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

ADVOCATES FOR CHILDREN OF NEW YORK, INC. and ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, Petitioners, For a Judgment Pursuant to Article 78 of the CPLR -against- THE NEW YORK CITY DEPARTMENT OF EDUCATION, and DENNIS WALCOTT, as Chancellor of the New York City Department of Education, Respondents.	:	Index No.

MEMORANDUM OF LAW IN SUPPORT OF PETITION

This Memorandum of Law is respectfully submitted in support of the accompanying Article 78 Verified Petition (the "Petition") of Advocates for Children of New York, Inc. ("AFC") and Asian American Legal Defense and Education Fund ("AALDEF") (collectively, the "Petitioners"). Petitioners seek a judgment from this Court: (i) compelling Respondents the New York City Department of Education and Dennis Walcott, Chancellor of the New York City Department of Education ("Respondents" or "DOE"), to perform the duties required by New York Public Officers Law Section 84 *et seq.*, Section 1401.5 of the Rules and Regulations of the State of New York and the DOE's Regulation of the Chancellor ("Chancellor's Regulation") by producing the documents requested in Petitioners' Freedom of Information Law ("FOIL") requests within 60 days of this Court's order; (ii) enjoining further unilateral extensions of all

FOIL requests on the part of the DOE in violation of New York Public Officers Law Section 84 *et seq.*, Section 1401.5 of the Rules and Regulations of the State of New York and the Chancellor's Regulation by requiring that Respondents must respond to FOIL requests within the time required by FOIL; (iii) awarding Petitioners their costs and attorneys' fees in this proceeding; and (iv) granting such other and further relief to Petitioners as may be just and proper.

PRELIMINARY STATEMENT

Petitioners bring this lawsuit not only to compel the DOE's performance of its statutory obligations to provide documents responsive to two specific, long-unanswered FOIL Requests, but also to enjoin the DOE from further violations of its statutory obligations with respect to its treatment of all FOIL requests. Despite express statutory requirements, the DOE has engaged in a troubling pattern and practice of granting itself unilateral, seemingly infinite, extensions to respond to requests. Upon receipt of FOIL requests, the DOE must respond within five business days by denying, granting or providing an approximate date by which a decision will be made about the request. By statute, if the DOE grants the request, it must, within twenty business days, either produce responsive documents or provide a reasonable time by which they will be produced. Despite this unequivocal statutory imperative, more than a year has passed since Petitioners validly made the Requests at issue and the DOE still has not produced a large percentage of the responsive documents.

Petitioners made FOIL requests # 6762 and #6890 under the procedures provided by New York's Public Officers' Law Section 84 *et seq.* and the Chancellor's Regulation, thus they are entitled to the documents responsive to Requests #6762 and #6890. The DOE has shirked its

responsibilities by failing to provide the requested documents. This failure to provide the necessary records has frustrated Petitioners' own mission to ensure that students with disabilities and students who are English Language Learners/Limited English Proficient ("ELL/LEP") receive appropriate programs, teachers, and instruction in New York City public schools. Since Petitioners have exhausted their administrative remedies, this Court should direct the DOE to comply with its legal obligation to provide the documents requested in Requests #6762 and #6890.

Moreover, in addition to these two unsatisfied requests, the DOE has consistently failed to follow the correct procedure for numerous other FOIL requests. These requests have pertained to a variety of subjects such as diploma opportunities for students with disabilities, completion rates for General Education Degree ("GED") programs and discharge rates for high school students. Despite the variety in subject matter, the DOE consistently failed to provide timely responses and the requested documents.

The mission of both AFC and AALDEF is to advocate for the improvement of education of students and to ensure that all students receive a quality and appropriate education. Petitioners conduct this advocacy through various approaches: (1) working and collaborating with the DOE and other governmental agencies; (2) issuing public reports on the current state of education; and (3) litigation. All of these methods of advocacy require that Petitioners have the most current information. Information that is more than one year old is often stale and inadequate to inform Petitioners' advocacy. On more than one occasion, the DOE has disregarded Petitioners' advocacy efforts by claiming that Petitioners do not have current information and that the information reported by Petitioners is irrelevant. By unilaterally delaying Petitioners' requests

for information for more than a year, the DOE is in effect thwarting Petitioners' attempts to advocate on behalf of students in New York City.

As such, this Court must enjoin the DOE from further violations of FOIL law by banning the pattern and practice of unilateral extensions and commanding the DOE to respond within the required period of time for all FOIL requests.

