STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. AUGSC-AP-23-45

MERYL J. NASS, M.D., Petitioner, v. MAINE BOARD OF LICENSURE IN MEDICINE, Respondent.	**BOARD OF LICENSURE IN MEDICINE'S RULE 80C BRIEF**

This case concerns a physician who failed to follow fundamental standards of medical practice while providing telemedicine to three Maine patients in 2021. Following multiple complaints against Dr. Meryl J. Nass, the Board of Licensure in Medicine ("the Board") initially noticed Dr. Nass with 19 grounds for imposing discipline. By the time of hearing, only 13 grounds remained. And following a lengthy adjudicatory proceeding, the Board found multiple violations among 8 grounds for imposing discipline, including incompetence, violation of multiple telemedicine standards of practice, and lying to a pharmacist regarding a patient's care.

On appeal, Dr. Nass challenges the sufficiency of the evidence of only one of eight categories of violations found by the Board that she engaged in conduct that evidenced a lack of knowledge and an inability to apply principles and skills to carry out the practice of medicine. She claims the Board violated her due process rights. Dr. Nass claims that the Board was biased and that the Board Chair failed to make required findings of fact when she declined to recuse herself from the proceedings. Dr. Nass further asserts that the Board abused its discretion when it ordered her to undergo an evaluation. Dr. Nass argues that the Board violated *Narowetz v. Bd. of*

Dental Practice, 2021 ME 46, 259 A.3d 771. Last, Dr. Nass asserts that the Board made inadequate findings when it imposed costs on her.

All of Dr. Nass's contentions lack merit. Because the Board acted pursuant to its statutory authority, the Board's findings are supported by substantial evidence in the record and were not affected by bias or error of law, and no due process or *Narowetz* violations occurred, this Court should affirm the Board's Decision.

Factual Background

Statutory Background of the Board of Licensure in Medicine

The sole purpose of the Board is to "protect the public health and welfare … by ensuring that the public is served by competent and honest practitioners, and by … examining, licensing, regulating and disciplining" physicians and physician assistants. 10 M.R.S. § 8008 (2024). "Other goals or objectives may not supersede this purpose." *Id.*

The Board consists of eleven members appointed by the Governor: six actively licensed and practicing allopathic physicians; two actively licensed and practicing physician assistants; and three public members. 32 M.R.S. § 3263 (2024). Pursuant to 32 M.R.S. § 3266 (2024), the Board is required to hold regular meetings in March, July, and November, but regularly meets on the 2nd Tuesday of each month.

The Board has a duty to investigate complaints in a timely fashion, including complaints received from the public or those issued on its own motion, for conduct alleged to violate applicable Board statutes or rules. 32 M.R.S. §§ 3269(8), 3282-A(1) (2024). Following receipt or issuance of a complaint, the Board conducts a confidential investigation. 10 M.R.S. § 8003-B (2024); 24 M.R.S. § 2510(1) (2024). In addition, the Board receives Maine Health Security Act reports from health care providers, health care entities, physicians, and physician assistants, and

other persons ("Title 24 reports"). 24 M.R.S. §§ 2505, 2506 (2024). Title 24 reports relate to a licensee's clinical competence, unprofessional conduct, sexual misconduct, or misuse of alcohol or drugs. *Id.* Following receipt of a Title 24 report, the Board conducts a confidential investigation, including requesting additional information pursuant to its statutory authority. 32 M.R.S. §§ 3269(8), 3282-A(1); 24 M.R.S. §§ 2505, 2506, 2508, 2510. The Board may also direct a licensee to undergo a mental or physical examination. 32 M.R.S. § 3286 (2024).

Factual Background of the Complaints and Investigations of Dr. Nass

On August 22, 1997, Dr. Nass was first licensed to practice medicine in Maine. (R. 000767.) Dr. Nass specializes in internal medicine. *Id.* On October 6, 2021, the Board received a complaint against Dr. Nass alleging that she was providing "misinformation regarding the SARS CoV2 pandemic." (R. 003090-92, 003096-98.) The complaint included links to Dr. Nass's website and an interview. (R. 003091.) On October 7, 2021, Board staff docketed the complaint as CR21-191 and sent it to Dr. Nass for a response.[1] (R. 003096-98.)

On November 7, 2021, the Board received another complaint (CR-210) against Dr. Nass and several additional emails alleging that Dr. Nass was "spreading covid and covid vaccine misinformation." (R. 003234-40, 003245-47.) On November 16, 2021, Board staff reached out to the complainant seeking additional information regarding her complaint. (R. 003248-49.)

Dr. Nass responded to the complaints by challenging the Board's jurisdiction. (R. 003099-100.) Then on December 11, 2021, Dr. Nass sent the following unsolicited statement to Board staff in which she admitted lying to a pharmacist about a patient's diagnosis:

> There is something else I would like you to provide to the Medical Board ... one of my complex, high risk patients for Covid [Patient 2] just got Covid. The patient and I wanted him treated with hydroxychloroquine. I reviewed his dozen or so medications and

[1] Title 32 M.R S. § 3282-A(1) requires the Board to notify a licensee "of a complaint filed against a licensee as soon as possible, but not later than 60 days after receipt of this information." *Id.* Board staff do not edit complaints that are received from patients or other persons.

> discussed all potential drug interactions and how to ameliorate them, and we decided to proceed. But the problem was finding a pharmacist willing to dispense the drug. I was eventually forced, when the pharmacist called a few minutes ago and asked me for the diagnosis, to provide misinformation: that I was prescribing the drug for Lyme disease, as this was the only way to get a potentially life-saving drug for my patient.

(R. 000972.)

On December 19, 2021, the Board received a report pursuant to 24 M.R.S. § 2505 from a physician. (R. 000782-83.) The physician reported that she admitted Patient 1 to her hospitalist service after Patient 1 had suffered dyspnea, cough, and fatigue for the prior two weeks. *Id.* The physician reported that Patient 1 said that Dr. Nass diagnosed her "over the phone" with COVID-19 and prescribed five days of Ivermectin, which the physician knew was not indicated for treatment of COVID-19. *Id.* The physician reported that Patient 1 was hospitalized requiring supplemental oxygen for COVID-19 pneumonia. *Id.*

On December 20, 2021, Board staff sent Dr. Nass a subpoena for Patient 1's medical records.[2] (R. 003264-66.) On December 21, 2021, Board staff sent a second subpoena to Dr. Nass for Patient 2's medical records. (R. 003277-80.)

On December 27, 2021, Board staff explained to Dr. Nass that the subpoena for Patient 1's records arose from a Title 24 mandated report, and the subpoena for Patient 2's records arose from her email containing an admission that she lied to a pharmacist regarding a prescription for Patient 2. (R. 003283, 003287.) On December 29, 2021, Dr. Nass emailed Board staff requesting an extension for responding to the subpoenas. (R. 003292.) Board staff denied her request and explained that she was not being requested to respond to the investigations, but only to produce the two patient medical records. (R. 003293.) Dr. Nass responded that she thought only Patient

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[2] The subpoena states that it is issued pursuant to 5 M.R.S. § 9060, 10 M.R.S.§ 8003-A, and 32 M.R.S. § 3282-A, and as authorized by 22 M.R.S. §§ 1711-C(6)(F-1), (F-2), (H) and (I); and 45 C.F.R. §§ 164.512)A), (d), and (e). (R. 003266.)

1's records were subpoenaed. *Id.* Board staff resent both subpoenas. (R. 003297.) Dr. Nass's confusion continued. (R. 003302-07.) The Board's assigned legal counsel sent another email explaining that Patient 2's records were also being sought. (R. 003308.) Early the next morning, on December 30, 2021, Dr. Nass sent Board staff an email attaching 18 pages of what appeared to be an unsigned draft affidavit prepared in response to an affidavit of Dr. Nirav Shah that had no connection to the pending Board complaints or investigations. (R. 003312-3330.)

On December 31, 2021, the Board received another 24 M.R.S. § 2505 report regarding Dr. Nass from a certified nurse midwife ("CNM"). (R. 002017-27.) The CNM reported that earlier in 2021 one of her pregnant patients (Patient 3) became ill and tested positive for COVID-19. *Id.* Patient 3 contacted the CNM's office on September 22, 2021, for advice about COVID-19 care and told the CNM that she was on hydroxychloroquine prescribed by Dr. Nass. *Id.* The CNM reported that she was shocked. *Id.* Her concern was that Dr. Nass prescribed a medication that was not an approved or recommended treatment for COVID-19 and without consulting the obstetric/midwifery practice prior to doing so. *Id.*

On January 3, 2022, Board staff sent a subpoena for Patient 3's medical records to Dr. Nass. (R. 003332-34.) On January 5, 2022, Dr. Nass emailed that she had retained an attorney. (R. 003344.)

Dr. Nass's Treatment of Three Maine Patients

Patient 1

Patient 1 found Dr. Nass's name online and sought her out as a doctor for COVID-19. (R. 000525.) The patient wanted to have options for treating COVID-19 if or when she became ill. *Id.* Patient 1 contacted Dr. Nass to get a prescription for ivermectin because Patient1 believed it

was effective against COVID-19. *Id.* Patient 1 did not tell her primary care provider that she had consulted Dr. Nass. (R. 000537.)

On September 28, 2021, Patient 1 called Dr. Nass, and they spoke solely by telephone. (R. 000030, 000526, 000797.) Dr. Nass's notes of the call recorded "meds-0," "none" for prior medical histoiy (PMH), the patient's date of birth and weight, and narrative information about the patient's spouse and sibling. (R. 000797.) As requested, Dr. Nass prescribed ivermectin for Patient 1, in the event the patient got COVID-19 in the future. (R. 000796.) Dr. Nass did not discuss risks or benefits of taking ivermectin for COVID-19 and did not discuss other treatment options with Patient 1. (R. 000532-33.) Patient 1 relied on Dr. Nass as a physician in taking ivermectin for COVID-19. (R. 000526, 532-33.) Patient 1 understood she was supposed to call Dr. Nass if she did get COVID-19. (R. 000526.)

In December of 2021, Patient 1 became ill and had her husband call Dr. Nass. (R. 000527.) Patient 1 did not take a COVID-19 test. (R. 000534-35.) Patient 1 generally did not recall speaking to Dr. Nass during her illness and thought that her son and husband were communicating with Dr. Nass about her. (R. 000535.) Patient 1 believed she spoke to Dr. Nass on December 17 when she thought Dr. Nass advised her how long to quarantine. *Id.* Throughout her at-home period infected with COVID-19, Patient 1 was able to speak for herself and care for herself. (R. 000535-36.) Patient 1 believed her oxygen saturation levels were fine at home, but did not know what levels of oxygen saturation would be cause for concern. (R. 000536.)

The sum total of Dr. Nass's medical records for Patient 1 covering the at-home portion of the patient's COVID-19 illness were a single handwritten notation from December 17, 2021, made on the patient's September 28, 2021 record (R. 000797), text messages between Patient 1's son and Dr. Nass, only a few of which refer to Patient 1 (R. 000855-56, 000858-59), and a

handwritten note of a phone call from December 19, 2021, the day Patient 1 was admitted to the hospital (R. 000798). Dr. Nass's December 19 notes represent the first time Dr. Nass recorded any specific symptoms for Patient 1. Multiple conversations between December 17 and 19 are referenced, but no specific information about the calls is included. *Id.*

Patient 1's hospital admission record indicates she presented on Day 13 of her reported symptoms. (R. 000878.) Patient 1 informed hospital personnel that Dr. Nass treated her, diagnosed her over the telephone about two weeks prior to admission, and prescribed ivermectin, which Patient 1 took for five days and had nausea. (R. 000891.) The hospital admitted Patient 1 for acute respiratory failure and hypoxia, and she tested positive for COVID-19 via polymerase chain reaction ("PCR") testing. (000878-79, 000891.) On the day of admission Patient 1's oxygen saturation levels dipped as low 80 percent. *Id.* Patient 1 remained hospitalized from December 19 to December 25, 2021. (R. 000530, 000878-79, 000891.)

<u>Patient 2</u>

Patient 2 found Dr. Nass's name on a website maintained by an organization called Frontline Physicians using an acronym FLCCC. (R. 000542.) Patient 2 testified that "[o]ur primary motivation was to find a physician in Maine that could prescribe the medicines that we were looking for, primarily at that time ivermectin." *Id.* Patient 2 had been taking ivermectin prescribed by a Texas physician prophylactically prior to contacting Dr. Nass. (R. 000541.) On September 2, 2021, Patient 2 and his wife called Dr. Nass to discuss receiving ivermectin prescriptions in case they got COVID-19. (R. 000037, 000541-42.) Dr. Nass had Patient 2 identify the medications he was on and his weight (R. 000037-38, 000541-42.) In Patient 2's medical record for this call, Dr. Nass recorded 12 medications and 9 supplements, but identified no associated diagnoses or dosages. (R. 000981.)

Patient 2 had multiple other healthcare providers who prescribed various mediations to manage his complex healthcare issues. (R. 000552.) Patient 2's complex medical history included 35 active medical conditions at the time of his hospital admission in December 2021, some of which were serious and complicating factors for COVID-19 illness, particularly diabetes, obesity, and high blood pressure. (R. 001001, 000199.)

Patient 2 contracted COVID-19 around December 6, 2021, with a positive at-home test on December 10, 2021. (R. 000543-44.) Patient 2's wife called Dr. Nass on December 11, 2021. (R. 000545.) Patient 2 testified that he remembers very little after he began experiencing symptoms, possibly because of his low oxygen saturation or fever. (R. 000543.) Within days of his first symptoms, he experienced shortness of breath. (R. 000544.) Patient 2 was confused during his COVID-19 illness and repeatedly testified that his wife told him he was coherent and seemed lucid. (R. 000548-51.) Yet, he had little to no recollection of the course of his illness or conversations with Dr. Nass. *Id.*

On December 11, 2021, Dr. Nass spoke to Patient 2's wife and recorded a note on the September 21, 2021 medical record that included her plan to prescribe hydroxychloroquine and azithromycin, reduce the Patient 2's diltiazem (medication for high blood pressure prescribed by another provider), and have Patient 2 watch for hypoglycemia and call in 3 weeks. (R. 000981.) She failed to record any vital signs or symptoms. *Id.* Patient 2 testified that his medications may have changed in the interval between September and December 2021. (R. 000548-49.) When Patient 2's hydroxychloroquine prescription was presented to a pharmacy that day, the pharmacist called Dr. Nass seeking a diagnosis code. (R. 000027.) Dr. Nass then lied about Patient 2's diagnosis. *Id.* Instead of honestly stating that Patient 2 had COVID-19, she told the pharmacist that Patient 2 had Lyme disease. *Id.* Dr. Nass texted Patient 2's wife to inform her

that she had told the pharmacist that Patient 2's diagnosis was Lyme disease. (R. 000983.) Several hours later, Dr. Nass told Patient 2's wife that she had written a letter to the Board telling them they'd forced her to "miss inform [sic] a pharmacy today in order to get life-saving medication to a patient. Let's see what they do with that."[3] *Id.* The patient's wife did not respond.

