SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. LEWIS J. LUBELL, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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BOARD OF EDUCATION OF THE MIDDLETOWN ENLARGED CITY SCHOOL DISTRICT AND MIDDLETOWN ENLARGED CITY SCHOOL DISTRICT,

Petitioners,

-against-

JOEL E. DOUGLAS, Hearing Officer in a proceeding entitled "In the Matter of Middletown Enlarged City School District vs. Peter Panse, Section 3020-a Education Law Proceeding (File No. 5,348),"

Respondent.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 4305/06

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The following papers numbered 1 to 6 were read on petitioner's application pursuant to CPLR Article 78 and Peter Panse's cross-motion to dismiss and in opposition to petitioner's Article 78 proceeding:

Order to Show Cause-Verified Petition–Exhibits 1-3

Affirmation of Emergency 4

Petitioner's Memorandum of Law in Support 5

Petitioner's Supplemental Affirmation-Exhibits 6-7

Notice of Cross-Motion to Dismiss 8

Respondent's Memorandum of Law 9

Petitioner's Memorandum of Law in Opposition to Cross-Motion-Exhibit 10-11

Upon the foregoing papers and upon oral argument of this application, it is ORDERED that the respective applications are disposed of as follows:

This is an Article 78 proceeding brought as a result of a hearing under Education Law § 3020-a (hereinafter "§ 3020-a hearing") against Peter Panse, a teacher in the petitioners' school district. The underlying § 3020-a hearing was brought against Mr. Panse seeking to dismiss him for conduct the petitioners believed to be unbecoming a teacher and insubordination as a result of an after school art class in which nude models were used. The allegations against Mr. Panse include what petitioners describe as improper solicitation of Mr. Panse's public school students to participate in a for-profit course for which Mr. Panse would receive remuneration.

As part of the § 3020-a hearing, the petitioners herein intend to call Mr. Panse's students as witnesses during which testimony they intend to elicit information concerning the grades said students received from Mr. Panse in his public school courses as well as personal student information. In order to keep the records of the intended student witnesses private, petitioners requested the respondent, a hearing officer appointed pursuant to Education Law § 3020-a and 8 NYCRR 82.1.6, to close to the public and media only those portions of the hearing during which the students would be testifying. Any other portions of the hearing would be open to the public and the media. The respondent denied petitioners' request.

Petitioners contend that they are duty bound to protect the confidentiality and privacy of student records and their reputations in accordance with the Family Educational Rights Privacy Act ("FERPA"), 20 USC § 1232g, and 34 CFR Part 99 and seek to close only those portions of the hearing during which students themselves would be testifying. All other portions of the hearing would be open to the public and the media.

Counsel for Mr. Panse contends that the Court lacks jurisdiction over this matter and urges dismissal. Mr. Panse alleges that this matter is governed by the dictates of CPLR Article 75 and claims that stays of administrative or arbitration proceedings, once commenced, are not permitted. Furthermore, Mr. Panse argues that Education Law § 3020-a permits him to elect whether the hearing will be open or closed. Moreover, Mr. Panse claims that the hearing officer (the respondent in this action) may, at his or her discretion, exclude member of the public or media for any or all portions of the hearing in order to protect the privacy of a person under the age of 18 years. *See,* 8 NYCRR § 82-1.10. Panse's position on this issue is that it is within the respondent's unfettered discretion to determine whether or not to exclude the public and the media in order to protect minors and that this Court has no jurisdiction whatsoever to review such a decision. This Court wholly disagrees with Mr. Panse's position on this issue, for if Panse were correct, the respondent would have that which no other administrative or judicial body possesses, i.e. unchecked and non-reviewable power.

In the first instance, Mr. Panse's analysis is limited to CPLR Article 75, i.e. the stay of arbitration proceedings. His analysis in this regard is misplaced. Petitioners brought this action under CPLR Article 78 and for whatever reason, Panse chose to ignore that concept.

In order for petitioners to bring the instant action to by objecting to the act of an administrative body, it needed to demonstrate that it exhausted all available administrative remedies first, but this rule is not required to be followed when the pursuit thereof would lead to an irreparable injury or would be futile. *See, Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 57 (1978); *In the Matter of Crowe v Kelly*, 9 Misc3d 1111(A), 2005 WL 2290452 *3 (Sup. Ct., NY 2005). In the instant case, petitioners requested that the respondent close only those portions of the hearing to the media and the public during the testimony of minor children

in order to protect their privacy and confidentiality. Respondent refused to do so. Upon the rendering that decision, petitioners were faced with two options – proceed with the hearing and risk the divulgence of minor student confidentiality and private school records or seek a judicial remedy. Petitioners lacked any other avenue and therefore, not only had petitioners exhausted all available administrative remedies, their failure to seek judicial intervention would have rendered their position completely futile and there was a genuine risk of irreparable harm to the minor students. Therefore petitioners properly sought a judicial remedy.