STATEMENT OF FACTS

A. The Parties

Petitioner AFC is a New York-based public-interest not-for-profit corporation that has for forty years worked to promote access to the best education New York City can provide for all students, especially students of color and students from low-income backgrounds, including immigrant children, English Language Learners ("ELLs"), and students with disabilities. *See* Affidavit of Rebecca Shore, sworn to June 22, 2011 (hereafter, "Shore Aff."), ¶ 1.

Petitioner AALDEF is a national public-interest not-for-profit corporation dedicated to protecting and promoting the civil rights of Asian Americans. *See* Affidavit of Thomas Mariadason sworn to June 22, 2011, (hereafter, "Mariadason Aff."), ¶ 1. AALDEF's Educational Equity and Youth Rights Project conducts policy advocacy and provides legal assistance to protect the rights of Asian American students, in particular, low income immigrants, refugees, and other English Language Learners. *Id.*

Respondent The New York City Department of Education is the largest system of public schools in the United States, serving about 1.1 million students in nearly 1,700 schools.

Respondent Dennis Walcott is the Chancellor of the DOE and is charged with the administration of New York City's public schools, including the provision of academic standards, student placement, school funding, and teacher recruitment, with its main office at 52 Chambers Street, New York, New York.

B. Factual Background/Denial of FOIL Requests #6762 and #6890

Request #6762

The history behind the DOE's failure to comply with FOIL and provide the responsive records for Request #6762 has been extensive and circuitous. Request #6762 is based on Request #5736, which was filed almost three years ago on July 2, 2008. *See* Affidavit of Gisela Alvarez sworn to on June 22, 2011, (hereafter "Alvarez Aff."), ¶ 4, Ex. 2. Request #5736 sought records from Respondent pertaining to ELL students in nineteen select New York City public high schools during the 2006-2007 and 2007-2008 academic school years, including the number of ELLs and related demographic data, records related to the teachers of ELL students and classes provided in the schools, and records reflecting the programmatic choices of the parents of ELL students in those select schools. *See id.* Petitioners sought this data in order to address concerns about what programs were available to ELLs in schools that the DOE was closing at the time and what programs would have been available to ELLs who would have attended those schools. *Id.*

After an exhausting delay of more than six months that nearly led to litigation and included two appeals, the DOE partially responded to Request #5736. *Id.* The DOE suggested that reformulating the request for the remaining material still outstanding from Request #5736

would assist the DOE in producing the documents in a timely manner. *Id.* Petitioners followed the DOE's instructions and reformulated Request #6762 to conform with those suggestions. *Id.*

On February 24, 2010, Gisela Alvarez of AFC and Khin Mai Aung of AALDEF sent Request #6762 to Joseph Baranello, the Central Records Access Officer and Agency Attorney of the DOE. *See id.*, ¶ 3, Ex. 1. This request seeks four categories of documents from the 2008-2009 and 2009-2010 academic years pertaining to ELL/LEP students in certain New York City high schools. *See id.*

Respondent acknowledged Request #6762 on February 25, 2010 and informed AFC that a response to this request would be sent by March 25, 2010. *See id.*, ¶ 5, Ex. 3. Instead of providing the documents, the DOE repeatedly sent letters unilaterally extending its time to comply with Request #6762 to the following dates:

- April 22, 2010;
- May 20, 2010;
- June 18, 2010;
- July 19, 2010;
- August 16, 2010;
- September 14, 2010;
- October 13, 2010;
- October 27, 2010;
- November 3, 2010;
- December 10, 2010; and
- December 17, 2010.

See id., ¶ 6, Exs. 4.

On November 10, 2010, approximately eight months late, the DOE finally responded to Request #6762. *See id.*, ¶ 7. This response, however, only partially answered the request by providing a list of the number of ESL and bilingual teachers in the requested schools. *See id.* In addition, on December 21, 2010, approximately nine months late, the DOE provided a copy of the master schedules for the requested schools and stated that this was a complete response to the request. *See id.*, ¶ 8.

The DOE's response did not address section (b) of the request, which asks for data pertaining to "the number of units of Native Language Arts taught at the school and respective native language corresponding to each unit." *See id.* Moreover, the DOE did not provide a means to interpret whether certain courses on the master schedule were native language arts courses. *See id.* It also failed to demarcate the units of bilingual education by language as requested by section (d) of the request. *See id.* After the DOE's failure to provide this information, Petitioners wrote an appeal letter on February 4, 2011. *See id.*, ¶ 8, Ex. 6. The DOE denied this appeal less than three weeks later on February 22, 2011. *See id.*, Ex. 7.

