SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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STEPHANIE DICAPUA, et al,

Petitioners,

Index No.: 85035/2023

Hon. Ralph Porzio

-against-

CITY OF NEW YORK, et al.

Respondents.

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PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF ARTICLE 78 SPECIAL PROCEEDING

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PRELIMINARY STATEMENT

This case arises because Respondents-Defendants ("Respondents") New York City (the "City") and the NYC Department of Education (the "DOE") engaged in a continuing pattern of widespread discrimination against employees with religious objections to the City's COVID-19 vaccine mandate for DOE employees (the "Mandate"). Petitioners-Plaintiffs bring this putative class action on behalf of themselves and all other DOE employees and contractors denied reasonable religious accommodation under the Mandate (Petitioners and proposed class hereinafter "Petitioners").

The facts are appalling. After announcing the Mandate in August 2021, the City and the DOE openly admitted that they would not consider any religious or medical accommodations, despite their statutory responsibilities to do so. Labor disputes and lawsuits forced them to promise to adopt an accommodation policy ("Stricken Standards"). However, the policy was clearly designed and applied to deny as many applicants as possible. The Stricken Standards were facially unconstitutional, imposing denominational preferences and requiring the DOE to unconstitutionally deny accommodation to applicants with unorthodox and personally held religious beliefs. Under this policy, the DOE denied 100% of the approximately 7,000 initial applicants for religious accommodation through an autogenerated email that violated statutory requirements. The DOE then participated in what can only be described as heresy inquisitions to ensure that arbitrators upheld as many denials as possible on appeal. By November 2021, the

Second Circuit had already issued a merits decision holding that the Stricken Standards were facially unconstitutional. *Kane* v. *De Blasio*, 19 F.4th 152, 168 (2d Cir. 2021) (per curiam).

The City promised to give "fresh review" under a new "Citywide Panel" process, and reinstate wrongfully denied employees with back pay. However, the Citywide Panel process proved to be just as much of an exercise in futility and bad faith as the Stricken Standards had been. The Citywide Panel refused to even consider the vast majority of those denied under the Stricken Standards, reviewing fewer than 600 out of the original 7,000 plus applicants originally denied accommodation. And for those that it did review, the Panel almost universally upheld the denials through conclusory generic emails, stating little more than "does not meet criteria."

Multiple New York State courts have repeatedly held that the Citywide Panel determinations were arbitrary, capricious, unsupported by evidence and must be set aside. At this point, it is clear that all the religious accommodation denials were infected by errors of law, arbitrary and capricious, and an abuse of discretion. For purposes of this special proceeding, Petitioners seek provisional certification of a class (by separate motion) including all DOE employees who submitted a religious exemption request to the DOE or the Citywide Panel and were nonetheless denied accommodation. They seek an order setting aside the unlawful denials *nunc pro tunc*, reinstatement, and ancillary damages such as back pay and restoration of benefits, as well as an apology.

BACKGROUND FACTS

A comprehensive recitation of the relevant facts contained within the First Amended Complaint [NYSCEF No.40] along with declarations and evidence submitted in connection with this matter, are incorporated by reference in this consolidated memorandum of law. *See* [NYSCEF Nos. 2-37; 44 - 69]. The following summary encapsulates some of the key facts relevant to this Memorandum.

Though many religious people do not object to the vaccines, it is well-documented that there is a subset of people of faith who hold sincere religious objections that do not allow them to take a Covid-19 vaccine. Unfortunately, Respondents were unwilling to accept this, and, instead, elected to repeatedly harass, discriminate against and retaliate against religious objectors instead of accommodating them as required by law.

From the start, Respondents announced that they would not comply with their statutory obligation to reasonably accommodate any employees with religious objections to the Mandate. After labor disputes and a temporary restraining order forced them to agree to consider religious accommodations at all, the DOE adopted a facially unconstitutional and discriminatory religious accommodation policy designed to result in widespread denial of reasonable relief. [NYSCEF No. 4, "Stricken Standards"]. The Stricken Standards explicitly favor Christian Scientists above other religions and require that accommodation be denied to employees with religious beliefs that are not shared by "established" and "recognized" religions or leaders. - [Id. at 9]. Though government is prohibited from enforcing or adopting policies that

discriminate against minority faiths, the DOE adopted the clearly discriminatory Stricken Standards as official policy and enforced denials based on these unlawful criteria.

The DOE never even pretended to try to accommodate employees in good faith. The DOE denied every one of the more than 7,000 religious accommodation request through an autogenerated email, stating:

> We have reviewed your application and supporting documentation for a religious exemption from the DOE COVID-19 vaccine mandate. Your application has failed to meet the criteria for a religious based accommodation. Per the Order of the Commissioner of Health, unvaccinated employees cannot work in a Department of Education (DOE) building or other site with contact with DOE students, employees, or families without posing a direct threat to health and safety. We cannot offer another worksite as an accommodation as that would impose an undue hardship (i.e., more than a minimal burden) on the DOE and its operations.

