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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Index Number : 112666/2009

BAPTISTE, ANGELA

VS.

CITY UNIVERSITY OF NEW YORK

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, It is ordered that this ~~motion~~ Petition is dismissed per attached

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

Dated: 10/8/10

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ~~DO NOT POST~~ ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 17

In the Matter of the Application of
ANGELA BAPTISTE and JULIE SIMMONS,

Petitioners,

For Judgment pursuant to Art. 78
CPLR, and Common Law Relief

- against -

THE CITY UNIVERSITY OF NEW YORK,
KINGSBOROUGH COMMUNITY COLLEGE,
JOANNE LAVIN, RN EDD, as ACTING
CHAIRPERSON OF THE DEPARTMENT OF
NURSING and DR. CARMEN D. ROLLACK
as ASSOCIATE PROVOST and CHAIRPERSON
OF THE COMMITTEE FOR ACADEMIC REVIEW

Respondents.

Index No.: 112666/09

DECISION/ORDER

GOODMAN, E. J., J.:

In this Article 78 proceeding, petitioners Angela Baptiste (Baptiste) and Julie Simmons (Simmons) challenge their dismissal from the Kingsborough Community College (Kingsborough) Nursing Program, following respondents' denial of their applications for a waiver of certain academic requirements. Petitioners allege that respondents' denial of their waiver requests was arbitrary and capricious and in violation of law. More particularly, petitioners, who are Black, claim that respondents discriminated against them based on race by denying them a waiver of the Nursing Program's academic policy prohibiting students from repeating more than one failed clinical nursing class, and granting waivers to other, non-Black students. Petitioners seek

reinstatement to the Nursing Program and an opportunity to repeat the classes in which they received failing grades, as well as monetary damages.

In opposition to the petition, respondents submit a verified answer, and an affidavit of respondent Joanne Lavin. Petitioners, in response, move, by two, separate "cross motions," to amend the petition to assert causes of action for violations of the New York City Human Rights Law (Administrative Code of the City of New York § 8-107), and for leave to conduct discovery.

BACKGROUND

Kingsborough Community College, which is part of the City University of New York, offers a Nursing Program as part of its curriculum. Respondent Joanne Lavin has been a member of the Nursing Department faculty at Kingsborough since 1994, and, since April 2008, she has been Acting Chairperson of the Department of Nursing. Petitioners Baptiste and Simmons were admitted to the Nursing Program in Fall 2007. At that time, the Nursing Program had an academic policy, referred to as the "Retention Criteria," which allowed students who received a grade lower than "C" in a required nursing course with a clinical component, to repeat the course one time; the policy required students to apply for a waiver of the criteria to repeat the course a second time. Students could, however, repeat other required nursing courses, and could receive two grades below "C" in "co-requisite" courses,

and one grade below "C" in required nursing courses, without consequence. *See* Affidavit of Joanne Lavin (Lavin Aff.), ¶ 6.

In Fall 2008, apparently in response to concerns about the Nursing Program graduates' low pass rate on the national certification exam, the Retention Criteria were revised to be more stringent. *Id.*, ¶ 7. The revised Retention Criteria, effective as of the Fall 2008 semester, required that students earn a minimum of "C" in every required nursing course with a clinical component, and receive no grades below "C" in any co-requisite course. It also provided that "[s]tudents who fail a clinical nursing course achieving a grade of not less than 'C-' may apply to repeat the course one time only in the semester following the failure," and that a second grade of less than "C" in any nursing course with a clinical component will result in dismissal from the Nursing Program. *See* Criteria for Retention in the Nursing Program, Ex. A to Lavin Aff. Respondents admit that "occasionally, appropriate waivers to the Retention Criteria are granted." Verified Answer, ¶ 8.