After this, the course of Patient 2's at-home phase of his COVID-19 illness is primarily memorialized through text messages with Patent 2's wife. (R. 000982-87.) On December 15, 2021, Patient 2's wife inquired about monoclonal antibodies as a treatment option. (R. 000983.) Patient 2 testified that he had read about this treatment option online and was open to receiving it, however he did not recall discussing this option with Dr. Nass. (R. 000550.) Patient 2 testified that Dr. Nass would only have discussed a treatment option with him if he had raised it. *Id.* Unfortunately, by the time Patient 2's wife asked Dr. Nass about Patient 2 receiving monoclonal antibody treatment, it was too late in the course of Patient 2's illness for administration. (R. 000546.)

On the afternoon of December 15, 2021, Patient 2's wife reported to Dr. Nass that during the previous night, Patient 2's oxygen saturation had fallen to 88-89 percent and his heartrate was 111-115 beats per minute (R. 000984), an indication that Patient 2 was in hypoxic respiratory failure requiring emergency admission to a hospital. (R. 000201-203.) Dr. Nass, however, did not advise this course of action. When Dr. Nass spoke to Patient 2's wife by telephone at 7:30 p.m. that evening, Patient 2's wife reported his oxygen saturation had again fallen to 89 percent. (R. 000979.) Patient 2 also had an elevated temperature. *Id.* Dr. Nass made

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[3] Dr. Nass emailed her letter to the Board admitting to her lie on December 11, 2021. (R. 003280.) On this basis, the Board's staff initiated an investigation, case number AD21-220, and issued a subpoena for relevant patient medical records. (R. 003278-80.) Dr. Nass's lie was unnecessary and based on her misreading of the Board of Pharmacy statement. (R. 000016, 005163.)

no notation about his mental status. *Id.* Dr. Nass again did not advise that Patient 2 go immediately to the emergency department, but rather recommended that he obtain a chest x-ray. *Id.* Patient 2 testified that if Dr. Nass had told him to go immediately to the emergency department, he would have done so. (R. 000551.)

Patient 2 went to the hospital on the morning of December 16, 2021, and was admitted with acute respiratory failure and hypoxia, COVID-19, COVID-19-related pneumonia, and delirium (R. 000995.) The hospital record indicated that Patient 2's late presentation to the hospital contributed to the course of his illness. (R. 001028.) During his stay in the hospital, Patient 2 was in intensive care and intubated from December 19 to December 30, 2021, and then discharged on January 4, 2022. (R. 000995, 001028.)

Patient 3

Patient 3 was pregnant in the Fall of 2021. (R. 000563.) On September 19, 2021, she was informed she had tested positive for COVID-19 via a PCR test. (R. 000563.) Patient 3 was not able to connect with her Certified Nurse Midwife the following morning and researched potential doctors on the FLCCC website, where she found Dr. Nass. *Id.* Dr. Nass had never seen the patient before. (R. 000044.) During a phone call appointment with Dr. Nass that afternoon, Patient 3 told Dr. Nass that she was pregnant, and Dr. Nass asked her about her medications. (R. 000044, 000564.) Patient 3 was considered at higher risk for a more serious case of COVID-19 due to her obesity and pregnancy. (R. 000205.) Dr. Nass's medical record for that appointment does not include a medical history or any vital signs. (R. 002030.) The only record Dr. Nass made of Patient 3's medical history was "6 mos pregnant" and "4 days F, C, Cough, HA." *Id.* Dr. Nass prescribed Patient 3 hydroxychloroquine and azithromycin. (R. 000564-65.) Dr. Nass did

not offer to prescribe monoclonal antibodies but indicated to Patient 3 that her nurse midwife would be "the one to set that up." (R. 000566.)

January 11, 2022 Board Meeting and Procedural Background

On January 11, 2022, in the early morning just prior to the start of the regular Board meeting, Dr. Nass's attorney notified the Board that she was withdrawing her appearance for Dr. Nass's complaints and investigations that were on the agenda for Board consideration that day. (R. 008709, 009907.) During the Board meeting, the Board went into executive session to discuss the two complaints and three investigations involving Dr. Nass pursuant to 1 M.R.S. § 405(6)(f) to discuss confidential information under 10 M.R.S. § 8003-B and 24 M.R.S. § 2510 because there was a risk that the Board's usual practice of deidentification would be insufficient to protect the confidentiality of the matters discussed.[4] (R. 008708.) Following the Board discussion, the Board exited executive session, returned to public session, and took a lunch break to review additional materials. (R. 008729-30.) The Board deliberated in public session and voted to further investigate and: 1) issue a complaint regarding the three investigation matters; 2) issue an order directing Dr. Nass to undergo a neuropsychological evaluation to be performed on February 1, 2022; 3) offer Dr. Nass twenty-four hours to convert her license to inactive status and if she declined, issue an order of immediate suspension and authorize AAG Miller to negotiate an interim consent agreement to continue the license suspension until resolution of these matters; 4) subpoena ten patient charts; 5) request Dr. Nass answer questions within 30 days; and 6) obtain two expert reviews as identified by staff. (R. 008731-36.)

[4] An unofficial transcript of the Board's discussion during the meeting resulted from Dr. Nass recording the discussion even though she was instructed that the executive session portion of the Board's discussion was not to be recorded. (R 008709.) Dr Nass introduced the transcript, but not the actual recording, as an exhibit during the adjudicatory proceedings. (R. 8708-36.)

On January 11, 2022, the Board issued the Order Directing Evaluation to Dr. Nass. (R. 004491-95.) On January 12, 2022, after Dr. Nass declined converting to inactive status, the Board issued an Order of Immediate Suspension. (R. 000769-79.) Also on January 12, 2022, Board staff also issued two subpoenas. (R. 003368-72.) Then on January 13, 2022, Board staff sent the notice of Complaint CR22-4 involving the three investigations and sent the further investigation questions to Dr. Nass. (R. 003373-79.)

On January 24, 2022, Board staff issued the Notice of Adjudicatory Hearing scheduling Dr. Nass's hearing for February 7 and 8, 2022. (R. 009935, 009948-58.) On January 25, 2022, Dr. Nass's newly retained legal counsel requested a continuance of the hearing and requested extensions to respond to the further investigation questions and the subpoenas.[5] (R. 003380-86, 009959, 009961-65.) On January 29, 2022, Dr. Nass's legal counsel communicated that Dr. Nass would not attend the neuropsychological evaluation ordered by the Board because she had contracted COVID-19.[6] (R. 010016.) On February 1, 2022, a Conference Order issued granting Dr. Nass's requested continuance based upon her stipulation and agreement that the continuance of the suspension of her license would remain in effect until either the Board made a final decision on the allegations in the Notice of Hearing or a court adjudicated the validity of the Order of Immediate Suspension. (R. 009836, 010018.)

On March 22, 2022, an Amended Notice of Hearing issued scheduling the hearing for May 9 and 10, 2022. (R. 009837, 010022, 010035-50.) On March 30, 2022, Dr. Nass's legal

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[5] On February 16, 2022, Dr. Nass filed a Petition for Declaratory Judgment and Review of Agency Action challenging the Board's January 12, 2022 subpoenas in Kennebec County Superior Court, Dkt. AUGSC-CV-22-38. On March 4, 2022, Dr. Nass's legal counsel informed Board staff that she would not respond to the further investigation questions or submit a response to complaint CR22-4 (R. 010028), and she never has.

[6] On February 7, 2022, the Board ordered evaluation was rescheduled for March 12, 2022 (R. 10021), but the evaluation never took place after Dr. Nass filed a complaint and motion for a preliminary injunction on February 10, 2022, in Kennebec County Superior Court, Dkt. No AUGSC-CV-22-21.

counsel withdrew and requested another continuance. *Id.* The continuance request was granted and the hearing was anticipated to be rescheduled for September 12 and 13, 2022. (R. 009837, 010051, 010060-61.) On May 11, 2022, new legal counsel for Dr. Nass entered their appearance. (R. 010071-72.)

On September 7, 2022, Dr. Nass filed three prehearing motions including a motion to dismiss and a motion to recuse or permit voir dire. (R. 010247-97.) On September 26, 2022, Board staff issued the Second Amended Notice of Hearing scheduling the hearing for October 11, 2022. (R. 010429-39.) On September 30, 2022, Board staff issued the Third Amended Notice of Hearing. (R. 010512-22.) On October 4, 2022, Dr. Nass filed a motion to vacate the Immediate Suspension Order and Order Directing Evaluation. (R. 010550-53.)

On October 5, 2022, the hearing officer provided the parties with a recommended order on Dr. Nass's motion to dismiss. (R. 009853-54.) On October 7, 2022, the hearing officer issued an order on Dr. Nass's motion for voir dire and deferral on motion to recuse. (R. 009857-59.) On October 11, 2022, the first day of the hearing, the Board considered and denied Dr. Nass's motion to dismiss, (R. 000024), denied her motion to vacate the suspension and order directing evaluation (R.00024-25), and each individual Board member determined not to recuse in response to her motion to recuse (R. 000026).

On April 3, 2023, Dr. Nass filed a motion to disqualify Dr. Gleaton. (R. 010995-11010.) On May 19, 2023, the hearing officer transmitted Dr. Nass's motion to disqualify to Dr. Gleaton. (R. 011320-21.) On May 19, 2023, the hearing officer advised the parties of Dr. Gleaton's decision not to recuse herself. (R. 011118.) On May 30, 2023, Dr. Gleaton reiterated her decision not to recuse during the hearing on the record. (R. 000422.)

The Board held Dr. Nass's adjudicatory hearing on October 11 and October 25, 2022, and January 31, March 2, May 30, July 28, and September 19, 2023. On December 12, 2023, the Board issued its Decision finding that Dr. Nass engaged in multiple instances of "conduct that evidenced a lack of knowledge and an inability to apply principles and skills to carry out the practice for which she was licensed, subjecting her to discipline pursuant to 32 M.R.S. § 3282-A(2)(E)(2)." (R. 000001-000018, 000013.) The Board found that Dr. Nass's method of treating patients via telemedicine and obtaining only a medication list and a patient weight was "not comprehensive and was unsafe for patients." (R. 000014.) The Board found "[i]n particular" that Dr. Nass's "failure to escalate Patient 2's care in a timely manner was indicative of a lack of knowledge." *Id.* The Board also found a lack of knowledge or skill because Dr. Nass failed to evaluate for the three patients "what more effective treatments might have been available." *Id.* The Board was concerned that Dr. Nass was adamant at the hearing that there was no problem with her approach to patient care. *Id.*

The Board found that Dr. Nass committed multiple violations of its telemedicine standard of practice rules subjecting her to discipline pursuant to 32 M.R.S. 3282-A(2)(H), "by failing to obtain appropriate medical histories for Patients 1, 2, and 3" (Count IV) (R. 000014); "by failing to conduct an appropriate medical review" for Patients 1, 2, and 3 (Count V) (*id.*); "by failing to refer Patient 2 to an acute care facility or an emergency department when referral was necessary for the safety of the patient" (Count VIII) (R. 000014-15); by failing to timely document an informed consent in the medical records of Patients 1, 2, and 3 (Count XI) (R. 000015); by failing to maintain adequate medical records for Patients 1, 2, and 3, and failing to maintain an accurate medical record for Patient 1 (Count XII); and "by failing to have in place and follow

mandatory protocols" to ensure telemedicine was provided securely and confidentially (Count XIII) (R. 000015-16).

The Board found that Dr. Nass violated professional ethical standards and engaged in deceit or misrepresentation, subjecting her to discipline pursuant to 32 M.R.S. 3282-A(2)(H), "by failing conform to appropriate standards of care and professional ethics" by lying to a pharmacist about Patient 2's diagnosis (Count XIV). (R. 000016, 17.) The Board found that Dr. Nass "lied intentionally, which was unnecessary, done without consideration of the impact to others, and was likely intended to require the Board to take action against her, given that [Dr. Nass] widely disseminated the fact." *Id.* The Board further found that this "willful, unnecessary lying . . . indicating that it was required when it was not, and not considering that the matter could have been handled differently in retrospect is of great concern . . . and is difficult to redress through sanctions." *Id.*

The Board imposed a reprimand for violations of Counts II, VIII,[7] XIV based on the seriousness of the identified violations. The Board renewed Dr. Nass's pending license renewal application and imposed a 39-month suspension of her license, which could be lifted upon the completion of conditions of probation. (R. 000017.) The Board imposed a two-year period of probation during which Dr. Nass's license is subject to the conditions that Dr. Nass must: 1) get a practice monitor, 2) complete continuing education in ethics and recordkeeping, 3) submit a telemedicine plan to the Board, and 4) participate in a competency evaluation. (R. 000018.) Finally, the Board found Dr. Nass had the ability to pay and assessed Dr. Nass with $10,000.00 of its actual expenses. *Id.*

[7] There is a typographical error referencing this count as "Count VII," but it is clear from earlier in the Decision that Count VIII was the intended reference (R 000014-15, 17.)

On December 28, 2023, Dr. Nass timely filed a petition for review of the Board's Decision, which contained 14 separate challenges to the Board's action. (Pet. 16-18.) On September 17, 2024, Dr. Nass submitted Petitioner's Brief in Support of Petitioner's Petition for Review of Final Agency Action Pursuant to Rule 80C, Maine Rules of Civil Procedure ("Brief" or "Br.").

Issues

I. **Whether the Board Erred by Finding that Dr. Nass's Conduct with Patients 1, 2, & 3 Demonstrated Incompetence.**

II. **Whether the Board's Adjudicatory Hearing Was Affected by an Intolerable Risk of Bias that Denied Dr. Nass Due Process.**

III. **Whether Board Chair Dr. Gleaton Improperly Decided the Allegation of Bias Against Her.**

IV. **Whether the Board Erred in Issuing an Order Directing Evaluation to Dr. Nass.**

V. **Whether a *Narowetz* Violation Occurred.**

VI. **Whether the Board Abused Its Discretion When Assessing Actual Expenses.**

VII. **Whether Dr. Nass Waived Multiple Legal Arguments on Appeal.**

Standard of Review

In reviewing final agency action under 5 M.R.S. § 11007 (2024) and M.R. Civ. P. 80C, the Court reviews an agency decision for errors of law, abuse of discretion and findings unsupported by substantial evidence on the whole record. *Doane v Dep't of Health & Human Servs.*, 2021 ME 28, ¶ 15, 250 A.3d 1101. The Court may reverse the agency decision only if "the administrative findings, inferences, conclusions, or decisions are: 1) in violation of constitutional or statutory provisions; 2) in excess of the statutory authority of the agency; 3) made upon unlawful procedure; 4) affected by bias or error of law; 5) unsupported by substantial

evidence on the whole record; or 6) arbitrary or capricious or characterized by abuse of discretion." 5 M.R.S. § 11007(4)(C) (2024); *Cobb v. Bd of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 10, 896 A.2d 271. The Court's review is deferential and limited, and it does not substitute its judgment for that of the agency on questions of fact even if the record contains "inconsistent evidence or evidence contrary to the result reached by the agency." *Friends of Lincoln Lakes v Bd of Envtl Prot.*, 2010 ME 18, ¶ 13, 989 A.2d 1128; *Doane*, 2021 ME 28, ¶ 15, 250 A.3d 1101. The substantial evidence standard "does not involve any weighing of the merits of the evidence" and requires simply a determination as to whether there "is any competent evidence in the record to support a finding." *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d 1128. The burden of persuasion on appeal lies with the party seeking to vacate the agency's decision or order. *Id.* ¶ 15.