Request #6890

The same disregard that the DOE demonstrated through its delayed and incomplete response to Request #6762 was shown in its treatment of Request #6890. On April 29, 2010, Elizabeth Callahan of AFC submitted Request #6890 to Mr. Baranello of the DOE. *See* Shore Aff., ¶ 3, Ex. 1. This request seeks thirty-five categories of documents pertaining to students in District 75 schools in New York City from the 2007-2008 through 2009-2010 school years. *See id.* In particular, the request sought information sufficient to show whether students within District 75, the DOE school district dedicated only to students in New York City with the most

severe disabilities, have access to the credits and testing necessary to receive Regents, Advanced Regents, and local diplomas. *See id.* AFC requested this information after having worked with a number of District 75 students who were struggling to obtain the necessary course work and preparation to graduate. *See id.*

On May 7, 2010, the DOE acknowledged this request and informed Petitioner AFC that a response would be provided by June 7, 2010. *See id.*, ¶ 4, Ex. 2. However, the DOE failed to respond to AFC by June 7, 2010 and instead repeatedly sent letters unilaterally extending its time to respond to Request #6890 until the following dates:

- July 6, 2010;
- August 3, 2010;
- August 31, 2010;
- September 29, 2010;
- October 28, 2010;
- November 30, 2010;
- December 29, 2010;
- January 28, 2011;
- February 28, 2011;
- March 28, 2011;
- April 25, 2011;
- May 23, 2011;
- June 21, 2011; and
- July 20, 2011.

See id., ¶ 5, Ex. 3. Even when the DOE ultimately provided documents, these productions were incomplete. For instance on August 31, 2010, almost three months late, the DOE provided thirteen pages of spreadsheets listing the number of students in District 75 by categories, which only responded to a fraction of the requests. *See id.*, ¶ 6, Ex. 4. The DOE produced age, grade, gender, race, disability classification, program, and placement location data for District 75 only in full response to the second category of requested documents. *See id.*. The DOE also produced a list of whether students came from "Regional," "Special Pgms," or "District 88," for the 2009-2010 school year, in partial response to the fourth category. *See id.* In addition, the DOE produced a list of the number of students in alternate versus standardized testing by program, grade, disability classification, gender, ethnicity, school, and borough, in partial response to category twenty-six. *See id.* Finally the DOE produced records responsive to category thirty-two on May 23, 2011, *more than one year late*. *See id.*, ¶ 12, Ex. 10. The DOE did not produce documents for the other twenty-nine categories of documents. *See id.*

Following the DOE's failure to provide responsive documents, Petitioner filed a letter of appeal on February 1, 2011. *See id.*, ¶ 7, Ex. 5. The DOE denied the appeal on February 24, 2011, stating that the request was not constructively denied. *See id.*, ¶ 8, Ex. 6. On February 28, 2011, eight months late, the DOE produced to Petitioner the District 75 Organization Directory, purportedly in response to categories twenty-eight and twenty-nine, and denying the following requests for the following reasons: one (no documents exist); three through thirteen (DOE claims it has to create new records in order to respond); fourteen through twenty-five and thirty (the DOE has not tracked or collected this data). *See id.*, ¶ 9, Ex. 7.

In response to the DOE's letter, Petitioner sent a letter on March 25, 2011. *See id.*, ¶ 10, Ex. 8. Petitioner asked about the DOE's previous responses and denials as well as requested the

remaining responsive documents. *See id.* The DOE subsequently replied on March 28, 2011 with a letter putting off its time to provide responsive documents until April 25, 2011, but did not substantively answer any of AFC's questions about the DOE's response. *See id.*, ¶ 11, Ex. 9.

As a result of Respondents' repeated failure to comply with FOIL and the Chancellor's Regulation and after exhausting their administrative remedies, Petitioners seek an order pursuant to Article 78 compelling Respondents to produce the outstanding documents from Requests #6762 and #6890. Petitioners may bring an Article 78 action in this instance because the DOE has violated FOIL and its own rules by not giving Petitioners their requested records.

