

SUPREME COURT - STATE OF NEW YORK  
PART 6- SUFFOLK COUNTY

PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

In the Matter of LATINOJUSTICE PRLDEF,

Petitioners,

-against-

SOUTH COUNTRY CENTRAL SCHOOL  
DISTRICT,

Respondents.

ORIG. RETURN DATE: April 10, 2018  
FINAL RETURN DATE: May 8, 2018  
MOT. SEQ. #: 001 RTC

PETITIONER'S ATTORNEY:  
LATINOJUSTICE PRLDEF  
99 Hudson Street, 14<sup>th</sup> Floor  
New York, New York 10013

RESPONDENT'S ATTORNEY:  
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77 Conklin Street  
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Upon the reading and filing of the following papers in this matter: (1) Notice of Verified Petition, dated March 8, 2018, and supporting papers, including Memorandum of Laws; (2) Verified Answer and Affidavit in Support, including Memorandum of Law, dated April 18, 2018; (3) Reply Affirmation, dated April 23, 2018, it is,

**ORDERED** that Petitioners' Article 78 petition is referred to hearing to determine whether, and the extent to which, the information requested in Petitioner's August 1, 2017 FOIL request exist within respondent's custody and control; and it is further

**ORDERED** that the parties are directed to appear for a conference preliminary to the hearing, and at which time the date and time for the hearing will be scheduled, on **Monday, October 29, 2018 at 2:15pm**; and it is further

**ORDERED** that should the hearing become unnecessary the parties shall promptly contact Chambers to report same; and it is further

**ORDERED** that the petition is deemed amended to add, and timely served upon, *nunc pro tunc*, the Board of Education of the South Country Central School District as party-respondent, and the caption is amended as follows:

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In the Matter of LATINOJUSTICE PRLDEF,

*Petitioners,*

*-against-*

SOUTH COUNTRY CENTRAL SCHOOL DISTRICT  
and BOARD OF EDUCATION OF THE SOUTH  
COUNTRY CENTRAL SCHOOL DISTRICT,

*Respondents.*

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This is a special proceeding commenced on March 6, 2018 by petitioner against the South Country Central School District (“SCCSD”) related to respondent’s decision to deny document production in response to a Freedom of Information Law (“FOIL”) request. Petitioner alleges that respondent’s denial was arbitrary and capricious and that respondent failed to properly certify that it was not the custodian of the requested documents. Accordingly, petitioner seeks review of respondent’s denial of the FOIL request and an order, pursuant to Article 78 of the CPLR, setting the matter down for a hearing to determine whether the requested documents exist and should be produced.

Procedural posture. On August 1, 2017, petitioner, Latino Justice PRLDEF (“Latino Justice”), submitted a FOIL request<sup>1</sup> to the respondent South Country Central School District (the “School District”) for twenty-three categories of records related, *inter alia*, to its current practices and policies involving disciplinary matters against students alleged to be “gang-affiliated” and to the application of these policies and practices to students. Respondent’s designated Records Access Officer (“RAO”) responded to petitioner’s FOIL request on September 25, 2017 by providing 140 pages of documents<sup>2</sup> stated to be responsive to three of the

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1 In its supporting memorandum of law, petitioner, Latino Justice PRLDEF, states that it did so “as a non-profit and partisan civil rights legal defense and education fund,” and in its Verified Petition, it describes itself as a “New York-based national, non-profit public-interest civil rights legal defense and education fund formed as a not-for-profit 501(c)(3) tax-exempt corporation that works to protect and promote the civil rights of Latinos in the United State.”

2 These consisted of a “Gang Awareness” event flyer, the School District’s “Code of Conduct,” and the district’s “Progressive Discipline Standards of Intervention & Code of Conduct Summary.” Subsequently, after the petitioner appealed the RAO’s initial response to the District’s superintendent of Schools, petitioner was also provided with a copy of the School District’s policy “Number 7313,” entitled “Suspension of Students,” and the regulations

twenty-three categories of information and records requested by petitioner (Paragraphs 16, 17 and 21); by stating that it required additional time to respond to six of the categories (Paragraphs 1 through 5 and 22); by denying that documentation existed for thirteen of the requested categories (Paragraphs 6 through 15, 19, 20 and 23); and by requesting “further information” clarifying the remaining request, Paragraph 18<sup>3</sup>.

