

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHELENA J. McCOY,

Plaintiff,

v.

Case No. 2:23-cv-314
Jury Demand

**KANAWHA COUNTY BOARD OF EDUCATION and
DR. THOMAS F. WILLIAMS, Jr., Superintendent,
Kanawha County Schools,**

Defendants.

COMPLAINT

The Plaintiff, Chelena J. McCoy (“Plaintiff” or “McCoy”), files this Complaint against the above-named Defendants, Kanawha County Board of Education and Thomas F. Williams, Jr., (collectively “Defendants”), seeking injunctive relief and damages for violation of her right to freedom of speech under the First Amendment to the United States Constitution as authorized by 42 U.S.C. § 1983 of the Civil Rights Act. In addition, or alternatively, the Plaintiff seeks injunctive relief and damages for violation of her right to protection from retaliatory and discriminatory actions under the West Virginia Whistle-blower Law (“Whistle-blower Law”), W. Va. Code § 6C-1-1 *et seq.*, pursuant to this Court’s supplemental jurisdiction. The Plaintiff alleges that the Defendants acted under color of state law at all times.

I. INTRODUCTION

1. As the long-time School Counselor for Belle Elementary School, it was McCoy’s responsibility to oversee the administration of the federally-mandated West Virginia General

Summative Assessment (“WVGSA”) each year and in the spring of 2021. The U.S. Department of Education (“USDOE”) expects schools to achieve a 95% participation rate.

2. The WVGSA was cancelled in the spring of 2020 due to concerns about the COVID-19 virus. However, Kanawha County Schools administered the test in 2021 even though the pandemic continued. Exercising a safety option, approximately 30 Belle students, called E-Learners or virtual learners (hereinafter “Online Learners”), attended school from home. This option allowed for concerns that the COVID-19 virus could cause serious illness or death to vulnerable parents or household members if it was brought home from school.

3. In recognition of the risks of requiring Online Learners to take the test in the school building in 2021, the USDOE granted the West Virginia State Department of Education (“State Department”) a “waiver” from the usual 95% participation requirement. In granting the waiver, the USDOE instructed Kanawha County Schools and all West Virginia public schools to offer various safe testing options in relation to the WVGSA, including the option to test remotely or at other times or places or not test that year, and to take into account the safety concerns of Online Learners who had not attended school the entire school year.

4. As the date for testing approached, numerous parents of Online Learners expressed concerns to Belle Online teachers about sending their children into the building to test in the middle of the pandemic. McCoy knew that parents of Online Learners had not been informed of their right to request safe testing alternatives recommended by the USDOE, and had been provided confusing or misleading information about their right to request safe testing alternatives outside of the face-to-face classroom.

5. McCoy then became worried for the safety of Belle students and their families and requested permission from Defendants’ staff to communicate this important health and

safety information through Schoology,¹ the official school communication platform. However, the Defendants' administrative employees, Danielle Burke, Belle's Principal, and Jon Duffy, Director of Counseling and Testing (hereinafter collectively "administrators," "Burke," or "Duffy") informed McCoy that she could not do so. Duffy said it was their policy not to preemptively share the availability of testing alternatives for fear it could lower test participation rates not just that year, but also in future years when accountability standards are reinstated.

6. Realizing that vulnerable family members faced the risk of serious illness or death if their Online Learners were required to take the test inside the crowded school building, McCoy concluded she had an ethical obligation as a counselor, educator, and as a private citizen to inform the public of the potentially life-saving options and information offered by the USDOE. McCoy had begun to fear that other school districts may also be suppressing this important safety information.

7. Because the Defendants had foreclosed McCoy from conveying this information through Belle's official communication platform, she contacted statewide news media on her own time during a weekend in an effort to inform as many potentially affected people in the state as possible of the information that Kanawha County Schools administrators, and possibly other school administrators, had suppressed so that they could take appropriate measures to protect their families. In taking these actions, McCoy availed herself of the protections under the Whistle-blower Law and her right to freedom of speech as a private citizen.

8. Only one news outlet, WCHS-TV in Charleston, reported on McCoy's concerns noted in her state-wide press release. WCHS-TV aired a brief story on April 19, 2021 on this

¹ Schoology is the Kanawha County Schools official online platform through which classroom instruction was provided to Online Learners and which enables two-way audio and video communication between teachers, Online Learners, and their parents and caretakers.

concern based on interviews with McCoy and Duffy. In the story, Duffy conceded that children were not required to take the test.

9. On April 27, 2021, Defendants delivered a formal letter of reprimand to McCoy for allegedly providing inaccurate information to the news media. McCoy was later informed by the Board that the letter of reprimand would go into the Board's personnel file, the letter would follow her within and outside the Kanawha County Schools, including school systems in other states, and that McCoy could face further disciplinary action if there were future infractions.

10. Ultimately, the letter of reprimand was requested by both licensing agencies for school counselors, the West Virginia Department of Education and the National Board of Certified Counselors. Both licensing agencies also requested that McCoy explain in writing her shortcomings and failures as it related to the receipt of the reprimand received by Kanawha County Schools. This placed McCoy's professional licenses in peril, required additional work, and caused stress and embarrassment for McCoy. It also helped to send the message to all Kanawha County Schools staff that if they are told by the Board administrators to suppress public information, they better comply or they will face severe professional consequences and hardships.