In the Fall 2007 semester, Baptiste received a "C-" in Nursing 18 (Fundamentals), a required course with a clinical component. She repeated the course during the winter term, and received a grade of "B." Simmons also received a "C-" in Nursing 18 (Fundamentals) during the Fall 2007 semester, repeated the course during the winter term, and received a grade of "B." In

the Spring 2009 semester, both Baptiste and Simmons received grades below "C" in Nursing 23 (Pediatrics), another required course with a clinical component. Both petitioners applied for an opportunity to repeat the course, and both applications were denied by the Nursing Program faculty. The determinations of the Nursing Program faculty were reviewed by the Office of the Associate Provost, and were upheld. As a result, petitioners were dismissed from the Nursing Program, on or about May 11, 2009.

In her affidavit, Lavin attests that, as Acting Chairperson of the Nursing Program, she attends all meetings of the nursing faculty, including meetings where applications for waivers of the Retention Criteria are considered. Lavin Aff., ¶ 1. Lavin explained that a student's application for a waiver of the Retention Criteria is considered and voted on by the entire Nursing Faculty, after review of the student's application and her complete academic record. According to Lavin, the faculty considered Baptiste's application for a waiver, and found that it contained no information which would excuse her failing grade or justify granting a waiver. Lavin stated that the faculty further considered that Baptiste had failed all five of the national achievement exams she had taken, and consequently voted to deny her application for a waiver. *Id.*, ¶¶ 15-16. With respect to Simmons's application, Lavin asserts that her application set

forth "some details about her situation at the time, but was not sufficient to justify a waiver." *Id.*, ¶ 17. After considering that Simmons had failed four of the five national achievement exams she had taken, the faculty voted to deny her application for a waiver. Lavin then informed the Office of the Associate Provost, which reviews faculty determinations on behalf of the Committee on Academic Review, and which upheld the faculty decisions denying petitioners' requests. *Id.*, ¶ 18.

Lavin also attests that, in 2009, there were 27 applications for waivers of the Retention Criteria, including petitioners' applications. Of those 27 applicants, 25, including petitioners, requested waivers due to low grades in required nursing courses, and all of those 25 applications were denied. *Id.*, ¶ 20. Lavin also asserts that, of the 25 applicants who were denied waivers, nine were White and Non-Hispanic, 12 were Black and Non-Hispanic, two were Hispanic, and two were Asian/Pacific Islanders. *Id.*, ¶ 21. Lavin stated that of the two waivers that were granted, one was to a Black, Non-Hispanic student, and one was to a White, Non-Hispanic student. *Id.*, ¶¶ 22, 23. In addition, another student, who was Asian/Pacific Islander, was allowed to repeat a semester, due to illness which prevented her from attending school. Another White, Non-Hispanic student was granted a waiver in March 2008, prior to implementation of the more stringent Retention Criteria. *Id.*, ¶¶ 29, 30.

Petitioner Baptiste alleges that there were compelling reasons to grant her a waiver: in March 2009, five members of her family were in a terrible car accident, resulting in the death of her grandmother and two uncles. Petition, ¶¶ 11-12. As a result of grief and depression following the loss of her family members, Baptiste alleges that she was unable to focus on her studies and therefore received a poor grade in Pediatric Nursing. *Id.* Petitioner Simmons also alleges that the circumstances giving rise to her request to repeat a second failed nursing course were at least as compelling as those of students who were granted a waiver: as a result of being in an abusive relationship, she and her children became homeless and were for a while forced to live in shelters; she could not focus on her studies due to the stress and anxiety of her temporarily unstable living circumstances, and therefore received a poor grade in Pediatric Nursing. *Id.*, ¶¶ 29-30. Both petitioners also claim that other, non-Black students were warned that they were failing a course early enough in the semester to permit them to withdraw from the course without consequence, enabling them to repeat the class. *Id.*, ¶¶ 13, 31.