On October 25, 2017, Latino Justice appealed the RAO’s September 25, 2017 response and what it characterized as the “partial denial” of its requests to the School District’s Superintendent of Schools, Dr. Joseph Giani. On November 8, 2017, Dr. Giani granted the appeal to the extent that it sought a certification from the RAO that a diligent search had been conducted for the requested records and that either “the requested documents are not in the District’s records” or, with respect to the three categories of requests for which the School District had produced documents – Paragraphs 16, 17 and 21 – that “no further responsive to records could be located”; a corresponding certification from the District’s RAO was provided with the Superintendent’s determination letter, along with two additional documents<sup>4</sup> responsive Paragraph 21 of the FOIL request, which the District’s RAO averred she had “inadvertently omitted” from her prior response. However, quoting so much of Public Officers Law § 89(4)(a) as provides that “any person denied access to a record may within thirty days appeal in writing such denial” (emphasis in November 8, 2017 appeal determination letter), Dr. Giani declined to address the balance of the appeal, determining that “[t]here has been no such denial in this matter” and holding that “no appeal lies from a determination that granted you access to all records responsive to your request.” The current CPLR Article 78 proceeding, brought by Latino Justice against the School District, followed.

The current proceeding. The principal issues in this CPLR Article 78 are whether the School District has sufficiently responded to fourteen enumerated paragraphs of petitioner Latino Justice’s August 1, 2017 FOIL request and whether the RAO improperly omitted from her certification a representation as to whether or not the School District is “the custodian for”

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associated with that policy.

<sup>3</sup> This request, paragraph 18, was for certain records relating to the “New York State Board of Education.” In its September 25, 2017 missive, the RAO also noted that there is no “New York State Board of Education” and that if the intent of the request was for records relating to the New York State Education Department, it had no records responsive to the request.

<sup>4</sup> These consisted of the School District’s “Policy Manual” Section 7000 (“Students”), Number 7313, entitled “Suspension of Students,” and the associated regulations.

those records that it could not locate, a representation that petitioner contends is required by the Freedom of Information Law.

The fourteen paragraphs of Latino Justice's August 1, 2017 FOIL request that are at issue are as follows:

6. All documents maintained by the SCCSD purported to list or identify suspected gang members, with any identifying details redacted to the degree necessary to protect an unwarranted invasion of privacy.
7. Documents sufficient to identify the number of individuals whose identities the SCCSD has shared, due to suspected gang membership or activity, with the:
  - a. Suffolk County Police Department ("SCPD");
  - b. Immigration and Customs Enforcement ("ICE") or any other branch of the Department of Homeland Security ("DHS");
  - c. Federal Bureau of Investigation ("FBI");
  - d. Department of Justice ("DOJ");
  - e. Any other law enforcement agency.
8. All policies, guidance, procedures, memoranda, rules, instruction, documents, or correspondences directing SCCSD employees (including any school security officers) how to recognize and respond to suspected gang membership and gang activity. This includes, but is not limited to, specific descriptions of clothing, jewelry, hairstyle, shoes, tattoo, logos, makeup, symbols, graffiti tags, patterns, colors, symbols, hand gestures, songs, whistles, etc.
9. All policies, guidance, procedures, memoranda, rules, instructions, documents or correspondence specifying how SCCSD employees or administration may use the results of monitoring or investigating a students' [sic] social medial presence.
10. All policies, guidance, procedures, memoranda, rules, instructions, documents on how SCCSD employees or administration may use the results of monitoring or investigating a students' [sic] social media presence.
13. Any instructions, directives or memoranda from the Suffolk County Police Department to the SCCSD regarding how to identify gang membership or gang activity.

