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

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, on behalf of all represented employees in the City School District of the City of New York,

Petitioner,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and JOEL I. KLEIN, as Chancellor of the City School District of the City of New York,

Respondents.

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

16113813

Index No._____

VERIFIED PETITION

Petitioner United Federation of Teachers (the "UFT"), by its President Michael Mulgrew, on behalf of all represented employees in the City School District of the City of New York ("Petitioner"), by its attorneys Stroock & Stroock & Lavan LLP, Carol L. Gerstl, Esq. and Adam S. Ross, Esq., hereby alleges, as and for its Verified Petition, as follows:

1. This is a special proceeding brought against Respondents pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") to prevent Respondents from improperly violating the personal privacy of, and likely irreparably damaging the professional reputations of, thousands of public school teachers.

2. Specifically, this Proceeding arises out of Respondents' apparent decision to release certain internal and confidential teacher assessment materials, known as Teacher Data

Reports ("TDRs"), in response to Freedom of Information Law ("FOIL") requests (the "FOIL Requests") from certain members of the press. These documents are not subject to release under FOIL because they fall within the exception for non-final, subjective, deliberative, consultative intra-agency materials under Public Officers Law § 87(2)(g) and contain information that, if released in an unredacted form, would constitute an unwarranted invasion of privacy pursuant to Public Officers Law § 87(2)(b).

3. As alleged herein, TDRs , as they presently exist, are unreliable, often incorrect, subjective analyses dressed up as scientific facts and presented in an inherently misleading fashion that will invariably cause the public to form unsupported conclusions as to teacher quality and irreparably harm the professional reputations of educators.

4. Indeed, as asserted herein, the DOE has acknowledged the subjective and unreliable nature of the TDRs in its various explanatory and training materials which are replete with cautionary language and special instructions that limit their use and guide professional staff on how to properly interpret and apply TDRs. This acknowledgment, together with the purpose of the reports – as one of many intra-agency assessment tools for giving teachers information – and the recognized confidential nature of the information, provides a strong basis for finding that this material need not be disclosed because it falls into the statutory exceptions for non-final intra-agency material that, if released in an unredacted form, would also constitute an unwarranted invasion of privacy. Accordingly, as explained herein, at the inception of the TDR program, then-Deputy Chancellor Christopher Cerf stated that TDRs were confidential internal documents and that the DOE would work with the UFT in connection with advancing the best

legal arguments placing TDRs within an exception to disclosure. Similarly, the current website of the DOE proclaims that confidentiality will be preserved.

5. Tellingly, the DOE's past responses to FOIL requests seeking the universe of TDR materials struck the proper balance under the law by disclosing the information with teacher names redacted, thereby reflecting DOE's own interpretation of what the law and privacy rights mandated. The instant FOIL requests are entitled to no special treatment simply because they explicitly seek teacher names rather than generally requesting all TDR documents.

6. Therefore, this Petition seeks a temporary restraining order and preliminary injunction (i) prohibiting Respondents from releasing TDRs that are unredacted as to teacher names to any member of the public; and (ii) granting such other and further relief as the Court may deem appropriate.

PARTIES

7. Petitioner Michael Mulgrew is a resident of the State and City of New York, and is the President of the UFT, Local No. 2 American Federation of Teachers, AFL-CIO. The UFT is an unincorporated association with its principal place of business in the City and County of New York and is the recognized bargaining agent for all nonsupervisory pedagogical personnel and classroom paraprofessionals employed by the Board of Education of the City School District of the City of New York. The UFT brings this Petition on behalf of all represented employees in the City School District of the City of New York.

8. Respondent Board of Education of the City School District of the City of New York (the "Board") is located at 52 Chambers Street, New York, New York, and is a school

board organized under and existing pursuant to the Education Law of the State of New York and, for all purposes, serves as the government or public employer of all persons appointed or assigned by it.

9. Respondent Joel I. Klein is the Chancellor of the New York City Schools and as such, under New York Education Law, functions as the superintendent of schools and chief executive officer for the City School District of the City of New York.[1] The Chancellor serves at the pleasure of and is selected by the Mayor of the City of New York.

JURISDICTION

10. The jurisdiction of this Court to hear this proceeding is based upon Article 78 of the CPLR.

11. Venue is proper in New York County since, *inter alia*, Respondents are located and events material to this Petition took place there.

FACTUAL BACKGROUND

I. TEACHER DATA REPORTS

A. TDRs Present Complicated Subjective Assessments, Require Special Training to Understand and are Subject to Misinterpretation and Misuse

12. Beginning in the 2007-08 school year, the DOE commenced the "Teacher Data Initiative" as a pilot program in about 100 schools. The UFT and the DOE worked together

[1] In conjunction with amendments to the State Education Law enacted in 2002, many of the powers previously held by the Board of Education of the City School District of the City of New York ("BOE") devolved to the Chancellor, with the administrative operations assigned to a body denominated by the Mayor as the New York City Department of Education ("DOE"). Nonetheless, the BOE retained the power to ratify collective bargaining agreements and is the statutory employer of personnel for the City School District. The BOE, the DOE and the Chancellor are herein referred to collectively as the "DOE" or "Respondents."

to design the pilot program and sought to develop valid reports that would be utilized solely as professional development tools. The UFT only agreed to collaborate with the DOE with the assurance that the reports would remain confidential. The resulting TDRs, however, are, at present, so subjective and imprecise that they are unreliable. These reports purport to determine a teacher's "value added" to students' scores on the State math and English language arts ("ELA") assessments by attempting to control for a multitude of factors influencing achievement that are, admittedly, outside the teacher's control.