11. The Defendants have acted unethically and violated the public and employees' trust by placing their narrow interest in future test participation rates over their obligation to provide complete and accurate information to protect the health and safety of the children and families that they serve. By choosing to suppress information to serve their own interest over the public interest, Defendants violated their obligation to protect and inform students and families.

12. The Defendants have further acted unlawfully by taking unwarranted disciplinary and retaliatory action against McCoy for adhering to her ethical obligation under various counselor codes of ethics and as a private citizen that compelled her to blow the whistle on Defendants' wrongful suppression of information that she deemed essential to the health and safety of the public. By their actions, the Defendants have prioritized their own professional reputation and/or other professional interests over their legal and ethical obligation to provide the public with complete and truthful information essential to their health and safety. In doing so, the Defendants have also violated fundamental democratic principles.

13. Defendants also make clear that they intend to punish employees who insist on providing true and factual public information to the public, a dangerous precedent which serves to discourage employees from providing important health and safety information to the public interest if it runs counter to the school board's ranking or other narrow interests.

II. PARTIES

14. The Plaintiff, McCoy, resides in Lincoln County, West Virginia and is currently employed as a School Counsellor at Belle Elementary School ("Belle") in Belle, West Virginia.

15. The Defendant, Kanawha County Board of Education ("Board"), is empowered to control and manage all operations of Kanawha County Schools pursuant to W. Va. Code § 18-5-13(a). The Board's principal office is located at 200 Elizabeth Street, Charleston, WV 25311.

16. The Defendant, Dr. Thomas F. Williams, Jr. ("Williams"), is the Superintendent appointed by the Board to administer and oversee the day-to-day operations of Kanawha County Schools.

III. JURISDICTION AND VENUE

17. This Court has jurisdiction over Plaintiff's federal claim under 28 U.S.C. §§ 1331 and 1343. This Court has supplemental jurisdiction over McCoy's state claim, violation of the Whistle-blower Law, under 28 U.S.C. § 1367.

18. Venue in the United States District Court for the Southern District of West Virginia is proper pursuant to 29 U.S.C. § 1391.

IV. McCOY'S BACKGROUND AND CREDENTIALS

19. McCoy has been employed as a School Counselor for Kanawha County Schools for 13 years, including the last 11 years at Belle Elementary. During this time, her evaluations disclose that she has provided exemplary service to the children and families she serves.

20. McCoy has a Masters Degree in School Counseling and Community Agency Counseling from Marshall University. She is also credentialed as a Licensed Professional Counsellor ("LPC") and National Certified Counselor ("NCC").

21. McCoy was judged "Distinguished" by her supervising principal, Burke, in all categories in her formal evaluation for performance during the 2021-2022 school year, the latest evaluation as of the date of this Complaint. McCoy was also judged "Distinguished" the preceding year, and for most all of her years of employment with Kanawha County Schools, by Burke and the previous principal of Belle Elementary, Amanda Mays.

22. Prior to working for the Board, McCoy had approximately 15 years' experience in the counseling and mental health field, which included in-home family unification and stabilization services. She also worked as a court-appointed child custody evaluator and expert witness to assist judges in the adjudication of custody disputes involving child abuse and neglect

in the Family Court of Kanawha County and surrounding counties under the auspices of her company, Chelena J. McCoy & Associates, LLC. She also provided expert testimony on child and family related matters in the Kanawha County Circuit Court.

23. As part of her duties as School Counselor at Belle and for nine years prior to the actions that led to this Complaint,² McCoy was the School Test Coordinator, tasked with administering the WVSGA under the supervision of Burke and Duffy. Upon information and belief, Belle always achieved or exceeded the expected 95% participation rate for the WVSGA while she was the School Test Coordinator except when this requirement was waived due to the pandemic.

V. STATEMENT OF FACTS AND PROCEDURAL HISTORY

24. Each spring the State Department requires county school boards to administer the WVSGA, West Virginia's version of the federally-mandated assessment test. The WVSGA was scheduled to be administered in the spring of 2020 but was cancelled due to safety concerns related to the COVID-19 pandemic.

25. In light of continuing concerns about the pandemic, the USDOE issued a Guidance dated February 22, 2021 addressed "Dear Chief State School Officer" to "provide an update on assessment, accountability, and reporting requirements for the 2020 – 2021 school year." The Guidance is attached hereto as Exhibit 1.

26. The Guidance acknowledged that "assessment and accountability play an important role in advancing educational equity." However, the Guidance emphasized:

At the same time, it is clear that the pandemic requires significant flexibility for the 2020-2021 school year so that states can respond to the unique circumstances they are facing; keep students, staff, and their families safe; and maintain their immediate focus on supporting students' social, emotional, and academic development

² Subsequent to McCoy's decision to blow the whistle and speak out on the Defendants' suppression of important health and safety information, the Defendants' stripped McCoy of her long-held duties as School Test Coordinator.

Exhibit 1, *id.* (emphasis added). Consequently, the USDOE’s Guidance urged “flexibility” with respect to “assessment, accountability, and reporting systems for the 2020 – 2021 school year.” *Id.*

27. With regard to flexibility on assessment, the USDOE’s Guidance acknowledged “some schools and school districts may face circumstances in which they are not able to **safely** administer statewide summative assessments this spring using their standard practices”(emphasis added). Exhibit 1. For those circumstances, the Guidance stated: “Certainly, we do not believe that if there are places where students are unable to attend school safely in person because of the pandemic **that they should be brought into the school building for the sole purpose of taking a test.**” *Id.* (emphasis added).