14. All SCCSD policies, procedures, protocol, directives, guidance, rules or regulations that refer to the SCPD, ICE, or any other branch of DHS.
15. All contracts, memoranda of understanding, or agreements between the SCCSD and the SCPD, ICE, or any other branch of DHS.
16. All agendas and minutes from school faculty meetings, parent teacher association meetings and district board of education meetings relating to law enforcement agency presence in schools, dress codes, social media, disciplinary proceedings, gang-related activity, and immigrant children.
17. All SCCSD and school level policies, procedures, protocols, directives, guidance, rules or regulations given to SCCSD staff and contractors related to school dress-code, police relations, and gang-related activity.
18. Any inquiry or guidance sought by the district board of education, district superintendent, or school administration from the New York State Board of Education [sic] on how to address school dress-code, police relations, and gang-related activity within the district.<sup>5</sup>
20. Any instructions, guidance, or correspondence provided to students and their parents that amend, add, or change any of SCCSD's code of conduct regarding dress code, gang-affiliated behavior, and social media.
21. All policies, guidance, procedures, memoranda, rules, instructions, documents on how to provide and monitor "alternative instruction" for suspended students. (see N.Y.Educ. Law § 3205.)
23. All policies, procedures, protocols, directives, guidance, rules or regulations, and trainings provided to parties who interpret for students who are designated as "English as a New Language" students.

Latino Justice contends that the minimal production provided by the School District in response to a mere three of these itemized requests - Paragraphs 16, 17 and 19 - and the School District's denial that it has any records whatsoever responsive to eleven of the requests - Paragraphs 6

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<sup>5</sup> Respondent states in its answering papers that it inadvertently neglected to indicate in its response to petitioner's appeal and in the certification it enclosed with it, that it had found no records responsive to paragraph 18. Respondent does indicate and "certify" that there are no responsive records to paragraph 18 in its papers opposing petitioner's petition.

through 10, 13 through 15, 18, 20 and 23 - is inconsistent with statements made and documents promulgated both by the School District and by others, which indicate that responsive materials necessarily exist and that the School District's response to these portions of the August 1, 2017 FOIL request must, therefore, be deemed an impermissible denial of those requests by the School District as the Freedom of Information Law places on the answering agency the burden to justify denial of access to requested governmental records and the District has offered no justification for its denials here. In support of its contention, petitioner submits a series of affidavits and public statements by officials of the school district and local law enforcement agencies, as well as newspaper articles and citations to sections of the state Education Law, which, it argues, together demonstrate that additional documentation related to the policies, practices, communications and training of respondent responsive to petitioner's enumerated FOIL requests necessarily exist in the custody of the respondent. The School District argues otherwise, contending that petitioner's application and the materials upon which it bases its argument do not show, and therefore are insufficient to provide a factual basis to support any contention that, requested documents other than those which have been provided to the petitioner exist and are within the School District's control, and that as the District's Records Access Officer certified that she has provided the petitioner with all responsive records, it has overcome any inference that additional records exist.

Petitioner's supporting materials and citations. The materials that petitioner Latino Justice has attached to its petition and cites in support of its contention that the School District's responses to the enumerated paragraphs of its August 1, 2017 FOIL request are insufficient, listed in conjunction with the specific requests to which those materials correspond, are as follows:

