

Index No. 156610/2017

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

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FRANCESCO PORTELOS,

Petitioner,

-against-

NEW YORK CITY DEPARMTENT OF  
EDUCATION; CARMEN FARIÑA, CHANCELLOR  
of NEW YORK CITY DEPARTMENT OF  
EDUCATION; and JACLYN VARGO, DIRECTOR  
OF THE OFFICE OF SPECIAL INVESTIGATIONS,

Respondents,

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

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**MEMORANDUM OF LAW IN SUPPORT OF  
RESPONDENTS' VERIFIED ANSWER**

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**PRELIMINARY STATEMENT**

Francesco Portelos, (“Petitioner”), an employee of the New York City Department of Education (“DOE”), brings this special proceeding pursuant to Article 78 of the Civil Practice Law and Rules against the DOE, Carmen Fariña, as Chancellor of DOE, and Jaclyn Vargo, as Director of the Office of Special Investigations (“OSI”), (collectively, “Respondents”), challenging OSI’s decision to substantiate an allegation against Petitioner for the disclosure of confidential student personal information. The Petition should be dismissed.

The OSI investigation indisputably included interviews and a thorough review of the documents Petitioner admittedly posted publicly. Petitioner fails to

demonstrate that the decision of OSI to determine that Petitioner disclosed confidential student personal information was arbitrary, capricious, or in bad faith.

Confidential student personal information is protected under the Family Educational Rights and Privacy Act (“FERPA”) as well as Chancellor’s Regulation A-820. Here, after a complaint concerning violations of student privacy was filed with the DOE regarding a blog post on a website, OSI investigated. The website was uftsolidarity.org, and OSI found that the domain name of the website was registered to Petitioner. Documents related to student grade changes were posted on the website, and while some names were redacted, Student A’s name<sup>1</sup> was not. OSI further determined that the rest of the documents posted on the website contained enough personal information that someone with knowledge of the school could determine the identities of the students based on the data disclosed.

OSI conducted interviews of DOE employees, including Petitioner, as part of their investigation. Petitioner admitted to being one of the employees who posted the documents. Based on this information and a review of the documents, OSI substantiated the allegations that Petitioner violated FERPA and Chancellor Regulations A-820 by posting student educational records on the internet. In short, Respondents acted in good faith by conducting a thorough investigation and determining that Petitioner violated FERPA and Chancellor’s Regulation A-820.

Moreover, the only action taken against Petitioner in connection with that finding is that Petitioner received a letter from his supervisor discussing the substantiated complaint, but this letter is not a part of Petitioner’s personnel file. At this point,

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<sup>1</sup> To protect the student’s privacy, his/her name will be referred to as “Student A” in this memorandum and the accompanying Answer.

Petitioner has not been charged in any disciplinary proceedings or suffered any other consequences as a result of this substantiated allegation.

Petitioner argues that OSI reached the wrong conclusion, but, as set forth, he cannot meet his burden of establishing that OSI acted in bad faith.

Petitioner argues unpersuasively that OSI ostensibly lacks jurisdiction to investigate and determine if FERPA was violated. Petitioner argues that FERPA by its terms applies only to schools and therefore he cannot be disciplined for a FERPA violation. But Petitioner misses the point: OSI determined that his actions in posting private material constituted a violation of FERPA, but Petitioner was not sanctioned for this misconduct. It need only be added that DOE's own obligations under FERPA require it to investigate such alleged violations

Respondent also contends he cannot be found in violation of FERPA and/or the Chancellor's Regulation, because his actions in posting the material were done outside the scope of his employment with the DOE. Of course, in making this argument, Petitioner effectively admits that OSI reached the correct conclusion in holding him responsible for the posting. In an event, this argument fails because Petitioner admits that the individuals who posted the information on the website were DOE employees, all of whom have an obligation to follow the Chancellor's Regulations, even if this Court finds they are not obligated to follow FERPA. Chancellor's Regulation A-820 regulates the confidentiality of student records and applies to Petitioner as a DOE employee, regardless of whether he posted to the website outside of his teaching responsibilities.

