

Vaknin v Pace Univ.
2020 NY Slip Op 31088(U)
April 27, 2020
Supreme Court, New York County
Docket Number: 155887/2019
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

STACY VAKNIN,

Petitioner,

- v -

PACE UNIVERSITY,

Respondent.

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INDEX NO. 155887/2019
MOTION DATE 06/13/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the instant petition against respondent is hereby denied and dismissed, without prejudice, for the reasons stated hereinbelow.

Background

The following allegations (many of which respondent vigorously disputes) are taken from instant petition (NYSCEF Doc. No. 1) and petitioner’s supporting documents.

In fall 2016, petitioner, Stacy Vaknin, enrolled at Pace University (“respondent;” “Pace”) as an undergraduate student. Upon petitioner’s enrollment, Pace provided petitioner with (1) its academic criteria for graduation; (2) its EEO policies; and (3) its procedures in the event of any dispute between Pace and petitioner. The instant petition (NYSCEF Doc. No. 1) alleges that these policies constituted a contract between petitioner and respondent. The petition claims, “implicit in the contract, is [that the university will] apply the rules uniformly and not to act arbitrarily and capriciously and discriminatorily when applying the policies to a given situation.”

The instant petition outlines, at length, various aspects of petitioner’s undergraduate academic record at Pace. For example, in spring 2017, Pace permitted petitioner to take a medical leave of absence, and Pace placed her on academic probation pursuant to her 1.98 cumulative average GPA. (The motion papers also refer to the cumulative GPA as the “Cumulative Quality Point Average.” This Decision and Order will primarily use “cumulative GPA.”) In fall 2017, petitioner returned to Pace as a part-time student and enrolled in two courses. In spring 2018, petitioner returned to Pace as a full-time student. Petitioner alleges that she passed all of her spring 2018 courses except for “French” and that she received a “D” in “Communications 223” (despite the fact that everyone else in her group project received an “A”) and an “Incomplete” in “Public Speaking” (despite the fact that she received an “A” on all three speeches that she delivered for the course). Petitioner appealed her “F” grade in “Mass Media,” and she ultimately received an “A-.” Petitioner highlights that she maintained a GPA of “well over a 2.0” (a

summer 2018 semester GPA of 3.53 pursuant to the Official Transcript that Pace filed; NYSCEF Doc. No. 10) for her summer 2018 semester at Pace.

During the summer 2018 session, according to the instant petition, Pace “suddenly and unexpectedly” dismissed petitioner.

Prior to the fall 2018 semester, petitioner allegedly provided Pace with a letter about her health. Pace reinstated petitioner for the fall 2018 semester.

According to the instant petition, two weeks into the fall 2018 semester, Pace dismissed petitioner. With the assistance of petitioner’s advisor at Pace, Ms. Shannon Haick (“Ms. Haick”), petitioner appealed said dismissal, and Pace re-re-enrolled petitioner. Petitioner claims that she maintained an average of at least a “B” in all of her fall 2018 courses.

Petitioner claims that Pace dismissed her in late November 2018. Ms. Haick allegedly exclaimed on the telephone, “I have never seen this happen to a student at Pace University before.” Although Pace reinstated petitioner, petitioner alleges that the stress that this pattern of dismissals and reinstatements generated increased “the frequency and severity of several [of her] health issues.” Petitioner received “over a B” in her fall 2018 courses (although the official certified transcript indicates that petitioner received “I-F” and “F” grades for all of her fall 2018 courses; NYSCEF Doc. No. 10).

During Pace’s winter 2019 session (which is also referred to as the “January Intersession 2019” and the “Winter 2019 Intersession” in the motion papers), petitioner completed two courses. The instant petition asserts that petitioner received grades of “A-” and “B+” in said two courses (although the official transcript lists two grades of F for petitioner’s January Intersession 2019; NYSCEF Doc. No. 10).

In mid-February 2019 of petitioner’s spring 2019 semester, one of petitioner’s professors allegedly told her “that she could not be enrolled” at the university. Petitioner asserts that Pace had not notified her about said update. According to the instant petition, petitioner was, without explanation, subsequently locked out of the Pace online system and “was advised that she was no longer able to attend any of her classes.”