Paragraphs 6, 7 and 8. Petitioner contends that sworn affidavits made by Principal Timothy Hogan and Assistant Principal Daniel Fauvell of the School District's Bellport High School ("Principals' Affidavits"), filed in a separate United States District Court action, *D.B.R., etc. v. South Country Central School District, et al.*, Civ. No. CV-17-05151 (EDNY) (Exhibits H and I, respectively, to the petition), averring that school employees consult with members of the SCPD and identify students who are purportedly engaged in alleged gang activity or have gang affiliation, provide a factual basis to support its contention that materials responsive to paragraphs 6, 7 and 8 of the August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraphs 8, 13 and 15. Petitioner contends that public statements made by the SCPD's former Commissioner, Timothy Sini, and its former Assistant Commissioner, Justin Meyers, to the effect that SCPD "educate[s] the schools about what we think are telltale signs of gang membership" and "provides them with information regarding possible indications of public safety issues, such as gang activity . . ." (*see* Exhibits J and K to the petition), afford a factual basis for its contention that materials responsive to paragraphs 8, 13 and 15 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraphs 8, 13, 14, 16 and 17. Petitioner contends that the provision in respondent's "Code of Conduct" that prohibits "[t]he wearing of any combination of clothing which law enforcement agencies currently consider gang related (these may change)" (SCCSD Code of Conduct, Section III, paragraph 13 (emphasis supplied)) demonstrates that the district relies on instruction from law enforcement to identify gang-affiliated dress code violations and thus provides a factual basis to support its contention that materials responsive to paragraphs 8, 13, 14, 16 and 17 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraphs 9 and 10. Petitioner contends that the averment in the Principals' Affidavits that school faculty had knowledge of, had monitored and/or had investigated a student's social media presence provides a factual basis to support its contention that materials responsive to paragraphs 9 and 10 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraphs 14 and 17. Petitioner contends that the averments in the Principals' Affidavits that after four boys - two of whom were Bellport High School students - were found murdered in Central Islip in April 2017, murders that were "reported" to have been committed "by MS-13 gang members," Messrs. Hogan and Fauvell each "received training and guidance from the Suffolk County Police Department regarding the identification of gang symbols and markers of gang membership," provides a factual basis for its contention that materials responsive to paragraphs 14 and 17 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraphs 16 and 17. Petitioner contends that the "Gang Awareness" event flyer (Exhibit D), an event that was to "include a presentation on gang identification followed by a discussion on how to talk to your child about gangs," provides a factual basis for its contention that materials responsive to paragraphs 16 and 17 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraph 17. Petitioner contends that a statement by Superintendent Dr. Joseph Giani in an article published in the *Long Island Advance* (Exhibit O) that the School District had implemented "the Suffolk County Sheriff's Gang Resistant Education Program" in one of the District's schools and would be implementing it in another provides a factual basis to support its contention that materials responsive to paragraphs 17 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraph 18. Petitioner contends that respondent's failure to certify that there are no documents responsive to paragraph 18 provides a factual basis to support its contention that materials responsive to paragraph 18 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraph 20. Petitioner contends that the averments in Principal Hogan's affidavit that "[e]ach school year," he holds

quarterly grade level assemblies and meet[s] with all Bellport High School students to provide guidance with respect to my expectations of their conduct as it relates to the Code of Conduct, the [School District's Progressive Discipline, Standards of Intervention & Code of Conduct] Summary, and District policy generally

and that "[a]t each of the grade-level assemblies and class meetings during the 2016-2017 school year," he

discussed the prohibition of gang activity, engaging in gang-related behavior, wearing or displaying gang apparel and/or accessories, writing gang-related graffiti, making gang-related gestures or signs, and posting any symbols of gang affiliation on social media

(Exhibit H, §§ 20 and 22) provides factual bases to support its contention that materials responsive to paragraph 20 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraph 21. Petitioner contends that the School District's "Policy Manual" provision governing the "Suspension of Students" (*id.*, Section 7000, Number 7313), which does not itself identify how the School District provides and monitors alternative instruction for suspended students, in combination with Education Law § 3214, which requires that school districts "establish policies and procedures to ensure the provision of continued educational programming and activities for students removed from the classroom," provide a factual basis to support its contention that materials responsive to paragraph 21 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

Paragraph 23. Petitioner contends that Education Law § 3204, which requires "[t]he board of education of each [eligible] school district . . . [to] provide a program of bilingual education or English as a second language for eligible pupils," provides a factual basis to support its contention that materials responsive to paragraph 23 of its August 1, 2017 FOIL request are in the School District's custody or under its control.