Further, Petitioner claims that DOE was untimely in giving him a letter regarding the allegations in June 2017. While Petitioner correctly asserts that the CBA

sets forth time limits for placing letters to file, this disciplinary letter was not a letter that was placed in his personnel file.

Therefore, and as set forth more fully below, the Petition must be denied in its entirety.

### **STATEMENT OF FACTS**

Respondents respectfully refer the Court to the Statement of Facts set forth in Respondents' Verified Answer ("Answer"), and the exhibits annexed thereto, for a full statement of the facts relevant to this proceeding.

### **ARGUMENT**

#### **POINT I**

#### **RESPONDENTS' DECISION TO SUBSTANTIATE THE OSI ALLEGATIONS AGAINST PETITIONER WAS IN GOOD FAITH.**

##### **A. Standard of Review**

The standard for judicial review of an administrative determination pursuant to Civil Practice Law and Rules §7803(3), is whether the determination was arbitrary and capricious or affected by an error of law. See Scherbyn v. BOCES, 77 N.Y.2d 753, 757-58 (1991); Pell v. Bd. of Educ., 34 N.Y.2d 222, 230 (1974). The test of whether an administrative determination is arbitrary and capricious "relates to whether a particular action should have been taken or is justified...and whether the administrative action is without foundation in fact." Pell, 34 N.Y.2d at 231 (internal citations omitted). If a determination is supported by a rational basis, a reviewing court may not substitute

its judgment for that of the administrative body responsible for making the determination.

See Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009).

The burden is on the employee to establish “bad faith,” a violation of the constitution, a statute, or decisional law:

[t]he burden of raising and proving such “bad faith” is on the employee and the mere assertion of “bad faith” without the presentation of evidence demonstrating it does not satisfy the employee’s burden.

Soto v. Koehler, 171 A.D.2d 567, 568 (1<sup>st</sup> Dep’t 1991); see also Witherspoon v. Horn, 19 A.D.3d 250, 251 (1<sup>st</sup> Dep’t 2005). Conclusory allegations or speculation cannot suffice to support a claim of bad faith. Witherspoon, 19 A.D.3d at 251; Thomas v. Abate, 213 A.D.2d 251 (1st Dep’t 1995).

As demonstrated below, the Petition fails to establish bad faith.

**B. Respondents’ Decision to Substantiate the Allegations Against Petitioner Was in Good Faith.**

In this matter, near the end of the 2015-2016 school year, Petitioner became the subject of an investigation by the Office of Special Investigations (“OSI”), after OSI received a referral to investigate from the Special Commissioner of Investigation. See OSI Report dated October 19, 2016, Exhibit “2.”<sup>2</sup> OSI investigates allegations of improper and unlawful behavior, including corporal punishment and verbal abuse against students, to help ensure a safe and secure learning environment for New York City’s students. See OSI Website, publicly available at <http://schools.nyc.gov/Offices/GeneralCounsel/Investigative/OSI/default.htm>.

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<sup>2</sup> All numbered exhibits refer to those annexed to Respondents’ Verified Answer. Respondents used numbered exhibits because Petitioner had used alphabetized exhibits.

A principal, Santiago Taveras, reported that student transcripts, attendance records, and student grade change records were posted on the Internet. The records were posted on the website of a group called UFT Solidarity. See OSI Report dated October 19, 2016, Exhibit “2,” at 1. During the investigation, OSI discovered that the domain name “uftsolidarity.org” was registered by Petitioner. See OSI Report dated October 19, 2016, Exhibit “2,” at 1.

