

**Matter of Raizner v City of N.Y. Dept. of  
Educ.**

2008 NY Slip Op 30048(U)

January 9, 2008

Supreme Court, New York County

Docket Number: 0112664/2007

Judge: Eileen Bransten

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

PRESENT: BRANSON  
Justice

PART 6

CHARLE RAZNER

- v -

CITY OF NY

INDEX NO. 112664/07  
MOTION DATE 10/9/07  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED BY ADDING UP WITH  
THE ACCOMPANYING MEMORANDUM

This Judgment is subject to the County Clerk and Judge of the County of New York. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1-9-08

Eileen R. Bontec  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART SIX

-----X

In the Matter of the Application of CHLOE RAIZNER  
by MIRIAM RAIZNER, her mother and legal guardian,

Petitioner,

Index No.: 112664/07  
Motion Date: 10/09/07  
Motion Seq. Nos.:001,  
003, & 004

for Judgment pursuant to Article 78 of the Civil Practice

Law and Rules

-against-

CITY OF NEW YORK DEPARTMENT OF  
EDUCATION, CHANCELLOR JOEL KLEIN,  
ANNA COMMITANTE, and NICKY KRAM ROSEN,

Respondents.

-----X

PRESENT: EILEEN BRANSTEN, J:

Motion Sequence numbers 001, 003, and 004 are consolidated for disposition.

In Motion Sequence number 001, Petitioner Chloe Raizner ("Miss Raizner") by Miriam Raizner, her mother and legal guardian ("Mrs. Raizner") seeks a judgment pursuant to CPLR 7803(3) reversing, annulling, and setting aside the determination of respondent City of New York Department of Education ("DOE"), which denied her admittance to the City's programs for gifted children. DOE and co-respondents Chancellor Joel Klein, Anna Commitante ("Ms. Commitante"), and Nicky Kram Rosen ("Ms. Rosen") (collectively "Respondents") oppose the application.

**UNFILED JUDGMENT**  
This judgment has been filed with the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1409).

In Motion Sequence numbers 003 and 004, Respondents and Harcourt Assessment, Inc. (“Harcourt”) move pursuant to 22 N.Y.C.R.R. § 216.01 to file under seal certain portions of Harcourt’s testing materials that are attached to Miss Raizner’s Petition and Respondents’ Answer. Miss Raizner opposes the motion.

### **BACKGROUND**

DOE administers the Otis-Lennon School Ability Test (“OLSAT”) (published by Harcourt) to New York City Public School students seeking placement in the system’s programs for gifted children. *See*, Verified Answer, Ex. 12 at 1, ¶ 3; Ex. 13 at 1, ¶ 3. The test is designed to assess a student’s ability to learn, not test what a student has already learned. *Id.* The OLSAT includes 7 test levels, each designed and validated for testing school children in specific age-ranges. *See*, Verified Answer, Ex 13 at 1, ¶ 3. For example, the age-range for Level A is 4 years, 6 months to 6 years, 11 months; Level B’s age-range is 5 years, 6 months to 7 years, 11 months. *Id.* The OLSAT can validly be administered for purely age-based or grade-based comparisons. *Id.*, Ex 12 at 1, ¶ 3. Harcourt recommends the grade-based comparison because the test is often given in conjunction with the Stanford Achievement Test, which measures the knowledge and skills a student has learned. *Id.*, Ex 13 at 2, ¶ 6.

In November 2006, Mrs. Raizner submitted an application on behalf of Miss Raizner to be admitted to the 1<sup>st</sup> Grade at either the Gifted and Talented Program at P.S. 9 (“G&T”) or the Anderson School. At that time, Miss Raizner, age 6, attended kindergarten at P.S.9. *See*, Verified Petition at 2, ¶ 5. DOE scheduled Miss Raizner to take the OLSTAT on January 13, 2007.

