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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: A. Engoron
HON. ARTHUR F. ENGORON Justice

PART 52

Index Number : 111900/2011
STRAUSS, KAYLA F.
vs.
CITY UNIVERSITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 1/4/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 6, were read on this motion to/for Article 78 Relief

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits See Decision + Order No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the enclosed decision and order

FILED
APR 30 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/25/12

A
HON. ARTHUR F. ENGORON, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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In the Matter of the Application of
KAYLA F. STRAUSS,

Petitioner,

For a Judgment Under Article 78 of the CPLR,

- against -

THE CITY UNIVERSITY OF NEW YORK, THE BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK, and THE STATE OF NEW YORK,

Respondents.

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Index Number: 111900/11

Oral Argument Date: 1/4/12

Decision and Order

Arthur F. Engoron, Judge

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 6, were used in this Article 78 proceeding challenging one aspect of the tuition policies of The City University of New York:

	Papers Numbered:
Notice of Petition	1
Petition	2
Answer	3
Affirmation of Katherine Raymond in Opposition to the Petition	4
Affirmation of Steven Banks in Opposition to the Petition	5
Reply in Support of Petition	6

Upon the foregoing papers the petition is granted in part and denied in part, as particularized below.

Background

For purposes of the petition, the parties do not materially dispute the underlying facts.

Petitioner Kayla Strauss was born in or about 1992 in New York City. Eight years later her family moved to Florida, where her parents are still domiciled (this Court will use the linguistic convention that a person can have more than one "residence" but only one "domicile"; see generally, Bryan Garner, A Dictionary of Modern English Usage). In or about the fall of 2009 petitioner applied to various colleges, all of them in New York State. Several New York City

schools accepted her, and she decided to attend John Jay College of Criminal Justice, a constituent college of respondent The City University of the City of New York ("CUNY"). In June 2010 she graduated from high school and moved herself, her legal and administrative identity (including driver's license, voter registration and tax locus), her funds, and her personal property to New York City. She says that she intends to live here permanently. Since commencing college she has resided alone, rent-free, in an apartment her parents (or just her father) own on Staten Island. Her parents do not list her as a dependent on their tax returns. She is currently employed part-time in Manhattan.

In September 2010, she began studying full-time at John Jay, paying the higher tuition that CUNY charges out-of-state domiciliaries (infra). In or about July 2011 petitioner asked John Jay to deem her an in-state student for tuition purposes, commencing that fall's academic semester. John Jay denied her request, and CUNY's administration denied her subsequent appeal (Moving Exh. 1; Opp. Exh. D). CUNY'S determination (and presumably John Jay's) was based on the undisputed facts that she was not the child of in-state parents, not 24-years-old, and not financially independent, which, pursuant to CUNY's tuition policies (infra), precluded her from being considered a New York domiciliary.

Petitioner then commenced the instant CPLR Article 78 proceeding, seeking the following relief:

> (1) a declaration (a) that CUNY's tuition policy is arbitrary, capricious, and unreasonable, (b) that it violates (i) the equal protection and due process clauses of the state and federal constitution, (ii) the right-to-travel provisions of the federal constitution, and (iii) New York State Education Law § 355, (c) that it is null and void, and (d) that petitioner be deemed an emancipated and domiciled citizen of the State of New York;
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> (2) a refund of tuition money paid;
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> (3) monetary damages;
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> (4) a revision of the tuition policy;
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> (5) an injunction against further imposition of the tuition policy;
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> (6) costs and disbursements, including attorneys fees; and
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> (7) class-action certification.

Respondents' answer states that their actions fully comply "with the law and in no way are unconstitutional, erroneous, improper, arbitrary or capricious."

#111900/11

Pg 2

CUNY Tuition Policies

CUNY is governed by its Board of Trustees. Education Law § 6204(1). The Board is empowered "to determine in its discretion whether tuition shall be charged and to regulate tuition charges" and may charge "differential tuition rates based on state residency." Education Law § 6206(7)(a). CUNY currently charges in-state students $5,130 per year and out-of-state students $13,800 per year.