OSI conducted several interviews as part of the investigation. OSI interviewed Principal Taveras, who stated that he was reviewing the website when he discovered confidential documents concerning students from his school. Principal Taveras also stated that he realized he had recently prepared some of the posted documents to send to his union representative and had asked his secretary to scan them. See OSI Report dated October 19, 2016, Exhibit “2,” at 2. OSI also interviewed Mary Rodriguez, the school secretary. Ms. Rodriguez stated that she scanned the documents for Principal Taveras, but did not understand how the documents were obtained by uftsolidarity.org for its posting. She could not recall if the documents were left unattended prior to scanning. She also stated that the documents were in a locked closet in her office after she scanned them. See OSI Report dated October 19, 2016, Exhibit “2,” at 2.

Joseph Baranello, the Chief Privacy Officer at the Office of the General Counsel at DOE, also reviewed the documents to determine whether they violated the Family Educational Rights and Privacy Act (“FERPA”) and/or the Chancellor’s Regulation regarding student privacy. See OSI Report dated October 19, 2016, Exhibit “2,” at 2. He noted that one document, which was not redacted and showed Student A’s

name in its entirety, was published in violation of both Chancellor's Regulation A-820 and FERPA. See OSI Report dated October 19, 2016, Exhibit "2," at 2. Mr. Baranello also noted that DOE would not release student transcripts in the form they were published by UFT Solidarity because it would be possible, despite some redactions in the postings, for someone with enough knowledge of the DOE and student programs to use the information on the transcripts to identify the students in the records. See OSI Report dated October 19, 2016, Exhibit "2," at 2.

OSI also interviewed Petitioner as part of the investigation. Petitioner was accompanied by Donna Coppola, a representative of the United Federation of Teachers ("UFT"), Petitioner's union. Id. At the interview, Petitioner confirmed that the UFT Solidarity domain name is registered to him and admitted to being involved in posting the documents in question to the website. See OSI Report dated October 19, 2016, Exhibit "2," at 2. Petitioner stated that multiple people were involved, but refused to identify those people or explain how the documents were obtained. See OSI Report dated October 19, 2016, Exhibit "2," at 2. During the interview, Petitioner accessed the UFT Solidarity website and removed the post containing the documents, see OSI Report dated October 19, 2016, Exhibit "2," at 3, which confirmed that he had administrative access to the website. Notably, Petitioner admits that he redacted the student name and then later republished the article in its entirety. See ¶ Petition 32.

After Supervising Investigator Eric Black conducted interviews and reviewed the records, he concluded that Petitioner and UFT Solidarity's publication of Student A's education record with personally identifiable information was a violation of Chancellor's Regulation A-820 and FERPA. See OSI Report dated October 19, 2016,

Exhibit “2,” at 3. The investigation further concluded that the remaining partially redacted documents, also published by Petitioner and UFT Solidarity, contained “sufficient information that a person in the [school where the records originated] might be able to identify the students with reasonable certainty.” See OSI Report dated October 19, 2016, Exhibit “2,” at 3.

Notably, Chancellor’s Regulation A-820 states that “personally identifiable information” includes, but is not limited to the name of the student, as well as: “other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.” See Chancellor’s Regulation A-820, Exhibit “6,” at III (F). The documents Petitioner published included not only a student’s name, but enough information that other students could be identified without personal knowledge of the circumstances. See OSI Report dated October 19, 2016, Exhibit “2,” at 3.

Respondents substantiated the allegations OSI investigated regarding disclosure of student records in good faith. OSI conducted an investigation, interviewed witnesses, including Petitioner, and reviewed the records. Petitioner’s efforts to quibble with the contents of the OSI report, see Petition at 13, are insufficient to show that the report was generated in bad faith. See generally Ardsley Constr. Co. v. Port Auth. of New York and New Jersey, 75 A.D.2d 760, 761, (1st Dep’t 1980), *aff’d*, 54 N.Y.2d 876, (1981) (finding that a Plaintiff’s “mere disagreement” with the outcome is insufficient to establish bad faith). Respondents’ decision was made in good faith and the Petition should be dismissed.