As noted above, the School District opposes the petition, arguing that the petitioner's submissions fail to demonstrate that requested documents, beyond those it has already provided, in fact exist and are within respondent's control, and that any inference that additional records may exist is overcome by the District Records Access Officer's certification that a diligent search was conducted and that all responsive records have been provided to the petitioner. In the School District's view, none of the materials upon which the petitioner relies, including the



statements reportedly made by the former SCPD Commissioner and former Assistant Commissioner, the Principals' Affidavits, the news articles and the records already provided pursuant to the FOIL request reasonably lead to the conclusion that additional responsive records exist. The School District contends that the materials provide, at most, "mere conjecture" that further documents exist, which is insufficient to warrant a hearing. In addition, the School District urges that the petition must be dismissed for petitioner's failure to name the Board of Education of the South Country Central School District (the "School Board"), which, it argues, is a necessary party to this proceeding.

#### Failure to name a necessary party

The Court turns first to the question of whether petitioner's failure to name the School Board warrants dismissal of the petition. Although it is true that "[n]onjoinder of a party who should be joined . . . is a ground for dismissal of an action" it is equally true that the "joinder provision is to be employed to avoid dismissal" (*Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals*, 5 NY3d 452, 459 [2005]). Where, as here, service was effectuated upon the School District and "the Board was fairly apprised that it was [an] intended party, jurisdiction was obtained over [the board]." (*Gladding v Bd. of Educ. of Kings Park Cent. School Dist.*, 136 AD2d 636, 638 [2d Dept 1988]) Accordingly, deeming the petition amended to include the School Board, rather than dismissing the petition, is appropriate (*In re Long Is. Coll. Hosp.*, 41 Misc 3d 1210(A) [Sup Ct, Kings County 2013]).

#### Hearing

The Court next turns to whether the petitioner has articulated a demonstrable factual basis to support its contention that requested documents exist and are within the district's control but have not been provided nor any justification for not providing them proffered, entitling petitioner to a hearing. Under the Freedom of Information Law, "[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 [2]," which exemptions are to be narrowly construed (*Gould v New York City Police Dept.*, 89 NY2d 267 [1996]). An entity subject to FOIL is required, upon receipt of a demand for production of documents and the payment of the proper fee therefor, to "provide a copy of such record and certify to the correctness of such copy if so requested, or as the case may be, [to] certify that it does not have possession of such record or that such record cannot be found after diligent search" (Public Officers Law §89[3][a]). "The statute does not specify the manner in which an agency must certify that documents cannot be located. Neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required" (*Rattley v New York City Police Dept.*, 96 NY2d 873 [2001]).

However, although mere speculation that documents may exist is insufficient to support a challenge to the failure to release information (*Corbin v Ward*, 160 AD2d 596 [1st Dept 1990])

in the face of an agency's certification "that it was unable to locate requested documents after performing a diligent search, the [entity] requesting the documents may nevertheless be entitled to a hearing on the issue where [it] can 'articulate a demonstrable factual basis to support [the] contention that the requested documents existed and were within the [agency's] control'" (*Matter of Oddone v. Suffolk County Police Dept.*, 96 AD3d 758, 761 [2d Dept 2011], quoting *Matter of Gould v New York City Police Dept.*, *supra*; see also *Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 222 [2018]; *Oddone v Suffolk County Dist. Attorney's Off.*, 2013 WL 2256301, at 3 [Sup Ct, Suffolk County 2013]). Thus, courts have found a factual basis sufficient to support the petitioner's entitlement to a hearing on the issue of whether an agency has improperly failed to release requested information, despite a certification on behalf of the agency that no further responsive materials exist, in a wide variety of situations, as for example where the district attorney's office had interviewed 70 witnesses during the course of a criminal investigation but provided notes of only eighteen interviews, the investigating officer used a six-inch binder of documents to refresh his recollection when he testified at trial but only 88 pages ultimately were provided to petitioner and those did not even include the full complement of materials that had been produced to the petitioner in his earlier criminal trial pursuant to *People v Rosario*, 9 NY2d 286 [1961], *cert. denied*, 368 US 866 [1961] (*Matter of Oddone v. Suffolk County Police Dept.*, *supra*; see also *Oddone v Suffolk County Dist. Attorney's Off.*, *supra*) (contention that no notes were taken during investigation and preparation for trial in which 31 witnesses testified for the prosecution "simply not credible"); where an inmate-petitioner offered a paper trail with respect to the preservation of 911 tapes that the police department-respondent denied existed and offered newspaper articles questioning the conduct of two officers assigned to the case (*Wagstaffe v David*, 26 Misc 3d 1229(A) [Sup Ct, New York County 2010]); and where the police-department respondent released video footage of various police officers at a protest but denied petitioner's FOIL request for logs, after-action reports, photographs or other information of or identifying those officers (*Freewheels Bicycle Defense Group, Inc. v New York City Police Dept.*, 2008 WL 9721654, at 2 [Sup Ct, New York County 2008]) ("In addition, it is reasonable to expect that, at the very least, overtime records and radio tapes relating to the event were generated. Their purported absence also requires an explanation.").