Argument

I. The Board Properly Found that Dr. Nass's Conduct with Patients 1, 2, and 3 Demonstrated Incompetence.

The Board properly found that Dr. Nass's conduct with Patients 1,2, and 3 demonstrated incompetence. Specifically, her treatment of Patients 1, 2 and 3 evidenced a lack of knowledge or inability to apply principles and skills to carry out the practice of medicine. Contrary to Dr. Nass's contentions, this finding did not violate her due process rights and was supported by substantial evidence in the record.

A. The Board's finding that Dr. Nass's conduct demonstrated incompetence did not violate her due process rights.

Dr. Nass first challenges the Board's finding by misconstruing the phrase "treatment model" that the Board used in its Decision. Dr. Nass claims that the Board's criticism of her "treatment model" constituted a "new theory of misconduct" without defined standards which

was not contained in any notice of hearing. (Br. 9-12.) Consequently, she asserts that her due process rights were violated because she could not properly defend herself.[8] *Id.* Her argument, however, is merely an attempt to create confusion by infusing a simple term with uncertainty and ignoring common sense.

No mystery surrounds the term "treatment model." It means nothing more than how a physician practices medicine. In other words, it is simply the method by which a physician provides treatment to patients. The Third Amended Notice of Hearing explicitly and repeatedly described how Dr. Nass provided treatment to Patients 1, 2, and 3, and how this treatment violated applicable statutes and rules. (R. 000757-66.)

The fundamental requirements of due process are notice and an opportunity to be heard. *Doe v. Dep't of Health & Human Servs.*, 2018 ME 164, ¶ 15, 198 A.3d 782. The notice requirements for Dr. Nass's hearing are: 1) a "statement of the legal authority and jurisdiction under which the proceeding is being conducted;" 2) a "reference to the particular substantive statutory and rule provisions involved;" 3) a "short and plain statement of the nature and purpose of the proceeding and of the matters asserted;" 4) a "statement of the time and place of the hearing, or the time within which a hearing may be requested;" 5) a "statement of the manner and time within which evidence and argument may be submitted to the agency for consideration …;" and 6) "… the manner and time within which applications for intervention … may be filed." 5 M.R.S. § 9052(4) (2024). The Third Amended Notice of Hearing satisfied all these requirements. (R. 00757-66.)

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[8] Dr. Nass erroneously relies on *Balian v. Bd. of Licensure in Medicine*, 1999 ME 8, 722 A.2d 364, to argue that she did not receive notice of a relevant standard for the Board's finding. (Br. 12.) *Balian* involved the requirements to establish a standard of professional behavior established in the practice of medicine constituting unprofessional conduct under 32 M.R.S. § 3282-A(2)(F) and has no direct application to the requirements of section 3282-A(2)(E)(2) at issue here. *Balian*, 1999 ME 8, 722 A.2d 364.

Dr. Nass grounds her notice challenge to the Board's finding of violations of Count II. (Br. 9.). In its Decision for Count II, the Board found that:

> [Dr. Nass's] treatment model included patients doing their own research and determining what prescriptions they wanted before reaching out to [Dr. Nass]. Patients 1, 2, and 3 found [Dr. Nass's] name on a website listing physicians who would provide on demand prescriptions for certain medications. A telemedicine visit would then occur, during which [Dr. Nass] would consistently do only two things. First, [Dr. Nass] would obtain a medication list and cross-reference it for drug interactions. [Dr. Nass] utilized the medication list as a substitute for obtaining a medical history, which was insufficient, particularly because some medications are used to treat multiple different conditions. Second, [Dr. Nass] obtained the patient's weight, which was necessary for the dosing of one of the prescriptions. Each patient received the prescriptions that they came to the appointment requesting. [Dr. Nass] did not engage in a practice of obtaining records from other care providers of the patients or in sharing her own records with such providers. [Dr. Nass's] practice model was not comprehensive and was unsafe for patients. In particular, [Dr. Nass's] failure to escalate Patient 2's care in a timely manner was indicative of a lack of knowledge. In addition, [Dr. Nass] did not consider the opportunity cost of providing the requested medications, which resulted in a failure to evaluate what more effective treatment might have been available. Further, [Dr. Nass's] actions potentially led to an erosion of trust in the profession. The Board expressed concern that when asked at the hearing whether she saw any problems with her telemedicine model after the fact, [Dr. Nass] was adamant that there was no problem with her model. The Board noted that although physicians receive significant training, it is important to continue learning and being open-minded about different ways to treat patients that could be more helpful.

(R. 000013-14.)

As required by due process and 5 M.R.S. § 9052, the Third Amended Notice of Hearing sufficiently provided notice to Dr. Nass that the way that she practiced medicine and provided treatment to Patients 1, 2, and 3 (i.e., her treatment model), was problematic and not in accordance with established standards of care. Count II alleged that Dr. Nass violated 32 M.R.S. § 3282-A(2)(E)(2) for "incompetence by engaging in conduct that evidences a lack of knowledge or inability to apply principles and skills to carry out the practice for which the licensee is licensed in providing care for Patients 1, 2, and/or 3." (R. 000757.)

The Third Amended Notice of Hearing's short and plain statement of the matters asserted included multiple factual allegations. For instance, Dr. Nass prescribed a medication for Patient 1 "for Covid" with "no medical history…no coordination of care or set follow-up care, no medical decision-making, no diagnosis … and no assessment and plan" and that when Patient 1 later contracted COVID-19, she did not have the "benefit of outpatient COVID medications such as monoclonal antibodies." (R. 000759-60 ¶¶ 2, 4, 6.) Also, Dr. Nass prescribed a medication to Patient 2 *after identifying "21 medications and supplements without dosages, [with] no patient* history … no medical decision-making, no diagnosis … no assessment and plan" and lied to a pharmacist (R. 000761-62 ¶¶ 10, 11.) Furthermore, Dr. Nass prescribed medication to Patient 3 without consulting the patient's obstetric/midwifery practice without a "patient history … medical decision-making …[and] coordination of care." (R. 000762 ¶¶ 12, 13.) And the Board's Rules regarding telemedicine standards of practice state that "[p]hysicians using telemedicine in providing health care are held to the same standards of care and professional ethics as those providing traditional care" and include practice guidelines such as obtaining a medical history, coordination of care, and medical records. (R. 000763 ¶ 18.)

Moreover, the Third Amended Notice of Hearing included an entire section of alleged statutory and rule violations titled "Patient Care and Competence to Practice Medicine" which, in addition to Count II, included alleged violations of standards of care as set forth in the Board's Rules including failure to follow standards of care in her treatment of all 3 patients (Count IV), failure to obtain relevant medical history for all 3 patients (Count V), and failing to escalate care for all 3 patients when necessary (R. 000757-58). Dr. Nass concedes that she had notice that she allegedly violated standards of care in treating Patients 1, 2, and 3 (Br. 10). She also provided a vigorous defense. The words "treatment model" do not appear in the notice; that is a distinction

without a difference. Without question Dr. Nass received notice that the way that she provided medical care to her patients was being challenged. Dr. Nass had sufficient notice of the allegations related to Count II.

B. Substantial evidence in the record supports the Board's finding that Dr. Nass's conduct demonstrated incompetence.

Substantial evidence in the record supports the Board's finding that Dr. Nass's conduct demonstrated incompetence—defined in statute as conduct that evidences a lack of knowledge or an inability to apply principles and skills to carry out the practice of medicine. 32 M.R.S. § 3282-A(2)(E)(2). The substantial evidence standard "does not involve any weighing of the merits of the evidence" and requires simply a determination as to whether there "is any competent evidence in the record to support a finding." *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d 1128. This is true "even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 13, 989 A.2d 1128.

Dr. Nass asserts that there was either no evidence or the record contradicted the Board's findings in support of Count II. (Br. 12-16.) She is wrong, and ample evidence supports the Board's Count II finding. Dr. Nass and all three patients testified that they contacted Dr. Nass to obtain a prescription medication that they sought for COVID-19 in September 2021 after finding her online.[9] (R. 000030, 000032, 000037, 000044, 000049, 000085, 000104, 000106-107, 000128-130, 000136, 000525-26, 000541-542, 000564.) In each instance, Dr. Nass conducted a telemedicine visit by telephone. (R. 000037-38, 000041, 000044, 000095, 000105, 000113, 000115, 000126, 000526, 000532-33, 000542, 000548, 000552, 000564, 000567.) Although she obtained a medication list from the patient, she failed to obtain an adequate patient medical

[9] Dr. Nass highlights that patients have a "right" to refuse medications or treatment to support the converse--that patients have a right to receive medications or treatment. (Br. 13.) Patients do not have a "right" to obtain whatever medication or treatment they want.

history. *Id.* Dr. Nass then prescribed either ivermectin or hydroxychloroquine to all three patients. [10] *Id.* As Dr. Nass testified, "these people all had primary care doctors except for [Patient 1] and yet their primary care doctors were not giving them what they want and so they came to me." (R. 000132.) Dr. Nass did not obtain records of care from other providers. (R. 000795-798, 000854-869, 000974-93, 002026-2030.) And Dr. Nass failed to evaluate whether more effective treatment might have been available. (R. 000133, 000148-149, 000226, 000533, 000546, 000550.)

Perhaps most unsettling, Dr. Nass failed to recognize that her practice of medicine (or "treatment model") was dangerous and unsafe for patients. (R. 000196-197.) Dr. Nass testified that she obtained adequate medical histories of her patients. (R. 000036, 000105.) But that was simply not true. (R. 000795-98, 000130-131, 000797, 000981, 002030.) She stated that the documentation of her relationship with Patient 2 met the standard of care because it met her standard of care. (R. 000126.) It did not.[11] (R. 003425-433.) Although Dr. Nass expected all her patients to have a primary care provider or PCP, she did not communicate with PCPs unless the patient requested her to do so. (R. 000127.) She failed to coordinate care with other providers even when changing blood pressure medication prescribed by another provider to Patient 2. (R. 000132, 000549.) Dr. Nass's lack of basic knowledge of medical practice was shocking. When asked where she would find a standard of care for medical record documentation, she admitted,

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[10] Prescribing ivermectin and hydroxychloroquine for COVID-19 in September to December 2021 (the drugs requested by the patients) did not meet the standard of care (R. 000147-148, 000215.)

[11] Medical records must be complete, accurate and timely and should include:

> all patient-related electronic communications, records of past care, physician-patient communications, laboratory and test results, evaluations and consultations, prescriptions, and instructions obtained or produced in connection with the use of telemedicine technologies. The licensee shall note in the patient's record when telemedicine is used to provide diagnosis and treatment. The licensee shall ensure that the patient has timely access to all information obtained during the telemedicine encounter...

(R. 003429.)

"I don't know." (R. 000134.) Basic documentation standards are contained in the Board's Telemedicine Standards of Practice.[12] Board Rules Chapter 11, Telemedicine Standards of Practice § 13 (R. 003425-433.)

The greatest risk to patient safety is when a provider fails to recognize the need to take additional action. Unfortunately, that was the case when Dr. Nass failed to advise Patient 2 to go to the emergency department "because she didn't think he was sick enough to need it." (R. 000137.) Yet, Dr. Nass didn't think that she was responsible for the delay in Patient 2 obtaining necessary hospital care. *Id.* Her failure to escalate Patient 2's care in a timely manner evidenced a concerning lack of knowledge as did her failure to seek, obtain, and evaluate all the information necessary about his condition to properly treat him.

On December 15, 2021, Patient 2's wife reported to Dr. Nass that he had a fever of 102.9, oxygen saturation of 89 percent, colored sputum, sweating and chills. (R. 000041.) Yet, Dr. Nass did not consider an oxygen saturation below 90 as requiring immediate emergency care, (R. 000041), and simply instructed them to get a chest x-ray and let her know the results. (R. 000041, 000544, 000979.) She testified:

> So, yeah, so basically I said, look, this does not sound good, I don't think he's going to need to be in the hospital but I'm not comfortable, I think you have to take him to the hospital or at a minimum urgent care, at a minimum get a chest x-ray, let's see what that shows, I'll write you these prescriptions, you know, *assuming that he doesn't need to be admitted, but I don't really want you to fill* them, I don't want you to do anything, let's just get a baseline, let's have a doctor look at your husband and tell me where he is and we'll go from there.

(R. 000117.) Dr. Nass blamed the patient's wife for her failure to recognize Patient 2's need for emergency care.[13] (R. 000133-34.)

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[12] Basic documentation standards serve several purposes for physicians, patients, and others who care for patients. (R. 000143.)

[13] Patient 2 made clear that if Dr. Nass had instructed his wife that he immediately needed to go to the emergency department, they would have gone. (R. 000551.)

Based on all the evidence cited above and as Dr. Thomas Courtney testified, Dr. Nass's treatment of all three patients evidenced a lack of knowledge or an inability to apply principles and skills to carry out the practice of medicine. (R. 000197-205, 000207-208, 000227-228, 000230, 000233.) Substantial evidence in the record exists to support the Board's determination that Dr. Nass violated 32 M.R.S. § 3282-A(2)(E)(2) by engaging in conduct that evidenced a lack of knowledge or an inability to apply principles and skills to care out the practice of medicine in providing care to Patients 1, 2 and/or 3.

II. The Board was Impartial and Unaffected by an Intolerable Risk of Bias or Actual Bias.

The Board was impartial and unbiased and provided Dr. Nass due process. Dr. Nass's claim that the Board and Dr. Gleaton were affected by an intolerably high risk of bias is unsupported by the record. Dr. Nass has failed to establish evidence that the likelihood of bias was too high to be constitutionally permissible based on the facts and circumstances of the Board's process and adjudicatory hearing. Because the Board as a whole, and Dr. Gleaton individually, were properly impartial and unbiased, Dr. Nass was not denied due process in the adjudicatory hearing held by the Board.