13. Generally, the DOE achieves this measure of value added by (1) attempting to *predict* the cumulative improvement of all the teacher's students on State assessment tests as compared to the previous year, and then (2) comparing the students' actual cumulative improvement to the predicted improvement to generate (3) a purported measure of the teacher's positive or negative "added value." See Sample 2009-10 TDR available on DOE's online Teacher Toolkit ("2009-10 Sample TDR"), a copy of which is annexed hereto as Exhibit A, at 1.[2] While parts (2) and (3) are deceptively presented as a matter of simple arithmetic, as explained in the following section, part (1) camouflages a complex and largely subjective guessing game on the part of the DOE (and its private vendor) as to (i) which factors should be included and (ii) what relationship included factors should have to divining future student test results. This exercise includes some 35 factors recognized to be beyond the teacher's control, such as the student's ethnicity, economic level, and English learner status. Id.; see also "Frequently Asked Questions" ("FAQs") portion of the DOE's online Toolkit,[3] a copy of which

[2] Available at http://schools.nyc.gov/Teachers/TeacherDevelopment/TeacherDataToolkit/InterprettheReports/TeacherDataReports/default.htm

[3] http://schools.nyc.gov/Teachers/TeacherDevelopment/TeacherDataToolkit/FAQ/default.htm

is annexed hereto as Exhibit B, at 3. In their present iteration, TDRs also compare the teacher's value added to his or her "peer group" generating a percentile rank among purportedly similarly situated teachers. See 2009-10 Sample TDR, Exhibit A, at 1.

14. Upon information and belief, although half the principals in the pilot program shared TDRs with the subject teachers in the pilot program, sharing this information with teachers was not a requirement, and many teachers were not even aware that they were subjects of the pilot program. See DOE's "Introduction to NYC Teacher Data Initiative: Optional Additional Training Materials for Principals" (Fall 2008) ("Additional Training Materials"), a copy of which is annexed hereto as Exhibit C, at 3.

15. In the 2008-2009 school year, TDRs were rolled out citywide to all grade 4-8 math and ELA teachers for whom the DOE had, by its own designated standards, sufficient data. The program was explained to teachers by their principals, and DOE's official website maintains an extensive "Teacher Page: A Resource for Teachers" (also called the "Teacher Data Toolkit" or "Toolkit") dedicated to explaining TDRs, providing training materials and responding to teachers' anticipated concerns regarding the reports.[4]

16. Upon information and belief, the TDRs prepared during the pilot program and the 2008-09 school year were prepared by an outside vendor selected by the DOE. Each TDR purports to measure value added in the prior year using data from the prior year and, in 2008-09 up to two additional years, where available. Sample 2008-09 and Actual 2008-09

[4] http://schools.nyc.gov/Teachers/TeacherDevelopment/TeacherDataToolkit/default.htm

reports with identifying information redacted ("2008-09 Sample TDRs"), copies of which are annexed hereto as Exhibit D.

17. As part of this expansion beyond the pilot program, UFT representatives met with DOE representatives to discuss related issues. Among the concerns raised were the inherently subjective and evolving nature of the reports and their potential negative impact on teachers if misused or misinterpreted. In the context of that discussion, a joint letter was distributed to teachers from Chancellor Klein and then-UFT president Randi Weingarten that briefly described the purpose of the TDRs and recognized that, even after controlling for more than 35 different factors, "reports like these can never perfectly represent an individual teacher's contribution to student learning." A copy of that letter ("TDI Letter") is annexed hereto as Exhibit E, at 2. The UFT warned the DOE of the potential for these imperfect measures to be misunderstood and misused in a manner catastrophic to a teacher's professional and personal reputation both within the DOE and without. By letter dated October 1, 2008, then-Deputy Chancellor Christopher Cerf acknowledged these concerns by setting out the DOE's position that TDRs "will not and should not be disclosed or shared outside of the school community, defined to include administrators, coaches, mentors and other professional colleagues authorized by the teacher in question." A copy of that letter ("Cerf Letter") is annexed hereto as Exhibit F. He also expressed the DOE's intention to ensure that principals took steps to honor that confidentiality. Finally, specifically addressing the potential for a FOIL request of the type considered here, then-Deputy Chancellor Cerf assured UFT representatives that if a FOIL request were received, the DOE would work with the UFT to craft the best legal arguments available supporting an assertion that TDRs fall within an exception to disclosure. Id.

18. Subsequently, both the reports and the vendor preparing them changed for the 2009-10 school year. See FAQ, Exhibit B, at 1. This was, upon information and belief, in part due to significant statistical biases identified in the 2008-09 reports. Specifically, upon information and belief, the DOE's predictions of student achievement at both ends of the spectrum were too extreme, skewing teacher value-added results as either too low, where achievement was predicted to be too high, or too high, where achievement was predicted to be exceptionally low. The changes included revisions of the statistical modeling and the format and contents of the reports themselves. Id.; see also 2009-10 Sample TDR, Exhibit A. The 2009-10 reports were based on the prior year's data and up to three additional years of data, where available. According to the DOE webpage, 2010-11 reports (measuring last year's performance) will not be available until February and March 2011. See FAQ, Exhibit B, at 1.

19. It is unclear which year or years of reports are sought by the instant FOIL requests, however, the DOE has indicated that it intends to release TDRs prepared in the 2009-10 school year.

B. What TDRs Do Not Tell You

20. As noted above, the heart of the TDR analysis is not "hard" data; rather, it is the DOE's prediction as to what gains or losses are to be expected in student achievement. The remainder of the analysis consists of comparing actual achievement to this complex forecast. The difference between the two is designated the teacher's value-added.

21. The stated goal of the prediction methodology is to attempt to factor out some of the influences on student achievement that are outside of the teacher's direct control.

See FAQ, Exhibit B, at 2-3. The TDRs do not themselves report any of these factors, nor do they even list them as being part of the TDR analysis. Rather, these factors are incorporated in some manner, undisclosed on the TDRs themselves, in the DOE-designated calculation of predicted achievement. These calculations purport to give substantive meaning to items such as the "average prior achievement level; percent of students in a school receiving reduced price lunch; percentage of special education students (differentiated by services); English language learner status, whether the student is new to school; the average number of suspensions and absences at the school; the percentage of students held back; the student's ethnicity and gender." See FAQ, Exhibit B at 3.

