

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

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FRANCESCO PORTELOS,

Petitioner,

**VERIFIED ANSWER**

– against –

Index No. 156610/2017

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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Respondents, New York City Department of Education, (“DOE”), Carmen Fariña, in her official capacity as Chancellor of the DOE, and Jaclyn Vargo, in her official capacity as Director of the Office of Special Investigations, by their attorney, Zachary W. Carter, Corporation Counsel for the City of New York (“City”), as and for their verified Answer to the petition (“Petition”), respectfully allege as follows:

1. Deny the allegations set forth in paragraph “1” of the Petition, except admit that Petitioner purports to proceed as stated therein, and respectfully refer the Court to Petitioner’s Exhibit A cited therein for the contents thereof.
2. Deny the allegations set forth in paragraph “2” of the Petition, except admit that Petitioner purports to proceed as stated therein.
3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “3” of the Petition.

4. Deny the allegations set forth in paragraph “4” of the Petition, and affirmatively state that Petitioner did not identify “City of New York” as a Respondent in this proceeding.

5. Deny the allegations set forth in paragraph “5” of the Petition, except admit that DOE is organized and existing under the laws of the State of New York, and respectfully refer the Court to the Education Law and Chapter 20 of the New York City Charter, for a statement of the powers of the DOE.

6. Deny the allegations set forth in paragraph “6” of the Petition, except admit that Respondent Carmine Farina, sued here in her official capacity, is Chancellor of the DOE, and respectfully refer the Court to the New York Education Law § 2590-h for a full and accurate statement of the powers of the Chancellor of the DOE.

7. Deny the allegations set forth in paragraph “7” of the Petition, except admit that Jaclyn Vargo is the Director of the Office of Special Investigations at DOE.

8. Deny the allegations set forth in paragraph “8” of the Petition, except admit that DOE maintains offices in New York County, and that Petitioner purports to proceed as stated therein.

9. Deny the allegations set forth in paragraph “9” of the Petition, except admit that the Office of Special Investigations substantiated an allegation that Petitioner violated the Family Education Rights and Privacy Act (“FERPA”) by publishing confidential student information on his blog.

10. Admit the allegations set forth in paragraph “10” of the Petition.

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “11” of the Petition.

12. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “12” of the Petition.

13. Paragraph “13” of the Petition sets forth a legal conclusion only, to which no responsive pleading is required.

14. Deny knowledge or information sufficient to form a belief as to the allegations set forth in paragraph “14” of the Petition, except admit that DOE maintains policies regarding grade changes and state that Petitioner’s characterization of allegedly illegal changes is a legal conclusion to which no responsive pleading is required.

15. Deny knowledge or information sufficient to form a belief as to the allegations set forth in paragraph “15” of the Petition.

16. Deny the allegations set forth in paragraph “16” of the Petition, except deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding whether members reviewed the documents for redactions, or whether they were sent to the media, and state that petitioner’s characterization of the official capacity of NYCDOE employees is a legal conclusion to which no responsive pleading is required.

17. Deny the allegations set forth in paragraph “17” of the Petition, and respectfully refer the Court to the news stories cited therein for the contents thereof.

18. Deny knowledge or information sufficient to form a belief as to the allegations set forth in paragraph “18” of the Petition.

19. Deny the allegations set forth in paragraph “19” of the Petition, except admit that an investigation was conducted into the incident and the Mayor made comments about the investigation.

20. Deny the allegations set forth in paragraph "20" of the Petition, and respectfully refer the Court to the Petitioner's Exhibit B cited therein for the contents thereof.

21. Paragraph "21" of the Petition sets forth a legal conclusion only, to which no responsive pleading is required.

22. Deny the allegations set forth in paragraph "22" of the Petition, and respectfully refer the Court to the Petitioner's Exhibit C for the contents thereof.

23. Deny the allegations set forth in paragraph "23" of the Petition, except admit that the Office of Special Investigations ("OSI") investigated a complaint against Petitioner and state that Petitioner's conclusion as to the jurisdiction of the Special Commissioner of Investigation and OSI is a legal conclusion, to which no responsive pleading is required.

24. Deny the allegations set forth in paragraph "24" of the Petition, except deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding how UFT Solidarity collects revenue, and admit that OSI found that the documents Petitioner posted violated federal law regarding protection of student information, and that OSI determined Petitioner registered the domain name of the website the documents were posted on.

25. Deny the allegations set forth in paragraph "25" of the Petition.

26. Deny the allegations set forth in paragraph "26" of the Petition, except admit that Petitioner was contacted for an interview regarding an OSI matter in which he was the subject of investigation.

27. Deny the allegations set forth in paragraph "27" of the Petition, except admit that Petitioner, accompanied by his union representation, met with OSI as part of an OSI investigation.

28. Deny the allegations set forth in paragraph “28” of the Petition, except admit that OSI met with Petitioner and discussed the documentation that disclosed confidential student information.

29. Deny the allegations set forth in paragraph “29” of the Petition, except admit that Petitioner accessed the website during the interview and removed the article, and respectfully refer the Court to Petitioner’s Exhibit D cited therein for the contents thereof.

30. Deny knowledge or information sufficient to form a belief as to truth of the allegations set forth in paragraph “30” of the Petition, except admit OSI reviewed the student records throughout their investigation.

31. Deny the allegations set forth in paragraph “31” of the Petition.

32. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “32” of the Petition, except admit that Petitioner published the article, and respectfully refer the Court to Petitioner’s Exhibit B cited therein for the contents thereof.

33. Deny the allegations set forth in paragraph “33” of the Petition, and respectfully refer the Court Petitioner’s Exhibit E cited therein for the contents thereof.

34. Deny the allegations set forth in paragraph “34” of the Petition, except admit that Petitioner was given a copy of the OSI report, Petitioner submitted a response to the report, and respectfully refer the Court to Petitioner’s Exhibit A for the contents thereof.

35. Deny the allegations set forth in paragraph “35” of the Petition, and respectfully refer the Court to Petitioner’s Exhibit F cited therein for the contents thereof.

36. Deny the allegations set forth in paragraph “36” of the Petition, and respectfully refer the Court to Petitioner’s Exhibit G cited therein for the contents thereof.

37. Deny the allegations set forth in paragraph “37” of the Petition, except admit that Santiago Taveras was investigated and is still employed by DOE.

38. Deny the allegations set forth in paragraph “38” of the Petition.

39. Paragraph “39” of the Petition sets forth a legal conclusion to which no responsive pleading is required.

40. Deny the allegations set forth in paragraph “40” of the Petition, except deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding Petitioner’s search for caselaw.

41. Paragraph “41” of the Petition sets forth a legal conclusion to which no responsive pleading is required, except Respondents deny knowledge or information sufficient to form a belief as to the truth of Petitioner’s allegations regarding “Student A.”

42. Deny the allegations set forth in paragraph “42” of the Petition, except admit that Petitioner is a named defendant in the unrelated federal case cited, Docket No. 17-CV-2239, Eastern District of New York, and that the Office of the Corporation Counsel of the City of New York declined to represent Petitioner in that case, and respectfully refer the Court to Petitioner’s Exhibit I, and to the docket sheet and its contents in the federal case cited, for the contents thereof.

43. Deny the allegations set forth in paragraph “43” of the Petition, and respectfully refer the Court to Petitioner’s Exhibit C cited therein for the contents thereof.

44. Deny the allegations set forth in paragraph “44” of the Petition, except deny knowledge or information sufficient to form a belief as to the truth of the allegations regarding purported anonymous mail drops to Petitioner’s home mailbox and Petitioner’s

professed belief, and admit that Petitioner has made previous allegations to OSI and DOE, and that Petitioner has sued Respondents previously.

45. Deny the allegations set forth in paragraph “45” of the Petition, and respectfully refer the Court to the provision of the collective bargaining agreement cited therein for the contents thereof.

1. Deny the allegations set forth in the second paragraph “1”<sup>1</sup> of the Petition.
2. Deny the allegations set forth in the second paragraph “2” of the Petition.
3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the second paragraph “3” of the Petition.

**FOR A STATEMENT OF PERTINENT AND MATERIAL FACTS, RESPONDENTS RESPECTFULLY ALLEGE**

**A. The OSI Investigation into Petitioner’s Disclosure of Confidential Student Information.**

49. Petitioner is a teacher employed by DOE, currently assigned to the Absent Teacher Reserve. See Service History of Petitioner, annexed hereto as Exhibit “1.”<sup>2</sup>

50. 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, annexed hereto as Exhibit “2.”

<sup>1</sup> Petitioner’s numbering restarted after Paragraph 45.

<sup>2</sup> For the convenience of the Court, Respondents numbered the paragraphs in our Answer as if the paragraphs in the Petition had been numbered sequentially. Further, all numbered exhibits, unless otherwise indicated, refer to those annexed to the Verified Answer, because Petitioner used letters to refer to his exhibits.

51. 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, staff members, and parents. See OSI Website, publicly available at <http://schools.nyc.gov/Offices/GeneralCounsel/Investigative/OSI/default.htm>.

52. 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 [uftsolidarity.org](http://uftsolidarity.org), the website of a group calling itself UFT Solidarity. See OSI Report dated October 19, 2016, annexed hereto as Exhibit "2," at 1.

53. During the investigation, OSI discovered that the domain name "uftsolidarity.org" was registered by Petitioner. See OSI Report dated October 19, 2016, annexed hereto as Exhibit "2," at 1.

54. OSI conducted interviews of DOE staff as part of the investigation into confidential student information posted on [uftsolidarity.org](http://uftsolidarity.org). See OSI Report dated October 19, 2016, annexed hereto as Exhibit "2," at 1.

55. OSI interviewed Principal Santiago 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 had recently prepared these documents to send to his union representative and had asked his secretary to scan them. See OSI Report dated October 19, 2016, annexed hereto as Exhibit "2," at 2. Principal Taveras stated that many of the documents he had prepared for his union representative were included in the online post by UFT Solidarity. See OSI Report dated October 19, 2016, annexed hereto as Exhibit "2," at 2.



56. OSI also interviewed Mary Rodriguez, the school secretary. Ms. Rodriguez stated that she scanned the documents for Principal Taveras using a copy machine and saving them on a flash drive, as the copier does not save scanned documents to the network. See OSI Report dated October 19, 2016, annexed hereto as Exhibit “2,” at 2.

57. Ms. Rodriguez could not explain how the documents were obtained by whomever posted them to the UFT Solidarity’s website, but she also 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, annexed hereto as Exhibit “2,” at 2.

58. Joseph Baranello, Chief Privacy Officer at the Office of the General Counsel of DOE, was also interviewed as part of the investigation. He reviewed the documents posted by UFT Solidarity and noted that one document, which was not redacted and showed Student A’s name in its entirety, was published in violation of Chancellor’s Regulation A-820 and the Family Educational Rights and Privacy Act (“FERPA”). See OSI Report dated October 19, 2016, annexed hereto as Exhibit “2,” at 2.

59. FERPA is a federal law that applies to all schools that receive federal funds under an applicable program of the U.S. Department of Education. See OSI Report dated October 19, 2016, annexed hereto as Exhibit “2,” at 2.

60. 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, 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, despite some redactions. See OSI Report dated October 19, 2016, annexed hereto as Exhibit “2,” at 2.

61. On or about September 27, 2016, OSI notified Petitioner that he was the subject of an OSI investigation. Petitioner was interviewed as part of the investigation on or about October 11, 2016. See OSI Report dated October 19, 2016, annexed hereto as Exhibit “2,” at 2. Petitioner was accompanied by Donna Coppola, a representative of the United Federation of Teachers (“UFT”), Petitioner’s union. Id.

62. 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, annexed hereto as 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, annexed hereto as Exhibit “2,” at 2.

63. Petitioner stated during the interview that he and the others he claimed had posted the material took care to redact student identifying information, and that the failure to redact Student A’s name must have been an oversight. See OSI Report dated October 19, 2016, annexed hereto as Exhibit “2,” at 2-3.

64. During the interview, Petitioner accessed the UFT Solidarity website and removed the post containing the documents. See OSI Report dated October 19, 2016, annexed hereto as Exhibit “2,” at 3.

65. 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, annexed hereto as Exhibit “2,” at 3; see Chancellor’s Regulation A-820, annexed hereto as Exhibit “6.”

66. 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, annexed hereto as Exhibit “2,” at 3.

67. The investigator noted that Petitioner admitted his involvement in posting the records, and during the interview, was able to remove the post after accessing the website. See OSI Report dated October 19, 2016, annexed hereto as Exhibit “2,” at 3.

**B. Petitioner’s Disciplinary Conference and Disciplinary Letter Not to File.**

68. By notice dated March 21, 2017, Petitioner was summoned to a disciplinary conference by his supervisor, Mark Ryan. See Summons to Disciplinary Conference, annexed hereto as Exhibit “3.”

69. After this conference occurred, Petitioner sent a response to the OSI report to OSI Deputy Director Christina Nowak. See Petitioner’s Exhibit “F.”

70. 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, annexed hereto as Exhibit “4.”

71. On or about April 19, 2017, Field Supervisor Mark Ryan wrote Petitioner a disciplinary letter memorializing the conference 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, annexed hereto as Exhibit “5.”

72. The letter further noted that Petitioner's actions violated Chancellor's Regulation A-820 and FERPA and that Petitioner demonstrated professional misconduct by failing to maintain the confidentiality of student records. See April 19, 2017 Letter, annexed hereto as Exhibit "5."

73. Petitioner was also advised by the letter that the misconduct may lead to further disciplinary action, including disciplinary charges that could lead to termination of his employment. See April 19, 2017 Letter, annexed hereto as Exhibit "5," at 3.

74. Notably, the April 19, 2017 letter is a disciplinary letter that is not placed in Petitioner's personnel file. See April 19, 2017 Letter, annexed hereto as Exhibit "5."

75. 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).

76. As of September 27, 2017, no disciplinary proceedings have been initiated against Petitioner based on the substantiated OSI investigation regarding disclosure of student educational records.

77. Petitioner commenced the instant Article 78 proceeding on August 3, 2017.

**FOR A FIRST DEFENSE**

78. The Petition fails to state a cause of action upon which relief may be granted.

**FOR A SECOND DEFENSE**

79. At all times relevant to the Petition, Respondents acted reasonably, lawfully, and in good faith, without malice, in accordance with the Constitution and laws of the United States and the State of New York, the Charter and laws of the City of New York, the by-laws and regulations of DOE, and all applicable laws, by-laws, rules and regulations, and were neither arbitrary nor capricious.

**WHEREFORE**, 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, and that respondents be granted costs, fees, and disbursements together with such other and further relief as the Court deems just and proper.

Dated: New York, New York  
September 27, 2017

**ZACHARY W. CARTER**  
Corporation Counsel of the  
City of New York  
Attorney for Respondents  
100 Church Street  
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By:

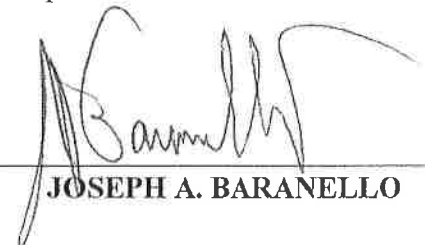


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LILIYA PERELMAN  
Assistant Corporation Counsel

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 Chief Privacy Officer and Agency Counsel 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 employees of the New York City Department of Education.

  
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JOSEPH A. BARANELLO

Dated: New York, New York  
September 27, 2017