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

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In the matter of the Complaint of STEVEN REISNER,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. 115400-2010

- against -

LOUIS CATONE, Director of the New York Office of Professional Discipline, New York State Department of Education; THE OFFICE OF PROFESSIONAL DISCIPLINE of the New York State Department of Education; and THE NEW YORK STATE DEPARTMENT OF EDUCATION,

Respondents.

---x

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENTS' CROSS-MOTION TO DISMISS THE VERIFIED PETITION

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Introduction

This reply memorandum of law is submitted in further support of the respondents' cross-motion to dismiss the Verified Petition ("Petition"). As discussed herein, petitioner fails to demonstrate that he has standing or a cause of action.

ARGUMENT

POINT I

PETITIONER DOES NOT HAVE STANDING TO SUE

1. The Respondents' Refusal To Investigate Petitioner's Complaint Against Dr. Leso Did Not Constitute An "Injury In Fact"

Petitioner's Memorandum of Law in Opposition to Respondents' Cross-

Motion to Dismiss the Verified Petition ("Pet. Opp.") (at 15-23) misses the essential point in this case - - petitioner did not suffer any cognizable harm, either from Dr. Leso's conduct at Guantanamo Bay or from the respondents' refusal to investigate such conduct. Without actual harm to his property, his ability to practice his profession or his right to do anything else for that matter, petitioner lacks the "injury-in-fact" necessary to confer standing to sue. Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 772 (1991); New York State Ass'n of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211-12 (2004) ("the critical element of in-fact injury" requires that petitioner "will actually be harmed by the challenged administrative action").

Further, any injury alleged by petitioner is indistinguishable from harm suffered by the public as a whole, and thus lacks the particularity necessary to confer standing. Indeed, while petitioner claims that his "statutory right" to an investigation was violated (Pet. Opp. at 16-18), Education Law § 6510 allows "any person" to submit a complaint to the Education Department about any licensed professional, and petitioner plainly seeks to vindicate what he perceives as a public interest, not his own (see Pet. Opp. at 1-2). The Court of Appeals, however, has made clear that in order for a litigant to have standing he must have suffered an injury specific to him, "distinct from that of the general public." Transactive Corp. v. NYS Dept. of Soc. Svcs., 92 N.Y.2d 579, 587 (1998) (citing Society of Plastics Indus., 77 N.Y.2d at 771-74) (see Memorandum of Law in Support of the Respondents' Cross-Motion to Dismiss the Verified Petition ["Resp. Mem."] at 11-12).

Petitioner fails to meaningfully distinguish cases which hold that individuals lack standing to bring lawsuits that would compel government investigations of other individuals. See, e.g., Sassower v. Commission on Judicial Conduct of State, 289 A.D.2d 119 (1st Dept. 2001); Matter of Morrow v. Cahill, 278 A.D.2d 123 (1st Dept. 2000); Matter of Wade v. Suffolk County Med. Soc'y, 88 A.D.2d 602 (2d Dept. 1982) (see Resp. Mem. at 13-14). Although petitioner asserts that such cases do not "speak" to the statute at bar (Pet. Opp. at 17), he misses the forest for the trees. They plainly state that an administrative body's decision not to proceed against a licensee does not present a "direct and harmful effect" upon a complainant that would confer standing. Morrow, 278 A.D.2d at 123.

Petitioner's reliance upon Weisshaus v. New York, 2009 WL 2579215 at *4 (S.D.N.Y. Aug. 20, 2009) is misplaced (Pet. Opp. at 16-17), inasmuch as that case held that even an individual who filed a misconduct complaint against her own attorney could not claim an injury "fairly traceable" to the government's decision not to investigate the complaint. The court further held that a law authorizing a tribunal to bring disciplinary proceedings (Judiciary Law § 90[2]) "does not bestow any rights on complainants and thus cannot serve as the basis for a cognizable injury-in-fact" (id). Similarly here, no provision in Education Law § 6510 grants a complainant the right to seek judicial relief, much less sue the Education Department to conduct an investigation of a psychologist who did not treat the complainant (see Resp. Mem. at 18). Cf. Society of Plastics Indus., 77 N.Y.2d at 770 ("Had the Legislature intended that every person or citizen have the right to sue . . .

