safety, but also “about . . . how well he will be respected and educated in the current system.” *Id.* Petitioner Ghirmatzion also believes that Mr.

Paladino's remarks impede the Board of Education's ability to function efficiently. *Id.*

- Petitioner Gretchen Cercone is the parent of a City Honors High School student and a BPTO member. Pet. ¶ 17; Pet. Ex. X. Petitioner Cercone cautions that Mr. Paladino's comments set a dangerous tone for the District's students. *Id.* Petitioner Cercone also notes that Mr. Paladino's conduct has disrupted the Board of Education's meetings and cost the District tens of thousands of dollars in "legal defense [fees] . . . due to numerous complaints" against Mr. Paladino. *Id.*
- Petitioner Chanda O'Donnell de Ramirez is a BPTO member, a BCSD parent, and former educator. Pet. ¶ 18; Pet. Ex. F-7; Pet. Ex. X. Petitioner O'Donnell de Ramirez witnessed first-hand the damaging effects of similar hate speech on students and families. *Id.* Petitioner O'Donnell de Ramirez recalled incidents of violence against Muslim students after the 2016 Presidential Election: "In School #3, girls had their hijabs tugged and removed by antagonistic peers; mothers cried wondering aloud if their children would be attacked while walking to and from school." *Id.* Likewise, Mr. Paladino's hate speech has had a devastating effect on Petitioner Chanda O'Donnell de Ramirez's multi-racial daughter's image. *Id.* Hence, she seriously questions Mr. Paladino's ability to act on behalf of children of color. *Id.*
- Petitioner Rachel Dominguez is a BPTO member and recalls how "friends from all over the world contacted [her] as [Mr. Paladino's] story gained traction and spread." Pet. ¶ 19; Pet. Ex. F-8; Pet. Ex. X. Petitioner Dominguez has been forced to protect her 8-year old son from Mr. Paladino's hateful speech, fearing the psychological effects that it could have on him. *Id.* Petitioner Dominguez is also concerned about Mr. Paladino's ability to understand her son's needs and look out for his best interests. *Id.*

A broad cross section of other individuals from Buffalo have also been deeply offended by Mr. Paladino's racist remarks:

- Robert K. Jones has lived in Buffalo since 1957. He writes that, "[a]s an African-American and being a product of discrimination of the [19]70's it reminds me of the hate and bigotry I dealt with while trying to get my education." Pet. Ex. X.
- Mary Mulvihill has lived in Buffalo since 1946. She writes that Mr. Paladino "has violated his sworn duty to conduct himself in the manner required by the Buffalo School Board Standards." She warns that "Mr. Paladino's offensively loathsome words set a bad precedent of the intolerance for all students that we are charged to teach, educate and guide. There is simply no place in our broad educational district for an elected official (School Board) member to speak of such hatred." *Id.*
- Angela Blue has lived in Buffalo since 1963 and has raised two African-American children in the BCSD. She believes that Mr. Paladino should be removed from the Board and "held accountable for his remarks as they taint the very aspect of

citizenship in the United States” and make it difficult to “lead[ ] the children by example.” As she remarks, “Our children deserve better than Paladino.” *Id.*

- James Cercone is a parent, former high school teacher, and current professor of education. He expressed that, “As a parent[,] I am concerned that Carl is unable to provide the leadership in our district that would ensure that all students regardless of race can receive an equitable education. This is an incredibly diverse school district and district leaders must be dedicated to all students.” *Id.*
- Kareem Haq, a 16-year old junior at City Honors School, described how Mr. Paladino’s comments have affected him and his fellow students, and worries that Mr. Paladino’s conduct has “allowed a space for bigots to say and do more prejudiced things.” Kareem explains, “Since [Mr. Paladino’s] controversy along with the rise of Donald Trump[,] swastikas have appeared, mostly within the school bathrooms. Insensitive and hateful things from student to student seem to be at an all-time high, with slurs such as the N word and ‘Paki’ being used on a regular basis.” Kareem describes “feel[ing] unsafe within my own school environment,” as do other students of color. He worries that Mr. Paladino is “creating an outlet in which he can teach young adolescents that hate speech is okay.” “[Mr. Paladino] is supposed to be an educational leader,” Kareem writes, and “his divisiveness has been anything but leadership material.” *Id.*
- Christina Salomone has been a social studies teacher in the Buffalo public schools for 19 years. Of the 125 students enrolled in her classes, 115 are African American. She attests that, during her tenure, Buffalo’s schools “have become more segregated and less diversified. Many of [her] students have experienced racism in and around the Buffalo area.” She finds it difficult to explain to her students “how someone of [Mr. Paladino’s] stature can say the things he does without consequences. It is hard [for Ms. Salomone] to teach [her students] to be active in the community and tolerant when representatives are not held to the same standards.” *Id.*
- Jerry Turcotte worries that Mr. Paladino “sets a negative example, which emboldens more negative behavior in my son’s school. There are reports of swastikas in the bathroom at my son’s school. It is difficult enough to raise a child in the city of Buffalo without the added confusion hateful and racist speech breeds.” Mr. Turcotte warns that Mr. Paladino’s “mere presence on the Board is a major distraction to its mission and the positive mission of the BPTO.” *Id.*

