

IN THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY, MARYLAND

MICHAEL LEE PHILIPS,	)	
<i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 342882V
	)	
BOARD OF TRUSTEES OF	)	
MONTGOMERY COLLEGE,	)	
	)	
Defendant.	)	
_____	)	

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION  
TO DISMISS FOR FAILURE TO STATE A CLAIM**

Plaintiffs, by counsel, respectfully submit this Response in Opposition to Defendant's Motion to Dismiss for Failure to State a Claim.

**I. INTRODUCTION.**

Defendant Board of Trustees of Montgomery College ("Defendant") moves to dismiss claims that Plaintiffs do not make. Plaintiffs do not assert private rights of action under 8 U.S.C. § 1621, Md. Code. Ann. Educ. § 16-310, or COMAR § 13.B.07.02.03. Nor do they argue that private rights of action should be implied under these provisions. Rather, Plaintiffs invoke the well-established right of Maryland taxpayers to challenge illegal or *ultra vires* acts of public officials. In this particular instance, Plaintiffs allege that Defendant's policy of allowing recent graduates of Montgomery County public

high schools to pay the lowest, in-county rate of tuition at Montgomery College without having to prove their legal place of residence violates both Maryland law and federal law. Because Defendant failed to challenge Plaintiffs' right to bring such an action or allege that Plaintiffs' Complaint does not properly state a claim for taxpayer relief, Defendant's motion must be denied.

## **II. STATEMENT OF FACTS.**

Plaintiffs are taxpayers and long-time residents of Montgomery County. Complaint at ¶¶ 1-3. Defendant is the governing body of Montgomery College, a public community college located in Montgomery County, Maryland. *Id.* at ¶ 4. As Montgomery College's governing body, Defendant is empowered to exercise general control over the college and to adopt reasonable and lawful rules, regulations, and policies for the operation of the college. *Id.*

As a public community college, Montgomery College relies primarily on appropriations of state and county tax dollars, as well as student tuition and fees, for its revenue. *Id.* at ¶ 7. Appropriations of state and county tax dollars account for approximately one half of Montgomery College's revenue. *Id.* By contrast, tuition and fees paid by students constitute less than a quarter of the college's revenue. *Id.*

By law, the tuition charged to a student who attends a community college in Maryland is determined by the student's place of residence. *Id.* at ¶ 8. Students who are residents of the county or counties supporting the community college at which they are enrolled are charged an in-county rate. *Id.* Students who are residents of the State of Maryland, but reside outside the county or counties supporting the community college at which they are enrolled are charged an in-state rate. *Id.* Students who reside outside the State of Maryland are charged an out-of-state rate. *Id.*

Contrary to Maryland law, however, it has been the long-standing policy of Defendant to provide reduced, in-county tuition to all recent graduates of Montgomery County public high schools regardless of their place of residence. *Id.* at ¶ 9. Students who have graduated from a Montgomery County public high school within three years of enrolling at Montgomery College are not required to prove residency status to receive the reduced, in-county tuition rate. *Id.* Until recently, this policy had never been put in writing. *Id.*

On November 15, 2010, Defendant Board of Trustees of Montgomery College ("Board") adopted a resolution incorporating its long-standing, unwritten policy into College Policy 45003. *Id.* at 10. Specifically, Defendant adopted Resolution No. 10-11-086 "to clarify and confirm tuition and fees practices

previously authorized by the Board but not contained in the present public policies on tuition." *Id.*

College Policy 45003 sets forth three categories of tuition rates: a "C Rate," which corresponds to the lowest, "in-county" rate, an "S Rate," which corresponds to a mid-level, "in-state" rate, and an "OS Rate," which corresponds to the highest, "out-of-state" rate. *Id.* at ¶¶ 12, 21, 23, 25, and 27. Pursuant to College Policy 45003, students who graduate from a Montgomery County public high school within three years of enrolling at Montgomery College will be charged the "C Rate" regardless of whether they are lawful residents of Montgomery County. *Id.* at ¶¶ 9 and 12.

