

**V.M. v Department of Educ. of the City of N.Y.**

2011 NY Slip Op 30147(U)

January 19, 2011

Sup Ct, New York County

Docket Number: 109285/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
*J.S.C.*  
*Justice*

PART 5

Index Number : 109285/2010

V.M.

vs.

NYC DEPARTMENT OF EDUCATION

SEQUENCE NUMBER : 001

ARTICLE 78

*CAL # 110*

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2, 3, 4

5, 6

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

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

Repeating Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**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: 1/19/11  
JAN 19 2011

*[Signature]*  
BARBARA JAFFE *J.S.C.*

Check one:  FINAL DISPOSITION •  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
V.M. on behalf of his minor child, K.M.

Index No. 109285/10

-against-

Motion Date: 11/30/10  
Motion Seq. No.: 1  
Calendar No.: 110

THE DEPARTMENT OF EDUCATION OF THE  
CITY OF NEW YORK and the CITY OF NEW YORK,

**DECISION & JUDGMENT**

Respondents.

-----X  
BARBARA JAFFE, JSC:

For petitioner:  
Stewart Lee Karlin, Esq.  
9 Murray Street, Suite 4W  
New York, NY 10007  
212-732-9450

**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).  
Kimberly Conway, AOC  
Michael A. Cardozo  
Corporation Counsel  
100 Church Street  
New York, NY 10007  
212-788-0865

By notice of petition dated August 9, 2010 petitioner moves pursuant to CPLR Article 78 for an order and judgment directing respondent to admit petitioner to the Brooklyn Latin High School, and seeks compensatory damages. Respondents oppose, and by notice of cross-motion dated October 21, 2010, move to dismiss the petition.

I. FACTS

Petitioner challenges, as arbitrary and capricious, respondents' decision denying him admission into Brooklyn Latin High School, a specialized high school.

Admission to the eight specialized public high schools is determined by a student's performance on the Specialized High Schools Admissions Test (SHSAT). (Affidavit of Maurice Frumkin, dated Sept. 28, 2010 [Frumkin Affid.]). Students and their parents are provided with a guide to taking the test and an admission ticket on which the student may indicate eight of his or her school preferences. (*Id.*; Affidavit of V.M., dated Oct. 20, 2010 [V.M. Affid.], Exh. A). The

students are encouraged to rank all eight schools. (V.M. Affid., Exh. A). The parent signs the admission ticket, which the student brings to the test. (*Id.*). Students taking the test again rank their preferred schools on a sheet accompanying the test, indicating their choices by filling in circles similar to those on standardized tests. (*Id.*). In selecting students for each school, respondents apply the choices selected on the sheet filled out at the test, not the admission ticket. (Frumkin Affid.)

Respondents determine a student's admission to the specialized high schools with reference to the scores, giving those with the highest scores their first choices, depending on available openings, and continuing down the list ranked by the test scores. (*Id.* at 16). Here, petitioner was advised that the deadline to submit requests to review his answer sheets for the 2009 to 2010 school-year examination was April 1, 2009. (*Id.*).

On October 26, 2008, petitioner took the SHSAT for entrance into the specialized high schools for the 2009 to 2010 school year. (*Id.*). His father alleges that he instructed his son on how to rank the schools, and to select Brooklyn Latin High School as his seventh choice. (V.M. Affid.). On February 5, 2009, the results were issued. (Frumkin Affid.). Petitioner was notified that he received a score of 177 and that he had not been selected for any of the schools he had selected. (*Id.*).

Petitioner's father alleges that, in the spring of 2009, petitioner's science teacher told him that his son had a high enough test score for entrance into the Brooklyn Latin High School. (V.M. Affid.). Thereafter, petitioner's father attempted to contact the high school's administrators, and alleges that the principal confirmed that petitioner's score was high enough for admission. (V.M. Affid.).

On August 25, 2009, Maurice Frumkin, respondents' deputy executive director of high

school enrollment, contacted petitioner's father and informed him that petitioner had not selected Brooklyn Latin High School on his answer sheet. (Frumkin Affid., Exh. D). By email dated September 1, 2009, petitioner's father stated that he wanted to review his son's answer sheet. (*Id.*).

Petitioner took the SHSAT again in the fall of 2009, seeking admission to specialized high schools for the 2010 to 2011 school year. (*Id.*). By letter dated March 2010, petitioner was notified that he received a score of 427, and thus was not offered admission into any specialized high school. (*Id.*, Exh. E). In an affidavit in support of respondents' cross-motion, Frumkin states that the lowest qualifying score for 10<sup>th</sup> grade admission to any school was 480. (*Id.*).

Frumkin met with petitioner's father on April 19, 2010 to review the answer sheet for the 2008 examination. (*Id.*). Although petitioner's father insists that his son filled in a circle for each school, the answer sheet reflects no circle filled in for Brooklyn Latin. (*Id.*, Exh. C). Although schools were ranked first through sixth, and a school is ranked eighth, no school is designated as petitioner's seventh choice. (*Id.*). Petitioners allege that the seventh choice was erased, or that petitioner mistakenly left it blank. (V.M. Affid). Petitioner's father alleges that Frumkin told him that he was adhering to the decision not to admit petitioner and that there would be no further appeal. (*Id.*).

Petitioners did not submit a request to review the answer sheet for the 2010 to 2011 school year. (Frumkin Affid.).

## II. CONTENTIONS

Petitioners allege that respondents acted arbitrarily and capriciously in refusing admission to petitioner, a qualified candidate, and that petitioner's educational future should not be determined by a teenager's mistake or by respondents' conduct in erasing a choice.

