SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

| | |
|---|---|
| In the Matter of<br>JESSICA HUSEMAN,<br><br>Petitioner,<br><br>-against-<br><br>NEW YORK CITY DEPARTMENT OF EDUCATION,<br><br>Respondent.<br><br>For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules. | Index No. 151019/2016<br><br>Justice Cynthia Kern |

**REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S VERIFIED ARTICLE 78 PETITION**

Respectfully submitted,

Patrick Kabat
Dentons US LLP
1221 Avenue of the Americas
New York, NY 10020-1089
(212) 768-6700

Attorneys for Petitioner

Dated: New York, NY
April 12, 2016

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## INTRODUCTION

In her Petition, education reporter Jessica Huseman demonstrated that the New York City Department of Education ("Respondent" or "DOE") wrongfully withheld from her a host of public records in violation of the Freedom of Information Law, Pub. Off. Law § 84 *et seq.* ("FOIL"). Indeed, aside from producing a single spreadsheet in response to her First Request, the DOE made no effort, whatsoever, to process the Requests at issue before litigation commenced — neither in the months after the Requests were filed, nor after Ms. Huseman's half-year of entreaties, both informal and through FOIL's administrative appeal procedures, seeking to obtain responses. Her claims have been substantially vindicated by the DOE's strategic, post-Petition scramble to produce documents to her before its Answer came due, and its promises to produce still more wrongfully withheld records. Yet even now, the DOE continues to refuse to do what FOIL requires of it: determine whether to grant or deny access to requested records. Instead, its Answer makes specious legal arguments that this Court cannot or should not consider the very delays and noncompliance that made this lawsuit necessary in the first place, let alone the merits of the Requests. This Court should reject those arguments. By refusing to timely process the Requests or entertain Ms. Huseman's administrative appeals, the DOE has refused, point-blank, to fulfill its statutory obligations. Ms. Huseman respectfully requests that the Court decline the DOE's invitation to sanction such conduct, declare the DOE's dilatory practices contrary to law, and order that the remaining withheld documents be immediately produced.

## SUMMARY OF ARGUMENT

By the DOE's account, Ms. Huseman is a burdensome FOIL requestor who bothers this Court with proceedings for which she has already received substantial relief, and the DOE, in

contrast, is an overburdened agency that has nonetheless produced to her hundreds of thousands of records. This account is misleading and should not be permitted to conceal the central legal issues in this case, which the DOE largely sidesteps or ignores.

First, Ms. Huseman is not a vexatious requestor. She is an accomplished education reporter who seeks to report on serious issues that affect New York City residents who entrust their children to the DOE. The Requests at issue here seek certain records that would show how concerns that affect the most vulnerable school children are addressed by the DOE. Second, contrary to the DOE's suggestions, while it has produced two spreadsheets in response to Ms. Huseman's Requests, it still has neither produced nor claimed exemptions for a substantial number of responsive public records. Third, it practically ignored the Requests until review by this Court was imminent.

The DOE's account ignores a key reason this Petition became necessary. According to the DOE, an agency can ignore its statutory responsibility to provide requestors with a meaningful estimation of the time of completion and may instead issue serial, *pro forma* "extension" letters endlessly promising, violating, and re-promising meaningless response dates. Further, according to the DOE, an agency may refuse to consider any administrative appeal regarding the reasonableness of such ever-expanding delays on the basis of those very form letters, rather than agreeing or disagreeing that the delay is "reasonable under the circumstances of the request," as FOIL requires. *See* N.Y. Pub. Off. Law § 89(3)(a). Indeed, in this proceeding, the DOE continues to maintain that it is permitted to endlessly extend its time to respond to FOIL requests by issuing *pro forma* extension letters, and that as long as it continues to issue them, there can be no constructive denial and, consequently, no appeal.

Now, the DOE asks this Court to conclude that such conduct is not subject to judicial review, by asserting that Ms. Huseman's Petition is moot because it has produced some documents and promised to produce others, and by claiming that Ms. Huseman is not entitled to declaratory relief. These arguments are contrary to law and underscore both the availability and the importance of declaratory relief. Absent declaratory relief, the DOE's unlawful practice of placing FOIL Requests it does not wish to process — or does not wish to process with the "reasonable" diligence required of it —in administrative limbo will persist, and FOIL requestors without the means or resources to engage counsel will remain entirely at the mercy of the optional compliance regime the DOE has created.