In a February 26, 2019 email to Ms. Haick, petitioner’s father, Berry Vaknin (“Mr. Vaknin”), requested petitioner’s fall 2018 and winter 2019 grades. He explained that he needed said information “in order to keep track of [petitioner’s] academic progress and how that impacts her financial aid.” (NYSCEF Doc. No. 2.)

On February 27, 2019, Ms. Haick informed Mr. Vaknin via email that petitioner failed all of her fall 2018 and winter 2019 courses. Ms. Haick’s email to Mr. Vaknin stated, in pertinent part:

Based on what [petitioner] shared with us about her progress in the courses, the probation appeals committee contacted each of her professors to verify her success. Unfortunately, all professors indicated that [petitioner] did not do what

she needed to in order to pass. Because of this, [petitioner] was dismissed from the university. She is encouraged to reapply after one year. A letter was sent from the Dean's Office indicating what she will need to do over this year in order to be accepted back to Pace. (Exhibit A; NYSCEF Doc. No. 2.)

Petitioner appealed this spring 2019 dismissal and contacted Pace's Dyson College Associate Dean Richard Schlesinger ("Dean Schlesinger"), who, on February 27, 2019, emailed petitioner with official notice of her dismissal from Pace (the copy of this dismissal letter that Pace submitted is dated January 14, 2019; NYSCEF Doc. No. 10).

On February 28, 2019, Mr. Vaknin emailed Ms. Haick and described discrepancies on petitioner's blackboard account (an online server that can display grades). Mr. Vaknin stated, in pertinent part, "[during] our last meeting together, you assured me that [petitioner] was doing much better in school. So this makes the situation even more confusing for us." (NYSCEF Doc. No. 17.)

Petitioner asserts that she met all academic and financial requirements for graduation from Pace.

Petition for CPLR Article 78 Relief against Pace University

On June 13, 2019, petitioner commenced the instant Article 78 special proceeding, seeking a judgment [1] declaring that Pace's actions were arbitrary and capricious; [2] directing respondent to reimburse petitioner for the tuition that she paid to Pace, plus "related expenses;" and [3] awarding petitioner monetary damages in an amount to be determined at trial for (a) "a lost career as a result of not obtaining a Degree[,] including the salary she would have earned if petitioner was conferred a degree;" (b) emotional and psychological suffering that Pace's conduct inflicted upon petitioner; (c) the loss of continuity in learning that said dismissals caused petitioner; and (d) damages to petitioner's professional reputation, pain, suffering, and emotional distress; plus attorney's fees, costs, and disbursements.

On September 27, 2019 (within the deadline to answer the instant petition pursuant to multiple adjournments to which the parties stipulated; NYSCEF Doc. No. 6, 7, and 8), Pace answered the instant petition with various admissions, denials, and nine Affirmative Defenses, disputing that it breached the claimed contract or that it violated any anti-discrimination laws. (NYSCEF Doc. No. 9.)

Pace denies that petitioner declared a major and/or a minor, stating that between fall 2016 and January 2019, petitioner constituted an "undecided" student in Pace's Dyson College of Arts and Sciences. Pace also disputes petitioner's semester-specific course grades and petitioner's semester GPAs and cumulative GPA. Pace asserts that in summer 2018, Pace dismissed petitioner not "suddenly and unexpectedly" (as characterized by petitioner) but, rather, because she did not meet Pace's requirement that its students maintain a cumulative GPA at or above 2.0. (NYSCEF Doc. No. 9.)

Although petitioner asserted that she submitted a letter about her health to the university prior to the commencement of the fall 2018 semester, Pace asserts that it received only two letters from Dr. Vilma Gabbay in April 2017. Pace stated that it considered the subject medical notes prior to

granting petitioner's request for a spring 2017 medical leave of absence (not for the fall 2018 semester). (NYSCEF Doc. No. 9.)

Pace denied that it dismissed petitioner two weeks into the fall 2018 semester and again in late November 2018. Instead, Pace asserts that it dismissed petitioner *following the completion* of the fall 2018 semester, as petitioner failed all five of her fall 2018 semester courses. (NYSCEF Doc. No. 9.)

