

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

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In the Matter of

JESSICA HUSEMAN,

Petitioner,

VERIFIED ANSWER

Index No. 151019/2016

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent.

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Respondent New York City Department of Education (DOE), by its attorney, Zachary W. Carter, Corporation Counsel of the City of New York, by and for its Verified Answer to the Verified Petition dated February 8, 2016, respectfully alleges as follows:

1. Denies the allegations set forth in paragraph “1” of the Petition, except admits that Petitioner purports to bring this proceeding as stated therein, and respectfully refers the Court to the Article and statutes cited therein for a complete and accurate statement of their provisions.

2. Denies the allegations set forth in paragraph “2” of the Petition.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “3” of the Petition.

4. Denies the allegations set forth in paragraph “4” of the Petition, except admits that DOE is an “agency” within the meaning of Public Off. Law § 86(3) and that DOE has an office located at 52 Chambers Street, New York, NY 10007, and respectfully refers the

Court to the statutes and bylaws cited therein for a complete and accurate statement of their provisions.

5. Denies the allegations set forth in paragraph “5” of the Petition, and respectfully refers the Court to Petitioner’s first, second, and third FOIL requests, Petitioner’s administrative appeal of those requests, and DOE’s responses to Petitioner’s administrative appeal for a complete and accurate statement of their contents.

6. Denies the allegations set forth in paragraph “6” of the Petition, except admits that Petitioner seeks to invoke the jurisdiction of the Court as stated therein, and respectfully refers the Court to the Article and statutes cited therein for a complete and accurate statement of their provisions.

7. Denies the allegations set forth in paragraph “7” of the Petition, except admits that Petitioner purports to lay venue in New York County as stated therein, and respectfully refers the Court to the statutes cited therein for a complete and accurate statement of their provisions.

8. Denies the allegations set forth in paragraph “8” of the Petition, and respectfully refers the Court to the correspondence referred to therein and annexed to the Petition as Exhibit 1 for a complete and accurate statement of its contents.

9. Denies the allegations set forth in paragraph “9” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 2 for a complete and accurate statement of its contents.

10. Denies the allegations set forth in paragraph “10” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 3 for a complete and accurate statement of its contents.

11. Denies the allegations set forth in paragraph “11” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 13 for a complete and accurate statement of its contents.

12. Denies the allegations set forth in paragraph “12” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 4 for a complete and accurate statement of its contents.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “13” of the Petition.

14. Denies the allegations set forth in paragraph “14” of the Petition, except admits that DOE responded to the First Request on September 14, 2015, and respectfully refers the Court to the letter and spreadsheet referred to therein and annexed to the Petition as Exhibit 5.

15. Denies the allegations set forth in paragraph “15” of the Petition, and respectfully refers the Court to the correspondence referred to therein and annexed to the Petition as Exhibit 6 for a complete and accurate statement of its contents.

16. Denies the allegations set forth in paragraph “16” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 7 for a complete and accurate statement of its contents.

17. Denies the allegations set forth in paragraph “17” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 8 for a complete and accurate statement of its contents.

18. Denies the allegations set forth in paragraph “18” of the Petition, and affirmatively states that DOE produced to Petitioner records responsive to the Second Request on February 19, 2016.

19. Denies the allegations set forth in paragraph “19” of the Petition, and respectfully refers the Court to the correspondence referred to therein and annexed to the Petition as Exhibit 9 for a complete and accurate statement of its contents.

20. Denies the allegations set forth in paragraph “20” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 10 for a complete and accurate statement of its contents.

21. Denies the allegations set forth in paragraph “21” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as part of Exhibit 11 for a complete and accurate statement of its contents.

22. Denies the allegations set forth in paragraph “22” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as part of Exhibit 11 for a complete and accurate statement of its contents.

23. Denies the allegations set forth in paragraph “23” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as part of Exhibit 11 for a complete and accurate statement of its contents.

24. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “24” of the Petition.

25. Denies the allegations set forth in paragraph “25” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as part of Exhibit 11 for a complete and accurate statement of its contents.

26. Denies the allegations set forth in paragraph “26” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as part of Exhibit 11 for a complete and accurate statement of its contents.

