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| <b>Matter of Zanelli v Rich</b>  |
| 2012 NY Slip Op 31350(U)   |
| April 30, 2012   |
| Supreme Court, Nassau County   |
| Docket Number: 12914/11  |
| Judge: F. Dana Winslow   |
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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 3  
NASSAU COUNTY**

**In the Matter of the Application of  
MARILYN A. ZANELLI,**

**Petitioner,**

**-against-**

**MOTION SEQ. NO.: 001  
MOTION DATE: 2/1/12**

**DR. THOMAS B. RICH, DR. KENNETH  
SAUNDERS & NASSAU COMMUNITY COLLEGE,**

**Respondents.**

**INDEX NO.: 12914/11**

**The following papers having been read on the motion (numbered 1-2):**

- Notice of Motion.....1**
- Verified Answer & Objections in Point of Law.....2**

This petition pursuant to Article 78 of the CPLR for a judgment, inter alia, annulling the respondents' Dr. Thomas B. Rich, Chairman of the Nursing Department at Nassau Community College, Dr. Kenneth Saunders, Executive Vice President of Academic Student Services at Nassau Community College and Nassau Community College's ("the College") Spring 2011 determination that the petitioner Marilyn A. Zanelli ("Zanelli") failed Nursing 204 a/k/a Comprehensive Nursing Care II which precluded her from graduating in May 2011 and directing them to, inter alia, immediately issue her a diploma, is determined as provided herein.

In the Spring 2011 Semester, the faculty of the College found the petitioner Marilyn A. Zanelli's practices to be "clinically unsafe," as a result of which she was going to fail the last class she was required to pass in order to graduate, Nursing 204 a/k/a Comprehensive Nursing Care II. The College offered her an opportunity to receive a "W" and to withdraw from the course and retake it when it was being offered again in the Spring of 2012. However, she declined that offer which resulted in her failing the course and being ineligible to graduate 2011. This proceeding ensued.

In this proceeding, Zanelli challenges her failing grade in Nursing 204 as "arbitrary and capricious," an "abuse of discretion" and "sufficient to shock the conscience of a reasonable person." She also alleges that the respondents violated her civil rights by depriving her of her constitutionally protected property interest in her

continued education and that they “intentionally, wilfully, wantonly, oppressively violated” her due process rights. She also advances claims for breach of contract and “misrepresentation.”

The facts pertinent to this determination are as follows:

The petitioner was a nursing student at the College. In order to graduate and qualify to take the Nursing National Council Licensure Examination (NCLEX-RN), a student at the College is required, *inter alia*, to obtain a grade of 75 in the following courses: Nursing 101 a/k/a Fundamentals of Nursing; Nursing 105 a/k/a Introduction to Medical/Surgical Nursing; Nursing 203 a/k/a Comprehensive Nursing Care I; and, Nursing 204 a/k/a Comprehensive Nursing Care II.

The Course Syllabus of Nursing 204 provides that in order to pass, a student must pass all written examinations and written assignments and more importantly here, perform all the clinical skills she has been taught in a correct and safe manner. In evaluating a student’s clinical performance, the professors who are all registered nurses themselves observe the students to evaluate whether they are able to properly apply the theory they have been taught in real life patient care. This requires students to assess the patient and his/her needs; to develop a diagnosis; to formulate goals which respond to their diagnosis; to develop interventions aimed at meeting those goals; and, to assess whether the care provided adequately fulfilled the goals. Needless to say, providing the care in a safe and appropriate manner is imperative.

Administering medications in a safe and appropriate manner which is first taught in Nursing 101 is required. That must be done in a sterile and uncontaminated manner.