22. The selection of these factors to the exclusion of others is a subjective judgment by the DOE, which has itself conceded that the process of *"predicting student growth is NOT an exact science"* and likened it to making *"weather forecasts."* See Additional Training Materials, Exhibit C, at 13-14 (capitalization in original, italics added). This is because, as the DOE has admitted, it is difficult to account for critical factors affecting student performance such as "[p]ersonal-life changes for students, teachers/[o]ther learning experiences: pull-out teachers, tutors, help at home" and the elusive nature of "[w]hat causes one student to respond well to a teacher and another not to respond well." Id.

23. Indeed, one of the external factors that affects student achievement is the fact that the tests, upon which student achievement is measured, are administered mid-year. See FAQ, Exhibit B, at 4. This means that, for example, the student's baseline proficiency score is based on his or her performance on a January 2008 pre-test. The student then continues with one teacher from January 2008-June 2008. In September 2008, the student moves to a new class

with a new teacher and then, in January 2009, the student takes the post-test, upon which his or her achievement is measured. The student's achievement, or lack thereof, is attributed solely to the teacher, the student had for the 2008-09 school year, despite the fact that another teacher was responsible for the student's learning from January 2008-June 2008. The original vendor utilized by the DOE for preparing TDRs attempted to control for this "two-teacher" variable, but, upon information and belief, the current vendor removed this variable from its analysis as there was no statistically reliable method for control. Thus, the current vendor does not control for the "two-teacher" variable. See NYC Teacher Data Initiative: Technical Report on the NYC Value-Added Model, 2010 ("Technical Report"), a copy of which is annexed hereto as Exhibit G, at pp. 1-8. Rather, going forward, the test administration date has been moved to May so that the teacher being held accountable for the student's achievement has actually taught the student for an entire school year. This change in administration date, however, did not occur until the 2009-10 school year. Accordingly, while student achievement is impacted by two teachers, *all of the TDRs subject to the instant FOIL requests* do not account for the impact of the second teacher on the student's achievement.

24. The variety of influences that TDRs do not and cannot account for are myriad. The DOE recognizes this fact in its FAQ when it asks how TDRs account for the effect of random events like loud construction noises outside a classroom on test day. The answer admits that such event would make the percentile reported on the TDR meaningless:

> The impact of events such as test-day construction and other *uncontrolled-for factors* are reflected in the ranges provided on the Teacher Data Reports. For example, if an uncontrolled-for factor occurred that would negatively impact student test scores, like test-day construction, you can still be 95 percent certain that a teacher's

> contribution to students' test score gains falls in the range provided. However, that teacher's contribution would more likely be higher than the highlighted result.

FAQ, Exhibit B at 4.

25. Put simply, the existence of an uncontrolled-for factor (of which, by definition, anyone looking at a TDR would not be aware) nullifies what little reliability can be attributed to a teacher's percentile. Rather, someone reading the fine print on the report is directed to the underlying "range." As discussed in the following section, the "range" or margin of error often renders the percentile ranking a meaningless measure as many of them are so wide (for example spanning from 14% to 84%) as to provide no real measure at all.

26. This process of incorporating certain factors, giving them weight and meaning and excluding others creates an inherent volatility to the TDRs themselves. Even student test scores (the validity of the measurement of which has now been recognized as flawed), arguably the only "factual" component of the TDR analysis, are subject to calibration changes. (For example, the State Education Department recently toughened standards on standardized tests, resulting in lower grades for City students. See Jennifer Medina, "Standards Raised, More Students Fail Tests," The New York Times, July 28, 2010), a copy of which is annexed hereto as Exhibit H; see also Statement on Research Related to Proficiency on State Assessments and Supporting Material, available at http://usny.nysed.gov/scoring_changes/ (summarizing research of Daniel Koretz and Howard T. Everson regarding lenient New York performance standards and rationale for re-setting cut scores on the State math and ELA assessments).

27. For these and similar reasons, the reliability of value-added models, as they have been developed to date, is questionable. While value-added analyses allow for more sophisticated comparisons of teachers than have been available in the past, they are still inaccurate and are not reliable indicators of teacher effectiveness and, therefore, researchers discourage their use as dominant factors in high-stakes decisions with regard to teacher performance.[5] Factors that contribute to the instability in value-added estimates include the differences in students assigned to an individual teachers' class from one year to the next (an issue which is further exacerbated in schools with high rates of mobility), small sample sizes, the cumulative effect of teachers (no one teacher accounts for all of a student's achievement, prior teachers have lasting effects), and external influences on student achievement. See EPI Paper, Exhibit I. As a result, a teacher who appears to be highly effective in one year can have a significantly lower rating the following year. Id. at 2.

28. As discussed above, the DOE has attempted to resolve the issue of instability by attempting to control for a large number of external influences on student achievement, but even their extensive list of variables (themselves difficult to properly give meaning) fails to completely isolate the unique effect of any individual teacher.[6] For example, the DOE analysis does not consider the differences between schools (*e.g.*, leadership, discipline,

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[5] See Eva L. Baker, Paul E. Barton, Linda Darling-Hammond, Edward Haertel, Helen F. Ladd, Robert L. Linn, Diane Ravitch, Richard Rothstein, Richard J. Shavelson, and Lorrie A. Shepard; Problems With the Use of Student Test Scores to Evaluate Teachers, Economic Policy Institute, Briefing Paper # 278 (August 29, 2010) ("EPI Paper"), a copy of which is annexed hereto as Exhibit I.

[6] See Sean P. Corcoran, Can Teachers be Evaluated by their Students' Test Scores? Should They Be? The Use of Value-Added Measures of Teacher Effectiveness in Policy and Practice, Annenberg Institute for School Reform, Education Policy for Action Series (2010) ("Corcoran Paper"), a copy of which is annexed hereto as Exhibit J.

staff quality, student mix,) thereby compounding a teacher's influence on student achievement with the effect of the school itself. See Corcoran Paper, Exhibit J, at 18.