According to 20 USC § 1232g(b)(2):

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless--
> **(A)** there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or
> **(B)** except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

As expressed in *Sauerhof v City of New York*, 108 Misc2d 805, this section [20 USC §1232g] does not bar the release of student records, but prescribes a fiscal sanction by the federal government against a school system which permits too free an access to such records. *See, Id.* at 806. Parents must first be sent notices of the intended release of the information if a judicial order is in place directing the release of the records or if the parents provide written consent to the release of their child's personal information. Neither party has requested such relief nor provided evidence of parental notification and consent and therefore the Court will not issue any

order directing the release of such information. Mr. Panse failed to even address the inherent conflict of FERPA and the Federal Regulation attendant thereto with the Education Law and the New York Administrative Code on this issue.

Pursuant to CPLR § 7803(3), the review of administrative tribunal determinations cannot be overturned on a question of fact unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. *See, In Matter of Pell v Board of Education of Union Free School District No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974). "The arbitrary or capricious test chiefly ' relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact . . . Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.'" *Id.* at 231. The same is true when dealing with issues of a discretionary nature, in which the inquiry is whether the discretion was abused. *See, Id.* at 232. When a court determines that a discretionary matter is at issue, that matter is subject to review only as a matter of law regarding the propriety of the discretion exercised. *See, Id.* at 234.

In the instant case, the underlying factual determinations of the respondent are not at issue. The sole issue for determination is whether the respondent's discretion was proper in deciding to keep the underlying proceedings open despite the purported testimony of minor students who would necessarily be revealing private and confidential information concerning their records.

It is readily apparent that Education Law § 3020-a and 8 NYCRR § 82-1.10. are fundamentally at odds with 20 USC § 1232g to the extent that under New York law, a hearing officer is permitted to unilaterally allow the revelation of a student's private and confidential

records during an administrative proceeding without parental notification and consent or notification after seeking court ordered release of the student's information. Neither respondent nor Mr. Panse submitted any evidence demonstrating the justification for the respondent's decision to keep open the student testimony portion of the subject hearing. It is of paramount importance to protect the students from revealing confidential information about them in a public forum. The underlying hearing does not result from the students' conduct, but rather from that of Mr. Panse. This Court is of the opinion that the respondent's decision to permit public and media access to that portion of the hearing during which the minor students would testify to be wholly improper given the overriding concerns of student privacy. Mr. Panse is not being denied due process. He is being permitted to confront all witnesses. The Court, however, is empowered to limit the exposure the minors have to the public and media, especially without parental notification and consent. Therefore, this Court determines that during any testimony by a student, the hearing shall be closed to all members of the public and the media.

Mr. Panse's arguments concerning CPLR Article 75 are unavailing. CPLR § 7502 [c] permits the Court to entertain an application for a preliminary injunction where the applicant's entitlement to an award may be rendered ineffectual without the granting of the relief. *See, In Re H.I.G. Capital Management, Inc. v Ligator*, 233 AD2d 270 (1st Dept. 1996); *New England Petroleum Corporation v Asiatic Petroleum Corporation*, 82 Misc2d 561, 565 (Sup. Ct., NY 1975). In the instant case, if the petitioners did not seek the relief requested herein, they would be faced with the prospect of revealing private and confidential student information in contravention of 20 USC § 1232g due to the decision of the respondent to permit such public testimony. Respondent would effectively force petitioners to violate Federal law, an irreparable harm in and of itself, and at the same time subject the minor students to the revelation of their

personal and confidential information, another irreparable harm. Justice is still being served. The hearing will go forth with the production and examination of all relevant witnesses. The only limitation is that the minor students will not be subjected to public or media display. The equities in this matter tip squarely in favor of student protection, and for this reason, petitioners' application is granted in its entirety and Mr. Panse's cross-motion is denied.

The foregoing constitutes the decision and order of this Court.

Dated: July 7, 2006 E N T E R
Goshen, New York

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HON. LEWIS J. LUBELL,

J.S.C.