28. The USDOE’s Guidance emphasized the “importance of flexibility in the administration of statewide assessments” and suggested several options to address these concerns. Exhibit 1. The options included “administering a shortened version” of assessments, “extending the testing window to the greatest extent practicable,” and “**offering remote administration where feasible.**” *Id.* (emphasis added).

29. Finally, the USDOE’s Guidance recognized that individual states may need additional flexibility based upon their specific circumstances and, if so, invited those states to request a “waiver” from the reporting requirements **after first affording the public and interested parties notice and an opportunity to comment.** Exhibit 1 (emphasis added).

30. By letter dated March 3, 2021, the State Department asked the USDOE to waive the 95% test participation rate requirement for the 2020-21 school year. The USDOE granted the waiver by letter dated April 6, 2021.

31. **Prior to receiving the waiver**, the State Department prepared a letter dated “February/2021” (“the Letter”) addressed “Dear Parent(s)/Guardian(s)” that was intended to convey information concerning administration of the WVGSA for Grades 3 – 8 in the spring of 2021. The Letter is attached hereto as Exhibit 2.

33. The Board instructed school counselors and principals to circulate the letter "on or before March 12" to all parents/guardians whose students attend Kanawha County Schools.

33. The Letter stated, “The test will be administered at your student’s school or at an off-site location to be determined by the county.” Exhibit 2.

34. The Letter was accompanied by a document titled “Frequently Asked Questions / Spring 2021 West Virginia General Summative Assessment (WVGSA)” (hereinafter “FAQ”).

35. The FAQ contained the following information:

Q. Can students take the test remotely?

A. No. remote testing is not allowed. All tests are administered in an in-person setting.

Q. Can students opt out of taking the state’s summative assessment in spring 2021?

A. Neither West Virginia law nor the regulations of the West Virginia Board of Education contain provisions for ‘opting-out’ of statewide assessments, and we are aware of no legal right for parents or students to do so.

See Exhibit 2.

36. Although the USDOE granted the State Department’s request for waiver (meaning schools were not required to achieve a 95% test participation rate for the 2020 – 21 school year), neither the State Department nor the Board circulated any new letters, notices or updated information sheets to Belle families or to the general public advising that the Board was now obligated to offer flexible and safe testing options for children, particularly Online

Learners, who may reside with fragile household members. The Board also failed to communicate to building level test coordinators **prior to McCoy's whistle-blowing** any information that the USDOE waiver afforded any new safety-related flexibility to parents/guardians who may have concerns relative to the requirement that children, especially Online Learners, take the test in person alongside the rest of a school's student body.

37. These new safety options went far beyond the routine "medical exemptions" given every year to students identified as fragile. **The new options were intended to afford protections to members of the student's household that the Defendants sought to suppress.**

38. After the waiver was granted, Belle's Principal, Burke, circulated the WVGSA Letter and Frequently Asked Questions (FAQ) Attachment, Exhibit 2, **again** to parents/guardians on the evening of April 19, 2021 (the same evening the news media reported the story that led to the instant whistle-blower action). The WVGSA Letter and FAQ page were recirculated that evening without any mention of the state-wide waiver, additional flexibility afforded by the waiver (taking into account COVID-19 safety concerns), or the Board's obligation to provide safe testing options to parents or caretakers of Online Learners with safety concerns. Burke also posted that evening on the Belle Schoology site, the school's primary form of communication with families, in all capital letters the following exact quote followed by an exclamation mark: "STUDENTS WILL NEED TO COME FOR TESTING!"

VI. McCOY'S ACTIONS TO REPORT WRONGDOING AND PROTECT THE PUBLIC

39. During the ordinary exercise of her duties during the 2020-2021 school year, McCoy became aware of and had personal knowledge of many students, particularly Online Learners, who lived (or were cared for) in homes with parents/guardians or household members who were elderly, frail, sickly, disabled, and or at high risk of serious illness or death if they

were to become infected with COVID-19.² However, McCoy was not familiar with the circumstances that prompted many families to enroll their students as Online Learners. McCoy also learned that many individuals in the Belle community had not yet been vaccinated as vaccines were not then widely available.

40. McCoy was aware of at least one Belle Elementary grandparent who died from COVID-19 that likely stemmed from a Belle classroom. In that case, the grandchild, who reportedly tested positive, may have carried the virus home after being present in a classroom that was shut down due to multiple reports of positive COVID test results in the classroom. The grandparent was hospitalized shortly after the classroom closure, and died in the hospital a few weeks later with the stated cause of death as COVID-19. McCoy was concerned that requiring Online Learners to enter a crowded school building for the sole purpose of taking the WVGSA would create an unacceptable, unnecessary risk of serious illness or death to one or more vulnerable family members.³ This was an outcome she wished to avoid. She believed that parents and guardians all over West Virginia should be provided all of the facts available (as per her professional codes of ethics and moral principles) so they could make the most informed decision for their family's safety with regard to testing in-person at their schools. McCoy believed they had a right to know, and she had an obligation to report, all of their options and the full truth about the waiver relieving participation requirements.