Both the prior, unwritten version of the policy and the recently-adopted, written version have had the effect of providing a public benefit -- reduced, in-county tuition -- to unlawfully present aliens who graduate from a Montgomery County public high school. *Id.* at ¶ 16. On information and belief, it was and is the intent of Defendant in establishing the policy to provide this public benefit to unlawfully present aliens who graduate from Montgomery County public high schools. *Id.* at ¶ 17. In fact, Montgomery College has admitted repeatedly that Defendant Board's long-standing policy enables unlawfully present aliens to pay the lowest, in-county tuition rate. *Id.* at ¶ 18. In its audited financial statements for Fiscal Years

2007, 2008, and 2009, Montgomery College stated: "[T]he Montgomery College policy is applicable to all persons, equally, and includes all citizens as well as undocumented aliens . . . ." *Id.* Moreover, Montgomery College spokesperson Brett Eaton was quoted in the October 29, 2010 edition of the Montgomery County Gazette as stating, "We do not give in-state tuition to illegal immigrants, with the exception of recent [Montgomery County public high school] graduates." *Id.* at ¶ 19.

Under federal law, unlawfully present aliens generally are ineligible for state or local public benefits, including post-secondary education benefits such as reduced tuition, unless a state has enacted a law affirmatively providing for such eligibility. *Id.* at ¶ 14. The State of Maryland has never enacted a law affirmatively providing that unlawfully present aliens are eligible to receive reduced, in-county tuition at public institutions of higher education, including community colleges such as Montgomery College. *Id.* at ¶ 15. The Maryland General Assembly attempted to enact such a provision in 2003, but then-Governor Robert L. Erlich vetoed the measure. *Id.*

Defendant Board's long-standing policy is causing substantial, pecuniary loss to taxpayers in Montgomery County and the State of Maryland. *Id.* at ¶ 20. By providing reduced, in-county tuition to all students who graduate from Montgomery County public high schools, regardless of their residence or

status as unlawfully present aliens, Montgomery College is failing to collect revenue that, by state and federal law, it is required to collect. *Id.* Because taxpayers in Montgomery County and the State of Maryland are subsidizing the cost of unlawfully present aliens attending Montgomery College, Montgomery County and Maryland taxpayers have been required and are being required to make up the resulting lost revenue through increased appropriations of tax dollars and, in particular, increased appropriations of county tax dollars. *Id. see also id.* at ¶¶ 30, 32, 34, and 36. Plaintiffs estimate that, as a result of Defendant's policy, Montgomery College failed to collect approximately \$7,940,374 in tuition in the four academic years between 2007 and 2010, causing substantial pecuniary losses to taxpayers. *Id.* at ¶¶ 22, 24, 26, and 28.

### **III. ARGUMENT.**

#### **A. Plaintiffs' Complaint Invokes the Long-Standing Right of Maryland Taxpayers to Challenge Illegal or *Ultra Vires* Acts of Public Officials, Not Any Private Causes of Action Under Federal Law, the Maryland Code, or Maryland Regulations.**

Defendant simply misconstrues Plaintiffs' Complaint. It asserts that Congress did not create a private right of action under 8 U.S.C. § 1621, and that the Maryland legislature did not create a private right of action under Md. Code Ann. Educ. § 16-310. It also asserts that there is no private right of action under COMAR § 13.B.07.02.03(c). Defendant's analysis is

irrelevant, however, because Plaintiffs have not claimed that any of these provisions authorize them to bring private rights of action. Instead, Plaintiffs assert that their status as injured taxpayers entitles them to bring this action.

Long-standing and well-established Maryland law authorizes taxpayer-plaintiffs to bring suit to enjoin illegal and *ultra vires* acts of public officials where those acts are reasonably likely to result in pecuniary loss or an increase in taxes. The tuition policy Plaintiffs have challenged, and which Defendant has acknowledged, is an illegal and *ultra vires* act by Defendant that has resulted in substantial pecuniary losses to Montgomery College and to Maryland and Montgomery County taxpayers.

In a landmark case in 1869, the Court of Appeals explained that,

[i]n this state the Courts have always maintained with jealous vigilance the restraints and limitations imposed by law upon the exercise of power by municipal and other corporations; and have not hesitated to exercise their rightful jurisdiction for the purpose of restraining them within the limits of their lawful authority, and of protecting the citizen from the consequence of their unauthorized or illegal acts.

