

**Lomastro v New York Inst. of Tech. Coll. of
Osteopathic Medicine**

2019 NY Slip Op 30493(U)

March 1, 2019

Supreme Court, New York County

Docket Number: 154158/2018

Judge: William Franc Perry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

ANTHONY LOMASTRO

Petitioner,

- v -

NEW YORK INSTITUTE OF TECHNOLOGY COLLEGE OF
OSTEOPATHIC MEDICINE,

Respondent.

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INDEX NO. 154158/2018

MOTION DATE December 6, 2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 were read on this motion to/for REINSTATE/CROSS MOTION TO DISMISS

In this special proceeding, Petitioner seeks an Order pursuant to Article 78 against Respondent, New York Institute of Technology, improperly named herein as New York Institute College of Osteopathic Medicine, (hereinafter "NYIT"), for reinstatement to NYIT in order to complete his medical degree, a declaration that the actions taken against Petitioner were arbitrary and capricious, requiring NYIT to allow Petitioner to sit for the COMLEX-USA Level I examination ("COMLEX I exam"), and reimbursement for the tuition paid to Respondent.

Respondent, NYIT, cross moves seeking an order and judgment pursuant to CPLR sections 404(a) and 7511, and Rule 3211(a)(7), dismissing the petition as it fails to state a cause of action, and entering judgment in favor of Respondent. Upon the foregoing documents, the Petition is denied and the cross motion to dismiss the Petition is granted.

BACKGROUND/CONTENTIONS

Petitioner is challenging his dismissal as a student from NYIT's College of Osteopathic Medicine (NYITCOM), an osteopathic medical college within NYIT. Petitioner was discharged.

due to his failure to timely pass the COMLEX I exam, administered by the National Board of Osteopathic Medical Examiners ("NBOME"), despite multiple failed attempts.

Petitioner enrolled in the Osteopathic Medical program in August 2014 at NYIT. (NYSCEF Doc. No. 1, ¶3). Petitioner completed his academic course work in his first and second year of medical school. Passing the COMLEX I exam is a condition of entering a student's third year when clinical rotations commence. (NYSCEF Doc. No. 1, ¶8). Petitioner concedes this requirement but contends that Respondent "jumped the gun" by requiring Petitioner to enroll in the Directed Study Course before he had taken the COMLEX I exam.

Respondent has submitted the affidavit of Dr. William Blazey, D.O., the Assistant Dean of Pre-Clinical Education for NYITCOM, in support of its cross motion to dismiss the Petition. (NYSCEF Doc. No. 14). According to Dr. Blazey, NYITCOM students are responsible for registering for and scheduling COMLEX I testing dates in compliance with their degree requirements. (NYSCEF Doc. No. 14, ¶4). Additionally, Dr. Blazey avers that the policies relative to the procedure and timeline for scheduling the COMLEX I test and any directed study course, are clearly set forth in the Student Handbook and on the NYITCOM website, and they are reprinted on the forms signed by students at the beginning of their leaves. (NYSCEF Doc. No. 14, ¶¶5 through 9; NYSCEF Doc. No. 15).

Notwithstanding the policies set forth in the Student Handbook, Petitioner contends that he was denied the opportunity to take the COMLEX I examination a fourth time because he was only allowed to take the examination twice while on leave; he claims that this is the direct result of Respondent's actions, requiring him to enroll in the Directed Study Course even though he had not taken the COMLEX I examination. Additionally, Petitioner speculates that had

Respondent provided extensive support the second time Petitioner had taken the examination, he would have, in all likelihood, passed. (NYSCEF Doc. No. 31, ¶¶19, 20).