The petitioner’s mistakes in Nursing 204 were first documented in her anecdotal record on February 15, 2011 by Professor Ferrucci as follows:

Student was not able to give medication for the first two weeks of clinical as she did not pass the math test. On the third (2/7/11) week student was assigned to administer medications. Student experienced difficulty with medication administration. Student was unable to administer heparin [an anti-clotting drug] via injection correctly as well as did not properly hang IVPB<sup>1</sup> to a primary line. Student also did not know before entering PT’s [patient’s] room if IVPB was compatible with the primary infusion. Student was told her medication administration was not at NUR 204 level. On 2/8/11

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<sup>1</sup>“IVPB” refers to an “Intravenous Piggyback.” “Intravenous” means the infusion of liquid substances directly into the patient’s vein. “Piggybacking” refers to a second infusion set into the same intravenous line.

student was to administer medications IV. Student experienced great difficulty with priming the IV line. Student also seems to experience difficulty with knowing how to handle important information.

Ex[ample], Student obtained a temp of 92.7 on one of her patients – yet did not retake temp (until told to do so by faculty) and did not check to see what the PT’s previous temp was. She also did not report findings to RN [Registered Nurse] or faculty. (Student was giving faculty report when faculty advised of temp.) Student is not performing at a NUR 204 level. Student needs to utilize the lab[oratory] and practice all previously learned and tested skills in order to be successful. Addendum: Student states frequently that “I have never done that on a PT before” or “This is the first time I am doing this.” Refer to above recommendation about the lab.

Professor Ferrucci recommended lab work to enable the petitioner to remediate and improve her clinical skills by practicing under the supervision of a professor or instructor. When she was presented with this anecdotal write-up, the petitioner refused to sign it and she went to see the Chairperson of the College’s Nursing Department, the defendant Dr. Rich, complaining that she was not presented with the write-up until one month after it was made and that the write-up was not accurate. She also complained that Professor Ferrucci did not like her and was not being fair in evaluating her. Dr. Rich advised the petitioner that it is/was the professor’s responsibility to evaluate the students and that Professor Ferrucci’s write-up would stand. He accused the petitioner of seeking to blame others for her actions and of not taking responsibility for them. He advised her to begin doing so and to pursue remediation as suggested. Dr. Rich’s synopsis of the meeting notes that Zanelli said she would not withdraw, that she intended to graduate and that “this” was not done.

Professor Gaffney’s anecdotal entry made on April 25, 2011 noted a serious error by the petitioner in administering medication as follows:

Student was administering . . . meds to 3 patients. She missed one of the meds due at 10PM. She included a med due at 10 AM in a cup due to be given at 10 PM. I told the student that any med error in the future would be grounds for clinical failure and that she is in clinical jeopardy. She was told she would be given another opportunity to give meds on the following day but that any error would mean clinical failure for the course.

When presented with this entry on April 26<sup>th</sup>, the petitioner again refused to sign it. An entry made that day in Zanelli's chart by Professor Gaffney reflects her refusal to sign and that she stated that she was going to graduate.

A third instance of clinical failure occurred on April 26<sup>th</sup> when petitioner's performance evidenced a failure to properly administer medication as well as a failure to employ sterile techniques. Professor Gaffney's anecdotal entry for April 26<sup>th</sup> reads:

Student was again administering . . . meds to 3 patients. She flushed the tubing of an IVPB she was to give with normal saline [solution], and when told to get another bag for another pt [patient], she said she had a large bag and could reuse it. I went to look at the bag. It was in the med room sink with no top on it – open to air. I explained to the student that this was a break in sterile technique. She said that she had second thoughts and did in fact get a new bag of NS [normal saline solution], however, she did this only after prompting by the instructor.

We then went into the PT [patient's] room to hang the IVPB. She was to flush the IVL [intravenous line] with a NS [normal saline solution] syringe. She expelled the air from the syringe but never looked to see if it was out as she proceeded to inject the PT [patient] with the air still in the syringe. The lock was on the tubing so the fluid leaked and went all over the pt's [patient's] arm.