C. Factual Background of the DOE's Pattern and Practice of Unlawful Unilateral Extensions

Outside of the DOE's errant behavior with respect to Requests # 6762 and #6890, the DOE has for some time engaged in a pattern and practice of failing to respond in a timely fashion to FOIL requests. In a multitude of FOIL requests, the DOE has undertaken a policy of unlawful unilateral extensions and has failed to provide the documents requested by Petitioners. The following demonstrate the egregious pattern and practice of the DOE's unlawful actions.

Request #6625

Request #6625 was issued on December 17, 2009 in order to seek information to determine the number of students who started high school in 2004, the number of those students who were discharged and the number who did not complete high school within four years. *See* Alvarez Aff., ¶ 10, Ex. 8. Not only did the DOE not provide the records within the statutorily recognized time but the DOE unilaterally extended its time to comply with the request until the following dates:

- February 23, 2010;

- March 23, 2010;
- April 20, 2010;
- May 18, 2010;
- July 1, 2010;
- July 30, 2010;
- August 27, 2010;
- September 27, 2010;
- October 26, 2010;
- November 24, 2010;
- December 27, 2010;
- January 26, 2011;
- February 24, 2011;
- March 24, 2011;
- April 21, 2011;
- May 19, 2011;
- June 17, 2011; and
- July 18, 2011.

See id., Ex. 9. After more than a year and a half, the DOE has still not produced all of the documents requested by Petitioner AFC. *See id.*, ¶ 10.

Request #6626

Petitioner AFC issued Request #6626 on December 17, 2009, seeking information related to GED completion rates. *See id.*, ¶ 11, Ex. 10. Petitioner was met with constant delays and unilateral extensions. *See id.*, ¶ 11. The DOE extended its date to comply to the following dates:

- February 23, 2010;
- March 23, 2010;
- April 20, 2010;
- May 18, 2010;
- June 16, 2010;
- July 15, 2010;
- August 12, 2010;
- September 10, 2010;
- October 8, 2010;
- November 8, 2010;
- December 9, 2010;
- January 10, 2011;
- February 8, 2011; and
- March 9, 2011.

See id., Ex. 11. After innumerable unilateral extensions, the DOE finally denied Request #6626 on March 9, 2011. *See id.*, Ex. 12. Because the DOE took so long to respond, the information sought in the request is stale. As a result, AFC did not appeal this denial, but instead have been forced to issue another request – Request #7632 – to which the DOE has also not responded, as discussed below. *See id.*, ¶ 11.

Request #6753

On February 19, 2010 Petitioner AFC filed Request #6753 seeking general information pertaining to Individualized Education Program ("IEP") Diploma. *See id.*, ¶ 12, Ex. 13. The DOE declared unilateral extensions until the following days:

- March 23, 2010;
- April 20, 2010;
- May 18, 2010;
- June 15, 2010;
- July 14, 2010;
- August 11, 2010;
- September 9, 2010;
- October 7, 2010;
- October 12, 2010;
- November 9, 2010;
- December 10, 2010;
- January 11, 2011;
- January 19, 2011;
- February 16, 2011;
- March 17, 2011;
- April 14, 2011;
- May 12, 2011; and
- June 10, 2011.

See id., Ex. 14. Although the DOE provided a limited number of documents related to Request #6753, it nonetheless continued to grant itself unilateral extensions until its June 10, 2011 denial. *See id.*, Ex. 15.

Request #7233

On October 6, 2010, Petitioner sent Request #7233 seeking information regarding "Contextual Analysis for Austin H. MacCormick – Island Academy, June 29, 2010" and accompanying studies or research. Affidavit of Chris Tan sworn to June 22, 2011 (hereafter "Tan Aff.") ¶ 3. The DOE extended its time to respond until the following dates:

- November 10, 2010;
- December 13, 2010;
- January 12, 2011;
- February 10, 2011;
- March 11, 2011;
- April 8, 2011;
- April 22, 2011; and
- May 20, 2011.

See id., ¶ 4, Ex. 1. Despite the fact that the DOE provided a limited number of documents, it still has not complied with the substance of Request #7233. *See id.*, ¶ 5, Ex. 2.

Request #7632

Petitioner issued Request #7632 on April 5, 2011 seeking information about students who are discharged or transferred to GED programs and their various success rates in achieving their GEDs. *See* Alvarez Aff., ¶ 13, Ex. 16. The DOE has extended its time to respond until the following dates:

- May 10, 2011;
- June 8, 2011; and
- July 5, 2011.