³ According to a study conducted by Dr. Alexandra Blenkinsop of Imperial College in London, 120,000 U.S. children lost a parent or grandparent who was a primary provider of financial support and care during 15 months of the 19-month COVID-19 pandemic. See Mike Stobbe, Associated Press, *More than 120,000 U.S. kids had Caregivers Die During Pandemic*, The Charlestown-Gazette Mail (Oct. 30, 2021). See also <https://apnews.com/article/coronavirus-pandemic-sciences-pandemics-covid-19-pandemic-race-and-ethnicity>.

41. As the date for commencement of testing at Belle approached, teachers of Online Learners advised McCoy that parents/guardians were asking questions and expressing concerns about the requirement that their children take the tests in-person at Belle.

42. In light of written communications from the Board, like the Letter (Exhibit 2) indicating that the tests were required, these teachers brought their concerns to McCoy, the (then) School Test Coordinator's, attention. It was then that McCoy realized parents and guardians facing these concerns were not sufficiently informed of their options and, in fact, were led and pushed to believe that there were very limited or no options but report to the school when told, for however many days the school required.

43. These circumstances presented McCoy with what she perceived in good faith to be an ethical dilemma, as she believed that she was both morally and ethically obligated to inform parents/guardians of all the information she had available.

44. In order to resolve this dilemma, McCoy consulted the American Counseling Association Code of Ethics ("ACA Code"), which is binding on LPCs in West Virginia and has been adopted by the West Virginia Board of Examiners in Counseling to govern its counselors.

45. The ACA Code's Preamble delineates "The fundamental principles of professional ethical behavior as:"

Autonomy, or fostering the right to control the direction of one's life;
Nonmaleficence, or avoiding actions that cause harm;
Justice, or treating individuals equitably and fostering fairness and equality;
Fidelity, or honoring commitments and keeping promises, including fulfilling one's responsibilities of trust in professional relationships; [and]
Veracity, or dealing truthfully with individuals with whom counselors come into professional contact.

See <http://www.counseling.org/resources/aca-code-of-ethics.pdf>. (Italics in original). As per the ACA preamble and other aspects of the ACA Code of Ethics, McCoy concluded she had an ethical obligation to provide complete and accurate information about the availability of safe testing options to the children and families that she serves.

46. The conduct of McCoy and the Defendants is also governed by the National Education Association's Code of Ethics for Educators ("NEA Code") which provides in its Preamble:

The educator, believing in the worth and dignity of each human being, **recognizes the supreme importance of the pursuit of truth**, devotion to excellence, and the nurture of democratic principles. Essential to these goals is the protection of the freedom to learn and to teach and the guarantee of equal educational opportunity for all. **The educator accepts the responsibility to adhere to the highest ethical standards.**

The educator recognizes the magnitude of the responsibility inherent in the teaching process. The desire for the respect and confidence of one's colleagues, of students, **of parents, and of the members of community provides the incentive to attain and maintain the highest possible degree of ethical conduct.** The Code of Ethics of the Education Profession indicates the aspiration of all educators and provides standards by which to judge conduct

See <https://www.nea.org/resource-library/code-ethics-educators>.

47. The conduct of McCoy and Duffy is also governed by the American School Counselor's Association Ethical Standards for School Counselors (ASCA Ethical Standards) which provides in A.1.i that school counselors: "Are knowledgeable of local, state and federal laws, as well as school and district policies and procedures affecting students and families and strive to protect and inform students and families regarding their rights."

See <https://www.schoolcounselor.org/About-School-Counseling/Ethical-Legal-Responsibilities.ACCA>

" <https://www.schoolcounselor.org/About-School-Counseling/Ethical-Legal-Responsibilities.ACCA> Ethical Standards for School Counselors-(1).

48. Consequently, McCoy requested a meeting with Burke to share her concerns that household members of Belle Online Learners could be placed at increased risk of serious illness or death if those children were required to take the WVGSA in the school building during this pandemic, when the school would be more crowded than at any other time the entire school year and while many people were still awaiting vaccination opportunities. McCoy advised Burke that she wished to inform these parents that safer options were available, such as taking the test outdoors, testing on days or at times when other students were not present, or developing a unique testing plan for an individual family, or as a last resort, skipping the test altogether.

49. After a very brief meeting (at most 15 – 20 seconds), Burke informed McCoy emphatically that she did not agree that this presented an ethical dilemma, and stated McCoy could not affirmatively provide any additional information to parents/guardians of Online Learners to advise them of safer options to take the WVGSA. Burke then turned and walked away from McCoy, indicating that she would not discuss it further.

50. McCoy then contacted Duffy as she was certain that he, as a school counselor, would understand the ethical dilemma and would contact Burke to assist in working out an agreement that everyone could live with. Much to her surprise and dismay, Duffy also said there was not an ethical dilemma. He also said McCoy could not affirmatively contact any parents/guardians to provide further information about safety options (not even the one family with a grandfather battling cancer who had kept their child at home throughout the pandemic due to concerns for this grandfather's life).

51. Duffy explained that the staff had to think about next year's WVGSA test participation rates and that providing options this year might decrease participation rates next year, when Kanawha County Schools would likely be mandated again to meet 95%

participation requirements. Because of these concerns, Duffy instructed McCoy that she should not provide any further information to any parents or guardians unless they called her directly to ask, even the family desperately trying to keep the ailing grandfather safe. McCoy knew that this low-income, underprivileged, disenfranchised family was not likely to call and ask for special accommodations, just as many others like them were not likely to call and assert their rights.