27. Denies the allegations set forth in paragraph “27” of the Petition, except admits that Petitioner submitted an administrative appeal of DOE’s response to the First Request and of DOE’s alleged constructive denial of the Second and Third Requests on September 18, 2015, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 12 for a complete and accurate statement of its contents.

28. Denies the allegations set forth in paragraph “28” of the Petition, except admits that DOE denied Petitioner’s administrative appeal of its response to the First Request on October 7, 2015, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 13 for a complete and accurate statement of its contents.

29. Denies the allegations set forth in paragraph “29” of the Petition, except admits that DOE denied Petitioner’s administrative appeal of DOE’s alleged constructive denial of the Second and Third Requests on October 7, 2015, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 14 for a complete and accurate statement of its contents.

30. Denies the allegations set forth in paragraph “30” of the Petition.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “31” of the Petition, and respectfully refers the Court to the document referred to therein and annexed to the Petition as Exhibit 15 for a complete and accurate statement of its contents.

32. Denies the allegations set forth in paragraph “32” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 16 for a complete and accurate statement of its contents.

33. Denies the allegations set forth in paragraph “33” of the Petition, except admits that Mr. Baranello and Petitioner’s counsel did not speak between October 30, 2015 and November 2, 2015.

34. Denies the allegations set forth in paragraph “34” of the Petition, and respectfully refers the Court to the correspondence referred to therein and annexed to the Petition as Exhibit 17 for a complete and accurate statement of its contents.

35. Denies the allegations set forth in paragraph “35” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 18 for a complete and accurate statement of its contents.

36. Denies the allegations set forth in paragraph “36” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 19 for a complete and accurate statement of its contents.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “37” of the Petition.

38. Denies the allegations set forth in paragraph “38” of the Petition, except admits that Petitioner submitted an administrative appeal of the alleged constructive denial of the Fourth Request on January 22, 2016, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 20 for a complete and accurate statement of its contents.

39. Denies the allegations set forth in paragraph “39” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 21 for a complete and accurate statement of its contents.

40. Denies the allegations set forth in paragraph “40” of the Petition, except admits that DOE denied Petitioner’s administrative appeal of the alleged constructive denial of the Fourth Request on February 5, 2016, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 22 for a complete and accurate statement of its contents.

41. Denies the allegations set forth in paragraph “41” of the Petition, and respectfully refers the Court to the letter referred to therein and annexed to the Petition as Exhibit 23 for a complete and accurate statement of its contents.

42. Repeats and realleges its responses to paragraphs “1” through “33” as if fully set forth herein.

43. Denies the allegations set forth in paragraph “43” of the Petition, except admits that Petitioner purports to proceed as stated therein, and respectfully refers the Court to the Article and statutes cited therein for a complete and accurate statement of their provisions.

44. Denies the allegations set forth in paragraph “44” of the Petition.

45. Denies the allegations set forth in paragraph “45” of the Petition.

46. Denies the allegations set forth in paragraph “46” of the Petition.

47. Denies the allegations set forth in paragraph “47” of the Petition.

48. Denies the allegations set forth in paragraph “48” of the Petition.

49. Denies the allegations set forth in paragraph “49” of the Petition.

50. Denies the allegations set forth in paragraph “50” of the Petition.

51. Denies the allegations set forth in paragraph “51” of the Petition, and respectfully refers the Court to the statute and constitutional provision cited therein for a complete and accurate statement of their provisions.

52. Denies the allegations set forth in paragraph “52” of the Petition.

53. Denies the allegations set forth in paragraph “53” of the Petition.

54. Denies the allegations set forth in paragraph “54” of the Petition.

55. Denies the allegations set forth in paragraph “55” of the Petition.

**AS AND FOR A STATEMENT OF
PERTINENT AND MATERIAL FACTS,
RESPONDENT RESPECTFULLY ALLEGES:**

Background

56. Between June 2015 and November 2015, Petitioner submitted eight separate FOIL requests to DOE, including the four requests at issue in the Verified Petition. Several of these FOIL requests sought multiple types of records, and in total Petitioner requested 14 types of documents and data during this approximately five month period. (Baranello Aff. ¶ 4.)