DISCUSSION

It is well settled that where, as here, an administrative agency makes a determination without a formal, evidentiary hearing, judicial review of the determination is limited to

whether the determination was arbitrary and capricious, that is, without a rational basis in the administrative record. *See* CPLR 7803 (3); *Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363-364 (1999); *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231-232 (1974); *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758 (1991); *Matter of Wagschal v Board of Examiners of Bd. of Educ. of City of N.Y.*, 69 NY2d 672, 674 (1986). "'[A] court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion.'" *Matter of Arrocha*, 93 NY2d at 363, quoting *Matter of Pell*, 34 NY2d at 232 (emphasis in original; citation omitted); *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007), *affd* 11 NY3d 859 (2008). "[O]nce it has been determined that an agency's conclusion has a 'sound basis in reason,' the judicial function is at an end." *Paramount Communications v Gibralter Cas. Co.*, 90 NY2d 507, 514 (1997), quoting *Matter of Pell*, 34 NY2d at 231; *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc.*, 46 AD3d at 428.

Further, "[c]ourts retain a 'restricted role' in dealing with and reviewing controversies involving colleges and

universities." *Maas v Cornell Univ.*, 94 NY2d 87, 92 (1999); *see Padiyar v Albert Einstein Coll. of Medicine of Yeshiva Univ.*, 2009 WL 1136795, 2009 NY Misc LEXIS 4755, *5 (Sup Ct, NY County 2009), *affd* 73 AD3d 634 (1st Dept 2010). "Strong policy considerations militate against the intervention of courts in controversies relating to an educational institution's judgment of a student's academic performance." *Matter of Susan M. v New York Law School*, 76 NY2d 241, 245 (1990) (citations omitted). As the Court of Appeals has explained, "[i]n order for society to be able to have complete confidence in the credentials dispensed by academic institutions, ... it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis." *Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 413 (1980); *see Matter of Susan M.*, 76 NY2d at 245-246; *Matter of McIntosh v Borough of Manhattan Community Coll.*, 78 AD2d 839, 839 (1st Dept 1980), *affd* 55 NY2d 913 (1982). Further, "[u]nlike disciplinary actions taken against a student, institutional assessments of a student's academic performance, whether in the form of particular grades received or actions taken because a student has been judged to be scholastically deficient, necessarily involve academic determinations requiring the special expertise of educators." *Matter of Susan M.*, 76 NY2d at 245 (citations

omitted); *see Matter of Olsson*, 49 NY2d at 413; *Moukarzel v Montefiore Med. Ctr.*, 235 AD2d 239, 240 (1st Dept 1997). Thus, while "the determinations of educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review, that review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith or contrary to the Constitution or statute." *Matter of Susan M.*, 76 NY2d at 246; *see Keles v Trustees of Columbia Univ. in City of N.Y.*, 74 AD3d 435 (1st Dept 2010) (student's contract and tort claims dismissed; review should be restricted to special proceedings under CPLR Article 78); *Matter of De Jong v Kings County Hosp. Ctr.*, 27 AD3d 398 (1st Dept 2006). Petitioners bear the burden of submitting proof sufficient to raise a triable issue of fact as to whether the determination was irrational or made in bad faith or for an impermissible reason. *See Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 (1st Dept 2006).

Here, the affidavit of respondent Lavin, based on personal knowledge as Chairperson of the Kingsborough Department of Nursing, reveals that respondents' denial of petitioners' applications was based on the Nursing Program faculty's evaluation of petitioners' complete academic record, including their poor performance on the national achievement exams. Lavin's affidavit sets forth sufficient factual reasons for the

faculty's decision to demonstrate that the faculty's decision, based on its consideration of petitioners' overall academic performance, involved a proper exercise of its discretionary judgment in denying the applications, and had a rational basis. *See Matter of Patti Ann H. v New York Med. Coll.*, 88 AD2d 296, 301 (2d Dept), *affd* 58 NY2d 734 (1982); *see also Matter of Gilbert v State Univ. of N.Y. at Stony Brook*, 73 AD3d 774 (2d Dept 2010); *Matter of Jeudy v City Coll. of N.Y.*, 233 AD2d 127 (1st Dept 1996); *Matter of Capasso v Pace Univ.*, 2009 WL 3982234; 2009 NY Misc LEXIS 4933 (Sup Ct, NY County 2009); *cf. Matter of St. Clare's Hosp. v Breslin*, 14 AD2d 380, 383 (3d Dept 1961)(factual reasons for decision must be sufficiently set forth in respondent's affidavit for court to decide whether determination was rational).