*Mayor and City Council of Baltimore v. Gill*, 31 Md. 375, 395 (1869) ("*Baltimore v. Gill*"). The Court not only found that the taxpayers were entitled to relief, but it granted them the relief they sought, namely an injunction against the City of Baltimore and its officers and agents restraining them from

borrowing money to assist in the building of a railroad. *Id.* at 394-95.

Numerous subsequent cases -- indeed, the Court of Appeals has described them as a "profusion of cases" -- have upheld this long-standing right of taxpayers:

From this decision [*Baltimore v. Gill*] and the long line of Maryland cases following in its wake, the principle has become established that a taxpayer may invoke the aid of a court of equity to restrain the action of a public official or an administrative agency when such action is illegal or *ultra vires*, and may injuriously affect the taxpayer's rights and property.

*Citizens Planning and Housing Ass'n v. County Exec.*, 273 Md. 333, 339, 329 A.2d 681, 684 (1974). The requirement that there be an "injury" to taxpayers' rights and property "has been interpreted to require a showing that the action being challenged results in a pecuniary loss or an increase in taxes." *Id.*; *120 West Fayette Street, LLLP v. Mayor and City Council of Baltimore*, 407 Md. 253, 267-69, 964 A.2d 662, 670-71 (2009); *Gordon v. Mayor and City Council of Baltimore*, 258 Md. 682, 687-90, 267 A.2d 98, 101-03 (1970). Moreover, "the taxpayer need not demonstrate that, necessarily, there will be pecuniary loss or increased taxes, but only the reasonable existence of that potential." *Inlet Assocs. v. Assateague House Condominium Ass'n*, 313 Md. 413, 442-43, 545 A.2d 1296, 1311 (1988) (emphasis original); see also *120 West Fayette Street, LLLP*, 407 Md. at



269, 964 A.2d at 671 (allowing taxpayer action to proceed where the alleged illegal and *ultra vires* act "may potentially cause [the taxpayer] pecuniary harm or an increase in taxes").

The showing required of taxpayers is quite modest. In what has been called "[p]erhaps the most liberal application of the test" (*Gordon*, 258 Md. at 688, 267 A.2d at 101), taxpayers who challenged the constitutionality of a statute enacted to aid in the reconstruction of Baltimore's Lexington Market were found to have stated a claim under the doctrine of taxpayer standing simply because the reconstruction project would cause the City of Baltimore to incur unspecified expenses:

If the Act is unconstitutional, the project is unlawful, and even though the City would not be obligated for the project, it presumably would incur some expense or loss in extricating itself and its property. As taxpayers, therefore, plaintiffs are entitled to sue to enjoin such an unlawful project.

*Castle Farms Dairy Stores, Inc. v. Lexington Market Auth.*, 193 Md. 472, 482, 67 A.2d 490, 493 (1949). Likewise in *Gordon*, the Court of Appeals upheld a taxpayer action to enjoin the transfer of books from the Peabody Institute's library to Baltimore's Enoch Pratt Free Library because the expenses of the allegedly illegal and *ultra vires* transfer were to be borne by City of Baltimore taxpayers. 258 Md. at 689-90, 267 A.2d at 102. Particularly salient here is *Thomas v. Howard County*, 261 Md. 422, 276 A.2d 49 (1971), in which the Court of Appeals sustained

a claim by taxpayers challenging Howard County's allegedly illegal and *ultra vires* failure to enforce the Howard County Plumbing Code and the accompanying failure to collect permitting fees. The Court in *Thomas* noted, "We and our predecessors have gone rather far in sustaining the standing of taxpayers to challenge the alleged illegal and *ultra vires* actions of public officials." 261 Md. at 432, 276 A.2d at 54. The failure to collect permitting fees in *Thomas* is not unlike Montgomery County's failure to collect out-of-state tuition from recent graduates of Montgomery County public high schools who are unable to prove that they are lawful residents of Montgomery County. Not only is Defendants' tuition policy reasonably certain to cause pecuniary harm to taxpayers in Montgomery County and throughout the State of Maryland, but it demonstrably is doing so. Complaint at ¶¶ 22, 24, 26, 28, and 29-37.