Respondent contends that Petitioner's claims are contrary to the plain language set forth in NYIT's COMLEX I Leave Policy, which provides that students are to successfully complete the Directed Study Course prior to petitioning for a leave of absence. (NYSCEF Doc. No. 15, pp. 1-2). The documents submitted in support of Respondent's motion establish that Petitioner completed his first and second year coursework in May 2017, and he was initially scheduled to take the COMLEX I examination on June 26, 2017, prior to the scheduled start of his Introduction to Clinical Medicine course on Wednesday, July 5, 2017. In addition, Respondent submits Petitioner's scheduling history and examination scores as maintained in NBOME's records and obtained from NBOME's website. (NYSCEF Doc. No.17). Respondent also submits the Academic Calendar published in NYITCOM Catalogs for the years 2016 - 2017 and 2017 - 2018, respectively. (NYSCEF Doc. No.18).

Based on the documents submitted and Petitioner's academic record and performance, Dr. Balzey explains that while Petitioner completed his coursework during the first year of his classroom curriculum, he was a consistently poor performer in his courses, with scores more than one standard deviation below the mean score of his classmates in almost every one of his classes. (NYSCEF Doc. No.14, ¶12). Dr. Blazey also explains that in addition to the COMLEX I, NBOME also administers a Comprehensive Osteopathic Medical Self-Assessment Examination (COMSAE) to help students prepare to take the COMLEX examinations, including the COMLEX I and that while a student's COMSAE score is not intended to predict performance on the COMLEX I, most students will receive a COMLEX score within 50 points of their COMSAE score. (NYSCEF Doc. No.14, ¶¶16-17).

Petitioner received a COMSAE score of 378 on June 22, 2017 and requested a meeting with Dr. Blazey to discuss his score; Dr. Blazey responded to Petitioner's email that same evening, advising him that he would not be in the office the following work day, and that they could not schedule a meeting prior to the date Petitioner had scheduled his COMLEX I examination, the following Monday, June 26, 2017. (NYSCEF Doc. No.14, ¶¶18, 19).

According to Dr. Blazey, Petitioner advised that he had decided to cancel and reschedule the COMLEX I examination from its scheduled June date for a later date, so that he could take advantage of additional time to study during the summer months. (NYSCEF Doc. No.19).

Petitioner deferred the examination to August in anticipation of enrolling in the Directed Study Course in July. During his meeting with Dr. Blazey on June 29, 2017, Petitioner was referred to NYITCOM's Academic Enrichment Specialists to assist in preparing a study plan. (NYSCEF Doc. No.14, ¶24). According to Dr. Blazey, Petitioner did not report the Academic Enrichment Specialists prior to the start of the Directed Study Course. (NYSCEF Doc. No.14, ¶25).

Petitioner took the COMLEX I exam on Tuesday, September 5, 2017 and received a failing score of 354. (NYSCEF Doc. No.17). The Directed Study Course was set to conclude as scheduled on October 6, 2017; since Petitioner did not receive a passing score on the COMLEX I during this period, and in accordance with NYITCOM's policies, Petitioner was eligible to apply for the 180-day COMLEX I Leave of Absence. NYITCOM granted Petitioner the 180-day COMLEX I Leave of Absence, commencing on October 7, 2017, and ending April 4, 2018. (NYSCEF Doc. No. 24).

During his COMLEX I Leave, Petitioner was permitted the same access to wellness counseling and support from NYITCOM's Academic Enrichment Specialists, that he had been

receiving during the Directed Study Course. (NYSCEF Doc. No.14, ¶45). Petitioner took the COMLEX I examination twice more during his leave of absence, on December 18, 2017, and again on February 22, 2018. Petitioner did not receive passing scores. (NYSCEF Doc. No.17).

According to Dr. Blazey, Petitioner “did not take advantage of the maximum of four attempts to pass the COMLEX I exam, and may have been able to take the COMLEX I examination at least one additional time during his COMLEX I Leave of Absence, had he scheduled his test dates to allow sufficient time to receive the score from a fourth examination prior to the expiration of his leave of absence on April 4, 2018. NYITCOM has no role in scheduling COMLEX examinations for its students.” (NYSCEF Doc. No.14, ¶48).