52. Because both Burke and Duffy refused to permit McCoy to disseminate information about safe testing options through Schoology or any other formal school communication platform, McCoy tried to devise an alternative method to convey this potentially life-saving information not only to the Belle parents/guardians known to her to be vulnerable, but to other potentially vulnerable persons throughout the public school system in West Virginia.

53. McCoy now feared that parents of Online Learners throughout the state had not been informed of their right to exercise safe testing alternatives. Therefore, on Saturday, April 17, 2021, two days before testing was to commence at Belle, McCoy decided that she had no choice but to spend her weekend contacting news media throughout the state in the hope that they would see the importance of this information and disseminate it to the public in the form of a news story. McCoy then contacted several statewide news media outlets to inform them of her concerns. McCoy knew that she was running out of time to notify West Virginia families of their rights as many schools across the county and state had already commenced testing.

54. In contacting the news media, McCoy expressly characterized herself as a whistle-blower and believed that this status would protect her from any discriminatory or retaliatory actions by her employer.

55. Many media outlets did not respond to McCoy's communication, but a WCHS-TV reporter responded to McCoy's communication and asked to interview her the following day, Sunday, April 18, 2021. The reporter also indicated she would contact Duffy to get the Board's response and would likely run a story Monday evening, April 19, 2021.

56. Later that day, at 7:01 pm, McCoy emailed the Board's Superintendent, Williams, to let him know that she had contacted the news media. She advised Williams in pertinent part:

I was very distraught and worried for the well-being of my students and my families. I reached out to the local media to try to get the facts and basic data to our parents. Basic human decency and my counselor code of ethics demand that I provide all the information to those that I serve so they can make wise decisions to take care of the safety and well-being of their family.

See email to Williams attached hereto as Exhibit 3.

57. In her email to Williams, McCoy said she had told Duffy of her particular concern about a member of one student's family who was battling cancer and she had asked permission to call that one parent, but Duffy still said no. Exhibit 3.

58. McCoy also told Williams she had contacted Burke and Duffy before notifying the news media to explain what she perceived to be her ethical dilemma, but both told her she could not provide any further information or facts to parents and guardians of Online Learners unless contacted directly by a parent/guardian. Exhibit 3.

59. Williams responded to McCoy by email on April 19, 2021 at 6:50 a.m. and stated in pertinent part:

If the family with cancer had a concern they would have contacted you. * * * * *
Schools have made arrangements for students to come in at different times of the day and some even after school so that they were not exposed to anyone else. In my opinion this was not an ethical dilemma as nothing was being done to hurt anyone. Thinking outside the box would have taken care of this issue.

See Exhibit 4 (emphasis added).

60. McCoy responded to Williams approximately 90 minutes later at 8:17 a.m.:

I asked to think outside of the box and test these kids at different times or outside under the picnic shelter and **I was told I could not let the parents know they had options. This could have all been avoided if Mr. Duffy or Mrs. Burke had been flexible and allowed me to make accommodations for those that needed them.**

See Exhibit 6, *supra* (emphasis added).

61. WCHS-TV broadcast a story about the controversy concerning whether parents/guardians were properly informed about the availability of safe testing options on Monday evening, April 19, 2021. McCoy and Duffy were interviewed as part of the story. A transcript of the story prepared by WCHS-TV is attached hereto as Exhibit 5.

62. In the story, McCoy explained her concern that parents were being made to “feel like they don’t have a choice” but to “send their kid in to this public school environment even though they’ve been keeping them at home for safety reasons.” Exhibit 5. Duffy admitted that students were not required to come into the school to test and that “There will not be penalties for not testing.” *Id.* Duffy also admitted that schools must offer alternative options for students who are not comfortable taking tests in a crowded classroom, stating “But certainly, if parents have concerns about the health and safety of the child coming into the building to test, we will be glad to accommodate that.” *Id.*

63. Duffy’s admissions confirmed that the information McCoy sought to convey by going to the news media – the information Defendants had suppressed -- was entirely accurate with one important distinction. Duffy still failed to explain that the primary purpose of offering safe testing alternatives during the 2020-212 school year – the reason USDOE granted the waiver to the State Department for this year -- was not just to protect the school children but to

protect potentially vulnerable persons in the children's household. Medical exemptions from testing had long been in place to protect children.

64. Based upon the foregoing, McCoy believes that she acted properly, ethically, and morally in contacting the news media in her capacity as a concerned private citizen to let as many potentially vulnerable parents and guardians as possible in West Virginia know that safe testing alternatives were available. McCoy also believes that Burke and Duffy, and by extension the Board, acted improperly by prohibiting her from affirmatively providing all the facts about safety and testing options.

65. McCoy asserts that she contacted her immediate supervisor, Burke, and the county-wide supervisor, Duffy, in a good faith effort to report her concerns and to resolve the problem before contacting the news media in her capacity as a private citizen to disseminate information relating to the health and safety of the public. She further asserts that she contacted Defendant Williams more than 12 hours before the story was aired in an effort to resolve her concerns.

66. McCoy also asserts that she availed herself of her right to freedom of speech as a private citizen and of her right to whistle-blower protection at all times in the actions she took and that she should not have been the subject of any adverse disciplinary or retaliatory actions. McCoy also asserts that the Defendants acted unlawfully by seeking to prohibit her from publicizing truthful information relating to the health and safety of the public that the Defendants wrongfully sought to suppress.