#### Breach of Executive Session Confidentiality

Mr. Paladino has also repeatedly violated his duty to maintain the confidentiality of executive session discussions. Pet. ¶ 73. All Board Members—including Mr. Paladino—received training about the Open Meetings Law and executive session requirements. Pet. ¶ 73;

Answer ¶ 73; Pet. Ex. W ¶ 4. During those presentations, each Board member was told about the need to ensure the confidentiality of discussions held during executive sessions. Pet. ¶ 73; Pet. Ex. W ¶ 5.

Mr. Paladino revealed confidential executive session communications when he disseminated the December 22, 2016 email to the media. Pet. Ex. C-1; Ex. W ¶¶ 7-12. As Dr. Nevergold explains, the email references discussions between Board members and a lawyer concerning a contractor hired by the District. Pet. Ex. W ¶ 9. According to Dr. Nevergold, “[t]he Board’s discussions on this subject were extremely sensitive, as we were discussing pending litigation with the contractor.” *Id.* Dr. Nevergold emphasizes “that it was absolutely vital to maintain the integrity and confidentiality of the executive session in order to avoid the district potentially being exposed to liability from making public these discussions.” *Id.* Notwithstanding the confidential nature of the information contained in the email, Mr. Paladino disseminated it to the press, including the *Buffalo News*, two local radio stations, and *Artvoice*. *Id.* ¶ 10. Dr. Nevergold establishes that Mr. Paladino’s disclosure was not authorized by the Board. *Id.* ¶¶ 11-12.

Mr. Paladino also revealed confidential executive session communications when he published a 16-page article in *Artvoice* on January 5, 2017, in which he described a conversation with the Board’s legal counsel about matters concerning labor negotiations with the Buffalo Teachers’ Federation. Pet. Ex. C-2; Pet. Ex. W ¶ 13. He made specific reference to a personnel and employment matter involving Principal Casey Young, who had a pending grievance against the District. Pet. Ex. W ¶ 15. Mr. Paladino describes the Board’s settlement proposals, including concessions on health insurance and restoring certain managerial prerogatives, as well as specific financial details of what the Board was willing to offer. Pet. Ex. W ¶¶ 16, 17. Mr.

Paladino further revealed confidential discussions and legal strategies to address a potential strike. Pet. Ex. W ¶ 18. Dr. Nevergold makes it clear that Mr. Paladino never received permission to reveal these confidential communications and/or violate the sanctity of the attorney-client privilege. “All of these issues were candidly and openly discussed in the executive session,” she attests, “and there was no permission or authorization granted to Mr. Paladino to release this information at any time.” Pet. Ex. W ¶ 20; Pet. ¶ 76.

On January 14, 2017, Mr. Paladino published another, 15-page article in *Artvoice*, in which he unrepentantly asserted that he is authorized to disclose information discussed in executive sessions if he alone determines that the information is old or stale or concerns a transaction that may, in his judgment, be completed. Pet. ¶ 77; Pet. Ex. D at 11-13.<sup>11</sup>

### **STANDARD**

“A board member has a responsibility to comport himself properly and set an example for the student body.” *Appeal of Hoefler*, 45 Ed. Dep’t Rep., Decision No. 15263, 2005 WL 6742542, at \*4 (N.Y.S. Dep’t of Educ. July 29, 2005) (citing case). “Moreover, as a public officer, a school board member takes an oath of office to uphold the law and faithfully discharge her duties (N.Y. State Const. Art. XIII, § 1; Public Officers Law § 10).” *Nett*, 2005 WL 6742549, at \*2. N.Y. Educ. Law § 2559 provides:

For good cause shown . . . the commissioner of education may remove any member of a board of education. Willful disobedience of any lawful requirement of the commissioner of education, or a want of due diligence in obeying such requirement or willful violation or neglect of duty, is cause for removal.