See id., Ex. 17.

The DOE has demonstrated consistency in one aspect alone – shirking its duty to respond to FOIL requests.

LEGAL ARGUMENT

I. THIS COURT SHOULD COMPEL THE DOE TO PRODUCE THE REQUESTED RECORDS BECAUSE ITS DENIAL OF PETITIONERS' REQUESTS VIOLATES FOIL AND NEW YORK PUBLIC OFFICERS' LAW

A. The DOE is Statutorily Required to Produce Documents Responsive to Requests #6762 and #6890

Petitioners are entitled to the outstanding documents responsive to Requests #6762 and #6890 because New York's Public Officers' Law Section 84 *et seq.*, Section 1401.5 of the New York State Rules and Regulations and the Chancellor's Regulation D-110 provide for the public access to agency documents through FOIL requests.[1] The rationale behind FOIL "is based on the overriding policy consideration that 'the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.'" *See Herald Co., Inc. v. Feurstein*, 3 Misc.3d 885, 890 (Sup. Ct. N.Y. County 2004). Moreover "[t]he Court of Appeals has repeatedly held that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Id.* Thus, "the legislative purpose was to enhance to the fullest permissible extent, the access of the public to

[1] The DOE qualifies as an "agency" under FOIL, which is defined as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any of one or more municipalities thereof, except the judiciary or the state legislature". Moreover the requests Petitioners seek constitute "records", which are defined as "any information kept, held, produced or reproduced by, with or for an agency ... in any physical form whatsoever...." N.Y. PUB. OFF. LAW § 86(3)-(4) (2011).

records and information in the possession of State and local government agencies...." *See In re Murphy*, 148 A.D.2d 160, 162, 543 N.Y.S.2d 70, 72 (1st Dep't 1989). Accordingly, unless a valid exception applies, upon receipt of a proper FOIL request, the DOE must provide responsive documents.

As with other agencies, when responding to FOIL requests, the DOE must follow a strict procedure. Upon receipt of a request, it must respond within five business days by denying, granting or providing an approximate date by which a decision will be made about the request. N.Y. PUB. OFF. LAW § 89(3). If the DOE is going to respond to the request, within twenty business days of acknowledging the request, it must give a reasonable date by which it can provide the documents.[2] *Id.* Failure to follow these procedures constitutes a constructive denial of the request, which allows for an appeal to the agency. N.Y. PUB. OFF. LAW § 89(4)(a) (2008); N.Y. COMP. CODES R. & REGS. tit. 21, § 1401.5(e) (2011); Chancellor's Regulation D-110(VIII)(A); *see also Bernstein v. City of New York*, N.Y.L.J., Nov. 7, 1990 at 22, col. 2 (Sup. Ct. N.Y. County) (finding that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law Section 89(3), can be construed as a denial of said request); *Newton v. Police Dep't of New York City*, 183 A.D.2d 621, 624, 585 N.Y.S.2d 5, 8 (1st Dep't 1992).

Here, it is undisputed that Requests #6762 and #6890 were validly served on the DOE. Moreover, the DOE indicated that it would respond to the requests and it did not invoke any FOIL exemptions at that time. As a result, this Court must first compel the DOE to produce

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[2] Courts also presume that all agency records are available for public inspection and copying, unless the documents in question fall within one of the enumerated exemptions set forth in New York Pub. Off. Law Section 87(2). *Herald Co., Inc. v. Feurstein*, 3 Misc.3d at 890. If an agency believes that one of the exemptions, which are to be narrowly construed, applies, then it bears the burden of demonstrating the applicability of the particular exemption claimed. *See id.* The documents requested by Petitioners in Requests #6762 and #6890 do not qualify as one of the enumerated exemptions, thus the DOE does not have valid reasons for not providing the requested documents.

documents responsive to Requests #6762 and #6890 because Petitioners are entitled to them. Not only have Petitioners followed the enumerated procedures to request documents under FOIL and exhausted their administrative remedies but Respondent is required to produce the types of records requested as they are not barred by any applicable FOIL exemptions.[3]

With respect to Request #6762 the DOE has not yet produced two of the four categories of documents. The DOE's response did not address section (b) of the request, which asks for data pertaining to "the number of units of Native Language Arts taught at the school and respective native language corresponding to each unit." Moreover, the DOE did not provide a means to interpret whether certain courses on the master schedule were native language arts courses. It also failed to demarcate the units of bilingual education classes by language as requested by section (d) of the request. Respondent erroneously claims that it is not required to compile or create new records related to demarcating bilingual education by language. This particular request simply seeks the identification of bilingual education classes by language at each school. Essentially this request represents the most basic information that the DOE should have for the schools requested: a listing of their classes.