A. Dr. Nass Has Failed to Establish an Intolerable Risk of Bias Under the Applicable Legal Standards.

Maine and U.S. constitutional due process guarantees of fairness and impartiality apply to Maine administrative agencies conducting adjudicatory proceedings. *Lane Const. Corp v Town of Washington*, 2008 ME 45, ¶ 29, 942 A.2d 1202. The Maine Administrative Procedure Act ("MAPA"), Section 9063 requires that adjudicatory "[h]earings shall be conducted in an impartial manner." 5 M.R.S. § 9063 (2024). The court reviews the Board's actions on questions

of law de novo, but will not substitute its judgment for that of the Board. *Doane*, 2021 ME 28, ¶ 15, 250 A.3d 1101 (citations and internal quotation marks omitted). To assess impermissible bias, the "Court asks whether, as an objective matter, the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional potential for bias." *Williams v. Pennsylvania*, 579 U.S. 1, 8, (2016) (gathering cases)(citations omitted). This standard must be assessed based on the facts and circumstances of each case. *Logue v. Dore*, 103 F.3d 1040, 1045 (1997) (citing *United States v. Polito,* 856 F.2d 414, 418 (1st Cir.1988) (holding the "court must evaluate the judge's actions according to a standard of fairness and impartiality, recognizing that each case tends to be fact-specific.") The Court must determine "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Rippo v Baker*, 580 U.S. 285, 287 (2017). Moreover, "[i]f an entity subject to adjudication by an administrator raises a claim of bias, the entity must offer proof to demonstrate an actual risk of bias or prejudgment in the form of a conflict of interest of some other form of partiality." *North Atlantic Securities, LLC, v. Off of Sec.*, 2014 ME 67, ¶ 44, 92 A.3d 335 (citation omitted). To prevail on her claim of a due process violation due to bias, Dr. Nass "must present evidence sufficient to overcome a presumption that the fact-finders, as state administrators, acted in good faith." *Friends of Maine's Mountains. v. Bd of Envtl. Prot* , 2013 ME 25, ¶ 23, 61 A.3d 689 (citing *Mallinckrodt LLC v. Littell*, 616 F.Supp.2d 128, 142 (D. Me. 2009)); *see also Withrow v Larkin,* 421 U.S. 35, 55 (1975). The court should review "isolated incidents in light of the entire transcript so as to guard against magnification on appeal of instances which were of little importance in their setting." *United States v. Candelaria-Silva*, 166 F.3d 19, 35 (1st Cir. 1999) (quoting *United States v Montas,* 41 F.3d 775, 779 (1st Cir.1994) (internal quotation marks omitted)).

When viewed under these standards, the administrative record demonstrates that Dr. Nass's allegations are wrong and even in the aggregate do not evidence an intolerable risk of bias by any Board member or the Board as a whole. The Board's complaint review and adjudicatory hearing were fair and impartial and met the requirements of due process.

Dr. Nass claims her due process rights were violated because the Board persecuted her for opinions they disagreed with. (Br. 16-20.) Dr. Nass originally moved for each Board member to recuse themselves from the administrative hearing due to bias. (R. 010286-97.) At that time, each Board member was provided with the filings on the bias allegations and was asked on the record whether they individually would recuse. Each stated they would not recuse. (R. 000025-26.) Dr. Nass has not argued the Board prejudged the specific facts of her case on appeal and has accordingly waived the argument. *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (citing *U.S v Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). Instead, Dr. Nass now erroneously claims the Board was affected by an intolerable risk of bias because they targeted Dr. Nass for public expression of opinions with which they disagreed. (Br. 17.) This argument is also baseless.

B. Dr. Nass's Core Argument that the Basis of the Board's Action was its Intent to Punish Dr. Nass's Opinions is Directly Contradicted by the Record.

Dr. Nass inaccurately asserts that the *Williams'* objective test is "easily met" in this case "because the Board targeted Dr. Nass for publicly expressing viewpoints with which the Board disagreed." (Br. 17.) This core factual contention is directly contradicted by substantial record evidence that shows the Board was concerned about a broad range of issues, including its particularly heightened concerns about Dr. Nass's medical practice and patient care. (R. 008708-36.) At the administrative hearing, Dr. Nass introduced an unobjected-to transcript of a recording she made of the Board's January 11, 2022 discussions of the five cases against her. *Id.* As described below, the sequence and nature of the Board's discussion of the five open cases and

the relevant issues demonstrates that the Board did not target Dr. Nass for her statements, nor did it intend to punish her on the basis of a disagreement of opinion. *Id* The record shows the Board engaged in measured and careful consideration of the multiple potential violations of the Board's laws and rules. *Id.* Where this foundational element of Dr. Nass's argument fails, the entire argument fails.

The Board's only discussion of Dr. Nass's public statements occurred at a single Board meeting on January 11, 2022, where just two of five cases under consideration related to Dr. Nass's statements, CR21-191 and CR21-210. (R. 008708-36.) The other three cases were open investigations related to patient care and medical practice. During this discussion, the Board was concerned primarily with the practice of medicine and patient care issues. *Id.* Only a part of the discourse involved the allegedly false, misleading, or inaccurate medical or science-based statements Dr. Nass made in her capacity as a licensed physician. *Id.* The Board first discussed the three Assessment and Direction cases, which included two statutorily mandated reports filed pursuant to 24 M.R.S. § 2505 by health care practitioners alleging concerns about Dr. Nass's practice of medicine and one case initiated by Board staff after Dr. Nass self-reported that she had lied to a pharmacist about a patient's diagnosis while they were both treating the patient. (R. 008709-15, 008723-24.)

The Board's discussions were preceded by references to the Board's rules regarding the practice of medicine via telehealth. These rules make clear that the same standards of care are applicable to medical practice apply to care provided via telehealth, including that practitioners must timely escalate care when required to ensure patient safety, maintain adequate medical records, use only appropriate technologies to assure the confidentiality of private health information. (R. 008714.) The predominant concern shared among Board members were the

problems with Dr. Nass's practice of medicine and patient care. Board members variously described Dr. Nass's alleged patient care, as demonstrated by the then-available evidence, as "dangerous," "super concerning," "bad medical care. Period," "egregious," and "very troublesome," with "bad medical care" repeated by multiple Board members. (R. 008716, 008718, 008721-23.)

Three investigation cases were discussed at length and the numerous shortcomings in Dr. Nass's medical practice and patient care were identified.[14] The apparent deficiencies discussed included: the lack of a valid physician-patient relationship; telephone calls with no video component for patients Dr. Nass had never seen as a physician before; the lack of diagnostic testing; the lack of any physical examination of the patients; prescribing drugs to patients based on as little information as was available to Dr. Nass or recorded in the patient medical records; no record of Dr. Nass's medical decision-making; inadequate medical records; and prescribing drugs that were not FDA-approved for the treatment of COVID-19 and there was significant information that prescribing those medications was not the standard of care. (R. 008716, 008718-20.) One Board member had "lots of questions about this Licensee's practice in general . . . I don't feel like this kind of care is appropriate regardless of what your diagnosis is." (R. 008716.) Another Board member summarized his concerns by stating "I see bad medical care. Period . . . If you were talking about ___ ear infection, we wouldn't accept the medical records, the decision-making, the response to the Board, etc. It's bad medical care." (R. 008718.)

[14] The investigation cases were referred to as "AD" or "A&D" cases during the Board's January 11, 2022 meeting, reflecting their procedural status at that time. At the end of the meeting, the Board voted to have these cases filed as a complaint, which was docketed as CR22-4 and sent to Dr. Nass on January 13, 2022. (R. 003373-74.).

The Board members also discussed Dr. Nass's lying about a patient's diagnosis to a pharmacist. (R. 008716, 008719-20, 008722.) Board members described the pharmacist's inquiry as routine, not unusual, and "the way we practice medicine in 2022 . . . for safety and better patient outcomes" (R. 008718-19), and Dr. Nass's admitted-to lie as "bad in terms of ethics," "unethical," and as a "patient safety issue." (R. 008716, 008719-20, 008722.) Another Board member expressed concerns about the Licensee's memory and cognition, based on the confusing barrage of challenging emails Dr. Nass sent to Board staff (*See, e g*, R. 008716, 003118-23, 003167-3233, 003344-62), and Dr. Nass's repeated inability to provide the correct patient's medical records (R. 008716).

Only after its discussion of these investigations did the Board discuss the allegations related to Dr. Nass's false, misleading, or inaccurate statements. When the Board members first discussed those cases, they discussed whether and how to proceed with those two cases. (R. 008721-24.) Multiple Board members expressed serious concern regarding the allegedly false, misleading, or inaccurate statements, including "it's misinformation that has us struggling with this disease now after so many years. I personally believe it's something we should probably include, but I'm happy to listen to others." (R. 008721.) Another Board member indicated that he had "very serious ethical concerns about a licensee's spreading misinformation . . . it's an active campaign to undermine public health initiatives. . . That's really harmful and I think falls well within our concern…" *Id.* One Board member was not sure whether to pursue those cases at all. (R. 008723.) While another Board member indicated

> I feel like we should get more information and look into the um for lack of a better term I don't like it either Brad misinformation. Um I think it is really a sticky subject . . . but I also feel this ethical and moral responsibility as a board of medicine that like we need to go down that rabbit hole. Like that is our job. . . and once we go there you know I don't know what the results will be but I think we need to get

down a little bit deeper. And I think we need some experts who can help us um do that.

(R. 008723.)

Based on its initial assessment of the exigency of the medical practice and patient care cases where there were concerns "that there's dangerous [patient] care happening" (R. 008723), the Board originally discussed proceeding on a separate, faster track with the medical practice, patient care cases as compared with the complaints about Dr. Nass's medically or scientifically inaccurate statements. (R. 008722-26.) They considered that bifurcation of these sets of cases could allow the Board to gather additional relevant information related to Dr. Nass's statements, including the answers to the 25 questions they wanted to posit to verify and further understand Dr. Nass's basis for her statements, such as citations to medical literature, if any. (R. 008726.) The Board also discussed that bifurcation would allow time for the Board-retained expert to review the issues. (R. 008722-26.)

In support of her argument that the Board targeted Dr. Nass because of speech the Board disagreed with, Dr. Nass cites a single statement made during the January 2022 Board discussion when a lone board member indicated he thought Dr. Nass's inaccurate statements were a "gigantic problem." (Br. 17.) The statement was part of a discussion, in which a Board member indicated a professional truism of science-based medical practice: "I have no heartburn with the notion that we [physicians] can collectively in our profession define what qualifies as unsubstantiated misinformation or bad information." (R. 008722.) Against this backdrop, the Board member commented that compared to honest mistakes or misspeaking, "to actively be promoting opinions that are collectively felt to be harmful that to me is a gigantic problem." *Id.* A Board member developing an opinion about the facts before him is insufficient to establish an intolerable risk of bias. *Liteky v. United States* 510 U.S. 540, 551 (1994). Finally, the sequence of

the discussion shows that this individual statement was not the basis for the preceding medical practice discussions or any actions that flowed from them. (R. 008715-32.)

During the January 11, 2022 board meeting, the Board ultimately decided to proceed with all five open cases against Dr. Nass simultaneously. (R. 008730-32.) They decided to issue an Order of Immediate Suspension based on the clearly articulated concerns about Dr. Nass's medical practice, patient care, and the Board's concerns about Dr. Nass's inaccurate statements. (R. 008716-24, 008732-36, 000769-77.) Based on the concerns raised by Dr. Nass's own conduct and communications, the Board also ordered an evaluation pursuant to 32 M.R.S. § 3286. (R. 008716, 008723-24, 008727-28, 008732-36.) The Board's consensus plan included seeking additional relevant information, including subpoenaing additional patient records; retaining appropriate experts regarding a) the practice of medicine and patient care and b) the ethics and professionalism required for physician's making false, misleading, or inaccurate statements about medical issues; asking Dr. Nass the list of twenty-five potentially clarifying questions; and ordering the 32 M.R.S. § 3286 neurocognitive evaluation to determine if Dr. Nass had neurocognitive issues with either memory or cognition, or another mental condition, that might impact her ability to practice medicine safely. (R. 008725-27, 008732-36.) Together this record demonstrates the Board's well-reasoned consideration of the substance of the various allegations, followed by suitable Board responses to the different categories of allegations.

In addition to being factually inaccurate, Dr. Nass's argument is legally insufficient to demonstrate an intolerable risk of bias. Unlike the cases where the Supreme Court has found an intolerable risk of bias, the record in this case does not support such a finding against the Board or its members. In *Williams,* the Supreme Court held "that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as

a prosecutor in a critical decision regarding the defendant's case" which is neither alleged by Dr. Nass in, nor applies to, this case. *Williams*, 579 U.S. at 8. Dr. Nass alleges no such Board member involvement in her case or other conduct that courts have found problematic.

An intolerable risk of unconstitutional bias has also been found where a judge became entangled with trial counsel over contempt allegations because "contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot hold the balance nice, clear, and true between the state and the accused." *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (citation and internal quotation marks omitted). The Law Court has found a violation of due process where a presiding officer failed to recuse after objection in the face of "direct and admissible evidence tending to show the extent of the [presiding officer]'s hostility," including that he was a primary victim of the other's acts, had leveled multiple criticisms at the other person, and stated "his first act in office would be to 'get the Assessor.'" *Sevigny v. City of Biddeford*, 344 A.2d 34, 40 (Me. 1975). Similarly, the Superior Court (York County, *Brennan, J.*) found a Kittery Port Authority hearing process violated an applicant's due process rights where the Chairman made disparaging remarks about the application, then recused from the hearing, but later appeared as a witness against the application, because "the nature and extent of the Chairman 's participation in the proceedings impermissibly tainted the outcome. . ." *Dion v. Town of Kittery*, No. AP-04-001, 2004 WL 1925556, at *2 (Me. Super. Ct. July 12, 2004). Because Dr. Nass cannot establish that the Board acted against her out of any impermissible animus, prior involvement or active entanglement with her, there is no due process violation.

C. Dr. Nass's Bullet Points Are Not Evidence of an Intolerable Risk of Bias.

Dr. Nass attempts to overcome this clear record of the Board's articulated rationale with a series of speculations and mischaracterizations in the form of bullet points. (Br. 17-19.) As a preliminary matter, none of Dr. Nass's bullet points establish an intolerable risk of bias. Such a risk arises from personal, case-specific conflicts or interactions with the individual that place the factfinder in such a position that an objective person could not be certain that the factfinder's personal stake would not affect their judgment. *See, e g , Williams*, 579 U.S. at 8; and *Sevigny*, 344 A.2d at 40. Furthermore, as argued more particularly below, Dr. Nass's mischaracterizations of the facts and speculations of a nebulous biased intent, do not constitute the type of evidence sufficient to overcome the presumption of regularity to which Board members are entitled, let alone establish an intolerable risk of impermissible bias.

In her first bullet point Dr. Nass relies on a Board staff email to establish bias. This bullet point misstates the author, context, and import of the cited correspondence. Contrary to Dr. Nass's assertion, this email was not a general inquiry about why the Board was investigating Dr. Nass. Instead, the subject line of the email indicates the inquiry was specifically about complaint CR21-191, a case filed by a member of the public asserting Dr. Nass was making false, misleading, or inaccurate statements about COVID-19 and related issues in her capacity as a licensed physician. (R. 003121-23.) The cited email responded to Dr. Nass's assertions that Board did not have jurisdiction and that the complaint was spurious and would be dismissed. (R. 003121.) After explaining that only Board staff, and not the Board members were involved in investigating the case at this stage, the staff person responded

> The basis here for the Board's jurisdiction is that there is alleged unprofessional conduct, particularly where you have communicated in your capacity as a physician in the interview and on the website that could allow for patients and the public to view the information you provide as misleading and/or inaccurate. Please refer to

> the American Medical Association (AMA) Code of Medical Ethics that apply in contexts other than a patient clinical setting.