57. DOE has received a particularly large volume of FOIL requests during the time Petitioner submitted these requests and while DOE has been working to respond to them. During calendar year 2015, DOE received approximately 1,065 FOIL requests, even more than the 987 FOIL requests received in 2014, and both years represent a significant increase in the volume of FOIL requests from the approximately 788 FOIL requests that DOE received in 2013. This trend has continued in 2016, as thus far DOE has observed more than a 50% increase in the number of new FOIL requests than were received during the same time period in calendar year 2013. (Baranello Aff. ¶ 5.)

58. DOE has made significant efforts to provide, as quickly as reasonably possible, data and documents to Petitioner, pursuant to her numerous FOIL requests. Specifically, DOE has provided documents to Petitioner in response to her numerous FOIL requests as follows (the DOE internal reference numbers of FOIL requests are in parentheses): DOE produced to Petitioner spreadsheets containing approximately 4,718 records in September 2015 (F11,422 and F11,470), a spreadsheet containing approximately 1,660 records in October 2015 (F11,401), spreadsheets containing approximately 161,750 records in November 2015 (F11,471), a spreadsheet containing approximately 160,500 records in December 2015 (F11,471), approximately 270 pages of documents containing approximately 18,000 records in February 2016 (F11,402), and a spreadsheet containing approximately 989 records in March 2016 (F11,472). (Baranello Aff. ¶ 7.)

59. In addition to the significant volume of records produced to Petitioner during this time period, DOE has responded to hundreds of additional FOIL requests from many other requesters. (Baranello Aff. ¶ 8.)

First Request at Issue in This Proceeding – F11,422

60. On or around June 11, 2015, DOE received a FOIL request from Petitioner seeking data from the DOE’s Special Education Call Center from 2012 to 2015. Specifically, Petitioner sought “[t]he names of schools about which parents complained,” “[t]he names of school administrators or teachers named in the complaints,” “[t]he nature of the complaints,” and “[t]he action taken by the district to address the complaints.” (Pet. Exh. 1.) Petitioner’s request acknowledged that under federal law some redaction of this information would be necessary to protect the identity of students. (Baranello Aff. ¶¶ 9-10.)

61. The data that Petitioner sought in this request is stored in a large database. When appropriate filters were created and the records responsive to request F11,422 were extracted from the database, DOE determined that approximately 2,900 records were responsive to Petitioner's request. (Baranello Aff. ¶ 13.)

62. On September 14, 2015, DOE produced an Excel spreadsheet to Petitioner. This spreadsheet included data on all of the approximately 2,900 records that were determined to be responsive to Petitioner's request. For each record, DOE produced the school identification code where available, the date the complaint was opened, the status of the complaint, the resolution status, the source of the contact, the topic area to which the complaint related, and the sub-topic area to which the complaint related. (Baranello Aff. ¶ 14.)

63. DOE did not provide the names of teachers or administrators who were named in the complaint records because no separate data field for these names exists in DOE's database; rather, teacher and administrator names are included only in the detailed narratives separately maintained regarding these complaints. DOE did not provide these detailed narratives because DOE determined that it was prohibited from disclosing this information by federal statute, specifically the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g and its implementing regulations located at 34 C.F.R. Part 99. The FOIL statute provides that records and information that are exempt from disclosure pursuant to another state or federal statute are exempt from disclosure pursuant to FOIL. Public Officers Law § 87(2)(a). (Baranello Aff. ¶¶ 15-16.)

64. Petitioner administratively appealed DOE's September 14, 2015 final response by an appeal letter dated September 18, 2015 addressed to DOE's then-General

Counsel and Records Access Appeals Officer (RAAO) Courtayne Jackson-Chase. (Baranello Aff. ¶ 23.)

65. RAAO Jackson-Chase issued her decision on the appeal by letter dated October 7, 2015. The RAAO found that the decision to withhold the detailed narratives regarding the individual complaints was appropriate given the strict requirements of FERPA to protect student privacy, since the records in question “are not necessarily de-identified by merely withholding obvious identifiers, such as names, social security numbers or home addresses of students, and may lead to re-identification.” The RAAO also noted that federal FERPA regulations require DOE to consider how information that is disclosed may be combined with previously or subsequently released data or other reasonably available information in a manner that allows for the identification of students. 34 C.F.R. § 99.31(b)(1). Under the circumstances, the RAAO denied Petitioner’s appeal. (Baranello Aff. ¶ 24.)

