

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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ADVOCATES FOR CHILDREN OF NEW :
YORK, INC. and ASIAN AMERICAN :
LEGAL DEFENSE AND EDUCATION :
FUND, :

Index No.

Petitioners, : **VERIFIED PETITION**

For a Judgment Pursuant to Article 78 of the :
CPLR :

-against- :

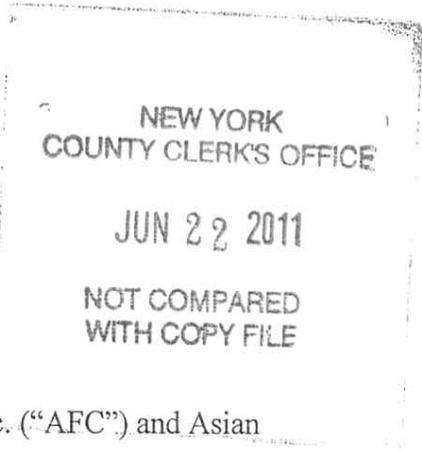
THE NEW YORK CITY DEPARTMENT OF :
EDUCATION, and :

DENNIS WALCOTT, as Chancellor of the :
New York City Department of Education, :

Respondents. :

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TO THE SUPREME COURT OF THE STATE OF NEW YORK:



Petitioners, Advocates for Children of New York, Inc. ("AFC") and Asian

American Legal Defense and Education Fund ("AALDEF"), for their Verified Petition pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"), allege as follows:

1. This is an action for a judgment pursuant to CPLR Article 78 issuing a mandamus (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.

THE PARTIES

2. 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.

3. 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.*

4. 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.

5. 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.

JURISDICTION AND VENUE

6. This Court has jurisdiction to hear this proceeding based upon Article 78 of the CPLR and Section 1401.7(i) of the Rules and Regulations of the State of New York.

7. Venue is proper in New York County under CPLR 506(b) because, *inter alia*, it is the county: a) where the parties have their main offices; b) where the information was requested; c) from which the key correspondence was sent and in which it was received; and d) where the information should have been provided.

FACTUAL BACKGROUND

The DOE has Repeatedly Failed To Provide Timely Responses to Petitioners' Requests

Request #6762

8. 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.*

9. 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.*

10. 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.*

11. 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.

12. 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.

13. 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

14. 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. *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, to obtain the credits and testing necessary to receive a Regents, Advanced Regents, and local diploma. *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.*

15. 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 request. *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 request twenty-six. *See id.* Finally the DOE produced records responsive to request 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.*

16. 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.

17. 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.

18. 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.

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

19. 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

20. 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

21. 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

22. On February 19, 2010 Petitioner AFC filed Request #6753 seeking general information pertaining to Individualized Education Program (“IEP”) Diploma data. *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

23. 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

24. 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.

AS AND FOR PETITIONERS' FIRST CAUSE OF ACTION

25. Petitioners repeat and reallege paragraphs 1 through 24 as if fully set forth herein.

26. Respondent has engaged in a pattern and practice of failing to comply with its obligations under New York Public Officers Law Section 84 *et seq.*, Section 1401.5 of the Rules and Regulations of the State of New York, and Respondent's Chancellor's Regulation D-110(VI) by routinely ignoring statutory deadlines, constructively and improperly denying requests and appeals, and ultimately failing to disclose to Petitioners the requested documents to which they are entitled.

27. The DOE's failure to perform its duties violates the letter and spirit of FOIL, which provides for open disclosure to the public. So long as the DOE maintains its pattern and practice of non-compliance with FOIL, Petitioners are profoundly hindered in their ability to advocate on behalf of their constituents and serve the public by holding Respondent accountable for its practices.

28. As a result of non-compliance, Petitioners urge this Court to issue a mandamus to compel Respondent 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 Chancellor's Regulation D-110, by: (i) compelling Respondents 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 Chancellor's Regulation by producing the documents requested in Petitioners' 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 Respondent 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.

WHEREFORE, Petitioners pray for an order:

1. Compelling Respondents 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 Chancellor's Regulation by producing the documents requested in Petitioners' FOIL requests within 60 days of this Court's order;
2. 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 Respondent must respond to FOIL requests within the time required by FOIL;
3. Awarding Petitioners their costs and attorneys' fees in this proceeding;
and
4. Granting such other and further relief to Petitioners as may be just and proper.

Dated: New York, New York
June 22, 2011

Respectfully submitted,

ADVOCATES FOR CHILDREN OF
NEW YORK, INC

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Dated: New York, New York
June 22, 2011

Respectfully submitted,

ADVOCATES FOR CHILDREN OF
NEW YORK, INC

By: _____

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A handwritten signature in cursive script, appearing to read "Thomas Maradason", written over a horizontal line.

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VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Thomas Mariadason, being duly sworn, deposes and says:

I am a staff attorney for the Educational Equity and Youth Rights Project for the Asian American Legal Defense and Education Fund. I have read the foregoing Verified Petition and know the contents thereof, and the same is true to my knowledge.



Thomas Mariadason, Esq.

Sworn to before me this
22nd day of June, 2011



Notary Public

IVY ORACION SURIYOPAS
Notary Public, State of New York
No. 025U6149309
Qualified in Kings County
Commission Expires July 10, 2011 *H*