In short, the fact that the DOE scrambled to process some of Ms. Huseman's requests *after* she filed this lawsuit is not something for which it should be rewarded. Nor is it relevant to the live legal issues that remain in this case, including the swaths of documents the DOE continues to unlawfully withhold. Even if the DOE could now establish some valid excuse for its repeated delays, which it cannot, its attempt to insulate the reasonableness of its actions from the administrative and judicial review required by FOIL are clearly contrary to law. This lawsuit was necessary to obtain improperly withheld records, many of which tumbled forth shortly after it was evident that the DOE's withholdings would be subject to judicial scrutiny. The relief requested by Ms. Huseman, including an award of attorney's fees and costs, will help to ensure that the DOE does not gamble on the relative rarity of a FOIL requestor's access to representation to ignore statutory timeliness requirements until challenged in court.

## ARGUMENT

### I. THE PETITION IS NOT MOOT.

As a threshold matter, this Court should reject the DOE's flimsy attempts to prevent it from even addressing the DOE's unlawful FOIL practices. The DOE asserts that the Petition is

moot to the extent it seeks review of the constructive denials of the Second, Third, and Fourth Requests because the DOE "has either produced to Petitioner the documents she seeks or has committed to producing them." Resp't's Mem. of Law in Support of its Verified Answer at 11-12 (hereinafter "DOE Mem."). But a mere promise to produce records in response to a FOIL request has no effect. Rather, the agency must "demonstrate that it *in fact provided* petitioner with the records responsive to [her] FOIL request." *Sowell v. New York City Police Dep't*, 292 A.D.2d 187, 188 (1st Dep't 2002) (emphasis added). Even in *Newton v. Police Dep't of New York*, which the DOE cites in support of its claim that the Petition is moot, *see* DOE Mem. at 14, the First Department recognized that the portion of the petitioner's claim for which the respondent had not actually produced records was not moot. 183 A.D. 621, 624 (1st Dep't 1992) (ruling on the merits of the petitioner's FOIL request for which respondents had produced no responsive records).

It is undisputed that the DOE has not produced a single record in response to the Fourth Request and has produced only one of four records requested by the Third Request. The Petition is not moot to the extent that it seeks review of the constructive denial of those requests. *See Sowell*, 292 A.D.2d at 188; *Coleman v. New York City Police Dep't*, 282 A.D.2d 390 (1st Dep't 2001) (petition is not moot where agency turned over only some, but not all, of the records sought in a FOIL request).

The Petition also is not moot as it relates to the Second Request.[1] Concededly, *after* Ms. Huseman commenced the instant proceeding, the DOE did produce a record responsive to the Second Request, and Ms. Huseman does not challenge the adequacy of that response. However, her Petition seeks not only an order to compel the DOE to comply with the Second Request but

[1] The DOE does not claim that the Petition is moot as to the First Request.

also a judgment declaring that the DOE's practice of issuing serial denial letters and refusing to provide substantive administrative review from unreasonable delays and improper denials is unlawful. The production of records responsive to the Second Request does not moot Ms. Huseman's claim for declaratory relief as it relates to the Second Request, and the DOE cites no authority to support such a proposition.

Moreover, even assuming *arguendo* that the Petition is moot as it relates to any of the Requests, this proceeding falls within an exception to the mootness doctrine because it "presents a 'substantial or novel [issue], likely to recur and capable of evading review.'" *Hearst Corp. v. City of Albany*, 88 A.D.3d 1130, 1131 (3d Dep't 2011) (alteration in original) (quoting *City of New York v. Maul*, 14 N.Y.3d 499, 507 (2010)). First, it is likely that the issue presented here will recur in the future, as the DOE maintains that it is entitled to issue serial extension letters, *ad infinitum*, in response to FOIL requests. *See* Verified Pet. at Exhibit 14 (hereinafter "Pet.") (denying Ms. Huseman's administrative appeal and stating that her requests were not constructively denied because the extension letters extended the reasonable approximate date by which the requests would be determined); *see also Hearst Corp.*, 88 A.D.3d at 1131 ("Respondent continues to maintain that the requested records are exempt from disclosure, making it likely that the issues presented here will recur in the future."); *Laborers' Intern. Union of North America v. New York State Dep't of Transp*., 280 A.D.2d 66, 69 (3d Dep't 2001) (agency's "longstanding practice" suggests great likelihood of repetition).