66. The U.S. Department of Education has emphasized, most notably in the preamble to the 2008 final rule that revised (among many other provisions) the definition of “personally identifiable information” found in the regulations promulgated under FERPA, that “FERPA is a privacy statute, and no party has a right under FERPA to obtain information from education records except parents and eligible students.” 73 Fed. Reg. 74,806, 78,834 (Dec. 9, 2008). (Baranello Aff. ¶ 17.)

67. The definition of personally identifiable information encompasses various types of information, including basic information like a student’s name, address, date of birth, and other direct or indirect identifiers. See 34 C.F.R. § 99.3. While FERPA’s implementing regulations include a de-identification provision, which permits an educational agency such as DOE to release education records without consent after removal of all personally identifiable

information, it also requires the educational agency to make “a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably identifiable information.” 34 C.F.R. § 99.31(b). (Baranello Aff. ¶ 18.)

68. In the context of determining whether records constitute personally identifiable information and, if so, how to de-identify such records, the U.S. Department of Education has indicated that “[t]he simple removal of nominal or direct identifiers, such as name and SSN (or other ID number) does not necessarily avoid the release of personally identifiable information.” 73 Fed. Reg. 74,806, 74,831. In fact, FERPA’s regulations define “personally identifiable information” very broadly, to encompass other types of information, including information that is linkable to a specific student and 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. Moreover, as the U.S. Department of Education noted in the preamble to the 2008 revisions, this new standard was promulgated to afford greater and clearer protection against the disclosure of student records than was provided by the standard it replaced. 73 Fed. Reg. 73,806, 74,831. (Baranello Aff. ¶ 19.)

69. Accordingly, DOE determined that releasing the detailed narratives, which describe, often in great detail, the nature of the special education complaints and the specific actions taken by DOE to resolve these complaints, would violate its obligations under FERPA, even if information such as student names and birthdates were redacted. DOE reached this determination because of the unique nature of many special education needs, which are rooted in students’ particular disabilities. Complaints regarding a student’s special education needs can be

specific enough that even with basic personal identifiers redacted, a member of the school community could determine the identity of a student based upon the content of their special education complaint or the specific actions taken by DOE to resolve the complaint. (Baranello Aff. ¶ 20.)

70. For example, a number of the complaints arise from situations in which a student has received a new or different diagnosis, necessitating new or different educational or related services. Because a specific set of special education services at a specific school can be unique, a reasonable member of the school community could read such a detailed narrative and identify the student by the services described, thereby learning private information about the student's disability status. (Baranello Aff. ¶ 21.)

71. Even when the services described in a complaint are not unique, the detailed narratives frequently contain other information that, in combination, would allow a reasonable member of the school community to identify the student with reasonable certainty. For example, the detailed narratives can contain information regarding the student's grade level, the names of the student's teacher and other service providers, and whether the student has siblings at the school (and whether those siblings also receive special education services). Each of these pieces of information alone may not directly identify a student, but in combination pose a serious risk that a reasonable member of the school community would be able to identify the student described in the complaint. (Baranello Aff. ¶ 22.)

72. The data sought by Petitioner is city-wide, but typically contains (as Petitioner requested) information about which school each complaint relates to. This creates a difficult situation for DOE: DOE is required, in order to comply with federal FERPA regulations, to determine whether release of a record will 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. However, because the data sought by Petitioner includes school communities all over the city, it is extremely difficult to check every one of the approximately 2,900 responsive detailed narratives to determine the uniqueness of the particular disability and services the student is receiving and to assess the risk that the substance of the complaint would reveal the student’s identity to a reasonable person in each particular school community even if personal identifiers are redacted. (Baranello Aff. ¶ 23.)

73. In addition to the detailed narratives of the complaints, a large number of the approximately 2,900 records responsive to the First Request also contain “notes” describing the actions taken by DOE to resolve the complaint. The notes typically contain the text of emails sent or summaries of phone calls or meetings conducted in the course of resolving a complaint, and generally include a significant amount of student-specific information similarly protected by FERPA.¹ In some cases, these notes also incorporate internal correspondence among DOE employees deliberating over the proper way to resolve a complaint, and therefore constitute pre-decisional materials subject to FOIL’s intra-agency exemption. Pub. Officers Law. § 87(2)(g); (Baranello Aff. ¶ 24.)