[NYSCEF No. 40 ¶ 111]. Pursuant to the Stricken Standards, employees were given one day to appeal, and the appeals were also governed by the facially discriminatory Stricken Standards.

In a press conference held on the eve of the religious accommodation hearings, Mayor de Blasio was asked how the City intended to decide which DOE employees to grant religious accommodation from the Mandate. He responded that there are only two religions he considers valid in this context – Christian Scientists and Jehovah's Witnesses. Then he concluded, "So, we are saying very clearly, it's not something someone can make up individually. It has to be, you're a standing member of a faith that has a very, very specific longstanding objection." This pronouncement was

unlawful. Since the adoption of the New York State Constitution, individual religious beliefs have been protected just as closely as orthodox ones.

The DOE then participated in what can only be described as heresy inquisitions, in which its representatives followed the Mayor's instruction, and harassed religious employees even more zealously than the unlawful policy required, impermissibly entangling themselves with religious questions. For example, Jewish applicants were routinely told that Jews could not be accommodated, on the grounds that the DOE had uncovered an article about a rabbi in Israel who was vaccinated. See, e.g., [NYSCEF No. 40 ¶ 91]. The applicants' patient attempts to educate the DOE about the diversity of the Jewish faith, and irrelevance of the beliefs of a rabbi outside of one's particular congregation, fell on deaf ears, and the DOE continued to zealously argue for denial of accommodations even of those who provided letters from their own rabbi, confirming that the applicant's actual congregation shared the same religious objection to the Covid-19 vaccines. *Id.* The same thing happened to Catholics, non-denominational Christians and even Buddhists. For example, DOE representatives argued that Petitioner Michael Kane ("Mr. Kane"), a non-denominational Buddhist, should be denied accommodation because, though they found him sincere, his religious beliefs are not shared by the Catholic Pope and must therefore be wrong. [NYSCEF No. 40 ¶ 8]. The DOE has never denied that it engaged in this behavior in any of the multiple lawsuits that ensued. Nor could it. Such shockingly ignorant and illegal comments were common and well-documented.

After appeals, the DOE only granted religious accommodations to one hundred and sixty-two employees, and even this small group remained subject to harassment and segregation without cause. DOE issued the rest letters with no reason other than an "X" next to the word "Denied" and involuntarily suspended them without pay. Before they even received any determinations, many of the named Petitioners in this lawsuit filed a lawsuit challenging the legality of the bad-faith policies in federal court.

In November 2021, on interlocutory appeal, the Second Circuit Court of Appeals declared the DOE's religious exemption policies unlawful, holding that denying a religious exemption "based on someone else's publicly expressed religious views —even the leader of her faith—runs afoul" of the First Amendment as well as statutory accommodation standards. *Kane*, 19 F.4th at 168. The Court also held that government should not second-guess religious adherents' "interpretations of [their] creeds." *Id.* (quoting *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989)).

In November 2021, the case was remanded, and the City promised to review religious accommodation requests *de novo* in compliance with governing standards set forth in Title VII, the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"). Any DOE employee who met the statutory criteria was supposed to be reinstated with back pay. But once more, Respondents refused to accommodate employees in good faith. Instead, the "Citywide Panel" convened by the City refused to even reconsider over 90% of the applicants of employees wrongfully denied accommodation under the Stricken Standards.

According to Eric Eichenholtz ("Mr. Eichenholtz"), Managing Attorney for the New York City Law Department, and architect of the Citywide Panel process, the Citywide Panel reviewed less than 600 of the 7,000 DOE employees denied religious accommodation under the Stricken Standards. [NYSCEF No. 68, Gibson Aff. Ex. 20] DOE denied the vast majority the opportunity to have any religious accommodation review other than under the unconstitutional Stricken Standards.

Upon information and belief, one category denied consideration by the Panel were those who had not applied under the Stricken Standards by September 2021, such as Petitioners Smith ("Ms. Smith"), LoParrino ("Mr. LoParrino") and Giammarino ("Mrs. Giammarino"), because they determined it was futile to apply until the policies were changed. And it was. These Petitioners were facially excluded from accommodation under the terms of the Stricken Standards due to the clergy letter requirement, and because Catholics were categorically barred from accommodation on the ground that Pope Francis is vaccinated. Others, like Petitioner Grimando ("Mrs. Grimando"), did not originally apply for religious accommodation in September 2021 because they had a medical exemption or other leave in place at the time, and the DOE refused to consider dual applications.