[i]t could easily have so provided; it did not.").

2. Petitioner Does Not Have "Public Interest Standing"

Petitioner's further contention that he has standing because of "the public interest" in this matter or because denying standing "would erect an impenetrable barrier to judicial scrutiny" is equally unavailing (Pet. Opp. at 18-22).

The cases petitioner relies on for his "public interest standing" argument (id. at 18-19) are not controlling in light of more recent Court of Appeals and First Department rulings which clearly establish that standing requires a petitioner to allege an injury different from that of the general public. See, e.g., Transactive Corp., 92 N.Y.2d at 587; Society of Plastics Indus., 77 N.Y.2d at 771-74; see also McAllan v. New York State Dep't of Health, 60 A.D.3d 464 (1st Dept. 2009) (denying standing where petitioner's injury was shared with many New York residents and therefore not "different in kind or degree from that suffered by the public at large").

Cases like Matter of Hebel v. West, 25 A.D.3d 172, 176 (3d Dept. 2005), only illustrate that petitioner has not, in any event, alleged a matter warranting an act of extraordinary judicial intervention. Hebel involved an issue of "great public interest" and "statewide concern" because an official was taking action that could "effectively amend the marriage laws of this state" without legislative or judicial imprimatur (id). Likewise, Wilkins v. Perales, 128 Misc.2d 265, 267 (Sup. Ct. N.Y. Cty.), aff'd, 119 A.D.2d 1018 (1st Dept. 1986), involved regulations that "would have a dramatic and immediate impact not only on thousands of homeless but on the city generally." And in Morgenthau v. Cooke, 85 A.D.2d 463, 464-65 (1st Dept. 1982)

(Pet. Opp. at 19 n. 2), the District Attorney was found to have a "personal, direct and substantial" interest in opposing a plan that would assign inexperienced judges to hear numerous felony cases prosecuted in Supreme Court, New York County.

Here, in comparison, petitioner challenges the respondents' refusal to investigate a single licensee's actions while in the military service eight years ago, almost two thousand miles from New York State, after exhaustive federal investigations found no fault with him. Petitioner utterly fails to show how Dr. Leso's alleged conduct now implicates a matter of great public concern for New York State. Although petitioner claims that the Education Department's decision "put[s] the public at the mercy of health professionals who may have used their skills in supporting acts of torture and inhumane treatment" (Pet. Opp. at 20), he does not allege that any other New York professionals engaged in such acts, much less explain how New Yorkers were subjected to or would be at risk of such conduct. Even if "public interest standing" were consistent with Court of Appeals law, invoking it would make no sense in this case. Cf. New York State Ass'n of Nurse Anesthetists, 2 N.Y.3d at 214 (mere speculation cannot supply an injury-in-fact).

As a final matter, petitioner obviously cannot rely on taxpayer standing cases like Boryszewski v. Brydges, 37 N.Y.2d 361, 364 (1975) (Pet. Opp. at 20), because he is not challenging legislative action. Transactive, 92 N.Y.2d at 589. Moreover, petitioner's contention that someone must have standing to contest the respondents' determination ignores the reality that many governmental decisions, such as declining to prosecute an individual or to pass a proposed law, are not judicially

reviewable. See Society of Plastics Indus., 77 N.Y.2d at 769 ("Courts surely do provide a forum for airing issues of vital public concern, but so do public hearings and publicly elected legislatures").