74. There are approximately 2,200 such “notes” that correspond to the approximately 2,900 records responsive to the First Request. In addition to the redaction of direct personal identifiers in these notes, in order to produce these notes DOE would be required to compare the information in each detailed complaint narrative with the information in its

¹ Each of the approximately 2,900 responsive records also contains a data field that briefly summarizes the actions taken by DOE and typically refers to the “notes” for more detailed information. These summaries of actions taken by DOE also contain student-specific information and therefore may not be disclosed without significant redaction for the same reasons that apply to the detailed complaint narratives and the “notes.” (See Baranello Aff. ¶ 24.)

associated notes, to ensure that the combination of this information does not paint such a unique portrait that a reasonable member of the school community could identify the student with reasonable certainty. For example, even if a complaint does not describe the student's particular special education services in detail, the associated notes frequently include emails from the student's principal, teacher, and/or service providers that carefully review the student's particular services as part of addressing how to resolve the complaint. (Baranello Aff. ¶ 25.)

75. DOE estimates that it will take an average of approximately 8 minutes to redact each of the approximately 2,900 records and their associated "notes." This would require approximately 386 hours of redaction time. In addition to the time necessary to redact each record, because of the sensitive nature of the student-specific information contained in these records, each record would need to be carefully reviewed to ensure that its disclosure, in redacted form, would not violate FERPA. DOE estimates that this careful review of the redactions made to the approximately 2,900 records and their approximately 2,200 associated notes would take an average of an additional 6 minutes per record, because the reviewer would need to conduct a substantially similar comparison of all of the information available in each record and its associated notes to ensure that the redactions required by FERPA were performed. This would require approximately 290 hours to review the redactions, for a total of approximately 676 hours. In addition, in many cases officials at individual schools would need to be consulted about the potential uniqueness of the substance of a special education complaint, requiring even more review time. (Baranello Aff. ¶ 26.)

76. DOE cannot reasonably engage an outside professional service to provide the extensive redaction required to produce the records sought by Petitioner in the First Request. Properly redacting these records requires an understanding of what constitutes an uncommon or

unique combination of education services, such that removing direct personal identifiers is inadequate to protect the student's identify. An outside firm would lack sufficient familiarity with the DOE school system to know, for example, whether placement of a child in a class with no more than six students is common or uncommon at a particular school. Given the multitude of different combinations of special education services described in these thousands of records, and the need to consult with individual schools in many cases to determine the uniqueness of particular situations, it is not possible for DOE to outsource this work. In addition, providing an outside firm with data containing information on medical diagnosis for thousands of students raises its own serious privacy concerns. (Baranello Aff. ¶ 27.)

77. Given the extensive personal information contained in these records and the difficulty of ensuring that a reasonable person in each school community would not be able to identify the student at issue in each complaint, DOE had a reasonable basis for denying access to the detailed narratives describing each complaint and the notes reflecting DOE's responses to each complaint. In addition, because of the extraordinary effort required to separate the FERPA-protected information in each record from the material, if any, that may be disclosed, and the impossibility of effectively outsourcing this work, performing the enormous number of redactions sought by Petitioner would constitute a major burden on DOE's limited resources. (Baranello Aff. ¶ 30.)

Second Request at Issue in This Proceeding – F11,402

78. On or about June 11, 2015, Petitioner submitted a FOIL request to DOE seeking "purchase records for schools purchasing instructional technology (including laptops, tablets and Smart Boards)." Petitioner specifically requested the name of the school, the product purchased, and the itemized cost of each product. Petitioner did not initially specify any time

period for this request or limit it to any particular subset of schools. Petitioner subsequently clarified that she was seeking records from the 2012-2013 school year to the present, in regard to the entire DOE school system. (Baranello Aff. ¶¶ 31-32.)

79. By letter dated June 18, 2015, five business days after the request was received, DOE acknowledged the request. DOE's letter also stated that a response was anticipated by July 17, 2015, which is 20 business days from the date of the acknowledgement. (Baranello Aff. ¶ 33.)