Second, the DOE's strategic post-litigation release of documents justifies the inference that the DOE is simply seeking to avoid a court ruling on the lawfulness of its extension letter practices and will strive to ensure that this issue continues to evade review, rendering a mootness disposition inappropriate. *See Hearst Corp.*, 88 A.D.3d. at 1131; *Laborers' Intern. Union*, 280

A.D. 2d at 69 (finding an issue is capable of evading review where agency is "in a position to almost invariably render a proceeding moot, just as it did in [that] case"). Tellingly, the DOE has attempted to do so in part by concealing the extent to which it made belated partial productions only *after* Ms. Huseman filed this Petition.

Contrary to its claim that it has engaged in "ongoing efforts to diligently respond" to Ms. Huseman's FOIL requests, DOE Mem. at 2,[2] the DOE only hastened to provide substantive responses *after* this litigation commenced. For example, the Second Request was pending for eight months, and the DOE had ceased even to send its *pro forma* extension letters by October 2015. After the DOE's September 2015 extension letter, Ms. Huseman received no further information about the status of the Second Request until this lawsuit was filed, when the DOE provided yet another extension letter, and finally, on February 19, 2016, the responsive documents that form the basis of its mootness argument. Likewise, the Fourth Request has been pending for over six months, during which time Ms. Huseman has received five extension letters from the DOE, each promising a response the next month that never came. Now that litigation has commenced the DOE has, through counsel, promised to produce records by April 29, 2016 and proffers that latest assurance as grounds for a mootness disposition. *See* DOE Mem. at 11–12. And the Third Request has been pending for over nine months, during which time Ms. Huseman has received eight extension letters from the DOE. However, it was only after Ms. Huseman initiated this proceeding that the DOE provided a partial response, just one of the four requested records. The DOE now uses its ninth production date (May 13, 2016, over ten months after the Third Request was filed) as the basis for its mootness claim. *Id.* The DOE's suggestion

[2] Also tellingly, the DOE has produced no records at all in response to the Fourth Request for correspondence pertaining to Ms. Huseman's FOIL requests, records which would not only reveal the extent to which the DOE gave any meaningful pre-litigation attention to the Requests, but are also among the most readily retrieved and easily produced.

that it was working diligently to respond to the Requests prior to the filing of the Petition is belied by the record, which shows, on the contrary, that the DOE has attempted — and can be expected to continue to attempt — to evade judicial review of its actions.

Third, although existing case law and the plain language of FOIL indicates that the DOE's serial extension letter practice violates FOIL, *see* Section III, *infra*, the issue has not been squarely presented to New York courts. Accordingly, Ms. Huseman's Petition presents a substantial issue upon which there is no authoritative guidance that implicates the important public policy underlying FOIL, *i.e.*, granting the public access to government records. *See Hearst Corp.*, 88 A.D.3d. at 1131; *Laborers' Intern. Union*, 280 A.D. 2d at 69. Accordingly, even assuming *arguendo* that the Petition might be deemed partially moot in relation to the Requests, the Court should consider the merits of Ms. Huseman's claims, including her claim for declaratory relief, under this exception to the mootness doctrine.