Further, petitioner's own cited cases show that "the manner by which respondents enforce Education Law § 6510" is not "insulated from judicial scrutiny" (Pet. Opp. at 22), but reviewed upon final misconduct determinations (see, e.g., Block v. Ambach, 73 N.Y.2d 323 [1989]; Matter of Stein v. Sobol, 162 A.D.2d 786 [3d Dept. 1990]), and unlawful or tortious conduct by a licensed professional may be subject to criminal and civil judicial remedies. See, e.g., People v. Hastings, 74 A.D.3d 1497 (3d Dept. 2010) (affirming criminal conviction of psychologist for sexual abuse of a patient).[1] And as petitioner notes, a psychologist's ethical conduct is also scrutinized by the American Psychological Association (Pet. Opp. at 21-22).

POINT II

THE PETITION FAILS TO STATE A CAUSE OF ACTION

1. The Respondents' Determination Whether A Complaint Alleges Professional Misconduct Involves Judgment And Discretion

Petitioner also lacks a viable cause of action for mandamus. Petitioner concedes, as he must, that "[r]espondents are required to make some threshold determination regarding whether a complaint they receive involves professional misconduct" (Pet. Opp. at 9). However, he mistakenly claims that this decision does not involve "an exercise of reasoned judgment." NYCLU v. State, 4 N.Y.3d 175, 183-84 (2005); Tango v. Tulevech, 61 N.Y.2d 34, 41 (1983). The assessment whether a

1 A criminal conviction may also constitute professional misconduct, under Educ. Law § 6509(5).

complaint alleges a valid claim is hardly a "non-discretionary, ministerial" act. Cf. Dyno v. Rose, 260 A.D.2d 694, 698 (3d Dept. 1999) (dismissing mandamus petition seeking to compel entry of a default judgment because the determination of a complaint's facial validity involves judgment and discretion).

The cases petitioner relies on (Pet. Opp. at 5-6) are not to the contrary. Indeed, Matter of Grzyb v. Constantine, 182 A.D.2d 942, 944 (3d Dept. 1992), dismissed a petition seeking to compel the state police to continue a criminal investigation because the "extraordinary remedy [of mandamus] will lie only to compel the performance of a purely ministerial act." Similarly, Klostermann v. Cuomo, 61 N.Y.2d 525, 539 (1984), compared a town council's ministerial duty "to designate up to four newspapers having the largest circulation for the purpose of receiving city advertising," to "the decision to prosecute a suit [which] is a matter left to the public officer's judgment and, therefore, cannot be compelled." The exercise of judgment in deciding whether to conduct an investigation is far more analogous to deciding whether to bring a criminal prosecution than to designate newspapers for advertising. Nor is Grant v. Cuomo, 130 A.D.2d 154, 157 (1st Dept.), aff'd, 73 N.Y.2d 820 (1988), comparable to the case at bar, as it dealt with the city's systemic failure to commence child abuse investigations within a set 24-hour period.

Petitioner also fails to distinguish cases holding that a decision to undertake an investigation is inherently discretionary and therefore not subject to mandamus (see Resp. Mem. at 22-24). Such cases were not decided on narrow statutory grounds, as petitioner contends, but on the broader principle that "the decision not

to conduct an investigation was a matter of discretion." Iocovello v. City of New York, 272 A.D.2d 201 (1st Dept. 2000); see also Sassower, 289 A.D.2d at 119) (respondent's "determination whether to investigate a complaint involves an exercise of discretion and accordingly is not amenable to mandamus") (citing Mantell v. NYS Commission on Judicial Conduct, 277 A.D.2d 96 [1st Dept. 2000]).

Petitioner's view, if adopted, would compel the respondents to open an investigation of every complaint by any person against any licensed professional, with no judgment or discretion to make an initial determination on whether it "alleges conduct constituting professional misconduct" under Education § 6510(1)(b). Such a result would be contrary to the statutory language, and prevailing law, and counter to the public interest in ensuring that the respondents allocate their resources in an efficient and rational manner.