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<sup>11</sup> In the January 14 article, Mr. Paladino also derided “dumbed down” Black leadership, Pet. Ex. D at 9, and was unrepentant about his bigotry: “If I offend minority adults in my effort to protect and assist minority children, I’m good with that, but their label makes no sense,” Pet. Ex. D at 2-3. Presumably, the “label” to which Mr. Paladino refers is, “racist.”

Moreover, “[a] member of the board of education may be removed from office pursuant to Education Law § 306 when it is proven to the satisfaction of the Commissioner that the board member has engaged in a willful violation or neglect of duty under the law.” *Appeal of Mandelbaum*, 39 Ed. Dep’t Rep., Decision No. 14, 299, 2000 WL 35921443, at \*2 (N.Y.S. Dep’t of Educ. Feb. 11, 2000). “To be considered willful, respondent’s actions must have been done intentionally and with a wrongful purpose.” *Id.*

## ARGUMENT

### **I. Mr. Paladino’s Removal Is Warranted Because His Racially Harassing Comments Have Harmful Effects on the Students of Buffalo.**

During the Board’s meeting on December 29, 2016, to consider the resolution calling for Mr. Paladino’s resignation, Board President Dr. Nevergold made the following remarks.

Words matter, Mr. Paladino. Our President—the Commander-in-Chief of this nation for the last eight years, Mrs. Obama—our First Lady, and Valerie Jarrett—Special Presidential Counsel, are all African-Americans. Among other things, they are accomplished, intelligent, beautiful people, and that’s not just my opinion. However, in the views you’ve expressed they are reduced to depraved individuals—criminals, frauds, gorillas, and more. **The impact on children of color—especially African-American children—are incalculable. How do we encourage them to aspire to use their God-given talents to soar [and] to reach for the stars when a sitting board member, responsible for their education, demonstrates such contempt for their role models.** This contempt rises to—or should I say lowers to—a level of unmitigated hateful racist and misogynistic rhetoric that can’t be dissociated from these students’ race and culture. Words matter, Mr. Paladino. As a sitting board member, you have amassed a record and established a pattern of behavior that is equally egregious and violates your oath of office and professional ethics as a Board of Education member. **Words matter, Mr. Paladino. I have heard, as has every Board member including you, from people all over the country who are incredulous that a sitting board of education member could demonstrate such a lack of responsible leadership for the children in our district.**

Pet. ¶ 69 (emphasis added).

Courts have repeatedly confirmed Dr. Nevergold’s admonition that, when it comes to the well-being of students and young children of color, “words matter.” In *Bethel School District No. 403 v. Fraser*, the Supreme Court acknowledged that speech “could well be seriously damaging to its less mature audience.” 478 U.S. 675, 683 (1986). In *Monteiro v. Tempe Union High School District*, the Ninth Circuit recognized that “words can hurt—particularly racist epithets,” with dangers posed by “messages of racism and sexism, or other ideas that if accepted blindly would serve to maintain or promote the invidious inequalities that exist in our world today.” 158 F.3d 1022, 1031 (9th Cir. 1998). The *Monteiro* Court additionally recognized that the younger a person is, the more likely those messages will help form that person’s thinking, and that the feelings of minority students, especially younger ones, are extremely vulnerable to racist messaging. *Id.* Likewise, in *Harper ex rel. Harper v. Poway Unified School District*, the Ninth Circuit found that “[s]peech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.” 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007) (citing studies demonstrating that demeaning gay and lesbian students in a school environment is detrimental to their psychological health and well-being and their educational development). In *Muller ex rel. Muller v. Jefferson Lighthouse School*, the Seventh Circuit cautioned against “speech that could crush a child’s sense of self-worth.” 98 F.3d 1530, 1540 (7th Cir. 1996).

The New York State Legislature has also found that students’ ability to learn and to meet high academic standards, and a school’s ability to educate its students, are compromised by

incidents of race discrimination or harassment. N.Y. Educ. Law § 10. And the United States Department of Education has emphasized that racial harassment poses a special danger in the unique setting and mission of an educational institution, which has a duty to provide a nondiscriminatory environment that is conducive to learning. *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 FR 11448-01, 1994 WL 71886, at \*11449 (N.Y.S. Dep't of Educ. Mar. 10, 1994). The *Guidance* explains:

The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students. This is especially true for younger, less mature students, who are generally more impressionable than older students or adults.

*Id.*

Academic research also confirms Dr. Nevergold's admonition that "words matter." In the article *Names Will Never Hurt Me?* researchers focused on the impact of racialized name-calling and students' evolving responses to racism. M. Varma-Joshi, C. Baker & C. Tanaka, *Harvard Educ. Rev.*, Vol. 74 No. 2 (2004), annexed as Pet. Ex. B-2. They described the startling effects of name-calling on young students, some of whom attempted to scrub off their skin, prayed to turn white, lost interest in school, and, in extreme cases, contemplated suicide.