## II. DECLARATORY RELIEF IS AVAILABLE.

The DOE's second gambit to avoid a Court ruling on its extension letter practice is its attack on available remedies. The DOE argues that Ms. Huseman is not entitled to declaratory relief because, it claims, "the exclusive remedy available in an Article 78 proceeding brought pursuant to FOIL is judicial determination of the denial or constructive denial of the requested records." DOE Mem. at 15. But Article 78 provides for broad remedies, *see* CPLR § 7806 (a judgment under Article 78 "may grant the petitioner the relief to which he is entitled"), and courts have not hesitated to award declaratory relief to Article 78 petitioners where warranted. *See, e.g., Johnson Newspaper Corp. v. Call*, 115 A.D.2d 335 (4th Dep't 1985) (converting Article 78 proceeding to a declaratory judgment action and declaring that disclosure of a "releasable copy" of reports of offenses prepared by the sheriff's office may not be withheld pursuant to the exemption in FOIL for unwarranted invasion of personal privacy); *Perez v. City*

*Univ. of New York*, 753 N.Y.S.2d 641, 654–55 (Sup. Ct. Bronx Co. 2002) (declaring that college senate and executive committee are agencies performing governmental functions within the meaning of FOIL and that respondents violated FOIL by voting by secret ballot), *aff'd Perez v. City Univ. of New York*, 5 N.Y.3d 522 (2005); *Quick v. Evans*, 455 N.Y.S.2d 918 (Sup. Ct. N.Y. Co. 1982) (holding that the Office of Court Administration ("OCA") is subject to FOIL in an Article 78 proceeding seeking "a declaration" that the OCA is subject to FOIL).

Moreover (and ignored by the DOE) this Petition expressly seeks relief pursuant to both Article 78 *and* CPLR 3001, distinguishing the instant proceedings from the Article 78 proceeding cited by the DOE in support of its argument that declaratory relief is unavailable. *See* DOE Mem. at 16 (citing *New York Times Co. v. City of New York Police Dep't*, 103 A.D.3d 405 (1st Dep't 2013)). In *New York Times*, the First Department specifically noted that the petitioners had failed to properly perfect a petition for hybrid FOIL and declaratory relief. 103 A.D. at 407. Here, by contrast, Ms. Huseman obviated any need for the Court to consider whether any portion of this action would need to be converted into a declaratory judgment action pursuant to CPLR §103(c) by properly pleading a hybrid petition, *see* Pet. at ¶¶ 1, 6, invoking the CPLR's guarantee that this Court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy"—that is, whether Ms. Huseman's statutory rights to a meaningful "date certain," timely responses, and to consideration of her administrative appeals by the DOE were violated by the DOE's extension letter practices—"whether or not further relief is or could be claimed." CPLR 3001; *see also* Practice Commentary C3001:14 ("The practitioner [seeking declaratory relief] with a choice between an action and special proceeding would usually do best to opt for the proceeding because of its facile and quick procedure."). Moreover, this Court (Stone, J.) recently concluded

that declaratory relief is also available to Article 78 petitioners by hybrid actions and serves the interests of judicial efficiency. *See Price v. New York City Bd. of Educ*., 16 Misc. 3d 543, 548 (Sup. Ct. N.Y. Co. 2007).

The only other authority the DOE proffers is an unreported disposition from Nassau County that has no bearing here. *Newsday LLC v. Nassau Cty. Police Dep't*, No. 8172/13, 2014 N.Y. Slip Op. 50044(U) (Sup. Ct. Nassau Co. Jan. 16, 2014). Unlike *Newsday*, declaratory relief in this case would not be "essentially . . . redundant" of an order compelling the DOE to release responsive documents. *Newsday*, 2014 N.Y. Slip Op. 50044(U) at *9. By itself, an order compelling the DOE to produce records to the First, Second, Third, and Fourth Requests will not address the DOE's violations of its statutory duties by issuing serial extension letters, denying that such serial extensions amount to constructive denials under FOIL, and declining to entertain administrative appeals. The DOE has shown that it intends to continue these practices in the future when responding to FOIL requests filed by Ms. Huseman and other members of the public, *see* DOE Mem. at 16–17 (arguing that the use of serial extension letters is lawful under FOIL), but those requestors—and indeed Ms. Huseman herself—will not always have the resources to do what Ms. Huseman has done: engage counsel, file an Article 78 petition, and obtain some documents, however belated and incomplete, as settlement overtures or mootness gambits. A declaration that these practices violate FOIL is the only adequate remedy to the harm caused by otherwise irremediable agency practices and would not be redundant of other relief.