The faculty removed the syringe, expelled the air & opened the lock so she could flush. Outside the PT's room I explained she must be sure all air is out of a syringe prior to injecting a PT as this is a breach of PT safety. She said she didn't see it and she also didn't see that the lock was on the tubing. She then proceeded to set the pump for the IVPB. She set the pump for 50 cc's to go over 1/2 hour by setting the rate at 30 instead of 100 cc's/hr. Then I said it is to go over one hour so she set it at 60 instead of 50 cc/hr. She programmed the rate on the pump incorrectly X2 [twice]. Calculation of the rate for an infusion is a N 105 [Nursing 105] Skill Violation of medical asepsis. By leaving the bag open which would cause contamination and thus make it unsafe for use, this is a break of a N 101 skill. Students are held accountable for all previously learned skills. By not seeing the air in the syringe and that the IV access was locked, she failed to assess the

patient prior to attempting to flush the IV line. The student was told she was not performing on a 204 level. She is at the end of this last rotation but is not yet ready clinically to graduate. Student placed the patient in physical & psychological jeopardy by her actions. Her performance on the prior day constituted 2 medication errors. Safe medication administration is a basic N 101 skill. This is a violation of the critical elements and of the 5 rights of med administration, potentially placing the PT in physical jeopardy. Based on her performance over the past two days, student has clinically failed the course. She did not perform at a safe and N 204 level [emphasis added].

When presented with this anecdotal write-up by Professors Ferrucci and DiDio on April 12<sup>th</sup>, the petitioner once again refused to sign. Based upon the conclusion that she was going to fail Nursing 204, Professors DiDio and Ferruci afforded petitioner an opportunity to withdraw from the class and re-take it instead of failing. The petitioner declined this offer.

On April 28, 2011, the petitioner met with Dr. Saunders at which time she complained about Professor Gaffney's anecdotal write-up and alleged age discrimination, too. A meeting was held that day between petitioner, Dr. Rich, Professor Gaffney, Executive Vice President of the College Dr. Kenneth Saunders, Dean of Nursing and Health Science Dr. Judith Bennett-Murray, and the College's Vice President for Affirmative Action Craig Wright. Dr. Saunders attests that the petitioner declared at that meeting that she "just want[ed] to graduate" and that she did not need to be a "nurse per se" but because she worked in a medical psychiatric ward, she wanted to graduate in order to be better prepared to serve her clients. She was advised that she could grieve her grade but that it was not likely that the investigation would be completed in time for her to re-enter Nursing 204, complete the class and graduate. Petitioner was advised that she could apply for readmission and take Nursing 204 in the Spring.

Associate Vice President Wright advised Dr. Saunders that of the 165 students who enrolled in the Nursing program with petitioner in 2009, 112 did graduate in May 2011. Sixteen of the enrolled students were 50-plus years of age: Twelve of those sixteen 50-plus students graduated; three withdrew from Nursing 203; and, one failed. Mr. Wright further advised Dr. Saunders that after thoroughly investigating petitioner's complaint of age discrimination, he found no evidence that anyone in the Nursing

Department intentionally or unintentionally discriminated against her.

Another meeting of the petitioner, Dr. Rich, Dr. Saunders, Dr. Bennett-Murray, and a faculty member of the nursing program and assistant to Dr. Rich, professor Mary Ellen LaSala, was held on May 2, 2011. The petitioner explained that she refused to sign the April 26<sup>th</sup> anecdotal record because it was inaccurate. She opined that she could not be fairly evaluated by Professors Gaffney, DiDio and/or Ferrucii. Dr. Rich reminded her that they were compelled to rely on faculty members' assessments and that she could interpose a rebuttal as well as withdraw from the course but she continued to refuse. Dr. Rich advised her that she could no longer attend classes or clinics that semester.