(R. 003121.) This communication was not authored by the Board and cannot evince any motivation on the part of that body. *Gorham v Town of Cape Elizabeth*, 625 A.2d 898, 902 (1993) (holding "the statements of the code enforcement officer, who is not a member of the Board, do not demonstrate denial of due process."). The email also does not establish any inappropriate motivation on the part of staff investigating a complaint filed with the Board. Licensing boards, including the Board of Licensure in Medicine, all share the sole purpose "to protect the public" which they perform by "ensuring that the public is served by competent and honest practitioners." 10 M.R.S. § 8008. Furthermore, this staff correspondence directly answered Dr. Nass's question regarding the grounds for the investigation—allegations that she provided false, misleading, or inaccurate information in her capacity as a licensee. (R. 003121.) Finally, the email provided her with additional information she could review related to those grounds. *Id.*

Similarly, Dr. Nass's second bullet is irrelevant to her due process claim because the alleged action was not taken by the Board. *Gorham*, 625 A.2d at 902. Furthermore, even if relevant, this was simply routine sharing of information that may have been relevant to the Board's pending complaints. To impute ill-intent is purely speculative and is not enough to show an intolerable risk of bias. *Schafer v. Schafer*, 2019 ME 101, ¶¶ 5-6, 210 A.3d 842 (rejecting litigant's speculation that judge's post-trial recusal created the "appear[ance] that there may have been undue prejudice by the trial judge" where unsupported by the record); and *Johnson v. Amica Mut. Ins. Co.*, 1999 ME 106, ¶ 11, 733 A.2d 977 (holding mere belief by a party of partiality insufficient to establish bias where party "failed to demonstrate, or even allege, a deep-seated favoritism or antagonism that would make fair judgment impossible."). Furthermore, "the

mere belief that a judge might not be completely impartial is insufficient to warrant a recusal if the judge believe she can act with complete impartiality." *Id.* at n.1.

For her third bullet, Dr. Nass has taken out of context a quote from a single Board member expressing his individual viewpoint related to harmful opinions that he felt were a "gigantic problem." (Br. 17.) As argued above the statement was a single Board member's impression of the facts, made mid-stream in the Board's discussion, which given its place in the discussion contradicts Dr. Nass's proposition that the Board proceeded against Dr. Nass based on this statement. Furthermore, the Board member's interpretation of the facts before him does not establish an intolerable risk of bias sufficient to violate due process. *Liteky,* 510 U.S. 540, 551.

In her fourth bullet, Dr. Nass asserts that the Board's list of 25 investigative questions are not authorized by law and "appear[] to be an effort to punish the 'harmful opinions' complained of earlier." (Br. 17.) Dr. Nass starts from an erroneous premise that the Board does not have authority to ask questions of its licensees. (Br. 17.) This is simply inaccurate. The Board has broad authority to investigate allegations against its licensees and is obligated by law to do so. 32 M.R.S. §§ 3269(8), 32982-A (2024). In aid of its investigative authority the Board also has subpoena power at any stage of investigation. 10 M.R.S. § 8003-A(1) (2024).

The Board reasonably sought additional information from Dr. Nass in aid of its investigation of two complaints (CR21-191 and CR21-210), which information, if provided, had the potential to resolve the issues raised by those complaints. (R. 008723, 008726, 008732-33.) The stated basis for the 25 questions was "to get more information about how the licensee is getting to the place where they are recommending and . . . talking about these things that are uh quite outside um mainstream medicine." (R. 008723.) The Board's staff supplied that the typical timeframe for a licensee to respond to this number of questions was 30 days. (R. 008734.) The

practice of investigating further by asking licensees questions is a routine and regular practice that often resolves or narrows cases against licensees. To find that the Board's statutory authority to investigate does not include the simplest and most straightforward method of investigation—asking questions—would yield an absurd and impractical result, contrary to the tenets of statutory interpretation. *State v. Santerre*, 2023 ME 63, ¶ 8, 301 A.3d 1244. The Board properly pursued its investigation in this case to obtain relevant information from Dr. Nass about the nature and bases of her medical opinions.

As described above, Dr. Nass's speculation that the questions "appear" to be a punishment for speech is contradicted by record evidence of the Board's thorough discussion of these cases on January 11, 2022. Even if not obviously contradicted by the record, Dr. Nass's unsupported speculation about the apparent basis to punish Dr. Nass is insufficient as a matter of law to establish intolerable risk of bias. *See, e.g., Schafer*, 2019 ME 101, ¶¶ 5-6, 210 A.3d 842; and *Johnson*, 1999 ME 106, ¶ 11, 733 A.2d 977. Rather, the Board's questions were part of its usual investigative practices and in this case were reasonably designed to obtain relevant information from Dr. Nass related to two open complaints. The mere asking of these questions does not evidence any bias or intolerable risk of bias.

In her fifth bullet, Dr. Nass asserts that the Board's subpoenas for Dr. Nass's appointment and patient records were supported by "no legitimate purpose." (Br. 18.) As explained above, the Board outlined in detail its significant concerns about Dr. Nass's potentially unsafe practice of medicine and patient care, inadequate medical recordkeeping, and non-secure, non-confidential communications as preliminarily shown in the three matters under investigation and Dr. Nass's communications with Board staff regarding the patients in those cases. (R. 008715-20.) The Board's subpoenas were directly justified by the level of concern the Board had about Dr. Nass's

medical practice, patient treatment decisions, medical recordkeeping, and potential cognitive impairment. Dr. Nass can point to no evidence in the record that any Board member sought to investigate further out of anything other than their legitimate concern for, and duty to protect, patients and the public. (R. 008715-20.)[15] There is no credible evidence in the record that this occurred.

Dr. Nass's sixth bullet asserts that the Board improperly directed her to undergo an evaluation and did so "without even hearing from Dr. Nass." (Br. 18.) Again, this ignores the detailed record evidence to the contrary. As argued above, the record clearly includes the Board's stated rationale for ordering the evaluation pursuant to Section 3286, namely whether Dr. Nass's mental condition might be interfering with her ability to safely treat patients. (R. 008715-16.) Dr. Nass's own communications raised these concerns, including her submission of incorrect patient records multiple times (R. 000784, 000799, 000813-14, 000832-33), her inability to recall which drug she had lied to the pharmacist about (R. 000716), her apparent inability to use the technologies through which she had been communicating with patients (R. 000784, 000799, 000813-14, 000832-33, 008715-16), and her inaccurate statements about scientific information (R. 004491-95.) The Board ordered the evaluation rather than requesting it because of Dr. Nass's uncooperative responses to the Board's prior requests and subpoenas. (R. 008723.)

Dr. Nass's seventh bullet alleges some inappropriate motivation inherent in how quickly the Board's Orders for Immediate Suspension and Directing Evaluation were issued. This allegation is also directly contradicted by the record. As described above, the record clearly

[15] Dr. Nass further attempts to insinuate some improper action by the Board through footnote number 7 repeating unsubstantiated statements that patient records were published in a newspaper and that "the Board" permitted this. (Br. 18.)

demonstrates that staff and counsel "anticipated" that the Board might pursue one or both of these time-sensitive and urgent options. (R. 008725.) This is the usual practice of Board staff and counsel. The Board was thus able to review the precise language of both documents, make any changes, and vote on the agreed-to language. (R. 008727, 008732, 008735.) Dr. Nass was present for this discussion. The Board issued the Order Directing Evaluation on January 11, 2022 (R. 004491-95) and the Order of Immediate Suspension on January 12, 2022 (R. 000769-77).

Dr. Nass's eighth bullet contains compound mischaracterizations. First, that the Board impermissibly sought to directly sanction Dr. Nass in violation of the First Amendment. Second, that the Department of the Attorney General took a position favorable to Dr. Nass's arguments related to her Motion to Dismiss. And, third, that the Board engaged in a pattern of targeting Dr. Nass "consistent with" its Fall 2021 Newsletter. (Br. 19.) These assertions are contradicted by the record. Dr. Nass, without explanation, cited to the evolution of the notices of hearing to support these erroneous contentions. (Br. 19, ¶ 1.) Review of the cited notices of hearing, ending ultimately with the operative Third Amended Notice of Hearing, shows that the various withdrawn alleged grounds for discipline and withdrawn alleged facts dealt with various allegations, many of which were unrelated to Dr. Nass's contention, reflecting an overall narrowing of the issues for hearing. (Compare R. 009948-58 with R. 000757-66.)

A notice of hearing apprises the licensee "whose legal rights, duties, or privileges are at issue," the public, and the adjudicating Board, of the nature of the allegations to be decided during an adjudicatory hearing in accordance with 5 M.R.S. § 9052. This notice, like a complaint in a civil or criminal matter, can be amended where the allegations intended to be adjudicated or proven change. *Id.* § 9052(4) (notice must refer to the "particular substantive statutory and rule provisions involved"). The actual evolution of this document does not support Dr. Nass's

suggestion that these withdrawn counts all related to speech or "misinformation." (Br. 19.) The withdrawn counts were: Count III alleging a violation of a standard of medical practice as set forth in "AMACME Opinion 1.2.11 Ethically Sound Innovation in Medical Practice" (R. 009949, 000757, 004901-02 (AMACME Opinion)); Count VII, alleging a violation of Board statute and rule by failing to "coordinate care" or provide records to other treating physicians (R. 009949, 000758); Count X, alleging a violation of a standard of medical practice established by AMACME Opinion 3.3.1 Management of Medical Records" (R. 009949-50, 000758, 004905-06 (AMACME Opinion)); Count XVI, alleging a statutory violation for engaging in disruptive behavior "that interferes with or is likely to interfere with the delivery of care" (R. 009950, 000759); and Count XVII, alleging a violation of a standard of medical practice evidenced by "AMACME Opinion 2.3.2 Professional in the Use of Social Media" (R. 009950-51, 000759, 004907-22 (Guidelines from BOLIM on Social Media)). The Third Amended Notice of Hearing also shows that Alleged Fact paragraphs 16-17, 19-21, and 23-24 were withdrawn. The withdrawn fact paragraphs related to the withdrawn grounds for disciplinary action. (Compare R. 009954-56 with R. 000763.) The statements recited in the withdrawn fact paragraphs numbered 19-21 deal with purportedly scientific assertions Dr. Nass made about the COVID-19 vaccine, and government agency actions related to the vaccine. None of the withdrawn counts alleged "misinformation" as a basis for discipline, but two did involve physicians' professional obligations.

The majority of the withdrawn allegations and facts had nothing to do with Dr. Nass's allegedly false, misleading or inaccurate statements. The record reflects that only part of the evolution of the Notice of Hearing dealt with Dr. Nass's allegedly false, misleading, or inaccurate statements about the COVID-19 vaccine or related matters. Finally, as part of

narrowing the issues for hearing, the Dr. Nass and Board staff specifically stipulated that the COVID-19 vaccine, vaccine efficacy, and Dr. Nass's statements about those topics were not part of the two incompetence counts, grounds for discipline I and II. (R. 000021.)

Dr. Nass's second erroneous statement is that her argument was so "obvious," the Department of the Attorney General did not oppose her Motion to Dismiss. (Br. 19, ¶ 1.) The Department of the Attorney General was not a party to this case, nor did that Department take any position on this matter. As stated in the Third Amended Notice of Hearing, Board's staff "with the assistance of an assistant attorney general will facilitate the presentation of this matter to the Board by gathering and offering evidence, examining witnesses, filing appropriate motions, and responding to motions and objections." (R. 00765, ¶ 3.) Furthermore, the Board's staff explicitly opposed Licensee's Motion to Dismiss, "Board Staff does not agree with the 'viewpoint discrimination' argument that is the main thrust of the Motion [to Dismiss]." (R. 010394.) Board staff overall argued that any potential contention Licensee had regarding viewpoint discrimination was mooted by the narrowed scope of the case. Specifically, the withdrawal of Grounds XVI and XVII, the only potential grounds to which Dr. Nass's speech argument might apply, meant that "viewpoint discrimination is simply not a viable basis for dismissal." (R. 010395.)

Finally, Dr. Nass refers to the Board's newsletter and erroneously claims that there was a pattern of targeting Dr. Nass that was "consistent with" the Board's policy position related to COVID-19 misinformation posted in the Board Fall 2021 Newsletter. (Br. 19.) An agency's "preconceived position on law, policy, or legislative facts is not a ground for disqualification" unless the challenger can show "prejudgment on the specific facts subsequently presented to the agency." *New England Tel & Tel. Co v Public Utilities Comm'n,* 448 A.2d 272, 280 (1982)

(citations omitted). The newsletter stated support for a Federation of State Medical Boards ("FSMB") statement, that FSMB had issued "in response to the dramatic increase in the dissemination of Covid-19 vaccine misinformation and disinformation by physicians and other health care providers . . ." (R. 005226.) The FSMB statement reads in full

> Physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards, including the suspension or revocation of their medical license. Due to their specialized knowledge and training, licensed physicians possess a high degree of public trust and therefore have a powerful platform in society, whether they recognize it or not. They also have an ethical and professional responsibility to practice medicine in the best interests of their patients and must share information that is factual, scientifically grounded and consensus-driven for the betterment of public health. Spreading inaccurate COVID-19 vaccine information contradicts that responsibility, threatens to further erode public trust in the medical profession and puts all patients at risk.

(R. 005226-27.) The Board newsletter states

> The Maine Board of Licensure in Medicine ("BOLIM") supports the position taken by the FSMB regarding Covid-19 vaccine misinformation spread by physicians and physician assistants. The Board also applies the standard to all misinformation regarding Covid-19, including non-verbal treatments and preventative measures. Physicians and physician assistants who spread Covid-19 misinformation, or practice based on such misinformation, erode public trust in the medical profession and may endanger patients.
>
> Covid-19 is a disease process which physicians and physician assistants should evaluate and treat in the same manner as any other disease process. Assessments and treatments of Covid-19 by physicians and physician assistants will be evaluated by the BOLIM in the same manner it evaluates assessments and treatments of any other disease process. Treatments and recommendations regarding Covid-19 that fall below the standard of care as established by medical experts and legitimate medical research are potentially subject to disciplinary action.

(R. 005227.) This is an unremarkable position for an entity whose sole purpose is protecting the public by ensuring the honesty and competence of its licensed practitioners. 10 M.R.S. § 8008. The Board stated that it would apply its standards of care and medical practice requirements to licensees who treated COVID-19 in the same manner as to any other medical conditions, and that

licensees must use and rely on science in making their treatment decisions. Furthermore, any practitioner who, as a licensee, gives patients, prospective patients, and the public false, misleading, or inaccurate scientific or medical information, may be subject to disciplinary action.