On November 20, 2018, petitioner submitted an Affidavit supporting the instant Article 78 proceeding, noting that she has a disability as defined by the Americans with Disabilities Act, specifically, borderline personality disorder and emotionally induced epilepsy. (NYSCEF Doc. No. 19.) She asserted, "I believe that Pace's actions were arbitrary and due to discriminatory reasons due to my disability." (NYSCEF Doc. No. 9.)

She also asserted that, in spring 2018, she appealed the "D" that Pace alleges that she received in her "Communications 223" (a course not found on her transcript), as petitioner stated that she received grades of "A" in all three essays that she submitted for the subject course, claiming that Pace never responded to the subject appeal. Additionally, petitioner claims that she received an "Incomplete" in her "Public Speaking" course despite receiving grades of over "B+" in the three speeches that she delivered for the course. Petitioner asserts that at the completion of the spring 2018 semester, she held a GPA of over 2.0. As for the winter 2019 session, petitioner reiterated that she received grades of "A-" and "B+" in her two courses, and she cites a screenshot of her Pace University "My Grades" webpage (NYSCEF Doc. No. 27). This screenshot however, indicates the following grades: "COS 214: Interpersonal Communications: F? (86.92)" and "PSY 375 Lifespan Development Psychology: I? (94)." (NYSCEF Doc. No. 9.)

Petitioner emphasizes the consequences of Pace's alleged actions toward her between fall 2016 and spring 2019: (1) she will not receive a bachelor's degree; (2) she is in debt; and (3) as a result of the immediately aforementioned consequences, she has no employment prospects. (NYSCEF Doc. No. 9.)

Discussion

In a CPLR Article 78 proceeding, the scope of judicial review is limited to the issue of whether the administrative action is rationally based. Matter of Pell v Board of Educ., 34 NY2d 222, 230-31 (1974).

It is well established that, when a private educational institution's actions are in question, "strong policy considerations militate against the intervention of courts in controversies relating to an educational institution's judgment of a student's academic performance." Susan M. v New York Law School, 76 NY2d 241, 245 (1990); Maas v Cornell University, 94 NY2d 87, 92 (1999). This Court keeps this policy in mind in examining petitioner's medical and academic records.

Medical Records

Petitioner argues "I believe that Pace's actions were arbitrary and due to discriminatory reasons due to my disability." (NYSCEF Doc. No. 19.) Pace responds by quoting from its University

Policy (the “Policy”) to the effect that “to request an accommodation for a qualifying disability, a student must self-identify and register with the Office of Disability Services for his or her campus.” (NYSCEF Doc. No. 10.)

Although the exhibit attached to the September 27, 2019 Affidavit of Kate Torres (“Ms. Torres”), Assistant Director of Pace’s Office of Student Accessibility Services (f/k/a the “Office of Disability Services”), features a receipt from a disability registration form from petitioner with a timestamp of November 8, 2018, Pace clarifies that petitioner “failed to follow up with the University Disability Coordinator to complete the accommodation consideration process.” (NYSCEF Doc. No. 12.) “Therefore, the petitioner never established her entitlement to a disability accommodation from the University,” Ms. Torres explained. (NYSCEF Doc. No. 11.)

In her September 27, 2019 Affidavit, Ms. Torres provided a link to Pace’s Counseling Center’s webpage, which features a section on “Complaints of Disability Discrimination” (the second-to-last header in yellow font) with two telephone numbers to which to direct such concerns. However, in her September 27, 2019 Affidavit, Dean Bette IT Kirschstein (“Dean Kirschstein”), Associate Dean of Pace’s Dyson College of Arts & Sciences, asserted,

Petitioner never alleged to the Appeals Committee that she had been subjected to any discriminatory treatment on the basis of a medical condition, disability or any other protected class status. (NYSCEF Doc. No. 11.)

With her September 27, 2019 Affidavit, Ms. Arletha Miles (“Ms. Miles”), Pace’s Title IX Coordinator/Affirmative Action Officer, submitted, inter alia, Pace’s Policy and Procedure on Discrimination, Non-Sex-Based Harassment, and Retaliation, and she asserted:

Neither the petitioner nor anyone else at the University has ever contacted me or members of my staff to report any allegations of discrimination against the petitioner based on a medical condition, disability or any other protected class status. (NYSCEF Doc. No. 11.)