*Id.* at 177. The study's participants "overwhelmingly felt that name-calling was a particularly insidious form of violence, specifically because of its harmless reputation," *id.* at 178, and often identified verbal abuse as their first memory of a racist attack, *id.* at 187. Participants also felt like highly publicized episodes of racism reflected what they routinely experienced, and only revealed to others "a 'secret' that the participants already knew." *Id.* at 185. The study's authors concluded that, sadly, "[f]or these young children, schools provided the curriculum for an education on racism." *Id.* at 187.

Moreover, academic research has found that school “culture” matters greatly to the well-being of students, including a culture of accountability that reflects an appreciation of how racist language enhances racial stereotyping. “Culture is the underground stream of norms, values, beliefs, traditions, and rituals that has built up over time as people work together, solve problems, and confront challenges.” K.D. Peterson & T.E. Deal, *How Leaders Influence the Culture of Schools*, Educ. Leadership, Vol. 56, No. 1, p. 28 (1998), annexed as Pet. Ex. B-1. Because this set of informal expectations and values influences how students think, feel, and act in schools, it is incumbent on school leaders to ensure that the school system reflects strong, positive, student-focused cultures. *Id.* Some of the most important work that educational leaders do is to reinforce positive cultural elements and core values that are conveyed to the school community as deep and pervasive. *Id.* at 29.

Mr. Paladino, by casually espousing appalling prejudiced tropes about African-Americans, shapes the District’s culture in a way that normalizes prejudice and encourages students and educators alike to respond in prejudiced ways. It is, therefore, incumbent on the State’s education policy makers to recognize the distress caused by Mr. Paladino’s offensive conduct, unequivocally condemn it, and remove him from the Board.

**II. Mr. Paladino’s Removal Is Warranted Because He Has Engaged in a Pattern of Inappropriate, Antagonistic and Offensive Conduct That Interferes With the Board’s Ability To Function.**

Mr. Paladino’s misconduct is unquestionably egregious. Instead of celebrating Buffalo’s diversity, Mr. Paladino—as one of only nine Board members—sets a tone of bigotry for the entire District, and his continued presence on the Board casts a cloud on a district that has long

struggled with a troubling history of racial inequity in public education.<sup>12</sup> As the court in *Bryant v. Independent School District No. I-38* articulated, “[s]chool administrators are not simply bystanders in the school. They are the leaders of the educational environment. They set the standard for behavior.” 334 F.3d 928, 933 (10th Cir. 2003). By denigrating the humanity of Black children and promoting racial intolerance within the District, Mr. Paladino has undermined public confidence in the Board, and thereby hampers its ability to carry out its mission.

In *Appeal of Gill*, the Commissioner removed a school board trustee who engaged in comparably egregious conduct for undermining public confidence in the school board, and for having a detrimental impact on the school board’s ability to carry out its mission. The trustee had “engaged in a pattern of behavior that included personal attacks, racial slurs[,] and antagonistic behavior toward his fellow board members and a taxpayer.” 42 Ed. Dep’t Rep., Decision No. 14,785, 2002 WL 34702304 at \*6 (N.Y.S. Dep’t of Educ. Aug. 22, 2002). Specifically, in response to a poll of trustees’ availability to attend an annual retreat, Mr. Gill stated, “We ain’t going nowhere with these n[\*\*\*]ers” *Id.* at \*5. At another point, Mr. Gill berated a taxpayer and called him “an uneducated Negro.” *Id.* Mr. Gill also admitted that he called the taxpayer “‘much worse’ than an ‘uneducated Negro.’” *Id.* The Commissioner made it clear that “where a trustee engages in a pattern of inappropriate, antagonistic, and offensive

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<sup>12</sup> In 1972, Buffalo parents and the NAACP filed a federal lawsuit to desegregate the City’s public schools. Chief Judge John Curtin found that Buffalo intentionally segregated teachers and staff and manipulated boundaries and transfer policies to ensure racial separation. *Arthur v. Nyquist*, 415 F. Supp. 904, 960-61 (W.D.N.Y. 1976). He concluded that “[t]he problems presented are difficult and will require rigorous effort to overcome, but overcome them defendants must.” *Id.* at 970. And, for years, Buffalo did. By 1985, the *New York Times* hailed Buffalo as a “national model of school integration.” Unfortunately, that success was ephemeral. By 2012, 70% of Buffalo’s schools were segregated again. Pet. ¶ 22.

conduct that interferes with the board’s ability to function, removal is warranted.” *Id.* at \*6. She went on to hold that:

There can be no question that such behavior is antithetical to the oath of office which petitioner Gill has sworn to uphold. It also sets an extremely poor example to the children of the district, for whose benefit petitioner is obligated to work. Moreover, it reveals an animus and disrespect toward certain sectors of the community which respondent is obligated to serve.