When the Board published the position statement in its newsletter in November of 2021, its members had no knowledge of the complaints against Dr. Nass. The Board did not learn of those cases until a few weeks before the January 11, 2022 board meeting. The existence of this policy position is not sufficient to establish bias without a showing of prejudgment of the specific facts of a particular case. *New England Tel. & Tel. Co.*, 448 A.2d at 280. On appeal, Dr. Nass has not argued or offered any evidence that the Board prejudged the specific facts in this case. As explained above, Dr. Nass made this argument at the administrative hearing, and the Board members all determined not to recuse. By failing to argue this in her 80C brief, Dr. Nass has waived the issue of prejudgment. Accordingly, the policy statement in the Fall 2021 Newsletter is insufficient to establish an intolerable risk of bias.

Dr. Nass's ninth bullet alleges that "[t]he Board misrepresented amounts being paid to Dr. Faust" in a submission to another state agency. (Br. 19.) The Board does not concede there was a misrepresentation, however, the cited document is irrelevant to Dr. Nass's due process claim because it cannot be attributed to the Board. *Gorham*, 625 A.2d at 902. A Board staff person, not the Board, authored and signed the subject document. Therefore, for the purposes of establishing bias, it is not attributable to the Board. Furthermore, this document is even one step further removed from Dr. Nass's case than the statement in *Gorham*, because the Board staff person did not communicate it to Dr. Nass.

Without further explanation or citation, Dr. Nass's tenth bullet argues that the Board imposed severe sanctions "for relatively minor misconduct" and that those sanctions were

inconsistent with comparator cases. (Br. 19.) Both assertions are incorrect. The misconduct found by the Board was far from minor. The comparator cases were procedurally and factually different from Dr. Nass's case in various respects, with only individual aspects that might have been useful for the Board. The Board found Dr. Nass exhibited a lack of knowledge and inability to apply principles and skills while practicing medicine in multiple ways.

The Board found that Dr. Nass "failure to escalate [Patient 2's] care in a timely manner was indicative of a lack of knowledge," a violation of Section 3282-A(2)(E)(2), and that this failure also violated Section 3282-A(2)(H). (R. 000013-14.) This particular finding was extremely serious and was based on the Board's judgment and the expert testimony of Dr. Courtney that hypoxia, as exhibited for two days by Patient 2, is a significant symptom in a COVID-19 patient because "[y]ou're right on the edge of dying from COVID. People in hypoxic respiratory failure at this point can quickly progress and die from the disease." (R. 000201.) Dr. Courtney further opined that the combination of Patient 2's hypoxia, tachycardia, and elevated temperature required him to be sent urgently to the emergency department. (R. 000202.) Patient 2 testified that if Dr. Nass had told him to go immediately to the emergency department he would have done so. (R. 000550.)

The Board also found that Dr. Nass prescribed drugs for all three patients following consultations consisting of only two components: reviewing a drug list (and not diagnosed conditions) for potential drug interactions with the patient's requested drug; and obtaining the patient's weight to calculate the correct dose of their requested drug. (R. 000013.) The Board found that this approach was "not comprehensive and was unsafe for patients." (R. 000014.)

Based on its telemedicine rules and the evidence adduced at hearing, the Board found multiple additional violations of its telemedicine rules, including failure to take medical histories,

maintain adequate records, have and follow mandatory written protocols to ensure telemedicine encounters are secure and confidential. (R. 000014-16.) Finally, the Board found that Dr. Nass engaged in deceit or misrepresentation and failed "to conform to the appropriate standards of care and professional ethics while using telemedicine" by intentionally and unnecessarily lying to the pharmacist, "without consideration of the impact to others, and was likely intended to require the Board to take action." (R. 000016, 17.) The Board also found this violation by Dr. Nass "of great concern to the Board" and "difficult to redress through sanctions." *Id.* Despite Dr. Nass's assertion, these are not minor issues, but instead constitute the core of knowledgeable, skillful, and ethical medical practice and patient care. The Board's sanctions reflect their judgment of the seriousness of these fundamental and significant violations by Dr. Nass.

Dr. Nass's reference to the comparator cases is unavailing. The referenced cases all dealt with different factual scenarios, with each case having only some overlap with the cases against Dr. Nass. (R. 004419-83.) These cases were not entered into evidence to delimit the Board's assessment of the full breadth of violations alleged and found in Dr. Nass's case, but for the Board's reference, if so desired. While they were admitted into evidence, they were not relied on during Board staff's closing argument or Board deliberations.[16] (R. 009779-805, 000644-728.)

D. Dr. Nass's Arguments Against Dr. Gleaton Do Not Establish an Intolerable Risk the She was Biased.

Dr. Nass singles out Board Chair, Dr. Gleaton, and, by mischaracterization and speculation, suggests that Dr. Gleaton acted improperly. This kind of innuendo is legally insufficient to overcome the presumption of regularity and establish bias. Compare *Friends of Maine's Mountains*, 2013 ME 25, ¶ 23, 61 A.3d 689 (a ruling made against a party not sufficient

[16] Dr. Nass did reference these cases in her oral closing argument on sanctions by stating that those cases were distinguishable because they were initiated by patient-filed complaints. (R. 000676-77.)

to overcome presumption or show bias) and *Schafer*, 2019 ME 101, ¶¶ 5-6, 210 A.3d 842 (party's speculations insufficient to show bias) with *Williams*, 579 U.S. at 9-11 (former D.A.'s direct and significant involvement as adverse advocate in original death penalty decision created intolerable risk of bias), *Sevigny*, 344 A.2d 34, 40-41 (evidence of presiding officer's campaign of words and actions against party overcame presumption and showed bias), and *Mutton Hill Estates, Inc., v. Town of Oakland*, 468 A.2d 989, 992 (1983) (presumption of regularity overcome and intolerable risk of bias established where factfinder held ex parte meeting with biased opponent and it was unclear from the record whether the Board relied on evidence so obtained). Furthermore, each allegation when reviewed objectively and in light of the entire record is too insignificant to establish an intolerable risk of bias. *Candelaria-Silva*, 166 F.3d at 35. The standards to evaluate the bias claims against Dr. Gleaton are the same legal standards recited above, in Argument subsections II.A-C. In addition, like trial court judges, Board members sitting as adjudicators also

> must not allow litigants to utilize the process of a recusal motion to delay or thwart the judicial proceedings where there is no reasonable basis for the motion and it is obvious on its face that it was intended to halt or delay the litigation. "A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is."

In re Michael M, 2000 ME 204, ¶ 14, 761 A.2d 865 (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). Accordingly, Dr. Gleaton was obligated not to recuse herself if no basis existed to do so.

Dr. Nass argues that Dr. Gleaton was biased for two reasons, 1) involvement in the FSMB; and 2) conduct evidenced by fleeting facial expressions and an accidentally unmuted comment during Day 4 of the adjudicatory hearing. (Br. 20-22.) The argument against Dr. Gleaton fails because the putative evidence, particularly when reviewed in light of the entire

record, is insufficient to overcome the presumption of regularity to which Dr. Gleaton is entitled. In addition, none of this purported evidence alone or in toto is the type of evidence that has been held to create an intolerably high risk of bias.

First, the FSMB is an organization whose members include the Maine Board of Licensure in Medicine, the Maine Board of Osteopathic Licensure, and the Medical and Osteopathic Boards of Medicine of other U.S. States and territories. As quoted below, according to FSMB's website

> [t]he Federation of State Medical Boards is national non-profit organization representing all state medical and osteopathic boards within the United States and its territories that license and discipline allopathic and osteopathic physicians and, in some jurisdictions, other health care professionals.
> Available at https://www.fsmb.org/about-fsmb-member-medical-boards/

(R. 011040.) To be a Director in FSMB, a state or territory board member must be nominated by their Board. Contrary to Dr. Nass's assertion, Dr. Gleaton's participation in FSMB is part of her work on the Maine Board of Licensure in Medicine, and not separate from or inconsistent with it.[17]

Dr. Gleaton's statement that her "experience and qualifications will enable me to collaborate well with others in developing strategic goals for the FSMB in supporting medical regulation into the future," (R. 005223) does not make the type of pledge Dr. Nass suggests. (Br. 20.) And it has no legal or factual nexus with Dr. Nass's case. Rather it is a policy statement by a

[17] Dr. Nass's reliance on the Governor's Conflict of Interest Policy (R. 011048-50) is unavailing because, as argued at hearing, assuming a violation of that policy was established, it would only allow the Governor to remove the board member "for cause," but would not establish a per se due process violation. (R. 011041, 011048-50) In addition, Dr. Nass is simply incorrect that the Governor's policy applies to FSMB. Instead, that policy prohibits membership in associations of licensees, not membership in national associations of regulatory boards. (R. 011048-50.) A BOLIM member might have a conflict under the Governor's policy for holding a leadership position in the American Medical Association (that nation's largest association of physicians), but not for membership in FSMB. It is common for Maine healthcare board members to hold these positions including in FSMB, the National Association of Boards of Pharmacy, and the National Council of State Boards of Nursing. (R. 011040.)

board member, acting on behalf of the Board that nominated her to FSMB, which is legally insufficient to establish an intolerable risk of bias. As stated above, a policy position is not grounds for disqualification without a showing of prejudgment of the specific facts in the case. *New England Tel & Tel. Co* 448 A.2d at 280. Dr. Nass did not argue or offer evidence that Dr. Gleaton prejudged the facts of Dr. Nass's cases. Having failed to argue an essential element of her bias claim, her argument must fail.

Furthermore, Dr. Gleaton's intent to collaborate in "supporting medical regulation into the future" is so attenuated from Dr. Nass and the specifics of this case that objectively it cannot demonstrate prejudgment. Dr. Nass's argument that Dr. Gleaton's FSMB participation created a conflict of loyalty, is similarly unpersuasive. *Rossignol v Me. Pub. Emps Ret. Sys.*, 2016 ME 115, n. 3, 144 A.3d 1175 (hearing officer's claimed motive to serve the MPERS Board which appointed him was insufficient to overcome the presumption of regularity or to demonstrate bias). Accordingly, Dr. Nass's vague, unsubstantiated allegations about Dr. Gleaton's role in FSMB and quoted statement are insufficient to overcome the presumption of regularity or to establish an intolerable risk that Dr. Gleaton was biased.

Second, Dr. Nass's allegations regarding Dr. Gleaton's fleeting facial expressions and Dr. Gleaton's unmuted comment amount to no more than a few total minutes of a hearing held over five full and two partial days of hearing. (R. 011044-47.) The Court should reject Dr. Nass's attempts to overinflate the importance of these occurrences with speculations of Dr. Gleaton's ill intent. *United States v. Candelaria-Silva*, 166 F.3d at 35. Despite Dr. Nass's speculation, there is no evidence that any of this conduct conveyed any message to fellow Board members, unlike in *Robinson* where the jury members reacted to the prosecutor's admittedly feigning sleep to annoy defense counsel. *State v. Robinson*, 2016 ME 124, ¶ 18, 134 A.3d 828. Such speculation by Dr.

Nass about how something appears is not a sufficient showing to establish an intolerably high risk of bias. *Schafer*, 2019 ME 101, ¶¶ 5-6, 210 A.3d 842.

When reviewing the instances of Dr. Gleaton's facial expressions to determine if they amount to a due process violation, the court must "differentiate between expressions of impatience, annoyance or ire, on the one hand, and bias or partiality on the other hand." *Logue*, 103 F.3d at 1045. A potentially negative impression or opinion of the individual arrived at during the course of a proceeding where the factfinder presides, does not in and of itself demonstrate bias. *Liteky,* 510 U.S. at 551. While a "favorable or unfavorable predisposition" arising during a proceeding may constitute impermissible bias, the factfinder's disposition must be "so extreme as to display clear inability to render fair judgment." *Id.*

Dr. Gleaton's passing facial expressions and single comment were not so extreme that they demonstrate a clear inability to render fair judgment. In fact, each instance cited by Dr. Nass is evidence of no more than Dr. Gleaton's reaction to the by-play of the hearing. All of which occurred during Dr. Nass's contentious cross-examination of a Board staff expert witness. Notably Dr. Gleaton's expressions came in response to counsel's tone of voice or demeanor (for which the hearing officer had admonished him repeatedly on Day 4), potentially confusing the witness by mixing up prescription drug names, or raising his voice. (R. 011044-47.) None of these reactions are extreme or demonstrate an inability to render a fair judgment.

Contrary to Dr. Nass's argument at the administrative hearing that Dr. Gleaton fell asleep (R. 010996-97), Dr. Nass now argues that Dr. Gleaton *pretended* to be asleep on two occasions on a single day of the adjudicatory hearing. (Br. 21.) Taken together Dr. Gleaton closed her eyes for about a minute. (R. 011044-45.) During that time, she made other visible movements that suggest she was not asleep. (R. 011032, 011044-45.) The video clip provided by Dr. Nass does

not show any evidence that Dr. Gleaton is pretending to be asleep, or that she is closing her eyes to impugn counsel's cross-examination as asserted. (Br. 21, Br. Ex. 1.) Dr. Nass's speculation that Dr. Gleaton feigned sleep, is not only a new argument on appeal; it is pure fiction. In support of her new position, Dr. Nass cites a case where the prosecutor admitted that he "feigned sleep in order to annoy defense counsel." *Robinson*, 2016 ME 24, ¶ 18. Those are not the facts in this case. Dr. Gleaton has not admitted to any of Dr. Nass's speculations, and the video clips that Dr. Nass cites do not support her assignment of malevolent intent or bias to Dr. Gleaton. (Br. Ex. 1, R. 011044-47.) Board staff refutes each of Dr. Nass's arguments below, with citations to Dr. Nass's video. (R. 011031-43, R. 011044-47.) Dr. Nass has failed to show that Dr. Gleaton closing her eyes for roughly a minute establishes an intolerable risk of bias.

Dr. Nass asserts that Dr. Gleaton "resorted to openly mocking counsel by muttering 'it's the same drug' …" during counsel's cross-examination. (Br. 21.) This is a mischaracterization of the record and even if Dr. Gleaton was critical of counsel's apparent misunderstanding, that would not establish evidence of an intolerable risk of bias. The transcript indicates that, during his cross-examination of Dr. Faust regarding an FDA tweet, counsel seemed to suggest that ivermectin for people is a different drug than that administered to animals, which is factually incorrect. (R. 000344, 011034.) This was not a contested fact in the moment or in the hearing overall. (R. 000344, 000757-66.) Counsel was not arguing this fact with the witness but was rather arguing whether the witness knew any doctors who had prescribed animal ivermectin to people. *Id.*

During this exchange, Dr. Gleaton said, out loud while unmuted on the Zoom webinar, "[i]t's the same drug." This is factually accurate. Immediately following Dr. Gleaton's comment, the witness, Dr. Faust, similarly responded "it really has to do with a matter of the dosage, and

other considerations." (R. 000344, 011034.) A factfinder's assessment that a party is mistaken about an issue of fact is not sufficient to establish bias. *North Atlantic Securities, LLC*, 2014 ME 67, ¶ 44, 92 A.3d 335. Nor can a factfinder's assessment of the credibility of presented evidence be the basis for a finding of bias. *Id.* ¶ 45. The record directly contradicts the premise that Dr. Gleaton intended her comment to be heard by any other participant. As soon as Dr. Gleaton was able to appropriately apologize, given that she was not the presiding officer, she did so, and explained she did not realize her microphone was unmuted. (R. 000344.) Even assuming *arguendo* a criticism of counsel was inherent in the interjection, the First Circuit has held, that a judge's direct and sharp criticism of counsel's tactics is insufficient to sustain a bias claim, even when delivered during a trial and in front of the jury. *Logue*, 103 F.3d at 1046 (citing *Liteky v. U.S.*, 510 U.S. at 555).