80. Responding to F11,402 required collecting records from four different school years, for a wide variety of products, for every school in the DOE school system. Given the complexity and breadth of F11,402, as well as the volume of other FOIL requests that DOE receives and responds to (from Petitioner and many others), DOE determined following the issuance of its June 18, 2015 letter that it would require additional time to respond to the request. While DOE's estimate as to when these records would be produced thereafter changed over time, each time this estimate changed DOE wrote letters so advising Petitioner, each time providing her with an updated estimate as to when DOE then believed the records could be produced. (Baranello Aff. ¶ 34.)

81. By letter dated September 18, 2015 addressed to RAAO Jackson-Chase, Petitioner filed an administrative appeal alleging that F11,402 had been constructively denied. RAAO Jackson-Chase issued her decision on the appeal by letter dated October 7, 2015. The RAAO noted that Chancellor's Regulation D-110(VIII)(A) states that a FOIL request may be deemed constructively denied only where the request is neither granted nor denied within the applicable time limits or within the time limits set in the acknowledgement letter or any extension letters. The RAAO found that Petitioner's appeal alleging constructive denial was

premature because DOE's efforts to respond to F11,402 within the applicable time limits communicated in its correspondence with Petitioner were ongoing. (Baranello Aff. ¶ 35; Exh. C.)

82. On February 19, 2016, DOE produced a PDF document to Petitioner containing purchase records for the types of technology sought in F11,402. The PDF document was 270 pages long and included approximately 68 records per page, for a total of more than 18,000 records. For each record, DOE provided the name of the school, the name of the product purchased, the quantity of the product purchased, and the purchase price of the item(s). (Baranello Aff. ¶ 36.)

83. DOE did not redact any information from the records provided to Petitioner in its final response to FOIL request F11,402 on February 19, 2016. (Baranello Aff. ¶ 37.)

Third Request at Issue in This Proceeding – F11,472

84. On or about July 1, 2015, Petitioner submitted a FOIL request to DOE seeking four types of records. First, Petitioner requested the "DOE database of employees currently on paid and unpaid leave." Second, Petitioner sought the "database of all NYC DOE investigations, open and closed, from the 2014-2015 school year to present." Third, Petitioner sought "copies of all employee settlement agreements from January 2014 to present." Fourth, Petitioner requested a "list of all employees in the 2014-2015 school year who received bonuses, and the amount they received." (Baranello Aff. ¶ 38-39.)

85. By letter dated July 9, 2015, five business days after the request was received, DOE acknowledged the request. DOE's letter also stated that a response was anticipated by August 6, 2015, which is 20 business days from the date of the acknowledgement. (Baranello Aff. ¶ 40.)

86. Responding to F11,472 required coordination among multiple DOE offices, including Human Resources, the Division of Teaching and Learning, and the Office of the General Counsel. The four sub-parts of F11,472 sought voluminous quantities of documents and data, and several types of records sought require careful review and redaction to comply with the exemptions in the FOIL statute. For example, the requested data concerning employees currently on leave requires redaction to the extent these records reveal private information about employees on medical leave. (Baranello Aff. ¶ 41.)

87. Given the complexity and breadth of F11,472, as well as the volume of other FOIL requests that DOE receives and responds to (from Petitioner and many others), DOE determined following the issuance of its July 9, 2015 letter that it would require additional time to respond to the request. While DOE's estimate as to when these records would be produced thereafter changed over time, each time this estimate changed DOE wrote letters so advising Petitioner, each time providing her with an updated estimate as to when DOE then believed the records could be produced. (Baranello Aff. ¶ 42.)

88. By letter dated September 18, 2015 addressed to RAAO Jackson-Chase, Petitioner filed an administrative appeal alleging that F11,472 had been constructively denied. RAAO Jackson-Chase issued her decision on the appeal by letter dated October 7, 2015. The RAAO noted that Chancellor's Regulation D-110(VIII)(A) states that a FOIL request may be deemed constructively denied only where the request is neither granted nor denied within the applicable time limits or within the time limits set in the acknowledgement letter or any extension letters. The RAAO found that Petitioner's appeal alleging constructive denial was premature because DOE's efforts to respond to F11,472 within the applicable time limits communicated in its correspondence with Petitioner were ongoing. (Baranello Aff. ¶ 43; Exh. C.)