29. Moreover, because the value-added model currently utilized by the DOE compares actual student performance with subjective predicted achievement, the result of the statistical analysis is merely an *estimate* of the teacher's value-added. Id. at 21; see also Technical Report, Exhibit G, at 16 ("[t]he value-added measure is our best estimate of the teacher's effects on his or her students given the data, and is often referred to as a *point estimate*) (italics in original). The resulting uncertainty is expressed in the TDR as a "range" of possible percentiles for any given teacher. See 2009-10 Sample TDR, Exhibit A. This margin of error considerably limits the value of the TDR as a measure of a teacher's contribution to student test scores in measuring teacher effectiveness. For example, upon information and belief, the average range for a teacher with only one year of test data reported is 54 percentile points. This means that the "real" score for the teacher could be plus or minus 27 percentile points from the estimated score reported on the TDR. In at least one example, the range reported for an individual teacher was 94 percentile points, essentially rendering that teacher's estimated score meaningless. Given these limitations, TDRs are, "at best, a crude indicator of the contribution that teachers make to their students' academic outcomes." Corcoran Paper, Exhibit J, at 28.

30. For the reasons described herein, the DOE correctly cautions principals that "[TDRs] should not be viewed as a silver bullet." See DOE's Teacher Data Initiative: Key Concepts PowerPoint ("Key Concepts"), a copy of which is annexed hereto as Exhibit K, at 3. "Rather [the TDR] is a tool available to principals and teachers to incorporate into their larger instructional and professional development plans." Id.

31. The DOE, however, provides this caution only in its training materials, not on the TDRs themselves: "not all negative value-added results are bad and all positive results are good." Key Concepts, Exhibit K, at 10. In assessing teachers, principals are entreated to remember to consider contexts that are not easily measured and not part of the DOE-determined model. Id.

C. What TDRs Do Tell You Is Misleading

32. Setting aside the complex and subjective underpinning that limits the ability of a TDR to present a measure approaching fact, the TDRs on their face present this analysis in a misleading manner.

33. The sample TDR provided in the online Toolkit, as well as the extensive training and explanatory materials, illustrate that TDRs contain complicated information likely to be misunderstood and/or misused by the press, leading to erroneous conclusions as to individual teachers' abilities and performance. Such misimpression can result in parents losing faith in particular teachers and even improperly seeking to have either teacher or their child reassigned.

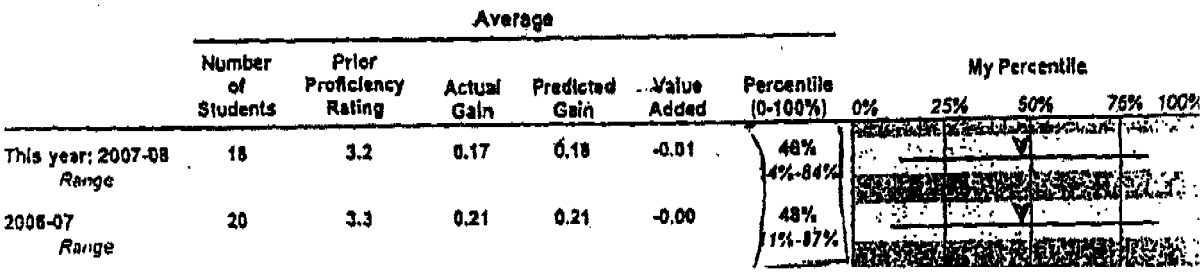
34. For example, the first page of the sample TDR provides a summary that purports to show where the teacher ranks against his or her "peer group." (As noted above, past reports also compared the teacher to other teachers in the same grade and subject throughout the school system). See 2008-09 Sample TDR and 2009-10 Sample TDR, Exhibits D and A. The TDR gives a percentile ranking, purporting to show how the teacher compares to other teachers. Id.

35. These percentiles are misleading and wrong. The TDR does not explain how the percentiles are derived. Moreover, acknowledging that the percentile may not even be accurate, the summary page provides a "range," cautioning in a fine-print footnote on the last page that

> a teacher's result on each line of the report *is most likely near, but may not be exactly equal to, the highlighted percentile result.* All statistical calculations contain some uncertainty, reflected in the range around the result. The range provided in the Teacher Data Report means you can be 95% confident that a teacher's actual result falls in that range....

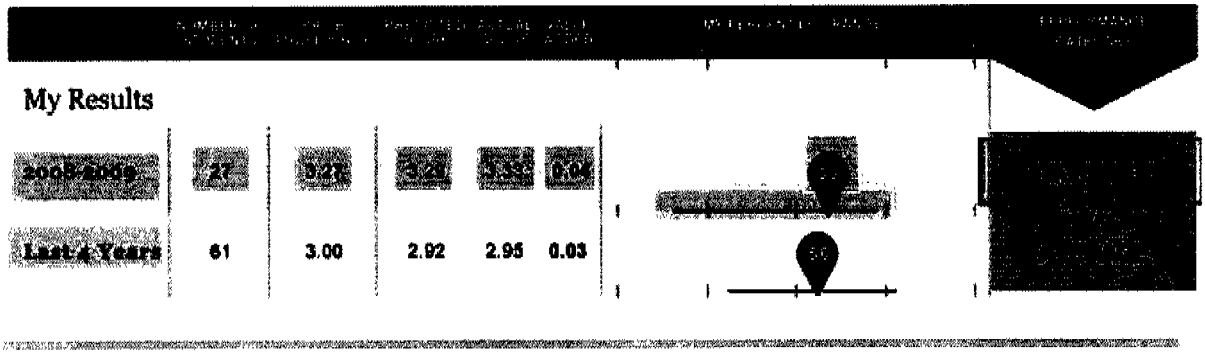
2009-10 Sample TDR, Exhibit A, at n. (g).