Pace has sufficiently demonstrated that it granted petitioner “a medical leave of absence in the only semester for which she requested such a leave” (NYSCEF Doc. No. 10). Pace e-filed the April 2017 letters from Dr. Vilma Gabbay, Chief of the Pediatric Mood and Anxiety Disorders Program at the Ichan School of Medicine at the Mount Sinai Hospital, that Pace consulted prior to granting petitioner’s sole request for a medical leave of absence (NYSCEF Doc. No. 10). “Having already been granted one medical leave of absence,” emphasizes Pace, “petitioner was clearly aware of the process for requesting another such leave if she wished. She did not request a second medical leave.” (NYSCEF Doc. No. 12.)

“Petitioner’s claim fails [*sic*] no better characterized as a failure to accommodate a disability,” argues Pace. (NYSCEF Doc. No. 12.) Pace explained that such an argument equates to a request that Pace “waive its academic standards” for petitioner’s benefit, a student request that even the U.S. Supreme Court has rejected. Southeastern Commun. Coll. v Davis, 442 U.S. 397, 408-410 (1979).

Tedeschi v Wagner College, 49 NY2d 652 (1980) (“Tedeschi”), holds that “when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.” Tedeschi v Wagner College, 49 NY2d 652, 660 (1980).

Consequently, as petitioner has failed to demonstrate that Pace discriminated against her disabilities, this Court turns its attention to, as phrased in Tedeschi, the “rule or guideline,” which petitioner claims that Pace violated between fall 2016 and spring 2019. Tedeschi v Wagner College 49 NY2d 652, 660 (1980).

Academic Records

The Court of Appeals holds that “rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.” Matter of 125 Bar. Corp. v State Liq. Auth., 24 NY2d 174, 178.

On September 27, 2019, Ms. Haick submitted a copy of the Policy (NYSCEF Doc. No. 10), which supports Pace’s position that Pace did not act “irrationally” (NYSCEF Doc. No. 18) in dismissing petitioner from the university. Matter of Pell v Board of Education, 34 NY2d 231 (1974).

The Policy requires that students maintain, inter alia, “a minimum cumulative QPA [Quality Point Average] of 2.0, unless indicated differently by a school, college, or specific major.” (NYSCEF Doc. No. 10.) Pursuant to the Policy, “any student who is not making satisfactory academic progress toward the degree is automatically put on academic probation” (NYSCEF Doc. No. 10, ■ 8).

Pursuant to the transcript, between fall 2016 and spring 2019, that Pace e-filed, petitioner’s cumulative GPA evolved as follows: 1.98 (fall 2016) to 1.98 (spring 2017; medical leave of absence) to 1.74 (fall 2017) to 1.56 (spring 2018) to 1.91 (summer 2018) to 1.34 (fall 2018) to 1.27 (January Intersession 2019). The transcript that Ms. Flaick submitted, bearing the Pace University Registrar’s signature that renders it official, indicates that petitioner’s “overall GPA” in fact amounted to 1.19. (NYSCEF Doc. No. 10, Exhibit B.)

The Policy specifies that “students with serious or continuing deficiencies will be academically dismissed from the University.” (NYSCEF Doc. No. 10.) As petitioner’s cumulative GPA consistently remained below the required GPA of 2.0 (and, pursuant to petitioner’s official transcript, concluded with a cumulative GPA of 1.19), this Court deems petitioner’s academic record as one that clearly demonstrates “serious or continuing deficiencies” meriting academic probation and, ultimately, dismissal from Pace under the Policy; thus, the subject dismissals were not arbitrary and capricious.

As Pace highlights, petitioner “fails to acknowledge” that her undergraduate cumulative GPA at all times remained below the required cumulative GPA of 2.0. Pace notes that, as petitioner did not file a discrimination case against Pace, petitioner “is alleging that applying such an academic standard to her was discriminatory. Such assertion is unsupported.” (NYSCEF Doc. No. 12.)