In December 2021, after the Second Circuit held the Stricken Standards unlawful and the City promised to provide fresh review, Petitioners Smith, LoParrino, Giammarino, and Grimando all requested religious accommodation review from the Citywide Panel. Only Ms. Smith's application was reviewed. On December 13, 2021, DOE, without explanation, informed Mr. LoParrino that his

application would not be considered and he was terminated on February 15, 2022. [NYSCEF No. 40 ¶¶ 485-486]. DOE provided most others, including Mrs. Giammarino, no response at all to their application to the Citywide Panel. DOE terminated Mrs. Giammarino in August 2022.

Many employees who *had* applied for accommodation under the Stricken Standards in September 2021 and timely appealed never received a determination either. Take for example Petitioner Salon ("Ms. Salon"), who waited for months on leave without pay for a determination by the Panel. Her house was in foreclosure, she had children to support, and the family was starving. Finally, she could wait no longer and had to violate her sincerely held beliefs to save her family. [NYSCEF No. 40 ¶¶ 569-590]. Ms. Salon describes the experience as "spiritual rape" and remains deeply traumatized. [Id.]

Of the 600 or fewer DOE employees the Citywide Panel did review, the Panel affirmed nearly all denials through conclusory and generic autogenerated emails. The ten original *Kane* plaintiffs were the first to receive their determinations. The Panel denied nine of them, including Petitioners DiCapua, Kane, Chu, Smith, Nwaifejokwu, Romero, Clark, and Delgado with the following generic email:

> The City of New York Reasonable Accommodation Appeals Panel has carefully reviewed your Agency's determination, all of the documentation submitted to the agency and the additional information you submitted in connection with the appeal. Based on this review, the Appeals Panel has decided to deny your appeal. **This determination represents the final decision with respect to your reasonable accommodation request.**
>
> The decision classification for your appeal is as follows: Does Not Meet Criteria.

[NYSCEF No. 50, Gibson Aff. Ex. 2]. The tenth, William Castro, was the only DOE employee that Petitioners are aware of who the Citywide Panel ever accommodated. As justification, he inexplicably received the same "reason" as the denied Petitioners, to wit - "The decision classification for your appeal is as follows: Does Not Meet Criteria." [*Id.* at 6].

Petitioners moved for emergency relief. In response, the City's attorneys provided counsel, after briefing concluded, newly drafted summaries (hereinafter referred to as "Concocted Summaries") purporting to give further "reasons" for the Panel's denials. [NYSCEF No. 10]. These Concocted Summaries were not part of the administrative record, were never given to any other DOE employee denied accommodation by the Citywide Panel and were clearly generated in anticipation of litigation. After all, the original denials stated that "[t]his determination represents the final decision with respect to your reasonable accommodation request."

The rest of the DOE employees considered by the Panel received substantially the same denial, though, at some point, the Citywide Panel changed the decision classification from "Does Not Meet Criteria" to state instead: "The employee has failed to establish a sincerely held religious belief that precludes vaccination. DOE has demonstrated that an accommodation to the employee would be an undue hardship given the need for a safe environment for in-person learning." [NYSCEF No. 11, *Loiacono* decision at *3].

Meanwhile, there was no substantial evidence to support any of the denials of accommodation. [NYSCEF No. 4, Dr. Risch Aff]. Even before the Mandates went into

effect in September 2021, it was already understood that the vaccines do not meaningfully stop transmission or the spread of disease. [NYSCEF No. 5, Dr. Bhattacharya Aff; NYSCEF No. 6, Dr. Makary Aff.].

Nonetheless, the vast majority of employees had no objection to vaccination and got vaccinated. There was no reason to segregate those who could not take the vaccines due to their religious beliefs. Nothing in the Mandate prevented reasonable accommodation or required such rigid rejection of any exception. In fact, the Mandate stated explicitly that: "Nothing in this Order shall be construed to prohibit any reasonable accommodation otherwise required by law." [NYSCEF No. 3, Mandate ¶ 6]. But even if Respondents had sufficient reason to deny any accommodations, they never articulated or supported these determinations with any objective or nonspeculative evidence sufficient to meet their burden under law.

On February 6, 2023, two days before oral arguments in the Second Circuit on the related federal case, the DOE announced it would be dropping the DOE mandate effective February 10, 2023. It immediately then moved on this ground to moot the case, claiming the teachers could come back. But still, months later, the DOE refuses to hire back any of the wrongfully fired teachers, despite continuous advertisements citywide for positions that Petitioners are eminently qualified for, and which urgently need to be filled. Meanwhile, Petitioners and their colleagues are desperate. Many, now deprived of income for a year and a half, have lost everything – life savings and retirement accounts were wiped out, as these hard-working teachers went hungry, lost their homes, watched their children suffer, were separated from their families,

and endured enormous pain and suffering as the government mocked their most sacred religious beliefs and shredded their basic human dignity.