*Id.* at \*6.

Furthermore, the Commissioner considered it an aggravating factor that Mr. Gill showed no remorse or appreciation for the inappropriateness of his conduct and an inability or unwillingness to conduct himself with civility and decency. *Id.* Mr. Paladino has likewise repeatedly demonstrated an utter lack of “remorse or appreciation for the inappropriateness of his conduct” and has demonstrated that he is unable or unwilling “to conduct himself with civility and decency.” *Id.* at \*6. In addition to his recent mass email describing March 2017 as “Stop Blaming White People Month”—in derision of Black History Month—and his acts of defiance in the immediate aftermath of the publication of his racist statements, *see supra* p. 8, on March 30, 2017, Mr. Paladino threatened to file a nakedly retaliatory federal lawsuit against Petitioners for money damages as punishment for exercising their fundamental right to challenge his offensive conduct.

**III. Mr. Paladino’s Removal Is Warranted Because He Has Willfully Violated his Duties as a Member Of The Board.**

Mr. Paladino must be removed from the Buffalo Board of Education because he willfully violated his duties under the Policies and By-Laws and the Buffalo Public Schools’ Standards. “School boards have the duty and authority to adopt policies, rules and bylaws to discharge their duties, which include educational standards, budget matters, management issues and health and

safety rules that secure the best educational results for students in their charge.” *Appeal of Gill*, 2002 WL 34702304, at \*4. To that end, a board member has a duty to proceed with constructive discussions aimed at achieving the best possible governance of the school district.” *Appeal of Kozak*, 34 Ed. Dep’t Rep., Decision No. 13,396, 1995 WL 17958448, at \*2 (N.Y.S. Dep’t of Educ. Apt. 6, 1995); *see also Appeal of Bd. of Educ. of Elmont Union Free Sch. Dist.*, 48 Ed. Dep’t Rep., Decision No. 15,783, 2008 WL 8715506, at \*2 (N.Y.S. Dep’t of Educ. July 19, 2008) (“[A] school board member takes an oath of office to uphold the law and faithfully discharge his duties and . . . a board member has a fiduciary obligation to act constructively to achieve the best possible governance of the school district.”) (citing N.Y. State Const. Art. XIII, § 1; Pub. Officers Law Art. 2, § 10).<sup>13</sup>

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<sup>13</sup> Mr. Paladino’s argument that the Petition should be dismissed for failure to join the Board of Education as a necessary party is meritless because Petitioners do not seek any relief against the Board as an entity. *See Application of Fu-Yun Tang*, 48 Ed. Dep’t Rep., Decision No. 15,932, 2009 WL 852184, at \*2 (N.Y.S. Dep’t of Educ. June 23, 2009) (since petitioner seeks only to remove individual board members “and does not seek any relief against the board as an entity, the latter is not a necessary party to petitioner’s application”) (citing cases).

Mr. Paladino Breached and/or Neglected His Duties Under the Buffalo City School District's Policies and By-Laws.

When Mr. Paladino ascended to the School Board,<sup>14</sup> he assumed a duty to honor its Educational Philosophy, which includes the following commitments:

- All schools should be safe and equitable;
- Schools should foster an awareness, understanding, and valuing of self and others;
- Understanding and appreciating diversity is essential for our community to survive and flourish;
- All persons are responsible for their choices and the impact of their choices on themselves, others, and the community; and that
- All children are special and need to be loved, respected, valued and affirmed.

With his bigotry, Mr. Paladino violated each of these commitments.

Mr. Paladino also violated the duties set out in the Policies and By-Laws, which establish that “[i]ndividuals within the Buffalo Public Schools shall be provided, to the greatest extent possible and within School District control, an educational environment free of fear; and where differences among people, including race, creed, color . . . sex/gender [or] sexual orientation . . . or disability are accepted and valued.” Policies and By-Laws No. 3413. The Policies and By-Laws further codify the Board of Education’s recognition that:

[T]he ideal educational environment provides a haven permitting growth and development for all. Every school should have an explicit commitment to developing a school “culture” which welcomes all its components. Emotional and psychological safety can best be