On the testing date, when the attendant called Miss Raizner and the other children into the examination room, Mrs. Raizner asked her if all the applicants were in kindergarten applying to 1<sup>st</sup> Grade. *Id* at 3, ¶ 10. The attendant allegedly told her that according to the paper work, Miss Raizner and all the other applicants were enrolled in 1<sup>st</sup> Grade applying to 2<sup>nd</sup> Grade. *Id*. After Mrs. Raizner told the attendant that her daughter was in kindergarten applying for 1<sup>st</sup> Grade, the latter allegedly responded that kindergarten students are given a different test and advised her to take Miss Raizner home. *Id*.

Mrs. Raizner then contacted Ms. Rosen, the Instructional Specialist at the Gifted and Talented Office, to inform her of what she believed was a mistake. *Id* at 4, ¶ 11. Ms. Rosen told her that DOE’s policy is to administer the test based on the applicant’s birth year. *Id.*, Ex. C. Therefore, Miss Raizner would be given the same test as all other six-year old children, irrespective of the differences in grade-levels.

Mrs. Raizner sent a complaint to Regional School Superintendent Gale Reeves and Gifted and Talented Program Executive Director Ms. Commitante on January 24, 2007

because DOE administered the OLSTAT in contravention of Harcourt's preferred method. In response, Ms. Commitante reiterated DOE's policy regarding the OLSTAT's administration. *See*, Verified Petition at 5, ¶ 15.

Miss Raizner took the OLSTAT Level B along with eight other six-year old students on February 4, 2007. *Id* at 7, ¶ 18. On May 22, 2007, Mrs. Raizner received notice that Miss Raizner was wait-listed for G&T. *Id.*, Ex H. A second notice arrived on May 25, 2007 stating that she was wait-listed for all citywide advanced programs; Mrs. Raizner interpreted this to refer to the Anderson School. *Id.*, Ex I.

Mrs. Raizner and Bernard Raizner ("Mr. Raizner"), Miss Raizner's father and attorney in the instant petition, negotiated with Harcourt to obtain copies of its technical manual for the OLSTAT, the actual Level A and Level B tests, and her exam. *See*, Verified Petition at 8, ¶ 23. Scott Barnes ("Mr. Barnes"), Harcourt's Vice President and General Counsel, agreed to provide Mr. & Mrs. Raizner with the requested materials on condition that they sign a confidentiality agreement. *See*, Harcourt Petition for a Protective Order, Barnes Aff'd at 2, ¶ 8. Mr. Barnes attests that the OLSTAT is comprised of a testing methodology based on propriety research, and is only sold to educational institutions. *Id* at 1, ¶ 5. Every educational facility that purchases the test must sign a confidentiality agreement because Harcourt believes that public disclosure of the test would jeopardize the examination's usefulness. *Id.* Mr. & Mrs. Raizner signed the agreement on August 14, 2007.

During negotiations with Mr. Barnes, Mrs. Raizner spoke to Mario Banda (“Mr. Banda”), an Educational Consultant at Harcourt. Mr. Banda allegedly told her that the OLSTAT was meant to be administered by grade and “expressed dismay that [DOE] was administering the test by age.” *Id.*, at 6, ¶ 17 & 21.

After Mrs. Raizner obtained the materials, she gave them to clinical psychologist Miriam Schechner, Ph.D. (“Dr. Schechner”) for review. *Id.* Based upon Dr. Schechner’s assessment of these documents, Dr. Schechner opined that Miss Raizner should have been administered the Level A rather than the Level B test because of her grade-level and age. *Id.*, Schechner Aff’d.

The school term began on September 14, 2007 and Miss Raizner was not accepted to either G&T or the Anderson School. Through Mrs. Raizner, she commenced the instant proceeding on September 20, 2007. She contends that the DOE’s policy of administering the OLSTAT by age rather than grade is arbitrary and capricious, and seeks to be placed in 1<sup>st</sup> Grade at either G&T or the Anderson School. Respondents oppose the application.

Respondents and Harcourt believed that Mr. Raizner would disclose the OLSTAT materials in violation of the confidentiality agreement. The Respondents moved for a protective order, with oral argument held on October 9, 2007. This Court expressed concern

that they lacked standing to seek a protective order, and thereby vacated it without prejudice. Harcourt then moved for a protective order, to which the Respondents submitted supporting papers.