## III. MS. HUSEMAN IS ENTITLED TO DECLARATORY RELIEF.

The DOE's practices of issuing rote, serial extension letters and refusing to entertain administrative appeals challenging the reasonableness of the period the agency claims to need to process FOIL requests is unlawful. It should be instructed as much.

The DOE's claim that it may issue an unlimited number of letters extending its time to respond to requests, DOE Mem. at 17–18, contradicts FOIL's clear requirement that an agency that cannot provide its response to a FOIL request within five business days must provide "*a* statement of *the* approximate date, which must be reasonable under the circumstances," within which the request must be granted or denied. *See* N.Y. Pub. Off. Law § 89(3)(a) (emphasis added). This provision requires an agency to evaluate requests and make a *meaningful* initial determination of how long it will actually need to respond. FOIL also provides that an agency will grant access to requested records but cannot do so within twenty days may provide a *single*, reasonable "date certain" within which it will grant access to some or all of the records. *Id.* Thus, the DOE's simple assertion that "[n]othing in the language of the FOIL statute prohibits an agency from revising the date by which it anticipates providing a response to a FOIL request," DOE Mem. at 16, is belied by the statutory language, which, by its plain terms limits the number of extensions an agency may grant itself in responding to requests. This requirement, embedded in a statute that must be construed in all cases of ambiguity in favor of the public's right of access, would serve no purpose at all if an agency could simply reissue dates at will.

Likewise, the "reasonableness" component would have no meaning or purpose whatsoever if it was unappealable. Incredibly, however, the DOE claims this as well, insisting that as long as it continues to issue monthly "extensions," administrative review of the reasonableness of the serialized, mounting delays is precluded because the request has not yet been granted or denied — that is, because the delay is continuing. This argument is circular and directly undermines the structure and purpose of FOIL, which contains constructive denial provisions both at the response and administrative appeal levels precisely to ensure that administrative remedies are not unavailable when an agency refuses to provide a substantive

response. *See* N.Y. Pub. Off. L. § 89(4)(a) (violations of timeliness requirements, including the reasonableness of the allotted extension or the reasonableness of the date certain "date certain" with a written explanation why that date is reasonable under the circumstances of the request, "shall constitute a denial" subject to administrative appeal). To accept the DOE's argument would be to turn the presumption created by FOIL on its head and permit an agency that issues unjustified monthly extension letters to avoid, at least with regard to all requesters who lack the resources to file a lawsuit, its most basic obligation under FOIL: to respond. Worse, to accept the DOE's argument would permit it to permanently deny a request with impunity: as long as the letters continue to issue, a request is unappealable; as long as there has been no appeal, administrative remedies have not been exhausted and there is no judicial review. This cannot be.

In its response papers, the DOE makes no attempt to comport its practice[3] with FOIL's statutory language regarding single extensions, nor its constructive denial provisions. Instead, it generally claims that unilateral, serial extension letters have been universally blessed by the First Department in *Advocates for Children of New York, Inc. v. New York City Dep't of Educ.*, 101 A.D.3d 445 (1st Dep't 2012). They have not.

In *Advocates for Children*, the First Department found only that an administrative appeal was premature where respondents' efforts to respond to the request "within the applicable time limitations" was "ongoing." 101 A.D.3d at 446; *see also Gianella v. Port Auth. of New York and New Jersey*, 998 N.Y.S.2d 306 (Sup. Ct. N.Y. Co. 2014) (same). Here, however, in every Request to which the DOE interposes this objection, the record reflects that the DOE made no

[3] Or its regulations, DOE Mem. at 19, through which the DOE asserts it has interpreted FOIL's provisions regarding constructive denials to provide that a requester may consider a request constructively denied if she "is neither granted nor denied access to records within the limits set forth above or in the acknowledgment letters or any extension letter(s)," DOE Mem. at 18-19. This construction is contrary to the plain language of FOIL as described above and, as a result, is not entitled to deference.

efforts to respond to Ms. Huseman's requests, save its issuance of rote extension letters, until after this lawsuit was filed.