36. The existence of this margin of error is not only hidden in a footnote at the end of the report, but it has been further obscured in the main body of the TDRs as part of the revisions between the 2008-09 and 2009-10 reports. The general public would not be on notice to consider each value added calculation in light of its margin of error, which varies from teacher to teacher and from measure to measure within a single report. In the prior form of report, the range was at least provided (although not explained) directly under the percentile itself. For example, in the Teacher B 2008-09 Sample TDR, the teacher's percentile under section 1, My Results, Compared to All NYC Teachers Citywide, This Year is shown as 48%. See highlighted area below taken from Exhibit D. Immediately below the percentile is the range 14% to 84%, set out in numerical form. As noted infra at ¶ 29, a range this wide is indicative of poor data and renders the assigned percentile essentially meaningless.



	Average						My Percentile
	Number of Students	Prior Proficiency Rating	Actual Gain	Predicted Gain	Value Added	Percentile (0-100%)	0% 25% 50% 75% 100%
This year: 2007-08	18	3.2	0.17	0.18	-0.01	46%	
Range						4%-84%	
2006-07	20	3.3	0.21	0.21	-0.00	48%	
Range						11%-87%	

37. This fact is that much harder to discern from the face of the new reports where the range is no longer even provided in numerical values. See 2009-10 Sample TDR, Exhibit A. Rather, the range is merely depicted as a straight horizontal line below a bubble containing the assigned percentile. See highlighted yellow box below. Readers are left to determine the range themselves by deciphering the scale of the line.[7]



38. Furthermore, the DOE admits in its FAQ, though not on the TDR itself, that "larger ranges indicate that there is more uncertainty about a teacher's value added percentile. The size of the range differs for each calculation based on a number of factors,

[7] Should the DOE release the requested information in an Excel spreadsheet, as it has done in the past, as opposed to the TDRs themselves, the range (and other measures) is more difficult to comprehend as the reader does not have the benefit of even the meager explanation provided on the TDR. See Previously Released Value-Added Scores ("TDR Spreadsheet"), an excerpt of which is annexed hereto as Exhibit L.

including that number of students included in the calculation. See FAQ, Exhibit B, at 3. Ranges will generally be larger when a teacher has taught for fewer years and had fewer eligible students." FAQ, Exhibit B. Thus, newer teachers (whether to the system or the grade and subject) will have particularly unreliable TDRs. Likewise, teachers who work in schools with high mobility rates, where students move in and out of the system frequently, may be disadvantaged by the lack of student data.

39. This creates a special risk of harm to new, untenured teachers who are most in jeopardy of negative consequences resulting from the likely unwarranted negative reaction of parents to these misleading percentiles.

40. The most salient information in the sample TDR is found on the first and second pages: the teacher's purported "value added." Value added results from a complicated calculation. First, a "proficiency rating" for each of the teacher's students is determined based on the student's performance on the prior year's standardized state test. Then, a prediction is made regarding each student's improvement ("gain") in proficiency on the current year's administration of the test. Each student's predicted gain is then subtracted from their cumulative actual gain and the result is represented as a positive or negative "added value" supposedly attributable to the teacher. The supposed "added value" for all students in the class are then averaged to arrive at the teacher's overall value-added estimate. This estimate is then converted into a percentile ranking, demonstrating how the teacher compares to his or her peers. 2009-10 Sample TDR, Exhibit A.

41. This "added value" determination has great potential for misunderstanding and misuse by untrained members of the public because "added value" is salient but not adequately explained or placed in the context set forth above. The terminology itself is practically designed to cause an undue response from parents who might be presented with what purports to be the teacher's "negative" impact on their child's achievement. This implies the teacher has somehow harmed the student, rather than the much more nuanced reality, which is that the student did not match the DOE's "weather forecast" for his or her standardized test score, the reasons for which may or may not have anything to do with a particular teacher.

42. Upon information and belief, because of these potentially misleading deficiencies in the TDR, the DOE instructs principals to be judicious in their use of TDRs, although these admonitions do not appear in the TDRs themselves. In the Additional Training Materials, the DOE warns principals that "predicting student growth is NOT an exact science," and that there is inherent "uncertainty in predicting student gains." Additional Training Materials, Exhibit C, at 13, 14. Moreover, the DOE recognizes "variation in the number of students or years available" and the "measurement error inherent in state assessments" as additional factors contributing to the "uncertainty of predicting student gains." Id.

D. TDRs Often Include Inaccurate Data

43. The lack of true validity of the TDRs is compounded by the use of inconsistent and inaccurate data. The DOE has acknowledged in its FAQ that there are inaccuracies in the data attributed to specific teachers, stating that:

> The main cause of discrepancies in a Teacher Data Report is incomplete data linking teachers to students through courses.

> Schools were asked to verify and make necessary changes to this information as part of the teacher course assignment verification process that took place in the [sic] June 2009. Because of how these data were historically saved, the DOE data did not have these data available for some schools and teachers, especially for earlier years. The data schools submitted during this process were used to generate the reports. The available data from the source systems was used to generate reports for schools that did not verify all or some of their data.

FAQ, Exhibit B, at 4.

44. Further exacerbating the inclusion of faulty data is the apparent total exclusion of teachers from the data verification process. Upon information and belief, the reports were not accompanied by the underlying list of classes and students attributed to each teacher as part of the TDR calculation. Thus, despite the DOE's knowledge that much of its data may lack integrity, upon information and belief, the vast majority of teachers have no way to ensure that their report is even based upon the right set of classes and students. Indeed, examination discloses instances where the class chargeable to a given teacher was in fact not taught by that teacher, a fundamental and fatal flaw known to Respondents prior to the commencement of this proceeding.