67. Notwithstanding all of the foregoing, Mellow Lee, Assistant Superintendent, came to Belle Elementary School on April 27, 2021, to personally deliver a letter dated April 21, 2021, signed by Williams. The letter stated, in part:

You have the right to speak on matters of public concern. (sic) you do not have the right, however, to misrepresent information you specifically know is incorrect. This was not appropriate and was insubordinate. If you are going to be providing information to the news in your capacity as a counselor for Kanawha County Schools, I expect that you provide information that is accurate, especially after you are repeatedly told what the accurate information is. This letter serves as a formal letter of reprimand.

See complete Reprimand Letter attached hereto as Exhibit 6. Williams never identified the information McCoy presented that he alleged to be incorrect. McCoy asserts that the information she presented was truthful and accurate, as Duffy confirmed in the WCHS-TV story.

68. McCoy was further informed by the Board's attorney, Lindsey McIntosh, that the letter would remain in the Board's permanent personnel file at the Board's office, it would follow her if she sought employment in other school systems within or outside West Virginia, and would form the basis for further disciplinary action, including termination, if she is found to engage in other actions disfavored by the Board.

69. McCoy asserts that the Reprimand Letter is unfair, contains untrue statements, constitutes a reprisal against her for exercise of her right to freedom of speech as a private citizen, constitutes unlawful retaliation and discrimination against a whistle-blower, and should be rescinded, removed from her personnel file, and that all references to the reprimand should be expunged.

70. The Reprimand Letter now permanently hangs over McCoy's head like a "Sword of Damocles," inhibiting her ability to seek employment in other school systems and effectively chilling McCoy from performing her job free from fear of further reprisal. Following McCoy's whistle-blowing action, the Defendants have also taken other actions that adversely changed McCoy's conditions of employment, including but not limited to the following:

(a) The Defendants have commenced micromanagement through Burke that has adversely changed McCoy's employment roles and responsibilities. For the first time ever,

Burke began mandating that McCoy perform counseling sessions for multiple students in numbers of sessions that greatly exceed what is appropriate for school counselors under West Virginia State Department of Education and the American School Counselors Association guidelines. *See* American School Counselor Association (“ASCA”) guidelines adopted for West Virginia School Counselors, attached hereto as Exhibit 7. The ASCA guidelines specify “appropriate duties” of school counselors as “short-term counseling to students” and “Inappropriate” duties as “providing long-term counseling in school to address psychological disorders.” *Id.* In specific, Title 126, Series 67 of the West Virginia Code of State Regulations provides that both group and individual counseling sessions should be "short term in nature," which the Rule defines as 30 to 50 minutes once a week for 4 to 7 weeks. *See*, W.Va. C.S.R. § 126-67-10.11 and 12.

(b) Specifically, Defendants have doubled, tripled, and in one case required McCoy to provide five times the number of sessions recommended by state and national school counselor standards. These standards have been defined by Duffy and his longtime predecessor, Dr. William Mullett, as limiting counseling sessions to four to six per individual child. This appears to be an attempt to overwhelm McCoy, by demanding that she provide extremely unrealistic, extensive, long-term services as compared to what is recommended and deemed appropriate for a school counselor by state and national school counselor guidelines.

(c) Following her whistle-blowing actions, Defendants reduced McCoy’s pay by approximately \$1,000.00 by excluding her from the Cultural Diversity Collaborative team (“the Team”) that she had proudly served on admirably for two years prior to the pandemic.⁴ McCoy submitted her application for the Team as usual for the 2021 – 22 school year but received no

⁴ The Cultural Diversity Collaborative Team was cancelled during the 2020-21 school year due to the pandemic.

response from the Team's director. McCoy emailed the Team's director offering to help get the program moving for the fall but received no response. McCoy sent a second email to the director, but again received no response. Because McCoy believed she had been a valued member of the team during the two years when she previously served, she could not fathom any reason for exclusion other than anger and retaliation for her whistle-blowing actions. To McCoy's knowledge, she is the only member of the team who was not invited back when it resumed functioning after the pandemic.

(d) McCoy applied for the Team during the current 2022 -23 school year and it was evident the Team's director intended to exclude her again. After learning that other applicants had been selected and the Team was already beginning to plan activities, McCoy contacted the Team's director to inquire about her application. Initially, the director didn't respond, but when she did, she advised McCoy that for some reason her name had been accidentally left off the list of participants. The director placed McCoy back on the Team for the current school year. McCoy's exclusion from the Team in 2021 – 22 and intended exclusion in 2022-23 damaged her financially, professionally, and emotionally.

(e) On the first day back in the 2021-22 school year, Burke attempted to remove McCoy's test administration duties and assign them to another teacher, Ms. Kelly Rucker. McCoy objected, as she had been the School Testing Coordinator at Belle for nine years, since arriving at the school, and testing is customarily administered by school counselors at all Kanawha County Schools. Notwithstanding McCoy's objection, Burke took the position of testing coordinator from McCoy and excluded her from most of the duties associated with this position. When testing was concluded, Burke signed the required document as School Test Coordinator, which had always been signed by McCoy except for the one year when testing was

cancelled because of the pandemic. Burke refused to even permit McCoy to see and distribute the test results, which has always been McCoy's responsibility. During the 2022 – 23 school years, Burke included Ms. Rucker while excluding McCoy from planning meetings and all decision making relating to testing, further solidifying McCoy's removal as School Testing Coordinator. When Duffy conducted the annual training for principals and counselors in preparation for training, Burke invited Ms. Rucker, a counselor in training, as if to further underscore to McCoy that she was being replaced as School Testing Coordinator. The loss of this title and associated responsibilities marginalized and shamed McCoy in front of her co-workers as the staff was aware that coordination of testing had always been McCoy's responsibility and is primarily the school counselor's responsibility, but inexplicably no longer was.