To begin with, DOE conspicuously fails to allege that it made any such efforts before litigation commenced. Although Joseph Baranello describes, generally, the actions needed to respond to the Second, Third, and Fourth Requests, *see* Aff. of Joseph Baranello in Support of Resp't's Verified Answer (hereinafter "Baranello Aff.") at ¶¶ 34, 41, 49, he does not say if or when the DOE undertook them; much less that he examined particular documents around a particular date and discovered a particular difficulty that would require a delayed response. Indeed, the only actions specifically attributable to pre-Petition conduct are his averments that he estimated how long a particular Request would take to process. But the mechanical regularity of his extension letters, each extending the estimated response time by one additional month, belies any assumption that this reflects a diligent effort to actually process and release documents in response to the request. Baranello Aff. at ¶¶ 12, 34, 42, 49.

Instead, the DOE relies on an exaggerated account of the extent to which it has responded to Ms. Huseman's requests, misleadingly claiming that it has produced hundreds of thousands of records.[4] *See* Baranello Aff. at ¶ 7. Again, however, prior to this lawsuit, the DOE provided a single record in response to the requests at issue in this proceeding: an Excel spreadsheet in response to the First Request with approximately 2,900 rows of information, *see* Pet. at Exhibit 5. Only after Ms. Huseman filed a lawsuit did the DOE provided meaningful responses to the Second and, in part, Third Requests: producing a single record in response to the Second

[4] To be clear, the DOE's claim that it has released many thousands of responsive "records" is patently misleading. It counts *each cell* in a spreadsheet as a separate record, notwithstanding that they are often a single word, and readily assembled for production *en masse* with the touch of a single button. Thus, when the DOE asserts it has produced 2,900 records in response to the First Request, it is referring to a single spreadsheet.

Request, a PDF chart listing different technology purchased by the DOE, *see* Baranello Aff. at ¶ 36, and a single record in response to one of four records sought by the Third Request, an Excel spreadsheet with approximately 989 rows of information, *see* Baranello Aff. at ¶ 44. The fact that each of these three records contains many entries does not mean that the DOE produced thousands of records to Ms. Huseman. Rather, the DOE produced three records with many rows of data.

Further demonstrating the absence of any ongoing effort to respond to the Requests prior to the instant proceeding, over an attenuated correspondence and throughout several administrative appeals, the DOE said *nothing* about any delays, difficulties, or indeed anything that reflected even a glancing encounter with the requested records. The only communications Ms. Huseman received from the DOE regarding the Second, Third, and Fourth Requests were repeated *pro forma* extension letters and denials of the administrative appeals of the constructive denials of the requests. *See* Pet. at Exhibits 4, 8, 11, 13, 14, 19, 22, and 23. And when Ms. Huseman's administrative appeals challenged the delays as unreasonable, and her counsel called to enquire about the cause, the DOE said nothing.

*Advocates for Children* is also inapplicable because the respondents' efforts to respond to the request at issue in that case were "within the applicable time limitations." 101 A.D.3d at 446. That makes sense: ultimately, if an agency came across a genuinely unexpected difficulty, it could revise its request to accommodate this difficulty without offending FOIL, because the overarching "time limitation" supplied by FOIL, that is, that the response issue by a date that is "reasonable under the circumstances of the request," would still be running. N.Y. Pub. Off. Law § 89(3)(a). However, the DOE failed to indicate anything to that effect, has failed to aver anything to that effect, and all available evidence suggests that the accumulated delays for the

production of spreadsheets and readily retrieved emails are *not* reasonable under the circumstances of these requests. *See* Mem. In Support of Verified Petition at 10–12, 16–17 (hereinafter "Pet'r Mem."). The DOE cannot refute these arguments. Instead, it now defends its delays by arguing for the first time that it suffers under a burdensome FOIL workload as a result of Ms. Huseman's submission of eight FOIL requests over a five-month period (four of which she does not challenge here) and the receipt of 78 more FOIL requests, overall, in 2015 than in 2014. *See* DOE Mem. at 2, 12; Baranello Aff. at ¶¶ 4–5. But if, as Baranello avers, he devoted good consideration to the length of time required to process the Requests, and each time required only an additional month or so, these claims of a burdensome FOIL workload cannot justify nine- and six-month delays in respond to the Requests, which continue even now, despite a two-month Answer extension.