STANDARD OF REVIEW

In a hybrid proceeding and action, such as this, separate procedural rules apply to those causes of action asserted under CPLR Article 78 and the other causes of action. *Rosenberg v. New York State Off. of Parks, Recreation, & Historic Pres.*, 94 A.D.3d 1006, 943 (2012). This memorandum of law supports Petitioners Article 78 claims. The plenary claims are reserved for further proceedings.

Judicial review of the acts of an administrative agency under Article 78 is limited to questions expressly identified by statute *(see* CPLR §7803; *Matter of Featherstone v. Franco,* 95 NY2d 550, 554 (2000)). Petitioners seek relief pursuant to CPLR §7803(3), in which the court assesses "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed" and CPLR §7803(4), "whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence." The governing standards for each prong are discussed in the respective argument sections.

TIMELINESS

Pursuant to CPLR 205(a), Petitioners have six months after the denial of supplemental jurisdiction in federal court to file new claims on the same occurrences

in state court, provided that the action would have been timely commenced at the time of commencement of the prior action. Petitioners filed their proposed class action federal suit on September 21, 2021, before the Mandate took effect. The district court declined to exercise supplemental jurisdiction on August 30, 2022, and Petitioners then timely commenced suit in state court and served defendants within the six-month period afforded by CPLR 205(a). This action is timely.

LEGAL ARGUMENT

I. Respondents' religious accommodation policies are unlawful, and the denials issued thereunder are affected by errors of law.

a. Petitioners are entitled to reasonable accommodation under the law.

The NYSHRL and NYCHRL make it an unlawful practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment based on, among other factors, religious views. Pursuant to both statutes, discrimination includes imposing a condition that would require an employee to violate his religion or creed. Exec. Law § 296[1][a]; N.Y.C. Admin. Code § 8-107[a]. Reasonable accommodation is thus an affirmative duty. *Id.*

The standards for establishing unlawful discrimination under both New York statutes are largely the same as the federal standards under Title VII. J*arrett v Manhattan & Bronx Surface Transp. Operating Auth.*, NY Slip Op 32701(U) (2017), citing *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 330 n.3 (2004).

But the state and local statutes impose more demanding affirmative obligations. Pursuant to statute, "[c]ourts must construe the 'NYCRL' broadly in favor

of discrimination plaintiffs, to the extent that such a construction is reasonably possibly." *Matter of Ansbro v. Nigro,* 2022 NY Slip Op 32580(U) (Sup Ct New York County, July 25, 2022). In 2019, the legislature amended the NYSHRL to add the same requirement, directing courts to construe the NYSHRL liberally for the accomplishment of the 'remedial' purposes thereof "regardless of whether federal civil rights law, including those laws with provisions worded comparably to the provisions of the [NYSHRL] have been so construed." N.Y. Pattern Jury Instr. – Civil Div. 9(I)(1) (citing Exec. Law § 300). Because Respondents' religious accommodation policies violate both the spirit and the law of these basic statutory accommodation obligations, all denials thereunder should be set aside.

b. Denials issued under the Stricken Standards are affected by errors of law.

As a starting point, all determinations made under the Stricken Standards must be set aside because the Stricken Standards are facially unlawful, playing denominational favorites and improperly excluding whole categories of religious objectors, regardless of their sincerity. In 2021, the Second Circuit held that the Stricken Standards are unconstitutional for this reason. *Kane,* 19 F.4th at 168-69.

Statutory definitions of religion track constitutional standards. In the United States, protected religion not only includes personally held or unorthodox beliefs, but also "any moral or ethical beliefs as to what is right or wrong which are sincerely held with the strength of traditional views..." 29 C.F.R. § 1605.1. The NYCHRL goes a step further, protecting, alongside religious beliefs, an employee's right not to violate his "creed" N.Y. City Administrative Code §§ 8-101.

As a floor, to comply with the law, the government may not second guess the validity of an employee's beliefs in a religious accommodation determination but must limit their inquiry to "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965). Even the City conceded that the Stricken Standards, "may" have been "constitutionally suspect" and consented to set aside the denials and provide *de novo* consideration of the accommodation requests. *Kane,* 19 F.4th at 167.

c. The City's refusal to consider religious accommodation requests violates the law.

Though the City promised to give *de novo* review to those denied under the unlawful Stricken Standards and reinstate with back pay all employees who qualify under the statutory standards, it declined to actually reconsider over 90% of the DOE employees seeking religious accommodation. The City's decision to deny review of these applications after the Second Circuit struck down the old policy is itself unlawful. *See, e.g., LaBarbera v. N.Y.C. Dep't of Ed.*, Index No. 85001/2023 (Sup. Ct. Richmond Cty, April 4, 2023). Respondents had an ongoing affirmative duty to accommodate these employees, or at least attempt in good faith to do so under lawful standards. In fact, since 2018, the NYCHRL provides a separate cause of action against employers who fail to engage in a cooperative dialogue with employees who request reasonable accommodations.