CUNY has extensively codified its tuition policies, particularly the requirements for in-state tuition status. See Pet. Exh. 2; Raymond Opp. Exh. A § II(A). According to Raymond Opp. Exh. A, pp. 5-6:

> In order to qualify for the University resident tuition rate . . . , a student must first meet the University's qualifications for residency. * * *
>
> In most cases, in order to qualify as a resident for tuition purposes, a student must have continuously resided in New York State for a qualifying period of 12 months. * * * In addition, a student must show that he or she has established New York as his/her domicile, which means that the student has a bona fide intention of living in New York permanently.
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> * * *
>
> Generally a dependent student's state of residency is considered the same as that of his or her custodial parent(s) . . . . * * *
>
> A student claiming independence from his/her parent(s) . . . residing out-of-state must present evidence of both financial independence and a legal residence in this State in order to be designated a New York resident for tuition purposes. * * * Factors taken into account in determining financial independence include, but are not limited to: whether the student is taken as a dependent on parents' . . . federal and state income tax returns; whether the student is employed and the amount the student earned relative to expenses; the extent of financial support received by the student from parents or guardians; and other sources of student income.
>
> Students aged 24 and older are considered independent and do not have to document financial independence from their parents.

In-state status is also granted to several miscellaneous categories of students (including members of the armed forces and their families and certain immigrants), none of which apply to petitioner.

Discussion

The Supreme Court Has Spoken

Any person involved or interested in American "higher education" knows that in-state, preferential tuition rates are a ubiquitous feature of the academic landscape. In Vlandis v

Kline, 412 US 441, 452-53 (1973), the United States Supreme Court recognized and validated this practice: "a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis." Vlandis dictates, however, that a school must afford a student "due process" before it denies a request for in-state tuition. That requirement governs the instant case (which apparently is one of first impression in New York). See generally, 56 ALR 3d 641, Validity and Application of Provisions Governing Determination of Residency for Purpose of Fixing Fee Differential for Out-of-State Students in Public Colleges (1974).

Vlandis addressed Connecticut's rules governing entitlement to in-state tuition. Pursuant thereto, an unmarried person who lived out-of-state at any time during the one year prior to applying for admission, or a married student living with his or her spouse living out-of-state at the time of applying for admission, were irrebuttably and permanently (i.e., during the student's entire enrollment) presumed to be out-of-state domiciliaries.

Justice Potter Stewart began his constitutional exegesis by noting that "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." Id. at 446. Indeed, by 1932 the Court had "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." Heiner v Donnan, 285 US 312, 329 (1932), quoted in Vlandis at 446. Justice Stewart also discussed, id. at 447, Stanley v Illinois, 405 US 645, 654 (1972), in which the Court invalidated an irrebuttable statutory presumption that unmarried fathers were not qualified to raise their children, because although "most unmarried fathers are unsuitable and neglectful parents . . . all unmarried fathers are not in this category; some are wholly suited to have custody of their children." The Court required Illinois to provide hearings to determine paternal fitness, even though "it is more convenient to presume rather than to prove." 405 US at 658. Closer on point, in Carrington v Rash, 380 US 89 (1965), the Court invalidated an irrebuttable presumption of non-domiciliary status that Texas imposed upon current members of the Armed Forces who enlisted out-of-state and moved in-state. See Vlandis at 447, fn. 4.

Having established the constitutional framework, Justice Stewart examined the facts before the Court:

> It may be that most applicants to Connecticut's university system who apply from outside the State . . . have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category. Indeed, in the present case, both appellees possess many of the indicia of Connecticut residency, such as year-round Connecticut homes, Connecticut drivers' licenses, car registrations, voter registrations, etc.

Justice Stewart then demolished Connecticut's proffered justifications, noting as to the first:

tt 111900/11

> basing the bona fides of residency solely on where a student lived when he applied for admission to the University is using a criterion wholly unrelated to [Connecticut's interest]. [A] student may be a bona fide resident of Connecticut even though he applied to the University from out of State. Thus, Connecticut's conclusive presumption of non-residence . . . ensures that certain of its bona fide residents . . . do not receive [preferential tuition], and can never do so while they remain students.