Accordingly, Dr. Gleaton's interjection of an uncontested, scientific fact within her sphere of expertise as a medical doctor when she did not realize her microphone was unmuted is not evidence of Dr. Gleaton's intent to mock counsel, let alone of an intolerable risk of bias.

Dr. Gleaton, as Board Chair, was not the presiding officer through the evidentiary phases of the proceeding, including on the day she is alleged to have shown bias, Day 4. In her role as Chair, she led the Board's deliberations on the final day, September 19, 2023. (R. 000644-96.) Unlike in *Sevigny* and *Dion*, where the presiding officer made clear statements, and took actions, against the party claiming bias, Dr. Nass cites to no direct detrimental personal statements or antagonistic actions by Dr. Gleaton to support Dr. Nass's claims of bias. The record reflects Dr. Gleaton made no such comments. Instead, the record shows that during deliberations Dr. Gleaton led the discussion in a fair and impartial manner (R. 000644-96) and exercised her own judgment appropriately during deliberations based on the evidence presented. (*See, e g.*, R. 000651). Dr.

Nass's assertions about Dr. Gleaton are not supported by record evidence. Dr. Nass only speculates about Dr. Gleaton's intent, and without more evidence in the record, she cannot overcome the presumption of regularity to which Dr. Gleaton is entitled. Accordingly, Dr. Nass has failed to establish that Dr. Gleaton was impermissibly partial or biased and unable to render a fair decision.

The Board proceeding was fair and impartial. From the original review of the five cases against Dr. Nass through the seven days of adjudicatory hearing, the record shows that the Board acted fairly and impartially, considering only the evidence presented at hearing and making findings based on that evidence. Dr. Nass's offered evidence does not overcome the presumption of regularity to which the Board and its members are entitled or establish an intolerable risk of bias. Accordingly, Dr. Nass's due process bias claims fail.

III. Dr. Gleaton Properly Determined Dr. Nass's Bias Allegation "As Part of the Record" as Required by 5 M.R.S. § 9063.

The plain language of 5 M.R.S. § 9063 directly contradicts Dr. Nass's argument that Dr. Gleaton was required to determine the bias allegation against her by making findings of fact on the record. (Br. 22-25.) Had the Legislature intended to require findings of fact on the record in Section 9063, it would have stated those requirements in the statute. Dr. Nass's request that the Court remand the case because the Board did not make adequate findings of fact or conclusions of law related to Dr. Gleaton's determination (Br. 24-25) should be denied.

Statutory interpretation is a question of law. *Santerre*, 2023 ME 63, ¶ 8, 301 A.3d 1244. "In construing the plain meaning of the language, we seek to give effect to the legislative intent and construe the language to avoid absurd, illogical, or inconsistent results." *Id.* (citing *Sunshine v. Brett*, 2014 ME 146, ¶ 13, 106 A.3d 1123).

The subject statute reads in pertinent part as follows:

> Upon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of a presiding officer or agency member in the proceeding requesting that the presiding officer or agency member be disqualified, that presiding officer or agency member shall determine the matter as a part of the record.

5 M.R.S. § 9063(1). Directly contradicting Dr. Nass's argument, this provision does not require the individual to make "findings of fact" on the record to support their conclusion. It requires only that the member "determine the matter as part of the record." *Id.* The member satisfies this requirement by simply ensuring that their determination of whether or not they are disqualifying themselves is made part of the record. There is no requirement that the member explain why they are or are not disqualifying themselves.

Section 9063(2) further delimits the individual nature of this determination by explicitly authorizing the member charged with bias to "consult with private counsel concerning the charge." *Id.* § 9063(2). By providing for private consultation with a lawyer, subsection 2 contemplates the agency member's rationale related to the charge being made in a privileged consultation with a private attorney.

The plain language of Section 9063's individual bias determination requirements are clearly distinguishable from Section 9061, which is the only MAPA provision that requires findings of fact in the record during an adjudicatory hearing. Section 9061 requires "[e]very agency decision made at the conclusion of an adjudicatory proceeding must be in writing or stated in the record and must include findings of fact sufficient to apprise the parties and any interested member of the public of the basis for the decision." 5 M.R.S. § 9061 (2024). "[C]ourts presume that when a legislature uses different words within the same statute, it intends for the words to carry different meanings." *Fair Elections Portland, Inc v. City of Portland*, 2021 ME 32, ¶ 29, 252 A.3d 504 (citing 2A Norman J. Singer & Shambie Singer, *Statutes & Statutory*

Construction § 46:6 at 261 (7th ed. 2014) ("Different words used in the same, or a similar, statute are assigned different meanings whenever possible."). Had the Legislature intended to impose the requirement that the individual charged with bias had to make findings of fact in the record, it would have stated those requirements clearly, as it did in Section 9061. Here the Legislature's use of different terms in these two provisions must be given effect.

Dr. Nass's argument relates specifically to her second allegation of bias against Dr. Gleaton, made via her Motion to Disqualify Dr. Gleaton, filed on April 3, 2023. (Br. 23, R. 010995-011010.) Board staff filed a Response on April 26, 2023. (R. 011031-50.) Dr. Nass filed a Reply on May 9, 2023. (R. 011073-77.) Dr. Gleaton was provided with the filings on the matter and determined not to recuse herself. (R. 011118.) Dr. Gleaton's determination was first made as a part of the record when it was communicated to the Hearing Officer who communicated it to Dr. Nass and Board Staff on May 19, 2023. (R. 011118.) On May 30, 2023, Dr. Gleaton was also asked on the record during the adjudicatory hearing to verify her determination not to recuse, which she did. (R. 000421-22.) Under the plain meaning of the statutory provision, both communications met the requirements of Section 9063, because Dr. Gleaton made her own individual and personal determination of the bias charge, and that determination was made "as a part of the record." 5 M.R.S. § 9063(1).

In support of her argument that findings of fact were required for Dr. Gleaton's individual decision, Dr. Nass cites a series of cases holding that agencies making final decisions must make sufficient findings of fact to permit judicial review. (Br. 22-25.) These cases are inapplicable to the individual bias determination required under Section 9063 because they apply only to agency or Board decisions, like those made pursuant to Section 9061, not to individual bias determinations pursuant to Section 9063. *See Narowetz*, 2021 ME 46, ¶ 22, 259 A.3d 771;

Christian Fellowship & Renewal Ctr. v. Town of Limington, 2001 ME 16, ¶ 16, 869 A.2d 834 *Fair Elections*, 2021 ME 32, ¶¶ 33-34, 37-38, 252 A.3d 504; *Gashgai v. Bd of Registration in Med*, 390 A.2d 1080, 1084-85 (Me. 1978); *Comeau v. Town of Kittery*, 2007 ME 76, ¶ 13, 926 A.2d 189 (all holding "agency's" or body's decision was not supported by sufficient findings of fact).

Applying the plain meaning of Section 9063, assigning the Legislature's differing word choices different meaning, and viewing those provisions in light of statutory scheme of MAPA subchapter IV, Dr. Nass's argument that Dr. Gleaton did not comply with Section 9063 is wrong. Pursuant to 5 M.R.S. § 9063(1)'s plain meaning, Dr. Gleaton properly determined as a part of the record not to recuse from the proceeding. There was no error, and thus no basis to remand the case.

IV. The Board's Order Directing Evaluation is Authorized by 32 M.R.S. § 3286 and Supported by the Administrative Record.

On January 11, 2022, the Board issued an Order Directing Evaluation requiring that Dr. Nass submit to a neuropsychological evaluation on February 1, 2022.[18] (R. 004491-95.) Even though Dr. Nass has never complied with the Order Directing Evaluation and the Board has taken no enforcement action for her failure to comply, Dr. Nass argues that the Board acted arbitrarily and capriciously and violated her due process rights in issuing it. (Br. 26-28.) Title 32 M.R.S. § 3286 authorizes, and the administrative record supports, the Board's issuance of the Order Directing Evaluation.

When the Board has a concern that a licensee's alleged conduct or behavior may result from or be affected by a mental or physical condition which may interfere with their practice of

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[18] On January 29, 2022, counsel for Dr. Nass informed adjudicatory hearing counsel that she would not attend the scheduled February 1, 2022 evaluation because she had contracted COVID-19 with symptoms manifesting on January 25, 2022, including fatigue and "brain fog." (R 010016.)

medicine, the Board may request that the licensee undergo an evaluation. 32 M.R.S. § 3286.

Title 32 M.R.S. § 3286 provides:

> Upon its own motion or upon a complaint, the board, in the interests of public health, safety and welfare, shall treat as an emergency a complaint or allegation that an individual licensed under this chapter is or may be unable to practice medicine with reasonable skill and safety to patients by reason of mental illness, alcohol intemperance, excessive use of drugs, narcotics or as a result of a mental or physical condition interfering with the competent practice of medicine. In enforcing this paragraph, the board may compel a physician to submit to a mental or physical examination by a physician or another person designated by the board. Failure of a physician to submit to this examination when directed constitutes an admission of the allegations against a physician, unless the failure was due to circumstances beyond the physician's control, upon which a final order of disciplinary action may be entered without the taking of testimony or presentation of evidence. A physician affected under this paragraph must, at reasonable intervals, be afforded an opportunity to demonstrate that the physician can resume the competent practice of medicine with reasonable skill and safety to patients.
>
> For the purposes of this chapter, by practicing or by making and filing a biennial license to practice medicine in this State, every physician licensed under this chapter who accepts the privilege to practice medicine in this State is deemed to have given consent to a mental or physical examination when directed in writing by the board and to have waived all objections to the admissibility of the examiner's testimony or examination reports on the grounds that the testimony or reports constitute a privileged communication.
>
> Injunctions must issue immediately to enjoin the practice of medicine by an individual licensed under this chapter when that individual's continued practice will or may cause irreparable damage to the public health or safety prior to the time proceedings under this chapter could be instituted and completed. In a petition for injunction pursuant to this section, there must be set forth with particularity the facts that make it appear that irreparable damage to the public health or safety will or may occur prior to the time proceedings under this chapter could be instituted and completed. The petition must be filed in the name of the board on behalf of the State.

32 M.R.S. § 3286. (emphasis added).

The second paragraph of Section 3286 authorizes the Board to direct any licensed physician to undergo a mental or physical examination and provides that Dr. Nass is deemed to consent to undergo an evaluation directed by the Board. *Id.* The only process required under this provision is that the Board direct in writing that the licensee undergo an evaluation.

However, due to the serious and significant concerns that the Board had regarding Dr. Nass's ability to safely practice medicine following review of all of the complaint and investigation material at its January 11, 2022 meeting, the Board issued an Order Directing Evaluation to Dr. Nass pursuant to the Board's authority contained in the first paragraph of 32 M.R.S. § 3286. This paragraph grants the Board the authority under certain conditions to compel licensed physicians to undergo examinations and to summarily discipline them if they fail to do so.[19]

Dr. Nass contends the issuance of the Order Directing Evaluation violated her procedural due process rights. (Br. 26-28). Dr. Nass's argument fails.

To prove a violation of her procedural due process rights, Dr. Nass must show: "1) state action; 2) a deprivation of a life, liberty, or property interest; and 3) inadequate process." *Botting v. Dep't of Behavioral & Developmental Servs.*, 2003 ME 152, ¶ 23, 838 A.2d 1168. Dr. Nass suffered no deprivation of her property interest in her license when the Board issued the Order Directing Evaluation. And as she points out, the Board did not enforce the Order Directing Evaluation by imposing discipline for her failure to comply.[20] (Br. 28.) Although, Dr. Nass claims that her "financial resources are at stake" (Br. 27), that alone is insufficient. *Cf. Bar*

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[19] The third paragraph of Section 3286 outlines the process the Board must follow if it desires to enjoin a physician from practicing medicine prior to the completion of the examination and any disciplinary proceedings. *Id.*

[20] Although Dr. Nass cites this fact to support the proposition that when the Board issued the order "time was not obviously of the essence" (Br. 28), that is directly contradicted by the Board's issuance the next day of the Order of Immediate Suspension pursuant to 5 M.R.S. § 10004(3) (2024). (R. 000769-77.) The Order of Immediate Suspension expired automatically 30 days after issuance. *Id.* The Board's inaction in enforcing the Order Directing Evaluation resulted from actions taken by Dr. Nass including not attending the initially scheduled evaluation due to contracting COVID-19 (R. 010016), consenting to the continuation of the suspension of her license until the Board took final action (R. 000003, 009836), and filing a petition and motion for a temporary restraining order of the Order Directing Evaluation in Superior Court on February 10, 2022, Dkt. No. AUGSC-2022-00021, which arguably removed jurisdiction from the Board to take any action. *York Hosp. v. Dep't of Health & Human Serv's*, 2008 ME 165, ¶ 33, 959 A.2d 67. Moreover, the issuance of a final order of disciplinary action following a failure to submit to a directed evaluation is permissive, not required. 32 M.R.S. § 3286.

Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74, 79 (Me. 1980) (inconvenience, expense, or reputational injury resulting from holding administrative hearing does not constitute irreparable injury "but rather is an unavoidable cost of regulation"). Last, Dr. Nass argues that the Order Directing Evaluation "stigmatizes [her] as someone suffering from a substance misuse or a physical or mental condition." (Br. 27.) That a disciplinary proceeding has commenced as evidenced through issuance of an Order Directing Evaluation is a "matter of fact that cannot be undone." *Hamilton v. Bd of Licensure in Med*, 2024 ME 43, ¶ 11, 315 A.3d 762. Because she is deemed to have consented to an evaluation when directed by the Board and because she can show no deprivation of a life, liberty, or property interest, Dr. Nass's due process claim fails.

Dr. Nass also argues, without any legal citation, that the Board acted arbitrarily and capriciously in issuing the Order Directing Evaluation and that it is unsupported by record evidence. (Br. 28-29.) Neither is true.

Dr. Nass bears the burden of demonstrating that the Board abused its discretion in issuing the order. *Stein v. Me. Criminal Justice Academy*, 2014 ME 82, ¶ 23, 95 A.3d 612. "An abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Id.* (quoting *Lippitt v Bd. of Certification for Geologists and Soil Scientists*, 2014 ME 42, ¶ 16, 88 A.3d 154). That the Board could have made choices more acceptable to the appellant or the Court is not enough to demonstrate an abuse of discretion. *Id.* The "arbitrary or capricious standard is high" and a court "will not find that an administrative agency has acted arbitrarily and capriciously unless its action is 'wilful and unreasoning' and 'without consideration of facts and circumstances.'"