89. On March 25, 2016, DOE produced a spreadsheet to Petitioner containing data on bonuses paid to DOE employees for the 2014-2015 school year as sought in the fourth part of F11,402. This spreadsheet included approximately 989 records. For each record, DOE provided the name of the employee, the employee's role (e.g., principal or assistant principal), the school where the employee worked, the "tier" or bonus level, the amount of the bonus paid to the employee, and whether this amount was pro-rated. No information was redacted from this document. (Baranello Aff. ¶ 44.)

90. DOE is committed to providing final responses to the other three parts of F11,402 by May 13, 2016, and has advised Petitioner of this date certain. (Baranello Aff. ¶ 45.)

Fourth Request at Issue in This Proceeding – F11,648

91. On or about September 18, 2015, Petitioner submitted a FOIL request to DOE seeking copies of all emailed communication to or from DOE's Records Access Office sent in regard to FOIL requests F11,471, F11,472, and F11,422. FOIL request F11,648 also requested "copies of all emails sent in the process of fulfilling this FOIL request." (Baranello Aff. ¶¶ 46-47.)

92. By letter dated September 25, 2015, five business days after the request was received, DOE acknowledged the request. This letter also stated that a response was anticipated by October 26, 2015, which is 20 business days from the date of the acknowledgement. (Baranello Aff. ¶ 48.)

93. Given the extent of F11,648, the need to review each responsive email to determine whether statutory exemptions such as attorney-client privilege and the intra-agency exemption apply, and to make necessary redactions of exempt information from the responsive emails, as well as the volume of other FOIL requests that DOE receives and responds to (from

Petitioner and many others), DOE determined following the issuance of its September 25, 2015 letter that DOE would require additional time to respond to the request. While DOE's estimate as to when these records would be produced thereafter changed over time, each time this estimate changed DOE wrote letters so advising Petitioner, each time providing her with an updated estimate as to when DOE then believed the records could be produced. (Baranello Aff. ¶ 49.)

94. By letter dated January 22, 2016 and addressed to RAAO Jackson-Chase, counsel for Petitioner filed an administrative appeal alleging that F11,648 had been constructively denied. RAAO Jackson-Chase issued her decision on the appeal by letter dated October 7, 2015. The RAAO noted that Chancellor's Regulation D-110(VIII)(A) states that a FOIL request may be deemed constructively denied only where the request is neither granted nor denied within the applicable time limits or within the time limits set in the acknowledgement letter or any extension letters. The RAAO also noted that additional time was necessary to respond to F11,648 due to the volume of records located in response to this request, the need to determine the extent to which statutory exemptions for attorney-client privilege and intra/inter-agency records permit DOE to redact the responsive records, and the time necessary to make redactions. (Baranello Aff. ¶ 50; Exh. C.)

95. DOE is committed to providing a final response to this FOIL request by April 29, 2016. (Baranello Aff. ¶ 51.)

**AS AND FOR A FIRST DEFENSE,
RESPONDENT RESPECTFULLY ALLEGES:**

96. DOE's FOIL Responses and Appeal Responses were in all respects proper, rational, and rendered in compliance with lawful procedures, were not affected by an error of law, and were not arbitrary and capricious or an abuse of discretion.

**AS AND FOR A SECOND DEFENSE,
RESPONDENT RESPECTFULLY ALLEGES:**

97. An agency withholding information pursuant to an enumerated FOIL exemption must articulate a "particularized and specific justification for denying access," Madera v. Elmont Pub. Lib., 101 A.D.3d 726, 727 (2d Dep't 2012), and DOE's Appeal Response to the First Request meets this burden. (See Pet. Ex. 13.) The Appeal Response provides a detailed explanation of the exemption supporting the information withheld, and specifically and explicitly discusses why the relied-upon exemption justifies each specific category of information withheld. (Id.) No conclusory statements or assertions are utilized or relied upon. See Dilworth v. Westchester Cnty. Dept. of Corr., 93 A.D.3d 722, 724 (2d Dep't 2012).