Of the thirty-five categories of documents encompassed in Request #6890, Respondent has failed to produce documents responsive to thirty-one of those requests. Specifically the DOE must produce records for requests six through twenty-five, concerning testing and graduation information, because Chancellor's Regulation A-820 requires it to maintain such records.

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[3] Respondent erroneously claims that Petitioners did not timely appeal the denial of Request #6762 because Respondent sent a letter of correspondence on December 21, 2010 and the appeal was not made until February 4, 2011. This argument should be rejected because the letter in question from Respondent could not have been deemed a denial of Request #6762 because it was not accompanied by a notice of appeal and did not contain any reasons stating the rationale for the denial under the requite law. *See* Chancellor's Regulation D-110(VI)(J); N.Y. COMP.

Chancellor's Regulation A-820(III)(C). Moreover, these types of education records may be freely released as long as the personal identifying information of students is removed. Chancellor's Regulation A-820(IV)(A)(2). In addition, the DOE must also provide documents responsive to requests twenty-seven and thirty, thirty-one, thirty-three, thirty-four and thirty-five dealing with placement and enrollment information generally because these records are not precluded by any FOIL exceptions. In sum, the DOE is required to produce the enumerated documents because FOIL dictates such action and no relevant exemptions apply.

B. The DOE Has Improperly Extended Its Time to Respond to Requests #6762 and #6890

Although FOIL grants the DOE the right to produce documents later than twenty business days following the receipt of the request, the DOE's delay must be reasonable. N.Y. PUB. OFF. LAW § 89(3). For instance, this Court ordered the New York State Insurance Department to disclose documents responsive to a governmental vendor's FOIL request for bids submitted to the Insurance Department by a competitor when it constructively denied the petitioner's request and appeal by simply ignoring them. *CAT*ASI, Inc. v. New York State Ins. Dep't*, 195 Misc.2d 456, 457 (Sup. Ct. N.Y. County 2002). *See also Rhino Assets, LLC, et al. v. New York City Dep't for the Aging*, 31 A.D.3d 292, 293 (1st Dep't 2006) (compelling New York City's Department for Aging to produce documents under FOIL after ignoring the petitioner's FOIL request and administrative appeal).

Here, the DOE's extension of time was by no means reasonable because it pushed back the date to respond to Request #6762 ten times over the course of fourteen months and fourteen

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CODES R. & REGS. tit. 21, § 1401.7. Thus the December 21, 2010 letter does not factor in to the time in which Petitioners had to file the appeal. As such Petitioners' appeal is timely.

times with respect to Request #6890 during one year. More telling however is the fact that after fifteen and thirteen months respectively, the DOE has still not produced all the records sought in Requests #6762 and #6890. As such, this Court must use its power to dictate that the DOE abide by its obligations under FOIL and the Chancellor's Regulation to produce the requested documents.

II. THIS COURT SHOULD ENJOIN THE DOE FROM FURTHER VIOLATIONS OF ITS FOIL OBLIGATIONS WITH RESPECT TO ALL FOIL REQUESTS

The DOE—on at least the seven occasions identified here—has consistently engaged in a pattern and practice of violating its statutory FOIL obligations. The DOE habitually grants itself unilateral extensions and refuses to provide documents lawfully requested by Petitioners, among others. This Court may find that this ongoing conduct constitutes a pattern and practice by analyzing "the nature of the right protected and the nature of the ordinary violations of such right." *U.S. v. Gilman*, 341 F. Supp. 891, 905 (S.D.N.Y. 1972). Moreover, "a finding of pattern [and] practice is a factual finding, and each case must stand on its own facts." *U.S. v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992).

For example, in *Gilman*, a housing discrimination case under the Civil Rights Act, the court found a pattern and practice of racial housing discrimination based on two identifiable instances. *Gilman*, 341 F. Supp. at 906. Similarly, other jurisdictions have found that fewer violations than committed by the DOE here, may amount to a pattern and practice. *See U.S. v. Big D Enters., Inc.*, 184 F.3d 924, 931 (8th Cir. 1999) (evidence of housing discrimination against three victims was sufficient to demonstrate a pattern and practice under the Fair Housing Act); *Balistrieri*, 981 F.2d at 929-930 (holding that a pattern and practice was established based

upon six distinct violations); *U.S. v. Garden Homes Mgmt., Corp.*, 156 F. Supp. 2d 413, 421 (D.N.J. 2001) (finding a pattern and practice of misconduct based upon three violations).