AngleZ Behavioral Health Servs v Dep't of Health & Human Servs , 2020 ME 26, ¶ 23, 226 A.3d 762 (quoting *Kroeger v Dep't of Envt'l Prot.*, 2005 ME 50, ¶ 8, 870 A.2d 566).

The administrative record supports the Board's issuance of the Order Directing Evaluation. The preliminary findings contained in the Order Directing Evaluation included Dr. Nass admitting to lying, intentionally deceiving a pharmacist regarding a patient's care, attempting to shift responsibility for her deception onto others, and directly involving her patient in the deception. (R. 004493-94; R. 008720, 008722, 008724). The Board also preliminarily found that Dr. Nass violated established standards of practice and that her medical records for her patients consisted solely of sparse handwritten notes and text messages with individuals who were not the patient. (R. 004492-94; R. 008715-16.) The Board also made preliminary findings regarding unprofessional conduct engaged in by Dr. Nass: 1) through false, misleading, or inaccurate statements communicated in her capacity as a physician (R. 004491-93, 008721); and 2) reflected in her communications with patients which demonstrated inappropriate maintenance of professional boundaries (R. 004493-94). The preliminary findings also indicated that Dr. Nass exhibited confusion and attention-seeking behavior (R. 004493-94, 008715-16, 008720, 008722); admitted her intent to violate standards of care which would risk harm to any patient seen in person (R. 004491); and was confrontational with Board staff (R. 004492-94; 008723). Dr. Nass's conduct described in the Order Directing Evaluation and reflected in all of the information reviewed by the Board prior to its issuance gave rise to a concern that an underlying behavioral or mental health condition may exist and "that Dr. Nass is or may be unable to practice medicine with reasonable skill or safety to her patients by reason of mental illness, alcohol intemperance, excessive use of drugs, narcotics, or as a result of a mental or physical condition interfering with the competent practice of medicine." (R. 004494).

The Order Directing Evaluation issued in accordance with the Board's statutory authority, 32 M.R.S. § 3286, and was based upon the Board's significant concerns for patient safety following its initial review on January 12, 2022 of more than 1700 pages of information gathered in connection with the then pending investigations and complaints involving Dr. Nass. The Board's issuance of the Order Directing Evaluation was reasonable given the facts and circumstances, and not as Dr. Nass contends, arbitrary or capricious, and should be upheld.

V. No Violation of *Narowetz* Occurred.

Dr. Nass's contention that a violation of *Narowetz*, 2021 ME 46, 259 A.3d 771 occurred is without merit. (Brief p. 29-31.) To make this argument, Dr. Nass grasps at insignificant email communications of the Board's assigned assistant attorney general and Board staff, misconstrues *Narowetz*, and ignores 5 M.R.S. § 9055 – the provision at issue in *Narowetz*.

Dr. Nass cites two email communications that involved no Board members: 1) January 10-12, 2022 email communications related to retaining an expert witness to review Dr. Nass's conduct; and 2) a November 5, 2021 email transmitting information to the file regarding Dr. Nass's appearance at a Board of Pharmacy meeting. (R. 005177, 008978, 009734.)

Narowetz does not prohibit boards and its staff from receiving legal advice. The Board is entitled to receive advice of legal counsel. 5 M.R.S. §§ 191(3)(B), 9055(2)(B) (2024). *Narowetz* prohibits boards from allowing the same assistant attorney general who advises them on a case during the preliminary stages of the case to ultimately prosecute that case before the board at an adjudicatory hearing:

> The plain language of [Section 9055] mandates that, in any case to be decided by a board, board members shall not be advised by the same legal counsel who will subsequently act in an advocate capacity in the same matter. If an assistant attorney general gives advice *to* a board relating to the merits of a complaint, he or she should not then prosecute the charge based on that complaint *before* the board.

2021 ME 46, ¶ 25, 259 A.3d 771 (emphasis in original).

Dr. Nass ignores 5 M.R.S. § 9055 because it is inapplicable on its face to the communications that she complains of. Section 9055 deals with ex parte communications during an adjudicatory proceeding and generally provides that communications between agency members authorized to take final action, presiding officers, and parties may only occur upon notice and opportunity for all to participate except that agency members or presiding officers are not prohibited from having "the aid or advice of those members of his own agency staff, counsel or consultants retained by the agency who have not participated and will not participate in the adjudicatory proceeding in an advocate capacity." 5 M.R.S. § 9055(2)(B) (2024). None of the communications deemed by Dr. Nass to violate *Narowetz* were made during an adjudicatory proceeding or made to Board members, the presiding officer, or any other party. Dr. Nass essentially concedes this. (Br. 30.)

Dr. Nass claims, however, that "[a]lthough this AAG may not have presented witnesses in the hearing, she still gave direct support to the prosecution" and accuses the assistant attorney general, based solely on the two truly insignificant emails of "working hand in glove with Board Staff prosecuting the case." (Br. 30). Dr. Nass's argument does not pass the straight face test. Dr. Nass fails to provide evidence of any *Narowetz* violation.

VI. The Board Did Not Err in Assessing Actual Expenses to Dr. Nass for her Violations.

Dr. Nass's egregious conduct established the foundation for the Board's assessment against her of a maximum of $10,000 of the actual expenses incurred. Dr Nass argues that the Board's findings are not detailed enough to support the sanction "especially" because "much of the hearing related to issues on which Dr. Nass prevailed." (Br. 31.) Her argument fails for multiple reasons.

Title 10 M.R.S. § 8003-D (2024) authorizes the Board upon the finding of a violation to assess a licensee "for all or part of the actual expenses incurred by the board or its agents for investigations and enforcement duties performed. *Id*; *Zegel v. Bd. of Soc. Worker Licensure*, 2004 ME 31, ¶ 19, 843 A.2d 18. "Actual expenses" include hourly costs of hearing officers. 10 M.R.S. § 8003-D. Dr. Nass does not argue, nor could she, that she was unaware of this potential sanction. (R. 009957, 010049, 010438, 010520.) Nor does Dr. Nass argue that she has an inability to pay the costs incurred. (R. 003471-73, 003474, 000676-77, 000695.)

Instead, Dr. Nass claims that the Board's Decision fails to meet the requirement that it is supported by findings of fact and conclusions of law detailed enough to permit Court review citing *Fair Elections*, 2021 ME 32, ¶ 34, 252 A.3d 504. That case is distinguishable because the municipality failed to make any stated findings of fact or conclusions of law to support its ultimate decision. *Fair Elections,* 2021 ME 32, ¶ 36, 252 A.2d 504. Furthermore, *Fair Elections* does not address any issue related to an administrative agency's imposition of sanctions.

Dr. Nass's attempt to buttress her argument by proclaiming that she "prevailed" on issues that took up substantial hearing time is disingenuous. (Br. 31.) First, 14 M.R.S. § 1501 (2004) allowing prevailing parties to be awarded costs has no application to an administrative proceeding and no similar provision exists in MAPA. Second, the Board reasonably exercised its discretion in imposing sanctions where it found multiple violations falling under 8 categories.[21] (R. 000013-18.) Third, Dr. Nass's argument would reward a party and enable them to avoid costs simply by engaging in tactics that prolong the administrative hearing.

The Board is permitted by statute to impose a range of sanctions on a licensee who is found to have violated its statutes or rules. 10 M.R.S. §§ 8003(5), 8003-D; 32 M.R.S. § 3282-

[21] The Board found no violations for five categories, two of which included her failure to respond to complaints and subpoenas. (R. 000016, 757-759.)

A(1). Where, as here, the "agency's decision was committed to the reasonable discretion of the agency, the party appealing has the burden of demonstrating that the agency abused its discretion in reaching the decision." *Forest Ecology Network v. Land Use Regul Comm'n*, 2012 ME 36, ¶ 28, 39 A.3d 74 (citation omitted). An agency abuses its discretion where it "exceed[s] the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law." *Id.* The assessment of actual expenses pursuant to 10 M.R.S. § 8003-D requires the Board to exercise its discretion reasonably in determining an assessment of costs. *Zegel v Bd. of Soc Worker Licensure*, 2004 ME 31, ¶ 19, 843 A.2d 18. Petitioner has not argued that the Board abused its discretion and has cited only to the distinguishable *Fair Elections* case. However, the Board did not exceed the reasonable bounds of the options available to it when it opted to assess a portion of its actual expenses. The Board's reasonable exercise of its discretion to assess costs rests squarely on its findings.

The Board's findings support its Decision and assessment of costs to Dr. Nass, and the Decision contains the reasons why the Board imposed this sanction. *Narowetz*, 2021 ME 46, ¶ 22, § 259 A.3d 771. The Board found that Dr. Nass engaged in the practice of medicine in a way that was "unsafe for patients." (R. 000014.) Dr. Nass failed to escalate a patient's care in a manner that endangered the patient. (R. 000014-15.) Dr. Nass violated several Board rules and maintained inaccurate or incomplete medical records. (R. 00014-16.) And, Dr. Nass lied intentionally and unnecessarily to a pharmacist about a patient's care, "done without consideration of the impact to others, and was likely *intended to require the Board to take action against her*, given that [she] widely disseminated the fact..." (Emphasis added) (R. 000016.) The Board noted this alone "is difficult to redress through sanctions." *Id.* The Board found that Dr. Nass had the ability to pay costs of hearing and imposed half of the costs of hearing, up to a

maximum of $10,000.[22] The Board supported its assessment of costs to Dr. Nass with sufficient findings and reasonably exercised its discretion in imposing that sanction.

VII. Dr. Nass Failed to Develop Argument on Five Legal Issues and Has Waived those Issues.

Dr. Nass asserted five legal issues in her 80C Petition that she subsequently failed to develop legal argument to support in her Brief. Where an appellant only "briefly mentioned" an issue and appellant "neither supplied argument nor suggested a rationale in support of their position" the Court "appl[ied] the 'settled appellate rule' . . . that 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (quoting *U.S v Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)). The Law Court consistently deems waived issues that are merely listed with no further argument. *Lincoln v. Burbank*, 2016 ME 138, ¶ 39, 147 A.3d 1165; *see also State v. Peters*, 2024 ME 33, n. 5, 314 A.3d 290 (single sentence in brief cites the Maine Constitution to support an assertion, the argument was deemed "undeveloped and thus waived"); and *Capelety v. Estes,* 2023 ME 50, n. 4, 300 A.3d 817 (single sentence in a brief insufficient and argument deemed waived). An unbriefed issue is considered waived. *Aseptic Packaging Council v. State*, 637 A.2d 457, n. 4, (Me. 1994) (citing Field, McKusick & Wroth, 2 *Maine Civil Practice* § 75A.1 n. 3 (2d Ed.1970) ("An unbriefed point is treated as waived.").

Dr. Nass listed five legal issues in her 80C Petition that she failed to develop arguments or state rationales to support in her Brief. First, "the BOLIM erred by denying Dr. Nass's motions. . . including Dr. Nass's Motion to Apply the Clear and Convincing Evidence Standard, Motion to Dismiss, Motion to Recuse or, in the alternative Permit Oral Voir Dire, Motion to

[22] During Board deliberations, the Hearing Officer identified the types of costs typically included and volunteered that actual costs associated with her participation in the hearing would be near $20,000. (R 000690.)

Disqualify, and Motion for Disclosure." (Pet. ¶ 63.) Of the listed motions, Dr. Nass's Brief developed argument related only to the alleged errors in Dr. Gleaton's determination on Dr. Nass's Motion to Disqualify, to which Dr. Nass devoted an entire section. (Br. 22-25.) As a result, her challenges to the other motions are unsupported by even perfunctory argument and have been waived by Dr. Nass.

Second, the Petition asserted that BOLIM "violated Dr. Nass's due process rights by having private, ex parte communications with each other; in particular Dr. Gleaton and the Hearing Officer private communications about . . . the Motion to Disqualify." (Pet. ¶ 65.) Nowhere in her brief did Dr. Nass articulate any argument on these grounds and she waived this issue.

Third, Dr. Nass asserted in her Petition that

> BOLIM violated the First Amendment of the United States Constitution, article I, section 4 of the Maine Constitution, and the due process clauses of the state and federal constitution, because the BOLIM's decision to find violations and impose sanctions was motivated by a desire to retaliate against Dr. Nass for her speech.

(Pet. ¶ 67.) Among these assertions, Dr. Nass developed only the argument that the Board's conduct violated due process because of bias. (Br. 16-22.) Although Dr. Nass baldly asserted "that the record shows that the Board targeted Dr. Nass for publicly expressing viewpoints with which the Board disagreed" (Br. 17), she made that assertion solely as evidence of the Board's impermissible bias in violation of due process. The Brief made no argument that the Board violated her rights of free speech. All of the cases she cited in this section of the Brief are due process cases. (Br. 16, 20, 22.) Not a single case cited by Dr. Nass refers to either the First Amendment of the United States Constitution, or retaliation for First Amendment protected speech caselaw. Nor does she cite to article I, section 4 of the Maine Constitution or any Maine

Constitutional caselaw related to free speech. (Br. 16-22.) Accordingly, Dr. Nass's free speech arguments under both the U.S. and Maine Constitutions are waived.

Fourth, the Petition asserted "BOLIM violated Dr. Nass's due process rights . . . and her rights under the Maine Administrative Procedure Act, because it imposed multiple discipline for the same alleged conduct for failing to obtain an adequate medical history of each patient (Count II, Count IV, Count V, Count VII)." (Pet. ¶ 69.) Again, Dr. Nass developed no arguments on her theory of due process violations for imposing multiple discipline in her brief and she has waived any such arguments.

Finally, the Petition asserted that the sanctions imposed by BOLIM were unreasonable or unduly harsh compared to prior disciplinary actions by the Board. (Pet. ¶ 75.) Dr. Nass advanced no developed legal arguments or supporting rationale on this issue in her Brief. Instead, Dr. Nass referenced this issue solely as a bullet point purporting to establish a due process violation through bias. In support of this point, Dr. Nass cited without explanation to a prior Board Consent Agreement and Dr. Nass's own argument about that case from the administrative record. (Br. 19.) Dr. Nass developed no legal argument on this point and has waived the issue.

Because Dr. Nass failed to brief the five issues identified above and did not develop arguments or state a supporting rationale, Dr. Nass has waived those legal issues in this appeal.

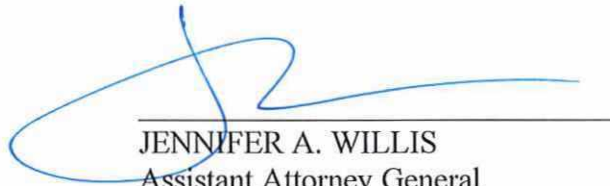
Conclusion

For the reasons stated above, the Board respectfully requests that the Court affirm the Board's December 12, 2023 Decision and Order.

Dated: October 17, 2024

Respectfully submitted,

AARON M. FREY
Attorney General



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