When Petitioner’s leave of absence expired on April 4, 2018, he had not passed the COMLEX I examination. Petitioner was dismissed from NYITCOM effective October 7, 2017, the date his COMLEX I Leave of Absence had commenced. (NYSCEF Doc. No.26).

Petitioner now seeks reinstatement to NYIT in order to complete the requirements necessary to earn his medical degree. Respondent seeks dismissal of the petition, as it claims Petitioner has failed to demonstrate that NYIT’s decision to dismiss him from NYITCOM, due to his failure to timely pass the COMLEX I exam, was arbitrary, capricious, irrational, or made in bad faith.

STANDARD OF REVIEW/ANALYSIS

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged in the pleading are accepted as true and are given the benefit of every possible favorable inference; the court must determine simply “whether the facts as alleged fit within any cognizable legal theory.”

Mendelovitz v Cohen, 37 AD3d 670, 671 (2d Dept 2007). A complaint does not state a cause of action upon which relief may be granted if it consists only of bare legal conclusions. *Cangro v*

Reitano, 92 AD3d 483 (1st Dept. 2012). The court is “not required to accept at face value every conclusory, patently unsupportable assertion of fact found in the complaint” and can “consider documentary evidence proved or conceded to be authentic” (*West 64th Street, LLC v Axis U.S. Ins.*, 63 AD3d 471, 471 [1st Dept 2009], quoting *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318 [1st Dept 1987] [internal quotation marks omitted]).

Judicial review of determinations made by educational institutions as to the academic performance of their students is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith, or contrary to Constitution or statute (see *Matter of Zanelli v Rich*, 127 AD3d 774, 775, 8 NYS3d 217 [2015]; *Matter of Rizvi v New York Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.*, 98 AD3d 1049, 1051, 950 NYS2d 754 [2012]; *Matter of Gilbert v State Univ. of N.Y. at Stony Brook*, 73 AD3d 774, 774, 899 NYS2d 853 [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, 556 NE2d 1104, 557 NYS2d 297 [1990]; see *Matter of Rizvi v New York Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.*, 98 AD3d at 1052; *Matter of Cunningham v Pace Univ.*, 288 AD2d 218, 732 NYS2d 573 [2001]).

“Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.” *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974); see *Allawi v State Univ. of NY at Stony Brook*, 2002 WL 31748836, *1, 2002 NY Misc LEXIS 1546, *5 (Sup Ct, Suffolk County 2002). A petitioner has the burden of demonstrating that 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, 812 N.Y.S.2d 522 (1st Dept 2006); *Matter of Baptiste v City Univ. of NY*, 2010 WL 4155279, 2010 NY Misc LEXIS 5020, *10 (Sup Ct, NY County 2010).

Here, Petitioner concedes that he was fully aware of NYIT's requirements to sit for the COMLEX I examination. Petitioner also concedes, in accordance with established legal authority, that the court's review of a student's dismissal is deferential and limited to whether such dismissal was arbitrary and capricious, irrational, made in bad faith or contrary to law. Additionally, the record demonstrates that NYIT permitted Petitioner to enroll in a ten-week Directed Study Course and that during this Course, Petitioner had the opportunity to consult with and receive assistance from both a NYIT Academic Enrichment Specialist and the Assistant Dean of Pre-Clinical Education, to create a personalized plan of study.

Despite the extensive assistance provided to Petitioner in accordance with NYIT's policies, Petitioner contends that he received absolutely no support from the school. (NYSCEF Doc. No. 31, ¶¶ 10 through 12). Additionally, Petitioner contends that because NYIT prematurely forced him into the Directed Study Course, he lost the opportunity to take the COMLEX I examination a fourth time because he was only allowed to take the examination twice while on leave. Petitioner's allegations are simply not supported by the record and the plain language of NYIT's policies and procedures.