45. While the UFT has only had the opportunity to review a small sample of TDRs, many were fatally flawed because they have been calculated based on errors in student lists. These errors included student test scores being attributed to the wrong teacher, the misidentification of class type, inconsistent treatment of similarly situated students from school to school and missing data. For example:

a. The report for one teacher reflected a total of 196 students taught over a period of two years. Upon further review, the report revealed a total of 57 students in one class, which was clearly erroneous in light of class size restrictions. The DOE has verified that at least 27 students never taught by the teacher were included in the report. See Extra Students Example, a copy of which is annexed hereto as Exhibit M.

b. In some schools, fifth grade teachers "departmentalize," meaning that one teacher teaches the entire 5th grade ELA and another teacher teaches all of the math classes. However, upon information and belief, some principals submitted homeroom lists to the DOE for the compilation of the TDR without noting the departmentalization structure. As a result, the teachers who only teach ELA received TDRs with both ELA and math scores for their students. Simply stated, the results for the math teacher were attributed to the ELA teacher and vice versa.[8] See Departmentalization Examples 1 and 2, copies of which are annexed hereto as Exhibit N (demonstrating that each teacher – Teacher A and Teacher B – both received an ELA and math TDR, even though each teacher only taught one of these subjects).

c. Collaborative Team Teaching ("CTT") classes are inclusive settings for both students with disabilities and general education students. Because these classes have two teachers, there is no way to separate the impact of one teacher from the other and, therefore, both teachers are supposed to be listed on the same TDR. Given the special nature of CTT classes, the DOE purports to utilize a different citywide

[8] Interestingly, this error in the analysis highlighted another issue with regard to the validity of the analysis—the margin of error (see *supra* at ¶¶ 34-38). When the results for one teacher were split between two reports rather than being averaged together (as they should have been), the teacher had wildly divergent ratings. For example, one teacher was ranked in the 97th percentile on one report and in the 14th percentile on the other. See Departmentalization Example 1, Exhibit N.

comparison group when reporting the percentile rankings of CTT teachers. The UFT has discovered instances where CTT classes were incorrectly identified. As a result, the value-added measurement was treated as a general education class, not as a CTT class, and one of the teachers in the CTT class was held wholly accountable for student achievement and compared to an improper peer group. See Missing Years and CTT Class Example, a copy of which is annexed hereto as Exhibit O, (the teacher for whom this TDR was prepared taught in a CTT class for the 2008-09 school year yet the data is not identified as such); see CTT Example, a copy of which is annexed hereto as Exhibit P, (the teacher for whom this TDR was prepared is a sixth grade teacher who taught several classes, one of which was a CTT class, yet, upon information and belief, the CTT class data is included in the TDR together with the general education data in contravention of DOE policy).

d. Students that receive Academic Intervention Services ("AIS") (additional academic supports including tutoring) have been treated differently in TDRs from school to school. Notably, students are eligible to receive AIS on the basis of low test scores. In most schools, these students are included in the homeroom teacher's class roster but, in some schools, principals remove these students from the class list. This is particularly problematic from a statistical perspective as this is not a random selection of students but, rather, a group of students with low starting scores. The removal of these students from an individual teacher's list would likely have a significant effect on the teacher's TDR, particularly if that teacher is being compared to other teachers whose TDR includes students receiving AIS. See email from Jackie Bennett to Sandra Tacina, dated June 22, 2010 ("AIS Example"), a copy of which is annexed hereto as Exhibit Q.

e. TDRs were produced, in at least one school, indicating they were based on four years of teacher results when, in reality, there were only two years of results (2005-06 and 2008-09). In other words, the report blended results from the 2006 and 2009 test cycles (even though the teacher had taught the same grade and subject in 2007 and 2008). Thus, the report offers a highly misleading portrait of the teacher and, with "four years" printed on the report, implies a stability and meaning to the results that simply does not exist. See Missing Years and CTT Example, Exhibit O (purporting to represent four years of testing data but reflecting a sample of only 40 students).

46. Perhaps as a result of these collective weaknesses, the DOE's instructions to principals emphasize that TDRs are subject to interpretation and should not be used alone to make professional development recommendations to teachers. In the Training Manual, principals are instructed to ask, "How might the Teacher Data Report fit into *existing* school plans for instructional improvement and professional development?" See Introduction to NYC Teacher Data Initiative, Training for Schools, Fall 2008 ("TDI Training Manual"), a copy of which is annexed hereto as Exhibit R, at 6 (emphasis in original). They are instructed to use information in TDRs in the context of "an array of instruments to determine teacher and school-wide professional development needs," such as classroom observations, teacher lesson plans, teacher participation in professional development, quality of student work, and student performance on state assessments. Id. at 7. The DOE's official position, as communicated to principals in the Training Manual, is that "[n]o one measure gives us the full story, but the various pieces come together to create a more reliable picture." Id. In other words, the TDR is

to be used in conjunction with other assessment materials to determine individual teacher training needs.

47. More recently, the DOE has unilaterally incorporated TDRs into the multi-factor tenure assessment process.[9] See Introduction: 2010 Teacher Tenure Decision Making ("2010 Teacher Tenure"), a copy of which is annexed hereto as Exhibit S. Thus, pursuant to DOE's stated intention, TDRs will now be used side-by-side with more traditional assessment methods such as classroom observations, teacher work-product evaluations, student work evaluations and other measures based upon which principals are to make tenure determinations. Such non-final, deliberative materials, like classroom observations, have long been held exempt from disclosure under FOIL.

48. According to the DOE's own materials, TDRs are intended to be deliberative, consultative and instructional tools to aid in the professional development of teachers and refine the focus of school curricula and planning. Now, pending the UFT's challenge at PERB, TDRs have been inserted into assessments for purposes of tenure determinations. Nonetheless, the DOE's Toolkit introduces TDRs as being designed to be used "as an additional tool to identify both your teaching strengths and areas needing further development. *Your report will not be shared with other teachers without your permission...*" See Welcome to the Teacher Data Toolkit ("TDI Toolkit Main"), a copy of which is annexed hereto as Exhibit T (emphasis added).

[9] Reference made herein to the DOE's tenure policy does not waive any right or claim by the UFT that such process violates other laws and/or agreements. Indeed, the UFT has challenged the propriety of such action at the Public Employment Relations Board ("PERB").