(f) Burke also removed McCoy from the Lead Coordinator Role for the Belle Elementary needy student Christmas assistance program that McCoy had always effectively led since becoming the counselor at Belle Elementary, as had the counselor before her. The only substantive change Burke made was to appoint herself as the leader in place of McCoy, effectively excluding McCoy from any leadership role. Burke's action caused confusion since school staff and members of the local community had always looked to McCoy for guidance in connection with this program, and continued to reach out to McCoy with information and questions that she was no longer able to assist with. This action further marginalized and embarrassed McCoy in front of school staff and members of the community as they knew McCoy had always coordinated this program.

(g) Unlike her past pattern of prompt responses, Burke began refusing to respond to multiple emails from McCoy requesting that she specify her dates of availability for required

counselor advisory committee meetings, in both the fall and spring of the 2021-22 school year. McCoy had to change meeting dates in an effort to include Burke, who was being difficult, and often still did not show up, despite the meeting dates being adjusted to Burke's delayed responses. These and similar patterned actions hindered McCoy from performing her duties and discredited her in front of her co-workers and community stakeholders who attend these meetings and support and advise the school counseling program.

(h) Burke moved McCoy's counseling office out of the main office suite, where it had been located for approximately 40 years. Burke relocated the counseling office, and McCoy, off to the far end of the building between the two floors of the school. McCoy was so physically isolated that multiple parents approached her, months into the school year, to say that they thought she no longer worked at the school because they had not seen her. They expressed their relief that she was still there.

(i) Burke has also taken numerous other damaging and retaliatory actions against McCoy that continue as of the date of this Complaint, including repeatedly addressing her in an insulting and accusatory tone, sometimes doing so loudly in the presence of McCoy's coworkers and/or colleagues.

VI. CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION (Violation of the Right to Freedom of Speech as a Private Citizen Under the First Amendment to the U.S. Constitution)

71. McCoy reasserts each and every allegation in paragraphs 1 through 70 in this Complaint as if set forth fully herein.

72. The Defendants have acted under color of state law at all relevant times herein.

73. The Reprimand Letter Defendants issued to McCoy, and the other retaliatory, discriminatory, and adverse actions that followed, constitute violations of McCoy's right as a private citizen to engage in freedom of speech under the First Amendment to the United States Constitution. In specific:

a) On information and belief, Defendant Kanawha County Board of Education, through the actions of its employees or officers, has a custom and/or practice that has resulted in violation of Plaintiff's First Amendment rights.

b) The Defendant Kanawha County Board of Education knew and/or reasonably should have known that permitting, ratifying and/or encouraging its employees to take the aforementioned adverse employment actions against Ms. McCoy was in violation of her clearly established First Amendment rights and federal law guaranteeing the same.

c) Likewise, Defendant Williams knew and/or reasonably should have known that taking adverse actions against Ms. McCoy was in violation of her clearly, established First Amendment rights; alternatively, Defendant Williams' actions were indifferent or deliberately in disregard of Ms. McCoy's First Amendment rights.

d) The Defendant's aforementioned custom or practice fails to comply with state and federal regulations and results in an institutional policy and/or custom that deprives citizens, including Ms. McCoy, of their First Amendment constitutional rights; in the alternative, the Defendant's aforementioned actions constitute deliberate disregard or indifference to Plaintiff's First Amendment rights.

e) Defendant Kanawha County Board of Education, acting under color of law, has perpetuated a custom and/or practice that deprived Ms. McCoy of her First Amendment rights.

74. As a result of Defendants' actions, McCoy has suffered damages as well as emotional distress, mental anguish, professional embarrassment, professional marginalization within the Kanawha County Schools system, and damage to her professional reputation and accreditations on the local, state and national levels.

**SECOND CAUSE OF ACTION
(Violation of the West Virginia Whistle-blower Law)**

75. McCoy reasserts each and every allegation in paragraphs 1 through 70 in this Complaint as if set forth fully herein.

76. McCoy is an "employee" of a public body as defined by the Whistle-blower Law, W. Va. Code § 6C-1-2(b).

77. The Defendant Board is a "public body" as defined by the Whistle-blower Law, W. Va. Code § 6C-1 -2(e)(1).

78. The Defendants, collectively, constitute an "employer" as defined by Whistle-blower Law, W. Va. Code § 6C-1-2(c).

79. McCoy made a "good faith report" of "wrongdoing" by the Defendants , to the Defendants, without malice or consideration of personal benefit which she reasonably believed to be true within the meaning of the Whistle-blower Act, W. Va. Code § 6C-1-2(d).

80. The Legislature enacted the West Virginia Governmental Ethics Act ("Ethics Act"), W. Va. Code § 6B-1-1 et seq., upon finding that "the holding of a public office or employment is a public trust," W. Va. Code § 6B-1-1(a).

81. In its findings, purpose, declaration, and intent the Legislature further found:

The decisions and actions of public officials and public employees must be made free from undue influence, favoritism or threat, at every level of government. Public officials and public employees who exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position **or who seek to benefit narrow**

economic or political interests at the expense of the public at large undermine public confidence in the integrity of a democratic government.

See W. Va. Code § 6B-1-1(b)(emphasis added).

82. The Legislature also declared:

[H]igh moral and ethical standards among public officials and public employees are essential to the conduct of free government; **that the Legislature believes that a code of ethics for the guidance of public officials and public employees will help them avoid conflicts between their personal interests and their public responsibilities,** will improve standard of public service and will promote and strengthen the faith and confidence of the people of this state in their public officials and public employees.

See W. Va. Code § 6B-1-1(d)(emphasis added).

83. By providing misleading or incomplete information to parents and guardians of children who attend Kanawha County Schools about safe testing alternatives, and by seeking to prohibit McCoy from providing truthful and complete information to the affected public through official school communication platforms, the Defendants sought to benefit their real or imagined personal interests in their future “test participation rates” at the expense of the health and safety of the public they are ethically obligated to serve and protect.

84. After the Defendants failed to correct the wrongdoing that McCoy witnessed and reported and refused to permit her to disseminate truthful information through Schoology and other official school channels relating to the health and safety of the children and families of Belle, McCoy concluded in good faith that she had a moral and ethical obligation as a private citizen to communicate the information to all members of the public whose health and safety could be affected by the information that the Defendants suppressed and that may have been suppressed by other boards of education. .

85. McCoy had reason to believe that the information she disseminated to the news media was true and she did so without malice or consideration of personal benefit within the

meaning of the Whistle-blower Law, W. Va. Code § 6C-1-2(d). In fact, McCoy undertook these actions despite the fact that she was placing herself in great jeopardy of wrongful repercussion by the Defendants, which is precisely what occurred here.

86. By her actions as aforesaid, McCoy is a “whistle-blower” as defined by the Whistle-blower Law, W. Va. Code § 6C-1-2(g).

87. Notwithstanding all of the foregoing, the Defendants issued the Reprimand Letter to McCoy and made significant changes to her roles and responsibilities, which constitutes an act of retaliation and discrimination against McCoy in violation of the Whistle-blower Laws. As such the Defendants, individually and collectively, have unlawfully retaliated and discriminated against McCoy in violation of the Whistle-blower Law, W. Va. Code § 6C-1-3(a).

89. As a result of Defendants’ actions, McCoy has suffered, and continues to suffer, damages as well as emotional distress, mental anguish, embarrassment, humiliation, and damage to her professional reputation and accreditations within her local school community as well as on the state and national counseling and community.

PRAYER FOR RELIEF

Upon the basis of all of the foregoing, McCoy prays that the court enter an Order finding as follows:

(a) That McCoy was acting as a concerned private citizen on Sunday, April 18, 2021, when she spoke to WCHS News and not pursuant to her official duties as a School Counsellor at Belle Elementary School, and when she disobeyed Defendants and contacted statewide news media to report that the Defendants were wrongfully suppressing information that was essential to the health and safety of the children and potentially vulnerable household members served by Kanawha County Schools and public schools across the State of West

Virginia, which actions are not now nor have they ever been part of her official duties as a school counselor;

(b) That McCoy was entitled to the protection of freedom of speech under the First Amendment to the U.S. Constitution when she took the necessary actions that led to issuance of the Reprimand Letter to her by the Defendants, who were willfully failing to follow the National Education Association's Code of Ethics;

(c) That the Reprimand Letter issued by Defendants to McCoy violated McCoy's right to freedom of speech under the First Amendment to the U.S. Constitution;

(d) That McCoy, by her actions as alleged herein, is entitled to the protections afforded to whistle-blowers under the Whistle-blower Law, W. Va. Code § 6C-1-1 et seq.;

(e) That the Defendants, individually and collectively, violated the Whistle-blower Law by issuing the Reprimand Letter to McCoy and by changing her job responsibilities and roles significantly in retaliation for contacting the news media to disseminate information that the Defendants sought to suppress about the availability of safe testing alternatives for school children who reside with potentially vulnerable parents and caretakers, not only in Kanawha County but in other West Virginia counties.

(f) That the Defendants have acted unethically by refusing to permit McCoy to provide truthful and complete information to the affected public, thereby seeking to benefit their real or imagined personal interests in their future "test participation rates" at the expense of the health and safety of the public they are ethically obligated to serve and protect.;

(g) That Defendants be required to rescind and remove the Reprimand Letter from McCoy's personnel file, and that all references to the Reprimand Letter be expunged from McCoy's personnel file and from all other personnel records maintained by Defendants;

(h) That Defendants be enjoined and prohibited from taking any further or future adverse, retaliatory, or discriminatory actions against McCoy and repair retaliatory discriminatory actions made to her roles and responsibilities within the school system;

(i) That McCoy be awarded a judgment against Defendants for her damages, including damages for emotional distress, mental anguish, professional embarrassment, humiliation, and damages to her professional reputation and accreditations;

(j) That McCoy be awarded a judgment for punitive damages against the Defendants;

(k) That McCoy be awarded her costs, including reasonable attorney's fees, as authorized by W. Va. Code §6C-1-5 and 42 U.S.C 1988 of the Civil Rights Act and W. Va. Code § 6C-1-5 of the Whistle-blower Law;

(l) That McCoy be awarded such additional equitable relief as may be necessary to secure complete justice in this matter.

PLAINTIFF REQUESTS A TRIAL BY JURY ON ALL ISSUES.

CHELENA McCOY,

By Counsel,

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