Respondent has established that students may take the COMLEX I exam up to four times and that it is the student's responsibility to schedule the examination in accordance with their degree requirements. (NYSCEF Doc. Nos. 14 and 15). As noted by Dr. Blazey, "Mr. Lomastro did not take advantage of the maximum of four attempts to pass the COMLEX I exam, and may have been able to take the COMLEX I examination at least one additional time during his

COMLEX I Leave of Absence, had he scheduled his test dates to allow sufficient time to receive the score from a fourth examination prior to the expiration of his leave of absence on April 4, 2018. NYITCOM has no role in scheduling COMLEX examinations for its students. Those examinations are administered between two and four times per month during winter and spring.” (NYSCEF Doc. No. 14, ¶48).

Indeed, NYIT’s policy regarding Licensing Examinations is clear and unequivocal; students are required to obtain a passing score on the COMLEX I exam prior to entering a student's third year when clinical rotations commence. (NYSCEF Doc. No. 15, p.1). Petitioner concedes that he was fully aware of this policy. (NYSCEF Doc. No. 1, ¶8). As such, the record demonstrates that Petitioner had not met the minimum requirements for continued enrollment as of August 1, 2017, and his contention that he could have been placed on leave for two months, while he took the exam, is contrary to the NYIT’s Leave Policy. Moreover, Respondent correctly notes that had NYIT permitted a policy exception for Petitioner, and allowed him to take leave prior to completing the Directed Study Course, he would have had less time, not more, to prepare for the examination.

While Petitioner’s disappointment is certainly understandable, our courts have long recognized that “although it may be unfortunate to spend years studying a discipline only to discover that one’s capabilities do not pass academic muster” there is nothing arbitrary about requiring “a general comprehensive examination to determine whether or not a student is properly qualified [for a degree].” *Matter of Hendessi v New York Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.*, 36 Misc 3d 1241[A], 960 NYS2d 50, 2012 NY Slip Op 51787[U] [Sup Ct, NY County 2012], citing, *Keles v New York Univ.*, 1994 WL 119525, *6, 1994 U.S. Dist LEXIS

4202, *18-19 (SD NY 1994), affd 54 F 3d 766 (2d Cir 1995), cert denied 516 U.S. 943, 116 S. Ct. 380, 133 L. Ed. 2d 303 (1995).

Limited judicial review of an educational institution's judgment of a student's academic performance "reflects the policy that the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment and these institutions are, for the most part, better suited to make relatively final decisions concerning wholly internal matters. This jurisprudential guidepost stems from the belief that these institutions are peculiarly capable of making the decisions which are appropriate and necessary to their continued existence." *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 92, 721 N.E.2d 966, 699 N.Y.S.2d 716 (1999) (internal citations omitted); see *Susan M. v. N.Y. Law Sch.*, 76 N.Y.2d 241, 245, 556 N.E.2d 1104, 1106, 557 N.Y.S.2d 297 (1990) ("Strong policy considerations militate against the intervention of courts in controversies relating to an educational institution's judgment of a student's academic performance. Unlike 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.").

Based on the record before the court, Petitioner has not demonstrated that NYIT's decision to dismiss him from NYITCOM due to his failure to timely pass the COMLEX I exam, was arbitrary and capricious. The record demonstrates that Petitioner was responsible to prepare for and schedule the COMLEX I exam as a condition of entering his third year when clinical rotations commence.

Petitioner's speculative claims that he would have been able to pass the exam, had he been given another opportunity and more extensive academic support, are simply not supported by the

record. Rather, contrary to the petitioner's contention, the determination to dismiss him from NYITCOM was properly based upon academic considerations, and was not arbitrary and capricious, irrational, or made in bad faith. Accordingly, it is hereby,

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that respondent's cross motion to dismiss the petition is granted; and it is further

ADJUDGED that respondent, does recover from petitioner, costs and disbursements in the amount as taxed by the Clerk, and that respondent have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court

3/1/2019
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE