THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

No. 217-2019-cv-00792

IDELL "DELLIE" CHAMPAGNE
243 South Main Street
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AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
18 Low Avenue, #12
Concord, NH 03301

THE CONCORD MONITOR
1 Monitor Drive
Concord, NH 03301

v.

CONCORD SCHOOL DISTRICT
38 Liberty Street
Concord, NH 03301

PETITIONERS' OBJECTION TO THE DISTRICT'S MOTION TO DISMISS

NOW COME Petitioners Dellie Champagne, the American Civil Liberties Union of New Hampshire, and the *Concord Monitor* and respectfully file this Objection to the Respondent Concord School District's Motion to Dismiss.

INTRODUCTION

The District is seeking to withhold non-identifying portions of the September 23, 2019 Report by effectively raising—through the "internal personnel practices" exemption in RSA 91-A:5, IV—the privacy of its public employees, including employees who may have even engaged in wrongdoing. As the District's Motion demonstrates, the District's basis for withholding the Report and potentially insulating wrongdoers from public scrutiny omits any consideration of the obvious and compelling public interest in the Report's disclosure. Indeed, the District's Motion

does not attempt to (because it cannot) contest the compelling public interest in the Report's disclosure. As explained in the Petition: "[T]here is reason to believe that the secret September 23, 2019 report documents a failure in how the District responded to allegations that Leung was abusing children, as the Board effectively terminated the District's Superintendent and High School Principal two days after it received the report. However, the District has given no reason to the public for its effective termination of these high-ranking officials." *See* Petition, ¶ 59. Moreover, Concord's taxpayers also have had no ability to meaningfully vet the adequacy of the recommendations proposed in the subsequent October 30, 2019 report without knowing how the District responded to allegations that Howie Leung was abusing students. Despite this obvious public interest in disclosure, the District—including the Concord School Board—continues to leave its constituents in the dark as to what transpired.

To be clear, the District, through its School Board, is choosing secrecy in favor of being transparent with its constituents. Its policy of secrecy is not legally required, as an exemption under Chapter 91-A, even if applicable, does not create a privilege that legally obligates a government entity to withhold an otherwise exempt record. *See Marceau v. Orange Realty*, 97 N.H. 497, 499-500 (1952) ("It is well settled that statutory privileges … will be strictly construed …. The obligation of every member of the community, regardless of inconvenience or disinclination to disclose information required in the administration of justice which may benefit third parties is one which is declared by the Constitution. The obligation should not be limited without a clear legislative mandate."). The District has even declined to produce to its citizens an executive summary or redacted version of the Report. To withhold the Report in its entirety—which was funded by Concord taxpayers at a rate of $245 per hour—is deeply damaging to government accountability, undermines the public's confidence in the District as a whole, and

creates the impression that the District is attempting to protect itself—and potentially even School Board members—by withholding evidence of improper conduct or a failure to act.

This is precisely the type of information that Chapter 91-A aims to make public. As explained below, the Report does not constitute an exempt "internal personnel practice" under RSA 91-A:5, IV. At the very least, this Court cannot render a definitive decision on whether the Report satisfies this exemption without reviewing the Report for itself. The District's Motion must be denied.

ARGUMENT

I. This Court Can Stay Resolution of Parts II (Paragraphs 43-44 only), III, IV, and V of the Petition Pending the Outcome of Three New Hampshire Supreme Court Cases.

The District's Motion focuses exclusively on the "internal personnel practices" exemption under RSA 91-A:5, IV. It should be noted, however, that the New Hampshire Supreme Court is currently considering in three Chapter 91-A cases the following: (i) whether the Supreme Court's construction of this exemption in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) and *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006) should be overruled; (ii) whether this exemption should continue to be viewed as categorical in nature; and (iii) if this exemption is categorical, whether this constitutes an "unreasonable restriction" on the public's right of access in violation of Part I, Article 8 of the New Hampshire Constitution. *See, e.g.*, *Union Leader Corporation et al v. Town of Salem* (Case No. 2019-0206) (challenging town's decision to withhold a complete, unredacted copy of an audit report investigating the Salem Police Department, which documents mismanagement concerning internal affairs investigations)[1];

[1] The ACLU-NH is lead counsel in this case. Petitioners' opening brief is attached as *Exhibit 1* to this Objection (excluding the Addendum) and also can be found here: https://www.aclu-nh.org/sites/default/files/field_documents/aclu-nh_opening_brief_with_addendum.pdf.