Id. at 448-49. Connecticut also pointed out that its irrebuttable presumption "eliminat[ed] the need for an individual determination of the bona fides of a person who lived out-of-state at the time of his application," which would be "not only an expensive administrative burden, but would also be very difficult to make, since it is hard to evaluate when bona fide residency exists." Furthermore, the presumption "prevent[ed] out-of-state students from claiming a Connecticut residence merely to obtain the lower rates." Justice Stewart's forceful rejoinder was the well-known statement in Stanley, supra, 405 US at 656, that "the Constitution recognizes higher values than speed and efficiency." He continued,

> The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practical means of establishing the pertinent facts on which the State's objective is premised. In the situation before us, reasonable alternative means for determining bona fide residence are available. Indeed one such method has already been adopted by Connecticut; after [the law at issue] was invalidated by the District Court, the State established reasonable criteria for evaluating bona fide residence . . . . [T]hese criteria, while perhaps more burdensome to apply than an irrebuttable presumption, are certainly sufficient to prevent abuse of the lower, in-state rates by students who come to Connecticut solely to obtain an education.

Justice Stewart summed up as follows:

> since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true, in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates. Since [the Connecticut law] precluded the appellees from ever rebutting the presumption that they were nonresidents of Connecticut, that statute operated to deprive them of a significant amount of their money without due process of law.
>
> * * *

> We hold only that a permanent irrebuttable presumption of nonresidence . . . is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents. The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates. Indeed, as stated above, such criteria exist; and since [the subject statute] was invalidated, Connecticut, through an official opinion of its Attorney General, has adopted one such reasonable standard for determining the residential status of a student. The Attorney General's opinion states:
>
> "In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc."

Id. at 452-454.

Application to the Instant Case

In the instant case, this Court interprets CUNY's written fee policies (supra), and CUNY's position in this litigation, to impose an irrebuttable presumption that a student under 24-years old, whose parents live out-of-state, and who is not financially independent, is not a New York domiciliary, even if he or she has lived here for a year. See Raymond Aff. ¶ 8 ("if a student is dependent on parents . . . who reside outside New York, the student is considered a domiciliary of that state"). This Court finds that under Vlandis, that irrebuttable presumption is an unconstitutional deprivation of due process.

Respondents claim (Raymond Aff. ¶ 9) that "CUNY's policy reasonably concludes that students who are dependent on their out-of-state parents are non-residents of New York State who lack the 'bona fide intention of living in New York permanently.'" Obviously, this is true of many, maybe even most such students; but presumably not all such students (see Vlandis, supra, "not necessarily or universally true"). At least as far back as the early 19th century our country has recognized the possibility of creating a new identity in a different location: "Moreover, Great Britain held to the old rule – 'Once an Englishman, always an Englishman' – a doctrine rejected by the United States in favor of the principle that a man could choose the nation to which he would give allegiance." Charles A. and Mary R. Beard, History of the United States, Kindle Ed. at location 3071 of 10443 (New York, 1921).

#111900/14

The preference against irrebuttable presumptions has its limits. No court would overturn an irrebuttable presumption that a person convicted of multiple homicides is not entitled to receive a pistol permit, even though such a person could, at least in theory, be completely reformed, non-violent, and gentle. But, from common experience, many college students settle down in the town where they received their gown (the more so, arguably, in a great metropolis like New York City). Depriving in-state tuition to even one student who, in fact, is a bona fide domiciliary, would be unjust and contrary to respondents' stated goals and policy.

This Court is aware that today's ruling will increase the already-substantial administrative burden on our state's system of higher education. However, due process always increases adjudicative costs. Still, society considers these costs worthwhile, in order to achieve more accurate and just determinations. New Jersey, in Shim v Rutgers, 191 NJ 374 (2007) (invalidating a presumption that university students dependent on out-of-state parents are non-domiciliaries), and Maryland, in Frankel v Board of Regents of Univ. of Md. System, 361 MD 298, 761 AD2d 324 (2000) ("absolute preclusion of in-state tuition status for any student whose primary monetary support comes from an out-of-state source, arbitrarily and irrationally discriminates against many bona fide Maryland residents in violation of the equal protection component of . . . Maryland Declaration of Rights"), have essentially ruled against irrebuttable presumptions without having gone broke. Whatever tribunal is adopted can, of course, take into account the location of the students' parent(s), all the factors indicated above, and any other reasonable and relevant data.