2. **Petitioner Has No "Clear Legal Right" To The Relief He Requests**

Petitioner also cannot make the necessary showing that his alleged legal right to compel an investigation is "so clear as to admit of no doubt or controversy." Matter of Coastal Oil New York, Inc. v. Newton, 231 A.D.2d 55, 57 (1st Dept. 1997); Matter of Petersen v. Village of Saltaire, 77 A.D.3d 954, 956 (2d Dept. 2010).

Petitioner conspicuously ignores the fact that the only provision in Education Law § 6510 authorizing a judicial proceeding, subsection 5, is inapplicable here (see Resp. Mem. at 18). Under standard principles of statutory construction, the specific provision for a remedy in a certain circumstance implies its unavailability in others: "where a law expressly describes a particular act, thing or person to which it shall

apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded." Petersen, 77 A.D.3d at 956 (citing McKinney's Statutes, § 240). Despite petitioner's mantra-like assertion that he has a "clear legal right" to the relief he seeks, he fails to cite any case granting it.

Equally meritless is petitioner's claim that the acts alleged by his complaint fell "squarely within the Respondents' oversight authority" (Pet. Opp. at 9).

Contrary to petitioner's argument, determining whether a complaint alleges professional misconduct in the practice of psychology does not involve "pure statutory reading and analysis" (Pet. Opp. at 8). The respondents plainly were called upon to use their expertise and familiarity in regulating the professions when determining whether Dr. Leso's alleged assistance in the interrogation of Guantanamo detainees came with New York's definition of the practice of psychology. Where, as here, statutory interpretation implicates "knowledge and understanding of underlying operational practices . . . the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute." Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980); cf., Matter of Fox v. Board of Regents, 140 A.D.2d 771, 772-73 (3d Dept. 1988).

Further, petitioner utterly fails to refute the respondents' reasonable interpretation of Education Law § 7601-a.

A plain reading of the statute shows that the practice of psychology concerns therapeutic, healing activities directed at patients, suggesting nothing remotely like the "acts of torture and inhumane treatment" that petitioner alleges took place

during the interrogation of suspected terrorists (Pet. Opp. at 20; Petition, ¶¶ 16-20).[2] For example, the purpose of the practice of psychology is described as "preventing or eliminating symptomatic, maladaptive or undesired behavior; enhancing interpersonal relationships, personal, group or organizational effectiveness and work and/or life adjustment; and improving behavioral health and/or mental health" (Educ. Law § 7601-a[1]). Moreover, the activities specified include "psychological (including neuropsychological) testing and counseling; psychoanalysis; psychotherapy; the diagnosis and treatment of mental, nervous, emotional, cognitive or behavioral disorders, disabilities, ailments or illnesses, alcoholism, substance abuse, disorders of habit or conduct, the psychological aspects of physical illness, accident, injury or disability [and] psychological aspects of learning (including learning disorders)" (id). The statute further provides that "diagnosis and treatment" means "the appropriate psychological diagnosis and the ordering or providing of treatment according to need [such as] counseling, psychotherapy, marital or family therapy, psychoanalysis, and other psychological interventions" (id., § 7601-a[2]).

The purpose of Education Law § 7601-a, as shown by its legislative history, is to "conform the law to current practice by taking into account what psychologists actually do in their everyday work" (Mem. in Supp. of S. 7727, McKinney's 2002 Session Laws at 2132). Thus, as observed in People v. R.R., 12 Misc.3d 161, 171

[2] Petitioner's latest assertion that Dr. Leso's role included "determining whether detainees should be given a mental health referral" (Pet. Opp. at 11) was not made in the Petition or in petitioner's letters to the Education Department, and would be contrary to his other claims in any event.