Here, the DOE's continuous extensions did not just occur once or a few times, but rather on *numerous* occasions. In response to each of the enumerated requests, the DOE not only shirked its duties under FOIL but also frustrated the purpose of the FOIL statute. The DOE's treatment of Request #6762 in particular makes plain the manner in which it has violated its statutory obligations under FOIL. Request #6762 only came about as a result of the DOE's failure to provide the requested records for FOIL #5736. After the DOE failed for innumerable months to provide the documents sought in Request # 5736, it then instructed Petitioner to reformulate the request in a manner such that the DOE could provide the documents. Petitioner followed the DOE's express instructions and altered the FOIL request with the belief that the DOE would make the documents available. However, this simply was not the case.

With respect to Request #6762, and not including the previous extensions from Request #5736, the DOE unlawfully extended its time to comply with the request ten times over the course of fourteen months. However as in cases such as *Gilman*, the DOE's transgressions with respect to unlawful extensions was not limited to Request #6762. The DOE extended its time to comply with Request #6890 fourteen times within the course of one year. Despite numerous promises to respond to the requests, the DOE only compounded its violations of FOIL by unilaterally dictating more extensions. More than one year after Petitioner first issued Request #6890, the DOE has still not produced the other thirty-one categories of documents.

As troubling as the DOE's responses to Requests #6762 and #6890 have been, this type of violation is unfortunately quite common for the DOE. As Requests #6625, #6626, #6753,

#7233, and #7632 highlight, the DOE has a pattern and practice of granting itself unilateral extensions to respond to FOIL requests. These requests vary in the type of information they seek, ranging from IEP data to GED records, yet the DOE's response has been consistent in the fact that it avoids its duties under FOIL by issuing repeated unilateral extensions. Petitioners' various aims in issuing these requests have been frustrated and entirely undermined by the fact the DOE has a pattern and practice of continuously extending its time to respond to requests. By delaying Petitioners' requests for information for more than a year, the DOE is in effect defeating Petitioners' attempts to advocate on behalf of students in New York City. Due to the DOE's continued disregard to its FOIL obligations, this Court must enjoin such further action on the part of the DOE. The DOE must cease the practice of continuous extensions and respond to FOIL requests within the statutorily required period of time.

III. PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES AND COSTS

In accordance with FOIL's fee-shifting provision, this Court may in its discretion award reasonable counsel fees and litigation costs to Petitioners if it finds that the petitioner has substantially prevailed in showing that: (1) "the agency had no reasonable basis for denying access"; or (2) "the agency failed to respond to a request or appeal within the statutory time." N.Y. PUB. OFF. LAW § 89(4)(c). Petitioners satisfy this test, and Respondent's flagrant and repeated violations compel this Court to exercise its discretion and award Petitioners their attorneys' fees and costs.

The Court of Appeals has stated that a party substantially prevails if the initiation of the Article 78 proceeding is responsible for bringing about the release of the requested documents. *Powhida v. Albany*, 147 A.D.2d 236, 239 (3d Dep't 1989). Here, if Respondents provide the

necessary documents responsive to Petitioners' requests or if the Court enjoins the DOE's pattern and practice of unilateral extensions, it will be as a direct result of Petitioners' decision to commence this proceeding. Moreover, the DOE had no reasonable basis for withholding the records, failed to respond to Petitioners' request within the statutory time and instead simply granted itself unilateral extensions.

CONCLUSION

Because Petitioners have a statutory right to documents responsive to their FOIL requests as well as an injunction barring the DOE from committing further violations of FOIL with respect to all FOIL requests, the Petition should be granted in full.

Dated: New York, New York
June 22, 2011

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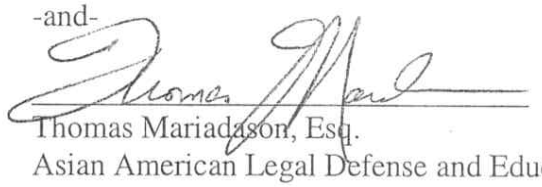

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