The College's Nursing Student handbook provides that there are Overriding Criteria for Measuring Student Achievement in the Clinical Area "which form the guidelines for the student's satisfactory performance in all patient care situations." The handbook provides that a "[v]iolation of any of the overriding criteria will jeopardize the student's standing in the course and may result in clinical failure." It specifically provides that "[a] single violation of an overrider or a critical element may be of such a serious nature that a student will immediately fail clinically." The criteria are set forth as including, inter alia, maintaining the patient's physical safety and not placing the patient in physical jeopardy of the danger of bodily harm and maintaining the principles of asepsis, i.e., maintaining a germ-free condition which requires a student to utilize appropriate hand hygiene measures, to utilize standard precautions, to protect patients from contamination, to keep contaminated materials out of clean areas and to establish and maintain a sterile field. The student is required to follow the critical skills of maintaining medical/surgical asepsis as well as physical safety. The handbook also requires the nursing student to perform procedures correctly in accordance with the following critical elements: To remain accountable for all skills mastered in previous semesters as well as those acquired in the current semester and to pass all skills before taking the final exam; to avoid an unsafe clinical performance which may result in an unsatisfactory rating for that day as well as avoiding a pattern of unsatisfactory clinical performances which could result in a failure for the course; and, to successfully complete all course requirements absent which a passing grade will not issue.

"While 'the determinations of educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review,' such 'review 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,' a standard that has 'rarely been satisfied in the context of challenges to academic

determinations because the courts have repeatedly refused to become involved in the pedagogical evaluation of academic performance.” Ochei v Helene Fuld Coll.of Nursing of North General Hosp., 22 AD3d 222 (1<sup>st</sup> Dept 2005), lv den., 6 NY3d 714 (2006), quoting Matter of Susan M. v New York Law School, 76 NY2d 241, 246 (1990), citing Moukarzel v Montefiore Medical Center, 235 AD2d 239, 239-240 (1<sup>st</sup> Dept 1997); see also, Maas v Cornell Univ., 94 NY2d 87, 92 (1999). “Courts have repeatedly declined to become involved in the evaluation of academic performance, reflecting ‘the policy that the administrative decisions of educational institutions involve the exercise of highly specialized professional judgment [that] these institutions are, for the most part, better suited to make.’ ” Keles v Trustees of Columbia Univ. in City of New York, 74 AD3d 435 (1<sup>st</sup> Dept. 2010), lv den., 16 NY3d 890 (2011), cert den., 132 S.Ct. 255 (2011). “In cases involving academic dismissal, educational institutions have the right to receive summary judgment unless there is evidence from which a jury could conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance.” Clements v Nassau County, 835 F2d 100, 1004, citing Ikpeazu v University of Nebraska, 775 F2d 250, 253 (8<sup>th</sup> Cir. 1985). In fact, “the legal standard in challenging an academic [matter] is necessarily a higher one than for disciplinary dismissals because . . . the determination is more subjective and evaluative than the factual questions presented in most disciplinary decisions.” Clements v Nassau County, supra, at p. 1004; University of Missouri v Horowitz, 435 U.S. 78, 90 (1978). Indeed, the United States Supreme Court has cautioned that courts should show great respect for teacher’s professional judgment when reviewing academic decisions, and should not overturn them “[u]nless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.” Clements v Nassau County, supra, at p. 1005, quoting Regents of the University of Michigan v Ewing, 474 U.S. 214, 225 (1985)

“The judicial reluctance to intervene in controversies involving academic standards is founded upon sound considerations of public policy. When an educational institution issues a diploma to one of its students, it is, in effect certifying to society that the student possesses all of the knowledge and skills that are required by his chosen discipline. In order for society to be able to have complete confidence in the credentials dispensed by academic institutions, however, 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. Indeed,



the value of these credentials from the point of view of society would be seriously undermined if the courts were to abandon their long-standing practice of restraint in this area and instead begin to utilize traditional equitable estoppel principles as a basis for requiring institutions to confer diplomas upon those who have been deemed to be unqualified.” Matter of Olsson Board of Higher Educ. of City of New York, 49 NY2d 408, 413 (1980).

This court finds that the College’s treatment of and determinations regarding the petitioner’s academic performance were not arbitrary and capricious. Substantive fact based evaluations evidencing clinical incompetence logically lead to the conclusion that the petitioner was not passing Nursing 204. For this court to conclude otherwise would “inappropriately involve [it] in the very core of academic and educational decision making.” Susan M. v New York Law School, *supra*, at p. 247. Indeed, there is the clear possibility that a public danger would be created were this court to intervene and usurp the College’s expertise and declare the petitioner qualified to graduate and concomitantly eligible to take the nursing examination. In fact, the College clearly acted in good faith by affording the petitioner viable options which would have enabled her to eventually obtain her degree. Olsson v Board of Higher Educ. of City of New York, *supra*, at p. 251-252.