49. The DOE's materials repeatedly echo this understanding of the TDR tool. An example is a FAQ, directed at school principals, that poses the question: "The results of one of my teacher's report contradicted my belief about that teacher. What should I do if my views differ from the reported results?"

> A: The Teacher Data Reports are intended to give principals and teachers another lens through which to view teacher performance. Principals whose previous views are challenged by the results presented in the Teacher Data Reports should reflect on what factors in either his/her perspective or in the teacher's performance caused this difference. *By asking and answering more questions, principals and teachers can determine if any new strategies could be helpful to improve the effectiveness of an individual or group of teachers.*

FAQ, Exhibit B, at 3 (emphasis added).

50. The FAQs also address how TDRs fit into the larger picture of information collected by the DOE. In response to the question, "How do Teacher Data Reports relate to other DOE data tools?" the DOE again emphasizes the consultative purpose of TDRs: "A. Teacher Data Report – along with periodic assessments, student-in-class work and homework, classroom observations, ARIS data and knowledge management tools, and other school-generated data – *were created to help school communities make decisions about where to focus instructional improvement efforts*." FAQ, Exhibit B, at 5 (emphasis added).

51. Finally, another FAQ comparing TDRs to School Progress Reports illustrates that DOE uses TDRs internally as professional development tools, rather than as data by which the public can or should hold the DOE and its schools accountable for student performance and improvement:

> Q: How are the measurements in the Teacher Data Reports different from School Progress Reports?
>
> A: Like the Teacher Data Reports, School Progress Reports were designed to help principals and teachers accelerate academic achievement for their students. However, Progress Reports were also created to enable students, parents, and the public to hold the DOE and its schools *accountable* for student achievement. In contrast, Teacher Data Reports are designed to be used *internally* and should not be shared with parents, students, or the general public.

FAQ, Exhibit B, at 2 (emphasis added).

E. Official DOE Policy Provides that TDRs are "Confidential and Thus Not Shareable with Parents" or Other Teachers

52. The DOE's materials emphasize that a TDR is a confidential document, for use only by school administrators, to be shared only with the individual teacher without the teacher's consent. For example, the Training Manual "cautions" principals to "[c]onsider individual teacher information *confidential* and thus *not shareable with parents*." TDI Training Manual, Exhibit R, at 15 (emphasis added). The online FAQs also respond to the question, "Can parents and/or the public download Teacher Data Reports?," with the response: "No. Reports are only available to school administrators and teachers who are receiving reports." FAQ, Exhibit B, at 2.

53. Moreover, a teacher's permission is required even to share a TDR with other teachers. The online Toolkit provides explicitly that "[y]our report will not be shared with other teachers without your permission." TDI Toolkit Main, Exhibit T. The online FAQs, in turn, explains that teachers and principals will receive separate log-ins and passwords to access TDR data. See FAQ, Exhibit B.

54. Indeed, the DOE's FAQs even provide that where a teacher is applying to a new position with the DOE, an interviewing principal does not have an automatic right to view a teacher's TDR without the teacher's consent. FAQ, Exhibit B, at 2.

55. This policy conforms to the DOE's assurances to the UFT at the inception of the TDRs. See Cerf Letter, Exhibit F.

F. The TDRs Contain Individual Identifying Data Regarding Teachers

56. Each TDR contains information by which a teacher can be personally identified, located by school and associated with a particular student or group of students. See 2009-10 Sample TDR, Exhibit A. For example, the TDR identifies the teacher's name, school and grade taught. Id.

57. If TDRs are released to the press or the public at large without sufficient redaction, flawed and misleading data would inevitably and irretrievably tarnish a teacher's reputation and privacy. Teachers could be subject to parental objection based upon misunderstanding of the information contained therein, including demands by parents for discipline, termination, or student transfer out of a teacher's classroom or school. Such teacher's professional reputation would be unfairly irreparably damaged by the predictable fallout associated with these complex and subjective documents.

II. PETITIONER'S MEMBERS WILL SUFFER IRREPARABLE HARM ABSENT INJUNCTIVE RELIEF

58. On October 11, 2010, Petitioner UFT received a press request for comment on the impending release by DOE of unredacted TDRs, curious in that the UFT was unaware of any decision having been made. Upon information and belief, the DOE advised

members of the press that it would release the unredacted materials despite having in the past provided TDRs in response to FOIL requests with teacher names and certain other identifying characteristics redacted.

59. That same day, the UFT contacted Michael Best, General Counsel to the Chancellor, regarding the apparent impending release. Mr. Best confirmed that FOIL requests had been received and that the DOE was considering releasing the unredacted reports.

60. On October 12, 2010, Mr. Best further advised Petitioner that there were four FOIL requests, each specifically seeking unredacted TDRs.

61. On October 18, 2010, UFT counsel wrote to the Corporation Counsel detailing the myriad issues and concerns presented herein. A copy of the letter is annexed hereto as Exhibit U. Nonetheless, almost immediately thereafter, the UFT received a letter from Mr. Best indicating that, subject to consideration of the issue at a meeting set for the following day between Petitioner's counsel and the Corporation Counsel, the DOE intended to release unredacted TDRs on October 20, 2010.

62. On October 19, 2010 counsel for Petitioner met with the Corporation Counsel's Office to discuss the legitimate privacy concerns of Petitioner's members. Nonetheless, on the following day, Petitioner was advised by the Corporation Counsel's Office that the DOE intended to release the unredacted TDRs on October 22, 2010.

63. Absent injunctive relief barring release of the TDRs, Petitioner's members will suffer irreparable harm and the ability of Petitioner to fully and fairly represent its members interests will be damaged.

64. TDRs purport to measure teachers' "value added" to their students scientifically. Teachers are ranked against each other according to the "value" they have purportedly added (or failed to add) to their students. Because of the way "value added" is calculated, a TDR may reflect that a teacher has added negative value to students.