> It shall be an unlawful discriminatory practice for an employer, labor organization or employment agency or an employee or agent thereof to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity

> has notice may require such an accommodation: (1) For religious needs as provided in subdivision 3 of this section.

N.Y.C. Admin. Code § 8-107 (28)(a). Any DOE employee denied review by the Citywide Panel is entitled to reinstatement.

It does not matter whether the employees submitted an application under the Stricken Standards or afterwards. What matters is that the DOE and the City were subsequently made aware that the employees required religious accommodation, and then nonetheless failed to provide them with any consideration, instead electing to terminate them without review. As the Supreme Court pointed out in *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), a formal request for accommodation is not a prerequisite to protection. "A request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive [to deny accommodation] but it is not necessarily a condition of liability." *Id.* at 774.

d. The Citywide Panel process was affected by errors of law.

The Citywide Panel process was also unlawful, and the decisions issued thereunder must likewise be set aside. Three glaring errors of law jump out. First, the decisions do not provide sufficient reasons or individualized analysis to allow any finding of rationality. Second, the City used the incorrect undue hardship standard and failed to meet their burden of proof or analysis on this issue. Third, the City failed to engage in individualized cooperative dialogue. These global errors are discussed in more detail below.

II. The denials were arbitrary and capricious.

The Citywide Panel's failure to provide documentation or reasoning to support their determinations renders the determinations arbitrary and capricious. When an agency makes a determination, it has an obligation to provide its reasoning. *Punnett v. Evans*, 26 A.D.2d 396, 399, 274 N.Y.S.2d 800 (1st Dep't 1966) ("the courts will not sanction an administrative denial which has neither offered the applicant an opportunity to present his case to the agency nor apprised the court of review with a basis for the finding against the applicant"). While courts will uphold an agency decision that demonstrates a rational basis for the determination, the record must provide sufficient detail to give rise to a determination of rationality, as courts cannot affirm an agency determination by "substituting what it deems a more appropriate or proper basis" to save a deficiently reasoned decision. *Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974). It is well-settled law that a reviewing court's function is limited to "whether the record contains sufficient evidence to support the rationality of the determination." *Garvey v. City of New York,* 77 Misc. 3d 585, 592 (Richmond Sup. Ct. 2022) (citing cases). In this inquiry, the reviewing court "must be certain that an agency has considered all the important aspects of the issue and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *O'Rourke v. City of NY,* 64 Misc. 3d 1203 (Sup. Ct. Kings County 2019). No such connection can be found here.

a. Respondents did not meet their burden on undue hardship.

This Court has already found that the City's conclusory "undue hardship" claims are arbitrary and capricious. *LaBarbera.*, Index 85001/2023 at *9. As a

threshold matter, the City did not even use the correct undue hardship standard, stating in all the initial denials "we cannot offer another worksite as an accommodation, as that would impose an undue hardship (i.e. more than a minimal burden)." [NYSCEF No. 40 ¶ 111]. Mr. Eichenholtz confirmed in a sworn affirmation submitted in a related federal case that the Citywide Panel continued to use this same *de minimis* standard. *See, e.g.,* [NYSCEF No. 49, Eichenholtz Aff. ¶ 33].

But the *de minimus* standard only applies under Title VII. The state and local standards are far more robust. Under state and local law, "undue hardship is defined as "an accommodation requiring a *significant* expense or difficulty (including a significant interference with the safe or efficient operation of the workplace...)" N.Y. Exec. Law § 296(10(d); N.Y.C. Admin. Code 8-107(3)(b).

Moreover, under the state and local statutes, the "covered entity has the burden of proving undue hardship" through detailed analysis and consideration of a number of enumerated factors, including, but not limited to the following:

> (a) The nature and cost of the accommodation; (b) The overall financial resources of the facility or the facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; and (c) The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees, the number, type, and location of its facilities...

NYC Administrative Code 8-102.

Similarly, if the undue hardship is alleged based on a safety concern, the statutes require rigorous individualized review and documentation as well. These determinations cannot be generalized or speculative. When determining whether an

employee poses a "direct threat" that cannot be reasonably accommodated, "the employer must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective information to ascertain: the nature, duration and severity of the risk; the probability that the potential injury will actually occur, and whether reasonable accommodations, such as modification of policies, practices or procedures, will mitigate the risk." 9 CRR-NY 466.11.