Seacoast Newspapers, Inc. v. City of Portsmouth (Case No. 2019-0135) (challenging decision to keep secret an arbitrator's report in an employment action filed by a former Portsmouth police officer who was terminated after receiving an inheritance in excess of $2 million from an elderly woman with dementia)[2]; *Salcetti v. City of Keene* (Case No. 2019-0217) (challenging City's decision to withhold access to records related to drug cases, underage parties, sexual assaults, police brutality, and restaurant inspections). These cases were argued on November 20, 2019 and were brought, in part, because the New Hampshire Supreme Court has suggested that the *Fenniman* and *Hounsell* decisions may have been wrongly decided. *See Reid v. N.H. AG*, 169 N.H. 509, 519-20 (2016) ("As the foregoing demonstrates, in interpreting the 'internal personnel practices' exemption in *Fenniman*, we twice departed from our customary Right-to-Know Law jurisprudence by declining to interpret the exemption narrowly and declining to employ a balancing test in determining whether to apply the exemption."). The outcome of these three cases likely will dictate the outcome of Parts II (Paragraphs 43-44), III, IV, and V of Petitioners' Petition. Accordingly, for the sake of judicial economy and preserving the resources of the attorneys in this case, Petitioners believe that this Court can and should stay resolution of these independent claims until the Supreme Court reaches a decision in these three pending cases.

As Part I addressing the Family Educational Rights and Privacy Act ("FERPA") is not at issue in the District's Motion, the true focus of the District's Motion is Part II (Paragraphs 45-47) of the Petition, which alleges that—even if *Hounsell* and *Fenniman*'s interpretation of the "internal personnel practices" exemption is correct—non-identifying information in the September 23, 2019 Report does not constitute an "internal personnel practice" as defined by these cases. Petitioners

[2] The ACLU-NH is co-counsel in this case. Petitioners' opening brief can be found here: https://www.aclu-nh.org/sites/default/files/field_documents/20190621_brief_plaintiff-appellant_-_public.pdf.

believe that this Court can adjudicate this claim while these three Supreme Court cases are pending. As explained below in Section II below, the public is entitled to disclosure even assuming that *Fenniman* and *Hounsell* continue to be good law.

II. In Addressing Petitioners' Claim in Part II (Paragraphs 45-47) that the September 23, 2019 Report Does not Constitute an "Internal Personnel Practice" Under *Fenniman* and *Hounsell*, the District's Motion Ignores the Motion to Dismiss Standard and Petitioners' Well-Pled Allegations.

As the New Hampshire Supreme Court has explained, the term "personnel" "refers to human resources matters," including with respect to the hiring of prospective employees. *Reid*, 169 N.H. at 522; *see also Clay v. City of Dover*, 169 N.H. 681, 686 (2017) (applying definition of "personnel" to hiring, "which is a classic human resource function"). This exemption generally implicates records "generated in the course of an investigation of claimed employee misconduct." *Hounsell v. N. Conway Water Precinct*, 154 N.H. 1, 4 (2006); *see also Union Leader Corp. v. Fenniman*, 136 N.H. 624, 626 (1993) (internal investigation records addressing whether police officer engaged in harassment constitutes an "internal personnel practice" because the records "document procedures leading up to internal personnel discipline"); *Reid*, 169 N.H. at 522. The Massachusetts Court of Appeals has similarly explained that "personnel" means documents "useful in making employment decisions regarding an employee." *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 58 Mass. App. Ct. 1, 8 (2003) (quoting *Wakefield Teachers Ass'n v. School Comm.*, 431 Mass. 792, 797-98) (2000)). Whether a record satisfies the definition of "personnel" is not dependent on its location; rather, the focus is on the "nature and character" of the document. *Id.* at 5, 7; *see also Hounsell*, 154 N.H. at 4 (referencing how the record was "generated").