65. However, as previously explained, the "value added" calculation is of questionable reliability and predicated on subjective standards. DOE acknowledges that TDRs are not reliable measures of teacher performance and provides extensive instruction to its principals on the proper reading, interpretation and use of TDRs. DOE does not permit them to be shared with other teachers or with parents. Nor does DOE permit training, development or tenure decisions regarding teachers to be made solely in reliance on TDRs. DOE has also acknowledged that substantial portions of the data upon which the TDRs are calculated contain significant reporting mistakes that negatively impact a teacher's value-added.

66. Yet, despite these acknowledged flaws, TDRs on their face purport to be objective, complete scientific "calculations" of a teacher's "value" to students. None of DOE's many warnings and caveats to principals regarding the proper use of TDRs appears on the TDRs themselves. The purportedly scientific nature of these documents, particularly viewed in isolation, will, on information and belief, create unfairly negative impressions of teachers' competence to members of the public who are not trained to evaluate these documents and are unaware of their methodological shortcomings. Substantial harm to individual teachers' professional reputations is likely to result from the release of the TDRs. For untenured teachers, who do not have the substantial due process protections of tenured teachers, such harm can easily translate into adverse employment consequences. And for teachers whose reputations are

permanently sullied by erroneous data the incalculable harm thus recklessly inflicted would be devastating.

67. Nevertheless, DOE now proposes to release unredacted TDRs to the press. The release of these materials poses an immediate threat of release of the information contained therein to the wider public, including parents, who would be able to identify their children's teachers. Teachers will be exposed harassment on a personal and professional level from parents unhappy with the contents of the TDRs. Such harassment could include demands for termination, discipline, and transfer of children out of teachers' classrooms, as well as threats to the persons of individual teachers.

68. Furthermore, DOE has expressly represented to teachers that TDRs will not be released to the public. Teachers will be irreparably harmed if the DOE releases TDRs in violation of its express policy.

III. THE BALANCE OF EQUITIES FAVORS PETITIONER

69. The balance of equities favors Petitioner here. While, as explained above, Petitioner's members face a real and immediate threat of irreparable harm in the absence of injunctive relief, Respondents will suffer no cognizable harm if injunctive relief is granted. Respondents are under no obligation to release these documents pursuant to FOIL, because they are non-final intra-agency materials and they also could lead to an unwarranted invasion of privacy. See Pub. Off. Law §§ 87(2)(b),(g). Likewise, the press is not entitled to receive documents that fall outside FOIL, much less erroneous data that is known to be flawed. And,

there are publicly available resources that permit assessment of school performance, including without limitation, School Progress Reports.

70. This balance leans even farther in favor of relief with regard to the modest delay associated with the grant of the order to show cause and temporary restraining order preserving the *status quo* long enough to permit the Court to consider the legitimate privacy concerns of educators prior to Respondents' irrevocable release of unredacted TDRs.

FIRST CAUSE OF ACTION

71. Petitioner repeats and re-allege the allegations set forth in paragraphs 1 through 70 above as if fully set forth herein.

72. Pursuant to Public Officers Law § 87(2)(g), a state agency has discretion to deny a FOIL request calling for non-final intra-agency materials of a deliberative or consultative nature.

73. TDRs constitute materials falling within POL § 87(2)(g).

74. As a result, Respondents' decision to release unredacted TDRs to the press or any other member of the public represents an arbitrary and capricious abuse of discretion under Public Officers Law § 87(2)(g).

75. Petitioner therefore seeks a review of Respondents' final decision to release TDRs to the press or any other member of the public.

SECOND CAUSE OF ACTION

76. Petitioner repeats and re-allege the allegations set forth in paragraphs 1 through 70 above as if fully set forth herein.

77. TDRs contain personal identifying information regarding teachers' names, work addresses (*i.e.*, schools), and grades taught. This information in the hands of the public could lead parents to unfairly demand that teachers be terminated, disciplined, and that the teacher or their child be transferred out of the classroom, as well as infringing upon teachers' privacy rights.

78. Pursuant to Public Officers Law § 87(2)(b), a state agency has discretion to deny a FOIL request that would lead to an unwarranted invasion of privacy.

79. As a result, Respondents' decision to release TDRs to the Press or any other member of the public without redacting the teachers' names represents an arbitrary and capricious abuse of discretion under Public Officers Law § 87(2)(b).

80. Petitioner therefore seeks a review of Respondents' final decision to release unredacted TDRs to the press or any other member of the public.

WHEREFORE, Petitioner respectfully requests that this Court issue an Order:

(1) Temporarily, preliminarily and permanently enjoining Respondents from releasing TDRs that are unredacted as to teachers' names to any member of the public under POL § 87(2)(b) and § 87(2)(g);

(2) Awarding Petitioner its legal costs and fees in bringing this proceeding; and

(3) Awarding Petitioner such other and further relief as this Court deems just and appropriate.

Dated: New York, New York
October 21, 2010

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Co-counsel for Petitioners

VERIFICATION

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

MICHAEL MULGREW, being duly sworn, deposes and says: that He is the President of the Petitioner United Federation of Teachers, in the above-entitled proceeding; that he has read the foregoing Verified Petition and knows the contents thereof; that Verified Petition is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

MICHAEL MULGREW

Sworn to before me this 21th day of October 2010.

NOTARY PUBLIC

NATALINE DELISLE-VANDERBURG
Notary Public, State of New York
No. 03-4888320
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires ~~March 30, 20~~ August 1, 2011

Index No.

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

MICHAEL MULGREW, as President of the UNITED FEDERATION OF TEACHERS, Local 2, American Federation of Teachers, AFL-CIO, on behalf of all represented employees in the City School District of the City of New York, Petitioner,

-against-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and JOEL I. KLEIN, as Chancellor of the City School District of the City of New York, Respondents.

16113813

For a Judgment Pursuant to Article 78 of the CPLR and for Declaratory Relief Pursuant to CPLR 3001

VERIFIED PETITION

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Attorneys for Petitioner

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PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on 20 , at M.*

Dated:

STROOCK & STROOCK & LAVAN LLP
Attorneys for

To:

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212 806 5400

Attorney(s) for