This "individualized standard" is a key component of the NYSHRL, which prohibits categorical pre-determinations. *See, e.g., Doe v. Roe, Inc.,* 143 Misc. 2d 156, 159 (Sup. Ct 1989), aff'd, 160 A.D. 2d 255 (1990). For example, the First Department held that the state could not preemptively bar methadone users from public employment, but rather, needed to assess in an individualized fashion whether the individual petitioner's methadone dependency would prevent him from performing in a reasonable manner the activities involved in the specific jobs he sought without posing a direct threat to others. *Perez v. New York State Hum. Rts. Appeal Bd.,* 70 A.D.2d 558, 559 (1979). Certainly, if drug users are afforded the right to an individualized review of the actual danger they pose, it would be shocking and unjust to deny the same individualized, non-speculative review to those who require religious accommodation from a City mandate to take a vaccine that cannot even stop transmission.

The bottom line is that the burden of proving the unavailability of any safe and reasonable accommodation lies with Respondents, who were required to make a

sufficient record to defend their denial on this ground. This is a substantial burden, as pursuant to the NYCHRL, "there is no accommodation (whether it be indefinite leave time or any other need created by a disability) that is categorically excluded from the universe of undue hardship." *Phillips v. City of New York,* A.D.3d 170, 182 (2009). Courts are expressly prohibited from rehabilitating a deficient record. "In light of the New York City Council's legislative policy choice to deem all accommodations reasonable except for those a defendant proves constitute an undue hardship, general principles of statutory interpretation preclude the judicial importation of other exceptions." *Id.*

The Citywide Panel simply cannot meet its burden of "proving" that any accommodation would present an undue hardship with these conclusory denials. Neither the DOE nor the City ever explained why any of these Petitioners could not simply be given an exemption, or at least test weekly, like teachers in every other school district in the state. Nor did the Citywide Panel ever explain why 162 employees could be accommodated remotely who qualified under the discriminatory Stricken Standards, but the Citywide Panel was unable to accommodate anyone but William Castro. This double standard is not only capricious, but also discriminatory and sets up an insurmountable Equal Protection problem. Essentially, Respondents imposed a more difficult undue hardship standard on employees who hold disfavored religious beliefs than those who were deemed acceptable under the facially discriminatory Stricken Standards.

b. Respondents fail to meet their burden of proving that they engaged in individualized cooperative dialogue.

Respondents also failed to engage in individualized cooperative dialogue. Respondents have an affirmative burden to prove that they have done so, and they have not and cannot. In *Jacobson v New York City Health and Hospitals Corporation,* 22 N.Y.3d 824 (N.Y. Ct. Appeals, 2014), the court noted that a defendant must prove through the record that it duly considered an employee's accommodation request, but "the employer cannot present such a record if the employer has not engaged in interactions with the employee revealing at least some deliberation upon the viability of the employee's request." *Id. a*t 837. Indeed, the NYCHRL was recently amended to specify that the cooperative dialogue needs to include, at minimum, evidence that the employer attempted to explain the difficulty that an accommodation might pose to the employee, to attempt to arrive at a good faith alternative. N.Y.C. Admin. Code § 8-102.

Respondents made no attempt to discuss any difficulty they might have had in accommodating any of the Petitioners before summarily denying relief, and nothing in the record supports an inference that they attempted to accommodate Petitioners in good faith. Instead, Respondents repeatedly attempted to ignore their reasonable accommodation obligations, only grudgingly reviewing any applications in response to court orders, and then denying nearly all applicants through autogenerated emails and obstructive and stubborn refusal to review. The Panel never met with a single one of the Petitioners, and it appears they only ever accommodated one. This is not "good faith" by any inference.

This Court recently reversed the denial of a firefighter's religious exemption request under the same Citywide Panel process, because: "There was no cooperative dialogue and no options given to the Petitioner as to how to maintain his position, while not contradicting his sincerely held religious beliefs.

A cooperative dialogue is not a suggestion. It is required by law." *Timothy Rivicci v. FDNY & NYC*, Index No. 85131/2022, NYSCEF Doc. No. 54, 10/05/2022. Petitioners are entitled to the same finding and relief.

c. All denials under the Stricken Standards were arbitrary and capricious.

Clearly, the DOE's initial autogenerated email denials fail to meet Respondents' burden and must be deemed arbitrary and capricious. Every single applicant received the same autogenerated email, stating, in sum and substance, that pursuant to the Mandate "unvaccinated employees cannot work in a school building without posing a direct threat" and "we cannot offer another worksite as an accommodation, as that would impose an undue hardship (i.e. more than a minimal burden). [NYSCEF No. 40 ¶ 111].

As a threshold matter, these determinations lack any basis in fact. The Commissioner's Order does not state that unvaccinated employees cannot work in school buildings without posing a direct threat. On the contrary, the Mandate specifically states: "Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law." [NYSCEF No. 3, Mandate]. Moreover, the DOE even sent the same autogenerated "undue hardship" email to

Petitioner Clark, who did not work in school buildings, and other employees who already worked remotely. [NYSCEF No. 40 ¶ 120].