Petitioner’s petition for a judgment annulling the College’s academic determinations pursuant to Article 78 of the CPLR is **denied**.

Petitioner’s due process claim is also **dismissed**. There is no right to hearing here. Board of Curators of University of Missouri v Horowitz, *supra* at p. 88-90; Moukarzel v Montefiore Medical Center, *supra*. The petitioner was afforded numerous adequate opportunities to participate in the College’s review process and she was advised of her academic deficiencies and given an opportunity to rectify them before she was denied her diploma. Illickal v Roman, 236 AD2d 247 (1<sup>st</sup> Dept. 1997), *lv den.*, 90 NY2d 802 (1997), *rearg den.*, 90 NY2d 937 (1997); *see also*, Engel v Pace University, 2011 WL 6008337 (Supreme Court New York County 2011). The petitioner’s allegation that the process employed deprived her of her liberty interest fails as well, as there is no evidence that the anecdotal entries were published or otherwise disseminated. Clements v Nassau County, *supra*, at p. 1006, citing Cleveland Bd. of Educ. v Loudermill, 470 U.S. 532, 547, n.13 (1985).

Petitioner’s claim premised upon denial of access to her educational records also fails. A student’s access to academic records is governed by the Family Educational and Privacy Act (“FERPA”), not the New York State Freedom of Information Law (“FOIL”).

20 U.S.C. § 1232g. Furthermore, not only did the College comply with the requirements of FERPA by mailing the petitioner a copy of her record within 45 days of her request, there is no private right of action to enforce FERPA under 42 U.S.C. § 1983. Taylor v Vermont Dept. of Educ., 313 F3d 768 (2<sup>nd</sup> Cir. 2000), citing Gonzaga University v Doe, 536 U.S. 273 (1997); see also, Papay v Haselhuhn, 2010 WL 4140430 (S.D.N.Y. 2010).

While a student may sue an educational institution for breach of contract, his/her claim must be predicated upon a failure by the school to act in good faith and to follow and adhere to its own terms and policies in denying the student his degree. Olsson v Board of Ed., *supra*, at p. 415, citing Matter of Carr v St. John's Univ., N.Y., 17 AD2d 632, 633 (2<sup>nd</sup> Dept 1962), *affd.*, 12 NY2d 802 (1962). In light of its having afforded the petitioner a further opportunity to ultimately succeed and in fact encouraging her to take advantage of it, the College's good faith here is beyond question. Matter of Olsson v Board of Higher Educ. of City of New York, *supra*; see also, Matter of Levy, 88 AD2d 915 (2<sup>nd</sup> Dept 1982), *affd.*, 57 NY2d 925 (1982). And, the College has demonstrated beyond question that the petitioner has not fulfilled the requirements for graduating and that it accordingly has not violated its own policies in denying her her degree.


Finally, the petitioner's claim for punitive damages fails as well. Not only have all of the claims on which that claim is predicated failed, the College's wrongdoing, if any, was not of the nature and magnitude warranting the imposition of punitive damages. Rocanova v Equitable Life Assur. Socy. of U.S., 83 NY2d 603 (1994); Walker v Sheldon, 10 NY2d 401 (1961).

In conclusion, it is hereby declared that the College's determination with respect to the petitioner's grade in Nursing 204 and her ineligibility to graduate were not arbitrary and capricious; that the College did not violate or deprive the petitioner of her rights to due process and/or liberty and property or her rights to her academic records; and, that the College did not breach its agreement with the petitioner. The petition is accordingly **denied** in its entirety and this proceeding is **dismissed**.

This constitutes the Order of the Court.

Dated:

April 30, 2012

  
J.S.C.

**ENTERED**

MAY 08 2012

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**