Furthermore, the DOE has not responded to Ms. Huseman's arguments that the records she seeks are of the type commonly kept, are readily accessible by the DOE, and cannot typically be withheld under FOIL. *See* Pet'r Mem. at 10–11, 17. The DOE produced records responsive to the Second Request only eleven days after this lawsuit was filed. The Fourth Request is similarly straightforward, seeking only emails about Ms. Huseman's FOIL Request that, logically, should be in the possession of a small number of DOE employees and easily retrievable from designated correspondence files and indexed by reference number. Finally,[5] the records sought by the Third Request are also easily located and are not, on their face, exempt from disclosure under FOIL, *see* Pet'r Mem. at 10–11. The DOE simply provides no basis for the Court to find, under the circumstances of the individual requests *before this lawsuit was filed*,

[5] The DOE's response to the First Request in addressed in section IV., *infra*.

that the delay in responding to the Second Request, and the continued delay in responding to the Third and Fourth Requests, was or is reasonable.

Because the DOE's efforts to respond to the Requests were neither within FOIL's time limitations nor part of an ongoing effort to respond to the Requests, *Advocates for Children* is inapplicable and does not shield the DOE's practices of issuing serial extension letters and refusing to entertain administrative appeals as to the reasonableness of delays. The Court should declare these practices contrary to FOIL.

## IV. THE DOE HAS IMPROPERLY WITHHELD PORTIONS OF THE RECORD RESPONSIVE TO THE FIRST REQUEST.

Finally, the DOE argues that it has properly withheld portions of the record it released in response to the First Request that are related to the nature of complaints to the Special Education Call Center, and the action taken by the DOE to address each, because it is prohibited from releasing that information under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. *See* DOE Mem. at 4–7. The DOE also argues that redacting students' personally identifiable information from these portions of the requested record would be unreasonably burdensome. *Id.* at 7–11. Effectively, the DOE attempts to make the FERPA molehill into a sufficiently forbidding mountain that it would seem unreasonable to expect the agency even to attempt compliance.

The DOE, however, does not cite a single FERPA case in support of its position, which is, charitably put, unique. The Supreme Court of Ohio recently rejected a similar claim where the agency withheld records in full on the basis of concerns that, even with redactions, individual students could be identified, holding *inter alia* that a document containing a person's request to obtain a disability-insurance policy on behalf of a student-athlete, NCAA eligibility compliance plans for individual students, and letters to parents involving issues of preferential treatment

must all be produced as redacted for names and addresses. *ESPN v. Ohio State Univ.*, 970 N.E.2d 939, 947–48 (Ohio 2012).

Furthermore, the DOE has its regulations wrong, and misidentifies certain information as FERPA-implicating personally identifiable information ("PII"). PII includes "information that would allow a reasonable person in the school community, *who does not have personal knowledge of the relevant circumstances*, to identify the student with reasonable certainty." 34 C.F.R. § 99.3 (emphasis added). Nonetheless, the DOE claims that facts about a students' disability, services received, grade level, teacher names, and service provider names is PII. But in many if not all cases, such information would identify a student only to individuals in the school community who *already have* personal knowledge of the student's circumstances, rendering it, by definition, *not* PII. *Id.*

The DOE's estimate of the time necessary to redact the requested record is based on an overly broad definition of PII that results in an overestimate of the time and effort required to complete the redactions.[6] Student and parent names, dates of birth, student ID numbers, home addresses, home phone numbers, and very unique disability or service information may constitute PII. But the redaction of this information is a relatively simple task that does not require specialized knowledge of a particular school to complete: a reviewer need not be a community member to know what a name, an ID number, or a unique disability is. Thus,

[6] DOE for the first time states that it intends to charge Ms. Huseman for the cost of manually redacting the Special Education Call Center record. DOE Mem. at 11, n.2. But manual redaction of a record is not part of the "preparation" of a record and cannot be charged to the requester. *See* FOIL-AO-19021 (May 15, 2013). An agency may only charge if it employs an efficient, automated, and *en masse* method, but the DOE avers redaction can only be completed by its personnel. *See* FOIL-AO-17606 (Mar. 31, 2009) ("Given the time-saving capabilities of software that could search for, locate, and redact [specified information] . . . the law permits an agency to recover costs to redact records in this manner.").

redacting information that is actually PII from the Special Education Call Center record would not be an undue burden.