Rather than seeking to assert or imply private rights of action under 8 U.S.C. § 1621, Md. Code. Ann. Educ. § 16-310, or COMAR § 13.B.07.02.03., however, Plaintiffs assert that these provisions make Defendant's tuition policy illegal and *ultra vires*. Plaintiffs do not need a "private right of action" under these provisions in order to state a claim for taxpayer relief. The taxpayers in *Baltimore v. Gill* did not need to assert a private right of action under the Maryland constitution in order to proceed with their claim that the public expenditures at

issue were illegal and *ultra vires*. 31 Md. at 387. Likewise, the taxpayers in *Citizens Planning and Housing Ass'n* did not need to assert a private right of action under the Baltimore County Charter in order to proceed with their claim that public officials in that matter allegedly initiated an illegal and *ultra vires* government reorganization scheme. 273 Md. at 334. Nor did the taxpayers in *Gordon* claim a private right of action under the charitable trust instrument by which nineteenth-century philanthropist George Peabody donated his library to the Peabody Institute. 258 Md. at 686-90, 267 A.2d at 101-02. Similarly, the taxpayers in *Thomas* did not claim a private right of action under the Howard County Plumbing Code in seeking to restrain county officials from failing to collect permitting fees. 261 Md. at 430-31. Finally, in *James v. Anderson*, 281 Md. 137, 149-51, 377 A.2d 865, 871-72 (1977), the taxpayers did not claim a private right of action under the Harford County Charter, but instead invoked the charter to demonstrate that the county executive's use of bond proceeds was illegal and *ultra vires*. Again, the provisions of Maryland and federal law cited by Plaintiffs in their Complaint make Defendant's tuition policy illegal and *ultra vires*. They need not have alleged anything more.

In this regard, Defendant's citations to *Day v. Sebelius*, 376 F. Supp.2d 1022 (D. Kan. 2005), *aff'd*, 500 F.3d 1127 (10th

Cir. 2007) and *Martinez v. Regents of the Univ. of California*, 2006 WL 2974303 (No. CV 05-2064) (Cal. Super. Oct. 4, 2006), *aff'd*, 83 Cal. Rptr. 3d 518 (2008), *rev'd on other grounds*, 241 P.3d 855 (2010) are inapposite. Neither *Day* nor *Martinez* sought to invoke the rights of taxpayers to enjoin illegal or *ultra vires* acts of public officials. The plaintiffs in *Day* were non-resident students and parents of non-resident students at Kansas public universities, not Kansas residents or Kansas taxpayers. Similarly, the plaintiffs in *Martinez* were students paying non-resident tuition at California public universities and colleges, not California residents or California taxpayers. By contrast, Plaintiffs in this action invoked their rights as taxpayers to enjoin Defendant's illegal and *ultra vires* tuition policy specifically in order to avoid the shortcomings of the plaintiffs in *Day* and *Martinez*. Their Complaint more than satisfies the requirements for a taxpayer action.

**B. Plaintiffs Have Pled Ample Facts Entitling Them to An Award of Injunctive Relief.**

Defendant's argument that Plaintiffs have failed to plead irreparable injury also is not well-founded. "As ordinarily understood, an injury is irreparable, within the law of injunctions, where it is of such a character that a fair and reasonable redress may not be had in a court of law, so that to refuse the injunction would be a denial of justice." *Bey v.*

*Moorish Science Temple of America, Inc.*, 362 Md. 339, 356, 765 A.2d 132, 140 (2001). “[I]n other words, where, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing it, it cannot be readily, adequately, and completely compensated for with money.” *Id.*

It is obvious from the allegations of Plaintiffs’ Complaint that “fair and reasonable redress” will not be had in a court of law (as opposed to a court of equity) and that money will not compensate them or their fellow taxpayers for the harm that Defendant’s illegal and *ultra vires* tuition policy is causing to the public fisc. The “taxpayer” nature of this action and the circumstances surrounding it also make it clear that no adequate remedy is available at law. Indeed, the nature of such challenges is why Maryland law makes injunctive relief available to taxpayers. See, e.g., *Castle Farms Dairy Stores, Inc.*, 193 Md. at 482, 67 A.2d at 493 (“As taxpayers . . . plaintiffs are entitled to sue to enjoin . . . an unlawful project”); *Ruark v. Int’l Union of Operating Engineers*, 157 Md. 576, 589, 146 A. 797, 802 (1929) (noting that decisions since *Baltimore v. Gill* “have consistently maintained the rule, and have sanctioned the relief by injunction whenever it appeared that the taxpayer complaining would sustain a pecuniary loss . . .”).