But more importantly, Respondents' reasons are too vague and conclusory. In *LaBarbera v. New York City Dept. of Educ.*, Index 85001/2023 (Sup Ct Richmond Cty, April 4, 2023), this Court recently issued a decision examining one of these initial autogenerated reasons for denial and found it insufficient. "[T]his Court finds definitively that the DOE's denial of the Petitioner's request was arbitrary and capricious because the reasons given for the denial were vague and conclusory." *Id.* at 9. The same reasoning applies to all the identical autogenerated emails.

The decisions on appeal under the Stricken Standards are even worse. They included no reasoning at all just an "x" next to the word "denied." [NYSCEF No. 8]. Clearly, these do not meet Respondents' burden. All denials under the Stricken Standards, whether initial or from an appeal, must be set aside.

d. The Citywide Panel denials were arbitrary and capricious.

The City's attempt to whitewash the bad faith denials under the Stricken Standards through "fresh" Citywide Panel determinations fares no better. Courts in every affected county have repeatedly held that the vague and conclusory Citywide Panel determinations were arbitrary and capricious too. *See, e.g., Finley v. The City of New York and FDNY,* Index no. 717617/2022 (Sup Ct Queens, Oct 27, 2022) ("The denial of the appeal contains no analysis or reasoning, no discussion of [petitioner's] assertions and contains no reference or mention of anything particular or specific to [petitioner's] religious exemption request."); *Loiacono v. the Bd of Educ. of the City of*

New York, et al, Index no. 154875/2022 (Sup Ct New York Cty, July 11, 2022 at *4) ("the reasons for the denial were vague and conclusory."); *Timothy Rivicci v. FDNY & NYC*, Index No. 85131/2022, NYSCEF Doc. No. 54 (Sup Ct Richmond Cty, October 5, 2022 at p. 5-6 ("the denial of the Petitioner's reasonable accommodation request was arbitrary and capricious because the reasons given for the denial were vague and conclusory," "simply citing 'undue hardship' is not an explanation for denial of a reasonable accommodation."); *Curatolo v. FDNY & City of New York*, Index No. 85219/2022, NYSCEF Doc. No. 38 (Sup Ct Richmond Cty, December 13, 2022) (denying request for religious exemption was "arbitrary and capricious because the reasons given for the denial were vague and conclusory"); *See, also, DeLetto v. Adams*, Index No. 156459/2022, NYSCEF Doc. No. 23 (Sup Ct New York Cty, September 13, 2022) ("three bases were cited [by NYPD], these general reasons, standing alone, are simply too conclusory" and Does Not Meet Criteria "Citywide Panel determination failed to cite any reason whatsoever for denial"); *Anderson v. Adams*, Index No. 156824/2022, NYSCEF Doc. No. 32 (Sup Ct New York Cty, October 21, 2022) ("three reasons cited [by NYPD] are conclusory and vague"); *Sutliff v. Adams*, Index No. 156891/2022, NYSCEF Doc. No. 27 (Sup Ct New York Cty, October 24, 2022) ("Does Not Meet Criteria" by Citywide Panel "is a textbook example of an arbitrary and capricious finding" and "is completely devoid of reasoning" and three reasons cited "do not assess specific reasons for requesting a religious exemption or analyze why respondents do not credit petitioner's assertions"); *Brousseau v. NYPD*, Index No. 157739/2022, NYSCEF Doc. No. 34 (Sup Ct New York Cty, November 1, 2022)

("respondents issued a blanket denial with no explanation," "three reasons cited [by NYPD] are conclusory and vague", and "Does Not Meet Criteria" determination by Citywide Panel "is completely lacking any reasoning"); *Stewart v. NYPD*, Index No. 157928/2022, NYSCEF Doc. No. 25 (Sup Ct New York Cty, November 9, 2022) ("bland and conclusory assertion [Does Not Meet Criteria] does not justify terminating someone's employment"); *Cano v. City of New York*, Index No. 156355, NYSCEF Doc. No. 39 (Sup Ct New York Cty, September 15, 2022) ("arbitrary and capricious" to terminate "without giving petitioner adequate reason for such decision at the appeals level"); *Grullon v. City of New York*, Index No. 156934, NYSCEF Doc. No. 31 (Sup Ct New York Cty, October 8, 2022) ("'Does Not Meet Criteria' was arbitrary and capricious for failing to provide a reason for such determination and failing to set forth the criteria that Petitioner failed to meet"); *Schimenti v. City of New York*, Index No. 85075/2022, NYSCEF Doc. No. 80 (Sup Ct New York Cty, December 16, 2022) ("the reason given for the denial were vague and conclusory and no rationale was provided"); *Moscatelli v. NYPD,* Index No. 157990/2022, NYSCEF Doc. No. 35 (Sup Ct New York Cty, December 23, 2022) ("determination is a prime example of a determination that sets forth only the most perfunctory discussion of reasons for administrative action."); *Schiefer v. Bd. of Ed. of the City of New York,* Index No. 155983/2022, NYSCEF Doc. No. 51 (Sup Ct New York Cty, October 4, 2022) (DOE's assertion of undue hardship without explanation was arbitrary and capricious).

At this point, it is well-settled law. These Citywide Panel determinations were defective, arbitrary and capricious. As the Citywide Panel issued the same, or

substantially the same denials to all applicants, these defects are global, and all those subjected to these arbitrary and capricious policies are entitled to relief. Petitioners ask for a global solution to this global error of law.

e. The Concocted Summaries cannot rescue Respondents' failures to provide a rational basis for their decision-making.

The ten original *Kane* plaintiffs received determinations from the Citywide Panel that are clearly deficient (stating only "Does Not Meet Criteria" as the reason). To the extent, however, that the City attempts to argue that the Concocted Summaries should also be considered, this does not set this case apart from any of the other decisions finding that the Citywide Panel determinations are arbitrary and capricious.

The Concocted Summaries, generated after the fact in anticipation of Litigation, cannot rescue Respondents' arbitrary denials of accommodations requests. First, the Concocted Summaries – which were emailed by defense counsel after a motion to set aside the conclusory decisions was fully briefed – were clearly not meant to be part of the original record, since no other DOE applicant to the Citywide Panel ever received such summaries before or after. As the Court recognized in *Loiocono*, "[o]f course, submitting after-the-fact reasoning to justify a decision is not proper as it is not a part of the administrative record." *Loiacono*, Index no. 154875/2022 at *5. For the same reasons, the Concocted Summaries cannot be considered in determining whether the Citywide Panel's denials were reasonable.

Even if the Concocted Summaries were considered, the Citywide Panel's determinations must still be set aside. In *DeLetto*, the City provided the police officer

applicant three similar conclusory, supposedly individualized "reasons" along with the Citywide Panel's generalized email claiming the application "does not meet criteria" and tacking on undue hardship. *DeLetto,* Index No. 156459. The Supreme Court held that "although three bases were cited, these general reasons, standing alone, are simply too conclusory." *Id.* at * 8. For example, the Court noted that while the decision stated that "the objection was personal or philosophical" as a basis for denial, no real substantive discussion of why this conclusion was drawn was provided. "It is not this Court's role to imagine what the agency might have said or should have said – it is the duty of the agency to explain why it made the decision. Here, the Court has no idea why the agency thought – or even if it did think, that the objection was personal or political or philosophical." *Id* at 3. So too here.

For all Citywide Panel denials, even those supplemented by Concocted Summaries, the record contains insufficient evidence to support the rationality of the denials. Rather than rehabilitate the reasoning, the Concocted Summaries reveal that the City continued the same discrimination against personally held and unorthodox religious beliefs, that made the Stricken Standards unlawful. For example, Petitioner Gladding wrote, as his primary reason for declining COVID-19 vaccination: "I have sought guidance directly from God, and He has answered me through prayer clearly and unequivocally – it is a sin to get vaccinated and I cannot do it. I have learned to listen when God guides me this way and I must do so now." There was no rational basis in the record for the City's lawyers to conclude in the Concocted Summary that, even though they found Mr. Gladding sincere, her reason

was deemed nonreligious, but rather a "personal fact-based choice" that does not merit religious protection under the reasonable accommodation standards. Respondent provided no analysis or explanation for why Mr. Gladding's plainly religious motivations were "a personal fact-based choice." This same lack of reasoning, or discriminatory reasoning, can be found in every Concocted Summary.

CONCLUSION

Petitioners respectfully request that the Court issue an Order:

1) Certifying this matter as a class action, with the class defined as all current or former DOE employees or contractors who submitted a request for religious accommodation from the Covid-19 vaccine mandate and appointing Petitioners as class representatives, and their attorneys as class counsel; and
2) Setting aside all denials of religious accommodation to the Covid-19 vaccine mandate *nunc pro tunc*; and
3) Reinstating Petitioners and all members of the proposed class to their former positions with full seniority, pension credits and other benefits, as if there were no break in service; and
4) Awarding back pay; and
5) Awarding costs and attorneys' fees; and
6) Awarding prejudgment interest on all amounts due; and
7) Such other, further, or different relief as the Court may deem just and proper.

Dated: Ithaca, NY
April 7, 2023

Respectfully submitted,

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Sujata Gibson, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 6996 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: Ithaca, NY
April 7, 2023

Respectfully submitted,

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