98. To the extent that some limited portions of data in the records responsive to the First Request are not protected by FERPA, segregating the information that is not FERPA-protected in these thousands of records would require DOE to expend hundreds of hours of work carefully reviewing and redacting portions of each record. This extraordinary effort – which cannot be effectively outsourced due to the specialized knowledge required to determine which information is sufficiently unique to require redaction, and the sensitive nature of the student information in these records – would constitute an “undue burden” on DOE. New York Comm. for Occupational Safety and Health v. Bloomberg, 72 A.D.3d 153, 162 (1st Dep't 2010).

**AS AND FOR A THIRD DEFENSE,
RESPONDENT RESPECTFULLY ALLEGES:**

99. The Petition should be dismissed as moot with respect to the Second, Third, and Fourth Requests on the ground that DOE has already produced, or will produce by May 13, 2016 and April 29, 2016 for the Third and Fourth requests respectively, all non-exempt responsive records in its possession.

**AS AND FOR A FOURTH DEFENSE,
RESPONDENT RESPECTFULLY ALLEGES:**

100. Petitioner is not entitled to declarative relief in an Article 78 proceeding brought pursuant to the FOIL statute.

**AS AND FOR A FIFTH DEFENSE,
RESPONDENT RESPECTFULLY ALLEGES:**

101. An award of attorney's fees and costs is not warranted in this proceeding.

**AS AND FOR A FIFTH DEFENSE,
RESPONDENT RESPECTFULLY ALLEGES:**

102. DOE's actions were in all respects legal, proper, reasonable, and in conformity with all applicable laws and regulations, and were neither arbitrary nor capricious.

**AS AND FOR A SIXTH DEFENSE,
RESPONDENT RESPECTFULLY ALLEGES:**

103. Respondent has not failed to perform any duty enjoined upon it by law.

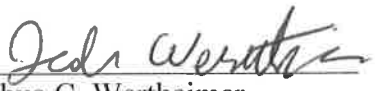
**AS AND FOR A SEVENTH DEFENSE,
RESPONDENT RESPECTFULLY ALLEGES:**

104. Respondent has not violated any rights, privileges, or immunities under the Constitution or laws of the United States, the State of New York, or any political subdivision thereof.

WHEREFORE, Respondent respectfully requests that the petition be denied in its entirety, that Petitioner's request for relief be denied in all respects, and that Respondent be granted such other and further relief as to the Court deems just and proper.

Dated: New York, New York
April 4, 2016

ZACHARY W. CARTER
Corporation Counsel of the
City of New York
Attorney for Respondent
100 Church Street, Room 2-305
New York, New York 10007
(212) 356-0877

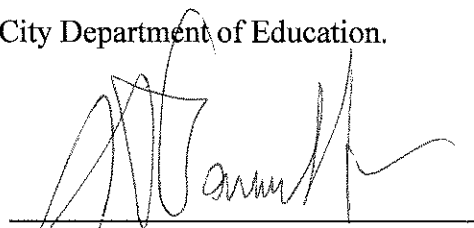
By: 
Joshua C. Wertheimer
Assistant Corporation Counsel

To: Patrick Kabat
Attorney for Plaintiff

VERIFICATION

STATE OF NEW YORK)
 : SS. :
COUNTY OF NEW YORK)

JOSEPH A. BARANELLO, an attorney duly admitted to practice before the Courts of the State of New York, affirms, under penalty of perjury, that he is the Central Records Access Officer of the respondent New York City Department of Education, that he has read the annexed Verified Answer and knows the contents thereof; that the same is true to his own knowledge, except as to those statements stated to be based upon information and belief, which to those, he believes to be true; and that the source of this information and the basis for his belief are the books and records of the New York City Department of Education, and from statements made to him by certain officers or agents of the New York City Department of Education.



JOSEPH A. BARANELLO

Dated: New York, New York
April 4, 2016

Index No. 151019/2016
Justice Cynthia Kern

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

In the Matter of

JESSICA HUSEMAN,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondent,

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules.

VERIFIED ANSWER

ZACHARY W. CARTER

*Corporation Counsel of the City of New York
Attorney for Respondents
100 Church Street
New York, N.Y. 10007*

*Of Counsel: Joshua C. Wertheimer
Tel: (212) 356-0877
Matter #: 2016-004045 GL*

Due and timely service is hereby admitted.

New York, N.Y., 2015....

....., Esq.

Attorney for