**C. Petitioner Received a Disciplinary Letter Not Placed in His Personnel File.**

By notice dated March 21, 2017, Petitioner was summoned to a disciplinary conference by his supervisor, Mark Ryan. See Summons to Disciplinary Conference, Exhibit “3.” The purpose of the meeting was to discuss the OSI report Petitioner’s disclosure of student educational records. Id. After the meeting, Petitioner sent a response to the OSI report to OSI Deputy Director Christina Nowak disputing DOE’s authority to make such a determination. See Petitioner’s Exhibit “F.”

On or about April 4, 2017, OSI Director Jaclyn Vargo denied Petitioner’s request to reconsider the final OSI determination. Director Vargo also noted that she reviewed the report and found that it was consistent with FERPA. See April 4, 2017 Letter, Exhibit “4.”

On or about April 19, 2017, Field Supervisor Mark Ryan wrote Petitioner a letter memorializing meeting they had in March 2017, and noted that the investigation found Petitioner posted documents containing Student A’s unredacted name to the UFT Solidarity website. See April 19, 2017 Letter, Exhibit “5.” The letter does not state that a copy of the letter was placed in Petitioner’s file and as such, is not a part of his personnel or school file. See April 19, 2017 Letter, Exhibit “5.” The applicable collective bargaining agreement requires that for a disciplinary letter to be placed in a personnel file, it must be completed within certain timeframes. If the timeframe to issue a letter to file has passed, supervisors may still issue letters that are not placed in a personnel file. Letters that are not a part of the employee’s personnel file may, among other things, serve to provide notice to an employee regarding a DOE policy or regulation, or memorialize performance issues (including misconduct). See Answer ¶75. Petitioner received a letter that is not a part of his personnel file. As of September 27, 2017, no disciplinary

proceedings have been initiated against Petitioner based on the misconduct described in the April 19, 2017 letter.

## POINT II

### **PETITIONER'S REMAINING ARGUMENTS ARE MERITLESS.**

#### **A. Petitioner's Claim that DOE Has No Authority to Investigate FERPA Violations is Meritless.**

FERPA is a federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. See OSI Report dated October 19, 2016, Exhibit "2," at 2; see also FERPA website, publicly available at <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last accessed September 21, 2017.) While Petitioner argues that FERPA only allows a student to file a complaint regarding FERPA rights and that DOE does not have the authority to discipline him over a FERPA violation, see ¶ Petition 40, 41, Petitioner's argument misses the point, because the DOE is not filing a complaint against him with the federal agency or even disciplining him in any way. Rather, DOE is fulfilling its compliance with FERPA by investigating violations of student privacy. When a complaint is filed against a school with U.S. Department of Education, that federal agency investigates, and if "a determination is made that a school violated FERPA, the school and the complainant are so advised, and the school is informed of the steps it must take to come into compliance with the law." See FERPA General Guidance for Students, publicly available at <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html> (last accessed September 21, 2017). As such, DOE is obligated under federal law to ensure its compliance with FERPA. Therefore, if a DOE employee is posting information under FERPA that would

violate the law, DOE should investigate any resulting complaint about that conduct to ensure that DOE employees are complying with the law and protecting student privacy. See generally Chancellor's Regulation A-820, at 1 (noting that the Regulation itself "incorporates pertinent provisions of . . . FERPA").

As such, Petitioner's argument that DOE cannot investigate an employee for violations of FERPA is meritless.

Notably, Petitioner omits from the Petition the fact that he was also investigated for violations of Chancellor's Regulation A-820, which indisputably applies to him as a DOE employee, and governs student privacy disclosure. See Chancellor's Regulation A-820, Exhibit "6."

**CONCLUSION**

For the foregoing reasons, Respondents respectfully request that the Petition be dismissed in its entirety, that the relief requested be denied in all respects, that judgment be entered for Respondents, together with such other and further relief as the Court deems appropriate.

Dated: New York, New York  
September 27, 2017

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