Here, the materials provided by petitioner, which include the affidavits of the School District's high school Principal and Assistant Principal, a published statement by the District's Superintendent of Schools and all, or portions of, the School District's disciplinary code, student codes of conduct and procedure manual, as well as corroborative public statements by the former Commissioner and Deputy Commissioner of the Suffolk County Police Department, amply demonstrate that the School District undertakes to address actual and potential gang-related activity among its students. Such undertaking includes educating students and parents about the detriments and dangers of gang affiliation as well as seeking to identify, and taking preventive, disciplinary and other action with respect to, students alleged to be engaged in gang activity. Also as part of that undertaking, at least two of the School District's school administrators have received "training and guidance from the Suffolk County Police Department regarding the identification of gang symbols and markers of gang membership," and at least one has shared

screenshots of a District student's Facebook page with the District high school's School Resource Officer, who is a Suffolk County Police Officer, and was informed that "the photos and/or images posted on the Facebook page constitute symbols of gang affiliation and/or gang membership," following which disciplinary action was commenced against the student.

As in *Oddone v Suffolk County Dist. Attorney's Off.*, *supra*, where the court held that it was "inconceivable" that the prosecutors would undertake to investigate and prepare to try a complex criminal case in which 70 potential witnesses had been interviewed and 31 ultimately testified for the prosecution without taking any notes, here it also seems inconceivable, and at the very least highly improbable, that the School District did not have and has not maintained any records, beyond a single, one-page flyer and a few code of conduct and disciplinary code and procedural provisions, that constitute, document, reflect or otherwise bear on its many efforts - including, but not limited to, gang-related school assembly programs and student meetings, administrator training in identifying gang-related activity, gang-resistance education programming, gang-related student disciplinary proceedings and suspensions, online monitoring related to detecting gang affiliation, activity and messaging, and the provision of instruction to suspended students - to address gang-related activity in its schools and among its students.

Accordingly, the court finds that the petitioner has demonstrated sufficient factual bases to warrant a hearing as to whether there exist, or existed, within the School District's control (1) materials responsive to Paragraphs 6 through 10, 13 through 15, 18, 21, and 23 of petitioner's August 1, 2017 FOIL request, or (2) further materials, beyond those previously provided to petitioner, responsive to Paragraphs 16, 17 and 19 of petitioner's August 1, 2017 FOIL request, any or all of which the School District has neither provided to petitioner nor proffered a justification for not providing. Petitioner's prayer for the award of attorneys' fees pursuant to Public Officers Law § 89(4) is reserved pending such hearing, as is petitioner's contention that the School District's certification is deficient for failing to recite, pursuant to 21 NYCRR § 1401.2(b)(7)(I), whether the School District is the custodian of the records requested in petitioner's August 1, 2017 FOIL request.

A conference in accordance with the foregoing will be held before the undersigned on **Monday, October 29, 2018 at 2:15pm.**

The foregoing constitutes the decision and order of the Court.

Dated: \_\_\_\_\_

10/15/2018  
Riverhead, New York

  
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HON. SANFORD NEIL BERLAND, A.J.S.C.

\_\_\_\_ FINAL DISPOSITION    XX NON-FINAL DISPOSITION