Subsidiary Requests for Relief

Turning, briefly, to petitioner's other requests for relief, this Court finds that CUNY's tuition policy is not arbitrary and capricious and does not violate the equal protection clauses of the state and federal constitution, because that policy may usually reach a correct determination; that the policy does not violate the right-to-travel provision of the federal constitution, because paying somewhat higher tuition for college is not an undue burden on such travel, given the state's interest in providing preferential tuition to in-state domiciliaries, and that, in any event, today's decision completely protects that right; that Kayla Strauss is not entitled, at this time, to be deemed a domiciliary of New York, or to be awarded a refund of tuition, but that she is merely entitled to due process on these questions; that she is not entitled to monetary damages, other than restitution, in this proceeding, as any such claim must be brought in the Court of Claims (Education Law § 6224 [4]); that she is entitled to a revision of the tuition policy, as indicated herein; that she is entitled to an injunction against future imposition of the tuition policy, as indicated herein; and that she is not entitled to class action certification, as today's decision is binding on respondents without any need for such certification, see, e.g., Baumes v Lavine, 38 NY2d 296, 305 (1975) (holding class action relief unnecessary where governmental operations are involved and subsequent petitioners will be adequately protected).

Final Analysis

CUNY's position in this litigation is reminiscent of the "Dennis the Menace" cartoon in which Mr. Wilson is drinking lemonade in front of Dennis's refreshment stand, which advertises "all-you-can-drink" for five cents. The caption has Dennis saying "I say that that's all you can drink." Here, CUNY's position, articulated throughout its Memorandum of Law, is "you can pay in-state

#111900/11

tuition if you are a bona fide domiciliary, but if you are financially dependent on out-of-state parents, we say you are not a bona fide domiciliary."

Respondents' memorandum of law brings to mind that old saying, "if you can't lick 'em, join 'em" (or maybe the correct saying is "making a virtue of necessity"). As noted above, Vlandis states as follows: "The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates." In their memorandum of law, respondents quote this sentence twice: on page 7, starting with "State can": and on page 14, starting with "to make." In respondents' view, this statement reinforces their right to deny in-state tuition to out-of-state domiciliaries. But that interpretation turns Justice Stewart's point on its head. What he meant, as is clear from the context, is that requiring due process is not an undue burden, because the state can adopt criteria that will weed out false claimants. Vis-a-vis petitioner, and similarly situated students (i.e., those dependent upon out-of-state parents), respondents have not provided criteria, they have imposed an irrebuttable presumption, which is impermissible under Vlandis.

In this vein, CUNY claims that it provides due process, because it provides out-of-state students an opportunity to prove that they are financially independent. However CUNY does not provide due process to dependent students, because it denies them an opportunity to prove that they are domiciliaries, which is the ultimate touchstone in tuition determinations.

Conclusion

This Court hereby declares null, void, and unenforceable, as a deprivation of constitutionally-mandated due process, the irrebuttable presumption contained in respondent The City University of the City of New York's tuition policies and practices, that a student who is not the child of in-state parents, not 24-years-old, and not financially independent, and who does not fit within a limited number of enumerated exceptions, is not a New York domiciliary. Petitioner's request for a tuition refund (i.e., restitution), attorney's fees, and injunctive relief, and the level of proof ("clear and convincing" or "preponderance") that shall be required to prove domiciliary status, shall be addressed at a conference to be held on May 9, 2012, at 11:30 A.M, 80 Centre Street, Room 328, New York, NY, or on such other date as the parties hereto may agree. Petitioner's other requests for relief are denied. Respondents' request to strike petitioner's Requests for Admissions is granted without prejudice as today's decision has rendered such requests moot (and petitioner apparently has withdrawn them).

Dated: April 25, 2012

Arthur F. Engoron, J.C.C.

#111900/11