In opposition to the petition, Lavin also explained that waivers of the Retention Criteria are rarely granted, and that in 2009, the year that petitioners applied for a waiver, only two out of 27 requests to repeat a required nursing course were granted. Of the two successful applicants, one student, who was Black, was permitted to repeat a co-requisite course; the other student, who was White, was withdrawn from a course due to excessive absences and was permitted to retake the course. A third student, who was Asian/Pacific Islander, was permitted to repeat her classes from the Spring 2009 semester because she had

been hospitalized and was unable to attend school at all.

Petitioners do not dispute the reasons set forth by Lavin for the denial of their waiver applications, and they do not claim that the faculty, after considering their complete academic record, had no rational basis for denying their applications. Petitioners do not deny that, in addition to failing a second required nursing course, they failed all or most of the national achievement exams that they took. Nor do petitioners claim that other students with similar academic records were granted waivers. Petitioners also do not contest respondents' evidence that, during 2009, only two of 27 student applications seeking waivers of the Retention Criteria based on low grades were granted, one to a non-Black student and one to a Black student. *See Matter of Klonowski v Department of Fire of City of Auburn*, 58 NY2d 398, 402 n 2 (1983)(failure to respond to new matter raised in answer to petition constitutes an admission to such new matter); *Matter of Reilly v Ross-Lee*, 2006 NY Misc LEXIS 3030, *5 (Sup Ct, Nassau County 2006) (same). Rather, petitioners contend that respondents discriminated against them based on race because they had more compelling personal reasons for being allowed to repeat another required course than other, non-Black, students who were permitted to repeat courses.

Petitioners fail, however, to present any evidence to suggest that respondents did not have a rational basis for

denying their applications, or to establish their claim that respondents applied the standards for granting waivers in a discriminatory manner. Petitioners bear the burden of demonstrating that respondents' determination was arbitrary and capricious, or in violation of law, and they must present evidentiary facts sufficient to raise a material issue of fact as to illegal or irrational conduct. *See Matter of Witherspoon v Horn*, 19 AD3d 250 (1st Dept 2005); *Matter of Jacquet v Kline Inst. for Psychiatric Research*, 228 AD2d 442 (2d Dept 1996); *Matter of Sachs v Board of Educ. of Mineola Union Free School Dist.*, 71 AD2d 898 (2d Dept 1979), *affd for reasons stated below* 50 NY2d 830 (1980). They must demonstrate "a clear legal right to the relief sought" in order to succeed (*Matter of Kaplan v Lipkins*, 36 Misc 2d 868, 869 [Sup Ct, Queens County], *affd* 19 AD2d 723 [2d Dept 1963], and "[b]are conclusory statements in a petition supported only by hearsay allegations by a person not a party to the proceeding are insufficient." *Matter of Trotta v Kirwan*, 47 AD2d 685, 686 (3d Dept 1975). "A mere belief of bad faith [or illegal conduct] does not satisfy the requirement, or warrant a hearing." *D'Aiuto v Department of Water Resources (Bur. of Water Supply)*, 51 AD2d 700, 701 (1st Dept 1976). Here, petitioners' submissions are insufficient to meet their burden of raising a material issue of fact with respect to any improper motive of respondents.