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<sup>14</sup> Although Mr. Paladino argues that he did not make the statements in his capacity as a member of the Board of Education, he effectively admitted that he was acting in his official capacity and within the scope of his duties when, on March 7, 2017, he requested that the Commissioner issue a certificate of good faith pursuant to N.Y. Educ. Law § 3811(c) specifically relating to his racist statements to the press. Mr. Paladino repeats that request in his memorandum of law. *See* Mem. of Law in Opp’n at 43. Section 3811 provides for the indemnification of school board members when they are defending actions and proceedings “arising out of the exercise of [their] powers or the performance of [their] duties under this chapter.” *See* Reply ¶ 39 and Ex. 14 thereto. Furthermore, the caption under the picture of Mr. Paladino that accompanied the December 23, 2016 comments identifies him as “School Board Member.” *See* Pet. Ex. A at 13.

addressed by intentionally fostering an environment where all members of a school community see their lives reflected and affirmed.

*Id.*

Thus, the Board of Education has committed itself to combating harassment. The Board believes that harassment stems from a lack of empathy, is fostered by prejudice, and requires that the victim be dehumanized. As such, the Board has assumed the responsibility to “teach about prejudice and history’s long struggle with it,” and “to replace stereotypes with accurate information and with the opportunity to meet a diverse cross-section of people, face-to-face.” *Id.* The Board is also charged with developing curricula “which mirror the diverse profile of the school community and examine the history of discrimination and racism.” *Id.* Mr. Paladino’s actions have subverted these efforts and betrayed all of these commitments.

In addition, the Policies and By-Laws establish the *School Board Member Code of Conduct* (“Code of Conduct”). Pet. Ex. J at 1311. The Code of Conduct requires Mr. Paladino to “[r]emember always that [his] first and greatest concern must be the educational welfare of the students attending the public schools.” Pet. Ex. J at 1311. Again, by his conduct, Mr. Paladino violated his duty to protect the educational welfare of Buffalo’s public school students. Mr. Paladino further violated his duty to “maintain[ ] a learning and working environment free from unlawful harassment or retaliation based on race, color . . . sex/gender, [or] sexual orientation.” Ex. J at 3420. In fact, Mr. Paladino has engaged in prohibited Racial and Color Harassment under the Policies and By-Laws, which is defined to include unwelcome verbal and written conduct directed at the characteristics of an individual’s race or color. Ex. J at 3420.

*Mr. Paladino Breached and/or Neglected His Duties Under the Buffalo Public Schools' Standards for Community-Wide Conduct and Intervention Supports.*

Every School Board member is expected to abide by the Standards, which were “developed to ensure that students—and all members of the Buffalo Public Schools community—learn and engage in appropriate behavior that supports student success in life and in society.” Pet. Ex. I at 1. The Standards guarantee that students have the right to “expect that school will be a safe, orderly and purposeful place for all students to gain an education and to be treated fairly.” Pet. Ex. I. at 25. Mr. Paladino has violated these Standards and engaged in “Racial Harassment,” which is defined as expressing “[a] negative opinion or verbal expression toward an individual or group of persons who possess common physical characteristics (i.e., color of skin, eyes, hair and facial feature genetically transmitted by descent and heredity) that distinguish them as a distinct division of human kind, based on these physical characteristics.” Pet. Ex. I at 59.

The Standards incorporate the Dignity for All Students Act, which was enacted to ensure that public school students can enjoy an environment that is free of race discrimination and harassment. N.Y. Educ. Law §§ 10-18. It followed a legislative finding that “students’ ability to learn and meet high academic standards, and a school’s ability to educate its students, are compromised by incidents of discrimination or harassment including bullying, taunting or intimidation.” N.Y. Educ. Law § 10. School Board members have a duty to promote a safe, healthy, orderly, and civil school environment that guarantees students the right to be treated respectfully by those in the school community. Pet. Ex. I at 24. This duty to cultivate a positive and respectful school climate and culture is essential to creating and maintaining a safe and supportive school community. Mr. Paladino has violated this duty by engaging in explicitly racially discriminatory behavior.

**IV. Mr. Paladino's Removal Is Warranted Because He Has Willfully Breached the Executive Session Confidentiality Requirement.**

Mr. Paladino disclosed confidential information from executive sessions when he disseminated the December 22, 2016 email to the media and when he published the January 5, 2017 *Artvoice* article. In so doing, Mr. Paladino willfully violated General Municipal Law § 805 and the Code of Conduct.