(Affirmation of Stewart Lee Karlin, Esq., dated July 13, 2010 [Karlin Aff.]). They seek compensatory damages for violating petitioner's right to equal protection under the New York State Constitution, and argue that the petition is timely, as the statute of limitations did not begin to run until April 19, 2010, when petitioner's father met with Frumkin to review the answer sheet. (*Id.*).

Respondents maintain that petitioners' claims are moot because petitioner may no longer be considered for admission to Brooklyn Latin High School for the 2009 to 2010 school year, that the claims are not timely because the statute of limitations commenced on August 25, 2009 at the latest, and that compensatory damages are unavailable in a special proceeding. (Verified Answer and Cross-Motion to Dismiss, dated Sept. 28, 2010).

### III. ANALYSIS

#### A. Mootness

A court may only decide "live controversies," and is prohibited from ruling on questions that have become moot. (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 810-811 [2003]). Although respondents allege that petitioner's claim is moot because the 2008 to 2009 school year has ended, Frumkin has not alleged that, if petitioners were to prevail in this matter, respondents would be unable to admit petitioner. Thus, respondents have not shown that this action is moot. (*Cf Finkelstein v New York State Bd. of Law Examiners*, 241 AD2d 728, 729 [3d Dept 1997] ["had petitioner not taken and passed the bar examination at the very next opportunity, she would have been successful in obtaining review"]).

#### B. Timeliness

Pursuant to CPLR 217(1), any proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the

petitioner. The determination becomes final and binding when the petition has been aggrieved by it. (*Yarbough v Franco*, 95 NY2d 342 [2000]). The statute is not tolled by the pursuit of administrative remedies or other attempts to change the determination. (*Kahn v New York City Dept. of Educ.*, \_\_\_ AD3d \_\_\_, 2010 NY Slip Op 09168 [1<sup>st</sup> Dept 2010]; *Aranoff v Fordham Univ.*, 171 AD2d 434, 435 [1<sup>st</sup> Dept 1991], *app denied*, 78 NY2d 858). However, it does not commence where an administrative body has created the impression that the determination, albeit issued, was intended to be nonconclusive. (*Edmead v McGuire*, 67 NY2d 714, 716 [1986]).

Here, petitioners were aggrieved by the February 5, 2009 decision, whereby they were notified that petitioner had not been selected for any of the specialized high schools. (*See Bottalico v Adelphi Univ.*, 299 AD2d 443 [2d Dept 2002] [statutory period began when university rejected petitioner's application for admission]; *Benson v Trustees of Columbia Univ. in the City of New York*, 215 AD2d 255, 255-256 [1<sup>st</sup> Dept 1995], *lv denied* 87 NY2d 808 [1996] [limitations period began when university determined that petitioner failed her dissertation]), and their attempts to review the answer sheet and discuss it with school administrators, pursued absent adherence to respondents' rules, did not toll the limitations period. (*Benson*, 215 AD2d at 255-256 [subsequent correspondence with university administrators did not toll statutory period]; *Aranoff*, 171 AD2d at 435 [same]). Consequently, the last date to serve the petition was June 5, 2009. As this petition was served more than a year later, it is not timely.

### C. Arbitrary and capricious

Even if timely, however, an academic determination is generally beyond the scope of judicial review, absent a showing that it was arbitrary or capricious. (*Matter of Susan M. v New York Law School*, 76 NY2d 241, 247 [1990]; *see also Keles v Trustees of Columbia Univ. in the*

*City of New York*, 74 AD3d 435 [1<sup>st</sup> Dept 2010]); *Gary v New York Univ.*, 48 AD3d 235, 236 [1<sup>st</sup> Dept 2008]). Given the “strong policy considerations [which] militate against the intervention of courts in controversies relating to” the decisions of educational institutions involving their students (*Susan M.*, 76 NY2d at 245), I decline to assess respondents’ admission procedures or their refusal to review petitioner’s answer sheet to discern his intent or whether it had been tampered with. Having demonstrated that Brooklyn Latin High School was not marked as a choice on petitioner’s answer sheet, whether petitioner intentionally or unintentionally failed to fill in a seventh choice, respondents have shown that as their decision not to admit petitioner was based on publicly available rules, they acted neither arbitrarily nor capriciously. Moreover, no evidence was offered that petitioner would have been admitted had he correctly selected Brooklyn Latin High School.

#### D. Damages

Compensatory damages are available in an Article 78 proceeding only where they are incidental to the primary relief sought. (CPLR 7806; *Gross v Perales*, 72 NY2d 231 [1988]). Here, as petitioners are not entitled to primary relief, they are not entitled to compensatory damages.

#### IV. CONCLUSION

For all of the foregoing reasons, it is hereby

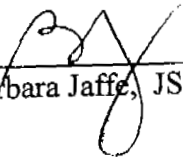
ADJUDGED and ORDERED, that the petition is denied; it is further

ADJUDGED and ORDERED, that respondents’ cross-motion for an order dismissing the petition is granted and the proceeding is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED and ORDERED, that respondents, having an address at 100 Church Street,

New York, NY, 10007, do recover from petitioners, costs and disbursements in the amount of \$ \_\_\_\_\_, as taxed by the Clerk, and that respondent have execution therefor.

This constitutes the decision and order of the court.

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED: January 19, 2011  
New York, New York

**BARBARA JAFFE**  
J.S.C.

**UNFILED JUDGMENT**  
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