(Sup. Ct. N.Y. Cty. 2005), the defined scope of practice is "wholly clinical in nature." Instead of reading the law in light of its clear purpose, however, petitioner isolates terms like "undesired behavior" and "psychological interventions" and gives them a meaning contrary to the rest of the statute and applies it to a setting that obviously was not clinical (Pet. Opp. at 11). Although petitioner cites various rules of statutory construction, he ignores the relevant rule which explains why his interpretation of the law is wrong:

> It is a fundamental rule of statutory construction that a statute or legislative act is to be construed as a whole, and that all parts of an act are to be read and construed together to determine the legislative intent . . . Statutory words must be read in their context, and words, phrases, and sentences of a statutory section should be interpreted with reference to the scheme of the entire section . . . [P]articular provisions, therefore, should not be torn from their places and, so isolated, be given a special meaning at variance with the general purpose and spirit of the enactment.

Comment to McKinney's Statutes, § 97 ("All parts to be construed together").

In view of the curative purposes reflected throughout Education Law § 7601-a, Dr. Leso's service in the United States military at Guantanamo Bay could not rationally be deemed to be the "practice of psychology" on patients under New York law. Indeed, the dictionary definition of "patient" cited by petitioner contradicts this analysis. The detainees were not "individual[s] awaiting or under medical care and treatment or any of various personal services," when the purpose of their interrogation clearly was not to provide them medical care or services but to obtain information from them in order to prevent more terrorist attacks (Pet. Opp. at 13).

Petitioner also misreads the cases that he claims show that disciplinary

action can be taken for patient abuse absent a patient-therapist relationship (Pet. Opp. at 13-14). In Block, a nurse was found guilty of professional misconduct for engaging in an "improper sexual relationship with a 16 year old, with suicidal tendencies, while she was a patient." 73 N.Y.2d at 335 (emphasis added). Similarly, in Stein, a psychologist was found guilty of unprofessional conduct for verbally abusing and threatening a female patient and her parents during the course of family therapy sessions. 162 A.D.2d at 786-87 (emphasis added). The conduct alleged by petitioner does not equate with those abuses of the patient-therapist relationship. Much less could petitioner claim that his right to compel an investigation based on it is beyond any "doubt or controversy." Coastal Oil New York, 231 A.D.2d at 57; see also Petersen, 77 A.D.3d at 956.

As a final matter, petitioner's assertion that his case is saved from dismissal because the respondents' determination was "arbitrary and capricious and affected by an error of law" is easily disposed of (Pet. Opp. at 14-15). Notably, petitioner did not cite CPLR § 7803(3) in his moving papers - - his initial memorandum of law (at 2-4) described the relief sought as "an order of mandamus" under CPLR § 7803(1).

In any event, the respondents' determination was in no way arbitrary and capricious or legally erroneous. As shown above and as previously stated (Resp. Mem. at 24-25), the respondents rationally found that Dr. Leso's alleged conduct at Guantanamo Bay did not constitute the practice of psychology or professional misconduct as understood by New York State, or within any known precedent. It therefore would not have made sense to commit state resources to an investigation.

While petitioner disputes the respondents' determination, the salient point is that it was not arbitrary but was based on reasonable grounds. Consequently, petitioner has no cause of action under CPLR § 7803(3). Howard v. Wyman, 28 N.Y.2d 434, 438 (1971) ("[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions [of] the administrative body") (quoting Rochester Tel. Corp. v. U.S., 307 U.S. 125, 146 [1939]); Matter of Karasik v. Board of Regents, 130 A.D.2d 923, 924-25 (3d Dept. 1987) (affirming agency's decision that rationally applied a statute within its enforcement authority).

CONCLUSION

For all of the foregoing reasons, the respondents' motion should be granted and the Petition and this proceeding should be dismissed.

Dated: New York, New York
February 8, 2011

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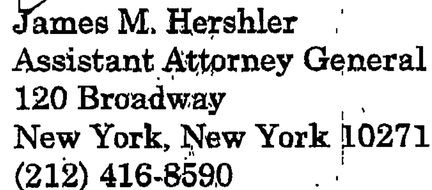

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