“In addition to a board member’s general duties and responsibilities, General Municipal Law § 805-a(1)(b) provides that no municipal officer or employee (including a school board member) shall ‘disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests.’” *Appeal of Nelson*, 49 Ed. Dep’t Rep., Decision No. 15,964, 2009 WL 8521906, at \*3 (N.Y.S. Dep’t of Educ. Aug. 14, 2009); *see also Elmont Union Free Sch. Dist.*, 2008 WL 8715506, at \*2 (“General Municipal Law § 805-a(1)(b) prohibits a board member from disclosing confidential information obtained at an executive session of a board meeting. Care must be taken to preserve the confidentiality of information obtained at a properly convened executive session.”) (internal citations omitted). Code of Conduct No. 1311(m) also requires Board members to “[r]efrain from disclosing confidential information acquired in the course of [their] official duties and from using such information to further [their] personal interests.” Pet. Ex. J. The Commissioner has long held that a school board member’s willful disclosure of executive session confidences constitutes serious misconduct warranting removal. *See Nett*, 2005 WL 6742549, at \*3 (“It is well settled that a board member’s disclosure of confidential information obtained at an executive session of a board meeting violates § 805-a(1)(b).”).

Mr. Paladino’s December 22, 2016 email, and his long, premeditated *Artvoice* articles on January 5, 2017, and January 14, 2017, make clear that his serial revelations of executive session

confidences were willful, not inadvertent. *Cf. Application of Scala*, 31 Ed. Dep't Rep. Decision No. 12,604, 1991 WL 11762555 at \*1 (N.Y.S. Dep't of Educ. Nov. 29, 1991) ("It is apparent from the record that respondent's remarks were made extemporaneously, in the midst of an uproar."); *cf. Application of Young*, 25 Ed. Dep't Rep. 297, 299, Decision No. 11,589 ("Respondent's remarks were made extemporaneously, in response to a question originally posed to petitioner. There is no indication that respondent's lack of judgment involved any willfulness on his part."). Mr. Paladino's explanation for his improper behavior, in the January 14, 2017 *Artvoice* article, also makes it clear that his violation was willful, not inadvertent. He insists that he is authorized to release information discussed in executive sessions if he alone determines that the information is old or stale or pertains to a transaction that may, in his judgment, be completed. But, as Dr. Nevergold contends, "[t]his interpretation of the executive session confidentiality requirement and/or requirement of maintaining the confidentiality of attorney-client privileged discussions is wholly unfounded and baseless." Pet. Ex. W ¶ 24. She also attests that "there is no authority that recognizes such an exemption" from the confidentiality requirement. Pet. Ex. W ¶ 25.

In *Hoefler*, the Commissioner sustained a school board member's removal under similar circumstances. 2005 WL 6742542, at \*1. The board member was charged with operating a website on which he disclosed sensitive and/or confidential information discussed during executive sessions of board meetings, including legal and personnel issues. *Id.* at \*1. The board member explained that he would "never keep the actions of the school board confidential,' even those actions conducted in executive session." *Id.* at \*7. Similarly, in his January 14, 2017 *Artvoice* article, Mr. Paladino all but vowed to continue to engage in similar behavior whenever he sees fit. *See* Ex. D at 11. In *Hoefler*, the commissioner found that a comparably unrepentant

attitude revealed a “profound lack of regard for duties as a Board member and Board policies, together with external law in New York.” 2005 WL 6742542, at \*8 (internal quotations omitted). Just like the board member in *Hoefer*, Mr. Paladino “has expressed no remorse or appreciation for the inappropriateness of his conduct, and continues to act with defiance and disdain.” *Id.* at \*10.

Mr. Paladino—without proffering any evidence whatsoever<sup>15</sup>—disputes the confidentiality of the information that he disclosed. *See* Answer ¶ 20. But the information that Mr. Paladino disclosed was confidential because it was discussed in executive session; was designated confidential by the Board; and contained attorney-client communications. *See Nett*, 2005 WL 6742549, at \*4 (“By electing to discuss the employment matter in private executive sessions, the board implicitly decided that such discussions would remain in confidence.”); *see also id.* at \*3 (“[A] decision to enter into executive session can only be made by a majority vote of the entire board. Similarly, only a majority of the board can act to relinquish the protection afforded once an executive session is convened.”). Furthermore, as established by Dr. Nevergold, the disclosed information was confidential because the executive session discussions were “extremely sensitive, as [they] were discussing pending litigation.” *Pet.*