Petitioner also disputes specific grades that she received in courses during her tenure as a Pace undergraduate student; examples that recur across petitioner's papers are her grades in her "Communications 223" and "Public Speaking" courses. (NYSCEF Doc. No. 1.)

However, Tedeschi v Wagner College, 49 NY2d 652, 658 (1980), cautions that "Matters involving academic standards generally rest upon the subjective judgment of professional educators."

The input that Pace solicited from petitioner's professors (the "professional educators" cited in Tedeschi) substantiates the rationality of petitioner's grades as indicated on her official transcript.

Professor Aditi Paul (COM 214, winter 2019; petitioner received an "F" grade) cited petitioner's failure to complete assignments by their respective deadlines and her own attempts at "making reservations for her accordingly." (NYSCEF Doc. No. 10.) Professor Sam Jeannite (PSY 375, winter 2019) indicated that petitioner completed only the midterm and final exam from the course assignments and therefore received a grade of "42" (presumably out of "100") in the course.

Professor Anuradha K. Herath (COM 225, fall 2018) stipulated, "I was willing to work with her," given petitioner's situation and her doctor's note. However, Professor Herath emphasized that petitioner "did not complete ANY assignments. I assumed she had dropped the class though her name was still on the roster. Therefore, I gave an I-F for the final grade." (NYSCEF Doc. No. 10.)

Professor Joan Roland (HIS 223, fall 2018) also addressed petitioner's possible medically-grounded arguments, stating, "[petitioner] claimed medical issues but the only documentation I ever got was a note saying she should be allowed to take the midterm at home. Complications arose and she never did." Professor Roland stated that she "chased after [petitioner] all semester." (NYSCEF Doc. No. 10.)

These statements belie petitioner's argument that Pace dismissed petitioner "for no reason" (NYSCEF Doc. No. 18).

This Court thereby follows Susan M. v New York Law School, 76 NY2d 241 (1990), which modified the Appellate Division's order so as to dismiss a law student's Article 78 petition in its entirety, because:

To so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions." Susan M. v New York Law School, 76 NY2d 241, 246-7 (1990).

Pace also reminds this Court that “despite the fact that the Policy only allowed no more than one appeal, [petitioner] was permitted to appeal the second dismissal.” (NYSCEF Doc. No. 12.)

Thus, Pace has established that Pace’s two dismissals of petitioner from the university each constituted “a purely academic decision,” one that did not involve arbitrary, capricious, and/or discriminatory actions and/or motivations against petitioner. (NYSCEF Doc. No. 12.)

Little League Lesson

In or about 1960 this Court was on a Little League baseball team that included a player with a full-length leg brace (apparently the result of childhood polio) and, hence, with very limited mobility. However, he could throw the ball fairly well, and in this one particular game the coach put him in the lineup as the pitcher. The opposing coach had the temerity to instruct a batter to bunt, and the batter easily reached first base safely. Nevertheless, our coach left the pitcher in the game. Watching this unfold, this Court (11 years old at the time) formulated the following “rule”: if a guy can pitch, let him pitch, even if his disability prevents him from fielding; but if he can’t pitch, don’t let him pitch just to make up for the fact that he also can’t field.

Here, if petitioner had demonstrated that she could do satisfactory academic work, but was prevented from demonstrating that because of personal problems, that would be one thing. Instead, petitioner has failed to demonstrate that she is capable of doing satisfactory academic work. At the very least, she has failed to demonstrate that respondent acted arbitrarily, capriciously, or irrationally in dismissing her, or that respondent is not entitled to the capacious discretion and protections that Susan M. and its progeny afford to educational institutions in academic matters.

Conclusion

Thus, for the reasons stated herein, the instant CPLR Article 78 petition of Stacy Vaknin against Pace University is hereby denied and dismissed in its entirety, without prejudice, to petitioner’s commencement of an action—if she deems herself so advised, and assuming, without deciding, that the Statute of Limitations does not bar such an action—alleging discrimination by Pace University under federal, state, and/or city anti-discrimination laws. The Clerk is hereby directed to enter judgment accordingly.

HON. ARTHUR F. ENGORON

4/27/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED

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APPLICATION:

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