Worcester Telegram is particularly instructive. There, the records at issue concerned, in part, an "internal affairs report" that related to the "ultimate decision by the chief to discipline or

to exonerate [the officer in question] based upon [an] investigation." *Worcester Telegram*, 58 Mass. App. Ct. at 7. Despite the fact that these records ultimately led to a disciplinary decision, the Massachusetts Appeals Court concluded that these documents were not "personnel" related because they concerned an internal affairs process "whose quintessential purpose is to inspire public confidence." *Id.* at 9; *see also id.* at 7. As that Court explained, information may confidentially exist in a personnel file for employment purposes, but that same information may exist elsewhere in a record that has no employment purpose and therefore is a public record. *Id.* at 10 ("The exemption for 'personnel [file] or information' is not dependent upon whether the same information may be available, or discernible, through alternative sources. Rather, the nature and character of the document determines whether it is 'personnel [file] or information.'").

Here, as the Petition adequately alleges, the September 23, 2019 Report does not constitute a "personnel" practice under *Fenniman/Hounsell* because it—unlike the records at issue in *Fenniman*/*Hounsell* (cases that the *Reid* Court limited to their facts) and like the internal affairs records in *Worcester Telegram*—was derived outside the employee discipline process. The Report's purpose was different—namely, to more broadly ascertain how the District responded to Leung's alleged misconduct. This is precisely the sort of information that supports the public's decision making about its institutions and those who should run them. As alleged in the Petition:

> [A]s in *Worcester Telegram*, the September 23, 2019 report was "*not* generated for disciplinary reasons [as in *Hounsell*], *but rather for a broader purpose—namely, to ascertain how the District responded to Leung's alleged misconduct*. Indeed, the District's July 1, 2019 Board minutes make that clear, explaining that Investigator Perkins was retained to complete an "independent investigation into how Board policies and procedures had been followed in December 2014 and December 2018." *See Exhibit H*, July 1, 2019 Concord School Board Minutes, at p. 8 (Agenda Item 12).

Petition, Part II, ¶ 47 (emphasis added). This allegation, which is supported by evidence in the form of Concord School Board minutes, is more than sufficient at the motion to dismiss stage.

However, contrary to the motion to dismiss standard, the District's Motion effectively ignores these well-pled factual allegations in Paragraph 47. *See ERG, Inc. v. Barnes*, 137 N.H. 186, 190 (1993) ("In determining whether a motion to dismiss should be granted, the court assumes all factual allegations to be true, and the reasonable inferences that can be drawn from those facts are construed in the plaintiff's favor."). The District has also not presented any actual evidence, in the form of affidavits or otherwise, to support its "heavy burden" in justifying nondisclosure. *See, e.g., Reid*, 169 N.H. at 532 ("When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.") (citations omitted)).

As *Worcester Telegram* makes clear, the fact that the Report may involve employee conduct and/or may have collaterally been used to discipline two employees—Superintendent Terri Forsten and Principal Tom Sica—does not transform the Report's nature and character into "personnel" information. *See, e.g., Worcester Telegram & Gazette Corp.*, 58 Mass. App. Ct. at 7 ("The officers' reports, the witness interview summaries, and the internal affairs report itself clearly bear on the ultimate decision by the chief to discipline or to exonerate Officer Tarckini based upon the investigation. However, that these documents bear upon such decisions does not make their essential nature or character 'personnel [file] or information.' Rather, their essential nature and character derive from their function in the internal affairs process …. That the internal affairs process might lead to discipline, or even criminal action, does not transmute all materials in an internal affairs investigation into a disciplinary report, disciplinary documentation, or promotion, demotion or termination information."); *see also Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501, 507-08 (N.M. Ct. App. 2010) ("While citizen complaints may lead DPS to investigate the officer's job performance and could eventually result in disciplinary action, this fact by itself

does not transmute such records into 'matters of opinion in personnel files.'").[3] Similarly, the fact that the September 23, 2019 Report may contain some information that may also be in an employee's personnel file does not change the Report's essential nature. Again, the central question is whether the Report's essential "nature and character" indicates that it was generated for the specific purpose of potentially disciplining an employee. *See Hounsell*, 154 N.H. at 4. As adequately alleged, the Report was not and, instead, had a broader purpose.

In sum, in its zeal to keep the Report secret from its constituents, the District incorrectly asks this Court to effectively render a final legal ruling in a vacuum, without any consideration of the Report's contents and how the investigator framed its stated purpose, without any verified evidence having been proffered by the District to meet its "heavy burden" justifying nondisclosure, and without even deferring to Plaintiffs' allegations in Paragraph 47 of its Petition as is required at this stage. As explained in Section III *infra*, this Court should, at a minimum, review the Report's contents to allow for argument as to whether the Report was generated in the context of individual employee discipline as in *Hounsell/Fenniman*, or whether its purpose was to—as the Petition alleges and as the July 1, 2019 School Board minutes reflect—more broadly determine whether "Board policies and procedures had been followed in December 2014 and December 2018."

[3] *Hounsell* itself reflects this important distinction. There, while a water precinct was permitted to withhold a report compiled as part of an internal disciplinary investigation into whether an employee of the water precinct threatened and harassed by a co-worker, the government agency voluntarily released the earlier report created by Municipal Resources, Inc. that investigated alleged mismanagement of the precinct. *Hounsell*, 154 N.H. at 2 ("In June 2003, the precinct, which is governed by a three-member board of commissioners, retained Municipal Resources, Inc. (MRI) to investigate the alleged mismanagement of the precinct. The precinct disclosed the resulting MRI report to the public.").

III. The District's Motion to Dismiss is Premature. This Case Can Only Be Resolved After this Court Receives a Copy of the Unredacted Report and Conducts a Forensic Review.

In light of Petitioners' well-pled allegations, this Court cannot rule at this stage that the Report, in its entirety, constitutes an "internal personnel practice" under *Fenniman* and *Hounsell* without actually reviewing the Report *in camera*. It appears that the District agrees that this Court can receive a copy of the Report under seal. *See* District's Mot. to Dismiss, at p. 4, n. 2 ("the District would agree to submit the unredacted report to the Court for in camera review for the purpose of verifying the scope and subject of the report").

Judicial review of the Report is especially necessary because, even if some portions of the Report constitute an "internal personnel practice" under *Fenniman/Hounsell*, it is implausible to believe the District's position that *every* sentence in *every* page of the Report's over 100 pages contains such exempt "internal personnel practice" information. In withholding the Report in its entirety, it is doubtful that the District has taken the least restrictive approach here. Thus, this Court will, at the very least, have to go through the Report line-by-line to determine which portions are exempt from disclosure under this exemption (though Petitioners believe, as explained in Section V *infra*, that this initial burden of conducting a line-by-line review of the Report should fall on the District). As the New Hampshire Supreme Court has explained in the context of court records, "instead of sealing an entire document because it has been determined that parts of it should not be accessible to the public, the court should consider if redaction of those parts is the appropriate least restrictive means." *See In re Keene Sentinel*, 136 N.H. 121, 131 (1992).

For example, to ensure that the public gets the maximum access to information possible, the Rockingham County Superior Court recently (and appropriately) reviewed line-by-line an unredacted audit report that was heavily critical of the Salem Police Department's culture and

internal affairs practices to determine whether the Town's redactions accurately constituted exempt "internal personnel practice" information. The Court ruled that many of the redactions did not pertain to "internal personnel practices" under *Fenniman/Hounsell*, and thus were ordered released to the public. *See Union Leader Corporation et al v. Town of Salem*, No. 218-2018-cv-01406 (Rockingham Cty. Super. Ct. Apr. 5, 2019) (Schulman, J.) (*e.g.*, Page 5, noting that redaction in Salem Police Department audit report was not an "internal personnel practice" because "[i]t was not part of an internal affairs investigation or disciplinary proceeding"), attached as *Exhibit B to Petition*. A similar line-by-line approach to maximize public disclosure was used in *State v. Robert Tulloch* where media outlets sought certain court filings arising out of a murder prosecution. *See State v. Tulloch*, No. 01-cr-0517, 518, at p. 3-4 (Lebanon District Ct., Feb. 28, 2001) ("The Court and counsel for the parties engaged in an exhaustive examination of all of the sealed documents which consisted of a paragraph by paragraph review of the supporting affidavits which premised the issuance of the arrest warrant and search warrant. After conducting an in camera review of the record, with only counsel for the parties and the petitioner present, the State consented to the release of certain previously sealed material …."), *attached as Exhibit 2* to this Objection. Such a line-by-line forensic review is necessary here to ensure that the public receives maximum public access.

Dismissal, without further judicial review, would be premature for two additional reasons. *First*, judicial review of the Report is necessary to ascertain whether there is any discussion in the Report of School Board members who had oversight of District administrators. As explained in the Petition, none of these Board members are employed by the District. Thus, any such parts of the Report addressing Board members would not constitute an "internal personnel practice." *See Reid*, 169 N.H. at 523 (noting that the investigation "must take place within the limits of an

employment relationship"); *see also* Petition, Part II, ¶ 47. The District's Motion addresses this issue only by disputing that the Report implicates Board members. *See* District Mot. p. 7, n. 3. Of course, this Court cannot resolve such a question at the motion to dismiss stage based on an unverified assertion from the District. Rather, this Court will need to examine the Report for itself to determine whether it implicates the behavior of Board members, which would not trigger the "internal personnel practices" exemption.

Second, additional information needs to be gathered as to whether the District has waived its assertion of the "internal personnel practice" exemption by disclosing the Report to third parties, including teachers' unions. *See, e.g., Cooper v. Department of the Navy*, 594 F.2d 484, 487-88 (5th Cir. 1979) (where counsel for the family of a person killed in a Marine Corps helicopter crash sought a report concerning the crash under FOIA, holding that the confidentiality of that report had been waived by the Department of Navy when it was found to have been distributed to people other than those authorized by the Department); *State of North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978) ("selective disclosure" found to constitute waiver; "The selective disclosure exhibited by the government in this action is offensive to the purposes underlying the FOIA and intolerable as a matter of policy. Preferential treatment of persons or interest groups fosters precisely the distrust of government that the FOIA was intended to obviate.").

IV. Petitioners' Counsel Must Be Given Access to the September 23, 2019 Report Under a Protective Order to Ensure a Fair and Full Adjudication of this Case.

It is critical to the fair resolution of this case that Petitioners' counsel obtain access to the Report under a mutually agreeable protective order. This is because this Court can only fairly evaluate the legality of the District's decision to withhold this information with all parties' counsel having received the opportunity to review the withheld information and make complete arguments to this Court. *See, e.g., Keene Sentinel*, 136 N.H. at 130 ("The court shall separately examine each

document in question in camera (in chambers with only counsel for the parties and for the petitioner present) on the record."). As the New Hampshire Supreme Court explained in *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996), *in camera* review outside the presence of counsel "should be used cautiously and rarely." *Id.* at 478 ("Although the procedure should be used cautiously and rarely, ex parte in camera review of records whose release may cause an invasion of privacy is plainly appropriate.") (internal citation omitted). While this case certainly implicates student privacy, Petitioners' counsel anticipates that two students who are referenced in the September 23, 2019 Report will have counsel and be represented in this case to ensure that their privacy is respected. This counsel—Attorney Scott Harris from McLane Middleton—has no objection to Petitioners' counsel having access to the Report. To the extent the Court has further concerns, Petitioners' counsel should, at the very least, be given portions of the Report that do not implicate student privacy. It is Petitioners' understanding that the Report does not use student names.

Withholding the Report from Petitioners' counsel would shut them out from meaningful participation in this case. Without access to this withheld information under an "attorneys' eyes only" protective order, Petitioners' counsel will be unable to particularize their arguments, nor will Petitioners be able to fully hold the District to its burden of showing that an exemption applies. *See, e.g., Murray v. N.H. Div. of State Police*, 154 N.H. 579, 585 (2006) ("It is not the petitioner's responsibility to clarify the respondents' vague categorizations."). Indeed, giving Petitioners' counsel access to the information in question would be consistent with Chapter 91-A's overall presumption in favor of disclosure, as it would place the burden fully on the District to resist disclosure and would fully allow Petitioners to ensure that the District is being held to its "heavy burden." *See Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (noting

that courts resolve questions under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents") (citation omitted); *Union Leader Corp.*, 141 N.H. at 476 ("When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure."). There is also no prejudice that would occur if this Court allows Petitioners' counsel to review the withheld information under an "attorneys' eyes only" protective order. There is no reason to believe that Petitioners' counsel—who are officers of this Court—will not faithfully comply with the confidentiality provisions of any agreed-upon protective order.

Multiple state courts have endorsed the approach of allowing the requester's counsel to review the disputed documents under a protective order to help level the playing field and promote fairness in the adversary process.[4] *See, e.g., Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 764 N.E.2d 847, 853 (Mass. 2002) (holding that lower court did not abuse its discretion in allowing limited disclosure to the plaintiff's counsel, subject to a protective order, of police internal affairs documents at issue); *Globe Newspaper Co. v. Police Com'r of Boston*, 648 N.E.2d 419, 430 (Mass. 1995) ("In the future, a judge faced with an expansive public records request, who decides that the disputed materials should be personally reviewed, may permit counsel for the custodian and the party seeking production access to the materials subject to an appropriate protective order. The parties could then particularize their arguments to the judge, citing specific materials, or portions of materials, that are exempt or subject to disclosure. This would relieve the judge from a tedious examination of materials against generalized claims that

[4] The New Hampshire Supreme Court has also often looked to the decisions of other jurisdictions in applying Chapter 91-A. *See Union Leader Corp. v. N.H. Housing Fin. Auth.,* 142 N.H. 540, 546 (1997).

exemptions are applicable."); *New Haven Police Chief v. Freedom of Information Com'n*, No. CV020514313S3, 2 Conn. L. Rptr. 314, 2002 WL 1518660, 2002 Conn. Super. LEXIS 2057, at *1-2 (Conn. Super. Ct. June 11, 2002) (explaining in the context of police records investigating a homicide: "While the Connecticut appellate courts have not addressed this issue, appellate courts or judges in other jurisdictions interpreting their own freedom of information statutes have approved the concept of granting counsel seeking disclosure access to the documents in dispute …. Without access to the records, defendants' counsel are in the difficult position of having to argue that records are not exempt under FOIA without having seen the records. Because counsel for the plaintiffs, based on their law enforcement positions, do have access to the police record, granting access to defendants' counsel will help level the playing field in this appeal and promote fairness in the adversary process."); *Evening News Ass'n v. City of Troy*, 339 N.W.2d 421, 437-38 (Mich. 1983) (noting that the court can consider allowing plaintiff's counsel to have access to the contested documents in camera under special agreement "whenever possible") (internal quotations omitted). Petitioners seek only the same relief given by these state courts.

V. Petitioners' Proposed Procedure Will Maximize Public Disclosure of Information While Protecting Student Privacy.

Petitioners propose the following procedure for resolution of this case. This procedure is not only designed to maximize the information that is made available to the public, but it also protects student privacy rights. Attorney Scott Harris from the law firm McLane Middleton will be representing the privacy interests of two students to ensure that no identifying information concerning these individuals is released without their input. As Petitioners have made clear in their Petition, this lawsuit "specifically excludes information in the September 23, 2019 report that would lead to the identification of victims and their families, as well as witnesses who are/were not employed by the District." *See* Petition, at p. 2. Petitioners do not object to such information

being redacted; in fact, Petitioners believe that such information should be redacted to protect the privacy of these minors, families, and non-governmental actors. *Id.*

1. District's Line-By-Line Review: The District will go through the September 23, 2019 Report line by line and determine which portions it believes are protected under FERPA or the "internal personal practices" exemption, or both. The District should note those portions of the Report it believes should be withheld by highlighting it. In addition, the District should number the highlighted passages so that the parties can more easily point the Court to those passages in their arguments. Petitioners believe that this first line-by-line review should be conducted by the District, as it is the government entity withholding the information. Otherwise, this significant burden will fall on the Court.

2. Judicial Review Under Seal: As explained in Section III of this Objection, the entire Report—including any designations explained in Procedure 1—should be filed with the Court under seal for the Court's line-by-line review consistent with the review undertaken in *Union Leader Corporation et al v. Town of Salem*, No. 218-2018-cv-01406 (Rockingham Cty. Super. Ct. Apr. 5, 2019) (Schulman, J.).

3. Providing the Report to Petitioners' Counsel Under a Protective Order: As explained in Section IV of this Objection, the entire Report—including any designations explained in Procedure 1—should be released to Petitioners' counsel under an "attorneys' eyes only" protective order.

4. Providing the Report to Students' Counsel Under a Protective Order: The Report should also be released to counsel for two students—Attorney Scott Harris from the law firm McLane Middleton. Attorney Harris will also agree to be bound to an "attorneys' eyes only" protective order, with the exception of the provisions that are designated by the District as pertaining to his clients under FERPA. With respect to these specific provisions, Attorney Harris will review these provisions with his clients so his clients can decide whether they believe the information should be released or deemed private under FERPA.

5. Briefing Schedule, Submission of District Affidavits, and *In Camera* Hearing on the Record With all Counsel Present: With respect to the remaining portions of the Report in which there may be areas of dispute as to whether those portions are "internal personnel practices" under *Fenniman* and *Hounsell*, *see* Petition, Part I and Part II (Paragraphs 45-47), a summary judgment briefing schedule—which would include the submission of affidavits by the District if necessary—should be established. Thereafter, an *in camera* hearing/oral argument on the record, and with all counsel present, should be conducted.

WHEREFORE, Petitioners respectfully pray that this Honorable Court:

(A) Deny the Respondent's Motion to Dismiss;

(B) Stay resolution of Parts II (Paragraphs 43-44 only), III, IV, and V of Petitioners' Petition until the New Hampshire Supreme Court decides *Union Leader Corporation et al v. Town of Salem* (Case No. 2019-0206), *Seacoast Newspapers, Inc. v. City of Portsmouth* (Case No. 2019-0135), and *Salcetti v. City of Keene* (Case No. 2019-0217);

(C) Adjudicate the remaining portions of the Petition—Parts I and II (Paragraphs 45-47)—consistent with the procedures discussed in Section V of this Objection; and

(D) Award such other relief as may be equitable.

Respectfully submitted,

DELLIE CHAMPAGNE, THE AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION, AND THE CONCORD MONITOR,

By their attorneys,

/s/ Gilles R. Bissonnette
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Date: January 21, 2020

Certificate of Service

I hereby certify that a copy of the foregoing was sent to counsel for the Concord School District, Wadleigh, Starr & Peters, PLLC, 95 Market Street, Manchester, NH 03101.

/s/ Gilles Bissonnette
Gilles Bissonnette

January 21, 2020