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<sup>15</sup> Mr. Paladino registers 27 unsupported affirmative defenses. The Commissioner has long held that respondents are responsible for establishing their affirmative defenses with affidavits and other supporting materials. *See In re Bd. of Educ., Buffalo*, 21 Ed. Dep’t Rep. 79, 81, Decision No. 10,604 (1981); *Appeal of Bd. of Ed., South Country CSD*, 33 Ed. Dep’t Rep., Decision No. 13,159, 1994 WL 16854631 (N.Y.S. Dep’t of Educ. Apr. 18, 1994); *Appeal of S.L.*, 33 Ed. Dep’t Rep., Decision No. 13,003, 1993 WL 1371320 (N.Y.S. Dep’t of Educ. Sept. 13, 1993). It is noteworthy that Mr. Paladino has already been the subject of a removal petition, in which he also proffered unsupported affirmative defenses. The Commissioner admonished Mr. Paladino for failing to discharge his burden. *Application of Simmons*, 53 Ed. Dep’t Rep. Decision No. 16,596, 2014 WL 1246859, at \*2 (N.Y.S. Dep’t of Educ. March 12, 2014) (concluding that Mr. Paladino failed to establish his affirmative defense because, other than a “conclusory allegation,” he set forth no further facts or any reference to specific actions”).

Ex. W at 2-3. Dr. Nevergold believed that “it was absolutely vital to maintain the integrity and confidentiality of the executive session in order to avoid the district potentially being exposed to liability from making public these discussions.” *Id.* at 3. Dr. Nevergold “unequivocally state[s] that at no time did the Board of Education agree to waive the protection of the attorney-client privilege, nor did it authorize or allow Mr. Paladino to release this information from the executive session.” *Id.* at 5. By disclosing this confidential information, Mr. Paladino undermined the Board’s negotiating position and undermined its ability to conduct meaningful discussions in executive session. As Dr. Nevergold attests, “Mr. Paladino’s unauthorized disclosures of confidential information have caused a great deal of disruption in the operation of the school district,” and “will have a chilling effect on the Board’s ability to conduct its business.” Pet. Ex. W ¶ 27.

In his Verified Answer, Mr. Paladino asserts that his actions were taken in good faith. Answer ¶¶ 31, 32. But Mr. Paladino does not provide any explanation or evidentiary support for his putative good faith. *Cf. Nett*, 2005 WL 6742549, at \*5 (finding no willfulness where board member disclosed confidential information on the advice of counsel and after researching advisory opinions). To the contrary, he acted in contempt of the training that the Board provided, which explicitly advised him that information discussed in a properly convened executive session is confidential and may not be disclosed. Pet. ¶ 73. Mr. Paladino’s revelation of attorney-client confidences further evinces his willfulness because, as someone who has been practicing law for decades, he thoroughly understands the critical importance of maintaining attorney-client confidences.<sup>16</sup> Mr. Paladino further contends that he acted to prevent crime or

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<sup>16</sup> Mr. Paladino has been admitted to practice law in New York State since 1972 and is admitted to practice law in the Commonwealth of Pennsylvania, the United States District Court for the

fraud, Answer ¶ 17, but he neither describes how the disclosure of confidential information was intended to prevent crime or fraud, nor indicates that he reported any crime or fraud to the Board or any other proper authority.

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Western District of New York and the Supreme Court of the United States. Reply ¶ 31; Reply Ex. 12, 13.

**CONCLUSION**

For the reasons set forth above, Mr. Paladino should be removed from the Buffalo Board of Education forthwith. Mr. Paladino's conduct cannot be reconciled with his duty to ensure that all the children of Buffalo receive a quality education. Those children should not be expected to accept that someone who is entrusted with their educational development links blackness to inhumanity. If Mr. Paladino is not immediately held accountable for his conduct, and removed from the Board, he will have put the lie to the District's mission to "ensure that every student will have the confidence, knowledge . . . character and hope" necessary to succeed.

Dated: April 28, 2017  
New York, New York

**NAACP LEGAL DEFENSE AND  
EDUCATIONAL FUND, INC.**

By: \_\_\_\_\_

  
SHERRILYN IFILL

Director-Counsel

JANAI NELSON

CHRISTINA SWARNS

JIN HEE LEE

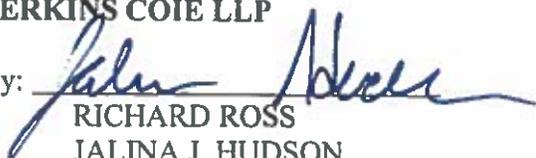
RAYMOND AUDAIN

MONIQUE LIN-LUSE

40 Rector Street, 5th Floor  
New York, NY 10006-1738  
212.965.2200

**PERKINS COIE LLP**

By: \_\_\_\_\_

  
RICHARD ROSS

JALINA J. HUDSON

30 Rockefeller Plaza, 22th Floor  
New York, NY 10112-0085  
212.262.6900

*Attorneys for Petitioners*