Petitioners' claims of discriminatory treatment rest chiefly on hearsay allegations that one non-Black student was granted a waiver, and that another non-Black student was allowed to withdraw from a class she was failing and repeat it. The petition alleges, "upon information and belief," that other non-Black students also were allowed to repeat a second failed nursing course or were allowed to withdraw from classes they were failing (*see* Verified Petition, ¶¶ 12, 13, 30, 31), but petitioners, in reply affidavits or otherwise, offer no "nonspeculative, nonhearsay factual pleadings" to support their allegations.[1] *See Matter of Podolsky v Bloomberg*, 37 AD3d 354 (1st Dept 2007); *see also Gary v New York Univ.*, 48 AD3d 235 (1st Dept 2008). Nor are there conflicting factual assertions in the affidavits of Baptiste and Lavin precluding summary determination of the proceeding. *Cf. Matter of Ransom v St. Regis Mohawk Educ. & Community Fund, Inc.*, 179 AD2d 860, 861 (3d Dept 1992). Respondents acknowledge that a non-Black student received a waiver, as did a Black student, and that those two were the only students out of 27 applicants in 2009 who were granted waivers, despite receiving low grades in nursing courses. Respondents also acknowledge that another non-Black student was permitted to repeat several courses when an illness prevented her from

[1]Notably, petitioner Simmons neither verified the petition nor submitted an affidavit in reply.

attending classes for a semester, and that in 2008, prior to the implementation of the revised, more stringent Retention Criteria, another non-Black student was granted a waiver.

In view of the evidence, petitioners' conclusory assertions that the denial of their waiver applications was based on unlawful racial discrimination are insufficient to raise a material issue requiring a hearing. *See Matter of DeQuito v New School for Gen. Studies*, 68 AD3d 559 (1st Dept 2009); *Ochei v Helene Fuld Coll. of Nursing of N. Gen. Hosp.*, 22 AD3d 222 (1st Dept 2005); *Moukarzel*, 235 AD2d at 239-240; *Matter of Cannon v Urlacher*, 155 AD2d 906 (4th Dept 1989); *Matter of Sachs v Board of Educ. of Mineola Union Free School Dist.*, 71 AD2d 898, *supra*; *Matter of Feigman v Klepak*, 62 AD2d 816 (1st Dept 1978). Even if, as petitioners contend, their compelling personal circumstances explained their failure of a second required nursing course, they have not shown that respondents' evaluation of petitioners' academic records and consequent denial of their applications to repeat the course was arbitrary and capricious or in violation of law, so as to warrant judicial intervention. Accordingly, the petition is denied.

Petitioners' cross motion to amend the petition to assert plenary causes of action for discrimination under the New York City Human Rights Law (Administrative Code of the City of New York § 8-107) also is denied. For the reasons stated above,

petitioners have failed to allege causes of action based on racial discrimination. To the extent that petitioners also seek to add a claim for disability discrimination, alleging that respondents failed to offer them a reasonable accommodation for their depression, the proposed pleading is without merit. Even if petitioners' alleged depression could be found to fit within the statutory definition of "disability," there are no factual allegations to support the claim that such condition was or should have been known to respondents, or that, at the time that they submitted their applications seeking a waiver of respondents' academic requirements, petitioners claimed to have a disability or sought any accommodation.

Petitioners' cross motion for leave to conduct discovery also is denied. Discovery in special proceedings will be allowed, pursuant to CPLR 408, when there is a demonstrated need for it, and when the discovery sought is "material and necessary" to the prosecution or defense of the proceeding. *See Matter of Town of Pleasant Valley v New York State Bd. of Real Prop. Servs.*, 253 AD2d 8, 16 (2d Dept 1999); *Matter of Town of Wallkill v New York State Bd. of Real Prop. Servs.*, 274 AD2d 856, 859 (3d Dept 2000). As the evidence clearly establishes that respondents' denial of petitioners' waiver applications had a rational basis and was not based on discriminatory motives, petitioners have not shown that the discovery sought, including

records of other students, even if not confidential, are material and necessary to the successful prosecution of this proceeding. *See Price v New York City Bd. of Educ.*, 51 AD3d 277, 293 (1st Dept 2008); *Stapleton Studios, LLC v City of New York*, 7 AD3d 273, 275 (1st Dept 2004); *Matter of Town of Pleasant Valley*, 235 AD2d at 16.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents, as taxed by the Clerk.

Dated: 10/8/10

ENTER:

EMILY JANE GOODMAN, J.S.C.