### DISCUSSION

Judicial review of an administrative determination pursuant to CPLR Article 78 is limited to the inquiry into whether the agency acted arbitrarily or capriciously, without any sound basis in reason. *See, Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231-232 (1974); *see also, Matter of Arrocha v. Board of Educ.*, 93 N.Y.2d 361, 363 (1999). As long as there is some rational basis or credible evidence to support an administrative determination, the agency's decision must be upheld. *See, Matter of Guzman v. Safir*, 293 A.D.2d 281 (1st Dept. 2002) (determination was not arbitrary and capricious "because there was some credible evidence to support the Board's conclusion"), *lv. denied* 98 N.Y.2d 614 (2002). Judicial review is not intended to weigh the merits of competing professional opinions because doing so undermines the function, authority and expertise of administrative agencies. *See, Matter of Arrocha v. Board of Educ.*, 93 N.Y.2d, at 363.

Here, while Harcourt may have a preference for the grade-based comparison, that option does not render the alternative irrational. Indeed, it is undisputed that Harcourt

determined that the OLSTAT can be administered either based on grade or age. *See*, Verified Answer, Ex 12 & 13. Accordingly, DOE's use of the age-based comparison is by no means unreasonable and is entirely rationale.

Moreover, while Dr. Schechner concluded that DOE should have given Miss Raizner the Level A test, her expert psychological opinion does not trump DOE's judgment in deciding differently. Neither does Mr. Branda's position that the OLSTAT should be administered by the grade-based comparison render DOE's decision arbitrary. To be sure, Harcourt designed the OLSTAT and concluded that either assessment is viable. Its determination cannot be mooted by one of its employee's opinions.

Agencies are given broad deference in administering their policies and procedures. Their determinations will not be altered absent clearly irrational decision-making. DOE was not irrational in choosing the age-based OLSTAT assessment and administering the Level B test to Miss. Raizner.

In another branch of this matter, Harcourt and Respondents move for a protective order sealing Verified Petition Exs. K, L, M, N, O, P, Q, and R and Verified Answer Exs AA, DD, EE, HH, II, JJ, KK, LL, MM, NN, OO, and PP. They argue that these exhibits, which contain portions of the OLSTAT-testing manual, contain propriety scientific research and methods whose disclosure would damage the tests's relevancy.

22 N.Y.C.R.R. § 216.01(a) provides, in relevant part, that

Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.

“Although the rule does not further define ‘good cause’ \* \* \* a sealing order should rest on a sound basis or legitimate need to take judicial action.” *Danco Laboratories, Ltd v Chemical Works of Gedeon Richter, Ltd.*, 274 A.D. 2d 1 (1<sup>st</sup> Dept. 2000).

This Court finds that there is good cause to seal these exhibits. First, Mr. & Mrs. Raizner are parties to a confidentiality agreement in which they promised to keep information about the OLSTAT undisclosed. Second, Harcourt submitted Mr. Barnes’ affidavit, where he attests that a public disclosure of the methods used in assessing scoring the OLSTAT would destroy its usefulness. Finally, Miss Raizner has failed to adequately identify any genuine, substantial public interest that would be furthered by public access to the information. *See, Danco*, 274 A.D. 2d 1. Accordingly, the County Clerk is directed to maintain the file in this proceeding under seal.

Accordingly, it is

ORDERED that the Clerk of the Court is directed to seal the file in this action upon service on the Clerk of a copy of this Order and Judgment with notice of entry; it is further

ORDERED that absent further Order of the Court, the Clerk shall deny access to the file to anyone except for counsel of record to any party to this proceeding, any party, and any representative of counsel of record to a party upon presentation to the Clerk of written authorization from said counsel; and it is further

ORDERED and ADJUDGED that, with the exception of the application for a sealing order, the petition is denied and the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the Court.

Dated: New York, New York

January 9, 2008

ENTER:

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain a copy, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

  
Hon. Eileen Bransten