Regardless, Plaintiffs' Complaint expressly pleads that "taxpayers in Montgomery County and the State of Maryland, including Plaintiffs, are suffering pecuniary injury and will continue to suffer such injury unless and until Defendant's policy is enjoined." Complaint at ¶¶ 41 and 48. Defendant's argument ignores these allegations completely. Even standing alone, they would be more than sufficient to plead a claim for injunctive relief. In addition, however, Plaintiffs also have expressly pled that they have no adequate remedy at law. *Id.* at ¶¶ 42 and 49. While the former set of allegations certainly constitute sufficient allegations of irreparable injury, it is all the more clear that Plaintiffs have properly stated a claim for injunctive relief when the former set of allegations are considered with the latter set and the well-established admonition that, in considering motions to dismiss, courts are "required to assume the truth of all of the well-pled facts in the complaint . . . and the reasonable inferences drawn from them, in a light most favorable to the non-moving party." 120 *West Fayette Street, LLLP*, 407 Md. at 261, 964 A.2d at 666 (internal quotation omitted).

Moreover, although Plaintiffs' Complaint goes to great lengths to describe the pecuniary losses caused by Defendants' illegal and *ultra vires* tuition policy, case law recognizes that "[t]he extent to which a taxpayer is capable of detailing the

damage anticipated from an illegal and *ultra vires* act . . . may be rather limited at the time the suit is initially filed . . . .” *Citizens Planning and Housing Ass’n*, 273 Md. at 344, 329 A.2d at 687. “It is not necessary for the purposes of pleading that the *amount* of the loss of revenue be specifically set forth . . . .” *Thomas*, 261 Md. at 431, 276 A.2d at 54 (emphasis original). “The details of the loss of revenue like the details of the amount of taxes paid by the individual plaintiffs are matters of proof as and when the case is tried on its merits.” *Id.* Plaintiffs’ allegations are more than sufficient to support their claim for injunctive relief in this taxpayer challenge to Defendant’s illegal and *ultra vires* tuition policy.

**IV. CONCLUSION.**

For the foregoing reasons, Plaintiffs respectfully request that Defendant’s motion to dismiss be denied.

Dated: April 5, 2011

Respectfully submitted,

JUDICIAL WATCH, INC.



Paul J. Orfanedes  
Md. Bar No. 9112190026  
Julie B. Axelrod  
(Not A Member of the Maryland Bar)  
Suite 800  
425 Third Street, S.W.  
Washington, DC 20024  
Tel: (202) 646-5172  
Fax: (202) 646-5199

*Attorneys for Plaintiffs*

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**[PROPOSED] ORDER**

Upon consideration of Defendant's Motion to Dismiss and Memorandum of Points and Authorities in Support thereof, Plaintiffs' response thereto, Defendant's reply, and the entire record herein, it is this \_\_\_ day of \_\_\_\_\_, 2011, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that Defendant's Motion to Dismiss shall be DENIED.

\_\_\_\_\_  
Circuit Judge  
Montgomery County, Maryland

Copies to:

Counsel of Record



CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2011, I caused a true and correct copy of the foregoing PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM and [PROPOSED] ORDER to be served, via first-class U.S. mail, postage prepaid, on the following:

Michael D. Hays  
Dow Lohnes PLLC  
1200 New Hampshire Avenue, N.W.  
Suite 800  
Washington, DC 20036-6802

Clyde H. Sorrell  
General Counsel  
Montgomery College  
900 Hungerford Drive, Room 355  
Rockville, MD 20850

  
Paul J. Orfanedes