## V. MS. HUSEMAN IS ENTITLED TO AN AWARD OF LEGAL COSTS AND FEES INCURRED IN OBTAINING COMPLIANCE WITH FOIL.

The DOE claims that the issue of attorneys' fees is premature. DOE Mem. at 19. Certainly amounts cannot be calculated at present if an award is deemed appropriate, but for the reasons stated in the Petition and Memorandum in Support of the Petition, Ms. Huseman is entitled to an award of reasonable legal fees and costs under FOIL. *See* N.Y. Pub. Off. Law § 89(4)(c)(i) & (ii). After Ms. Huseman initiated this proceeding, the DOE provided a record responsive to the Second Request and a record partially responsive to the Third Request, confirming that the DOE had no reasonable basis for withholding these records in their entirety during the more than eight months that the Second and Third Requests were left unresponded to. *See also Powhida v. City of Albany,* 147 A.D.2d 236, 239 (3d Dep't 1989) (attorneys' fees may be awarded under FOIL when the initiation of an Article 78 proceeding brings about the release of documents).

In addition, the record is sufficiently developed for the Court to determine that the DOE has engaged in repeated and unnecessary delays, and has demonstrated no reasonable basis for continuing to withhold part of the record responsive to the First Request, other records responsive to the Third Request, or records responsive to the Fourth Request. *See Matter of the Exoneration Initiative v. New York City Police Dep't*, Index No. 102688/12 (Sup. Ct. N.Y. Co. June 11, 2013) (awarding attorneys' fees where agency engaged in "unnecessary delays"). Accordingly, Ms. Huseman respectfully submits that an award of attorneys' fees and legal costs in an amount to be determined by the Court could be appropriately entered at this time. *See Matter of West Harlem Bus. Group v. Empire State Dev. Corp.*, 13 N.Y.3d 882, 884 (2009)

(noting that litigation "could have been avoided, or significantly limited had [the agency] in the first instance complied with the dictated of FOIL").

## CONCLUSION

For the foregoing reasons, Ms. Huseman respectfully requests that this Court: (1) grant Ms. Huseman's Article 78 Petition and compel the DOE to release documents responsive to Petitioner's FOIL requests by April 20, 2016; (2) declare the DOE's practice of issuing serial extension letters and refusing to provide substantive administrative review from unreasonable delays and improper denials through the serial issuance of improper extension letters to be unlawful; and (3) award Ms. Huseman litigation costs, including attorneys' fees, together with such other and further relief the Court deems just and proper.

Dated: April 12, 2016

Respectfully submitted,

DENTONS US LLP

By: */s/* Patrick Kabat
Attorneys for Petitioner

Patrick Kabat
Dentons US LLP
1221 Avenue of the Americas
New York, NY 10020-1089
Phone: (212) 768-6700

*Of Counsel:*
Katie Townsend, Litigation Director
Caitlin Vogus, Stanton Litigation Fellow
The Reporters Committee for Freedom of the Press
1156 15th St. NW, Suite 1250
Washington, DC 20005
Phone: (202) 795-9300
Fax: (202) 795-9303

*Attorneys for Petitioner Jessica Huseman*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

| | |
|---|---|
| In the Matter of<br>JESSICA HUSEMAN,<br><br>Petitioner,<br><br>-against-<br><br>NEW YORK CITY DEPARTMENT OF EDUCATION,<br><br>Respondent.<br><br>For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules. | Index No. 151019/2016<br><br>**AFFIDAVIT OF SERVICE** |

STATE OF NEW YORK )
)
COUNTY OF NEW YORK )

I hereby certify that on this 12th day of April, 2016, a true and correct copy of **REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S VERIFIED ARTICLE 78 PETITION** was served via the Court's electronic filing system on all parties requiring notice:

Zachary W. Carter
Joshua C. Wertheimer
Corporation Counsel of the City of New York
100 Church Street
Room 2-305
New York, NY 10007

/s/ Patrick Kabat
Patrick Kabat